How to Prevent Compensatory Education from Becoming De Facto Money Damages

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Why Are We Having This Conversation?
Nature Of The Problem

- Things are very different than they used to be…
- Volume of complaints continuing to increase.
- Demands are skyrocketing:
  - Payment for a variety of activities, many of which are non-academic.
    - Reimbursement and “Direct Pay”
  - Payment for outside tutoring/instructional programs not aligned to state adopted curriculum.
  - Payment for technology (computers, iphones, unspecified “AAC devices” and related software).
- Requests for substantial “pools”/“funds” of money to be used at parent/guardian discretion.
- Significant increase in attorneys’ fees.
How Did We Get Here?
Legal Rules Applicable To The Problem

• On April 29, 1985, the United States Supreme Court unanimously ruled that under the Education for All Handicapped Children Act (EAHCA; now the Individuals with Disabilities Education Act [IDEA]), parents could be reimbursed for unilaterally placing their child in a private school after they disagreed with the individualized education program (IEP) that public school officials had designed.

Legal Rules Applicable To The Problem

• Since that time, courts have consistently confirmed they have, and will use broad, equitable powers to remedy what they believe are failures by a school district to provide a FAPE to a disabled child.
Legal Rules Applicable To The Problem

• "But compensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting "appropriate relief."

Just A Short Birdwalk…

Damages Defined:
A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another.

Blacks Law Dictionary
Just A Short Birdwalk…

Damages Defined (cont.):
…A sum of money awarded to a person injured by the tort of another …

Money compensation sought or awarded as a remedy for a breach of contract or for tortious acts…

*Blacks Law Dictionary*
Legal Rules Applicable To The Problem

- Appropriate relief is designed to ensure that a student is appropriately educated within the meaning of the IDEA.
  - IDEA offers compensatory education as a remedy for the harm a student suffers while denied a FAPE.
  - Courts use their equitable powers “to bring a student to the point he would have been had he received a FAPE all along.” (*Park v. Anaheim*)

- Courts should apply a fact specific analysis to determine compensatory education.

- The behavior of the student’s parent(s) is also relevant in fashioning equitable relief.

- In providing equitable relief, the conduct of both parties must be reviewed to determine whether relief is appropriate.
Legal Rules Applicable To The Problem

• The IDEA provides the courts broad discretion in order to achieve "equitable relief" for disabled students, including reimbursement for private school tuition.

  Forest Grove School District v. T.A., 52 IDELR 151 (U.S. 2009)
  Park v. Anaheim Union High Sch. Dist., 464 F3d. 1025, 1034 (9th Cir. 2006).

• Courts can be creative in fashioning the amount and type of compensatory services to be awarded.
The court extrapolated the extension of equitable relief from the reimbursement provided in *Burlington* to compensatory education.

Compensatory education is not a contractual remedy, but an equitable remedy, part of the court’s resources in crafting appropriate relief.

Court’s powers of fact-finding and remedy-crafting entail broad discretion and implicate equitable considerations.

Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student.

*Reid ex rel. Reid v. Dist. Of Columbia, 401 F.3d 516, 518 (D.C.Cir. 2005).*
Legal Rules Applicable To The Problem

• Think carefully about the Court’s language and what it means for settlement negotiations:

“Overlooking this equitable focus, the Reid’s hour-for-hour formula in effect treats compensatory education as a form of damages – a charge on school districts equal to expenditures they should have made previously. Yet “[t]he essence of equity jurisdiction” is “to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.”

Legal Rules Applicable To The Problem

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• Qualitative rather than quantative focus!
Legal Rules Applicable To The Problem

• Remember definitions of FAPE:
  • Basic floor of opportunity which consists of access to specialized instruction and related services which are individually designed to provide educational benefit (Rowley), as recently clarified (Endrew F):
    • “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”

• Flexible approach/analysis will result in different results in different cases, depending on the child’s needs.
Legal Rules Applicable To The Problem

• Ninth Circuit adopts the reasoning in Reid:
  • Compensatory education is an equitable remedy that seeks to make up for “educational services the child should have received in the first place,” and “aim[s] to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA.”

  C.P. v. Prescott Unified School District, 631 F.3d 1117 (9th Cir. 2011)
Legal Rules Applicable To The Problem

- This broad authority extends to an ALJ who hears and decides special education administrative due process matters. An ALJ can award compensatory education as a form of equitable relief expressed.

- So under the umbrella of “compensatory education” – OAH and Courts can (and do) award educational services to be provided prospectively to compensate for a past deficient program.
Practical Application of Legal Rules to Settlements Offers
Flashback To That Birdwalk…

<table>
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<th>COMPENSATORY DAMAGES</th>
<th>COMPENSATORY EDUCATION</th>
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| “Compensatory Damages are such as will compensate the injured part for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury. Damages awarded to a person as compensation, indemnity, or restitution for harm sustained by him. The rationale behind compensatory damages is to restore the injured party to the position he or she was in prior to the injury.” | Monetary Damages are not available under the IDEA (Witte v. Clark Cnty. Sch. Dist., 197 F.3d 1271, 1275 (9th Cir. 1999))

IDEA offers compensatory education as a remedy for the harm a student suffers while denied a FAPE. (Puyallup) |

Compensatory Education is an equitable remedy that seeks to make up for “educational services the child should have received in the first place,” and “aim[s] to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA.” (Puyallup, quoting Reid) |

(Blacks Law Dictionary, Sixth Edition)
Delivery of Settlement Demands...
So What Now... And How?

- Goal is to get away from “pseudo damages”...
- to more specific relief that could be awarded...
- And that would actually benefit the student!
Compensatory Education
“Pyramid of Success”

- Identify and understand the nature of the exposure
- Determine the scope and magnitude of the exposure (each area of exposure)
- Plan to remedy loss of educational benefit

Remember: Compensatory Education is for loss of educational benefit; not necessarily just to re-do something that wasn’t done…
Get Down and Dirty…

• Know your case better than the other side.

• Conduct an **early** and **rigid** analysis of the strengths and maybe more importantly, the weaknesses of your case…

• Be aware and wary of the **natural tendency to be defensive about what you have or have not done.**

• Know where all the skeletons are.

• **Full Awareness is always the key.**
Keep Going…

- Know the student better than your opponent.
- Connect the law to how it is going to be used as a tool.
- You can utilize strengths of legal counsel to provide a true and critical analysis in light of knowledge of OAH and court decisions involving similar facts.
  - Don’t try to “convince” your own counsel.
  - Don’t leave out critical information!
- Know who your judge is.
- Consider how the judge (not you and not your opponent) will view the case given the facts before him/her.
Keep Drilling Down…

• Understand first, the nature and then the scope and magnitude of the exposure.

• Determine the actual nature of what may be problematic in a hearing:
  • Failure to implement IEP in accordance with own terms for a period of time?
    
    _LSH sessions missed for 1 month or 2 years?_
  
  • Student exhibiting behavior problems causing discipline and other issues?
  
  • Evaluations or meetings to address deficits delayed or didn’t occur at all?
  
  • Failure to assess in all areas of suspected disability?
  
  • IEP doesn’t include goals that correspond to the district’s own assessment?
Why Are You Asking Me To Do All Of This?

• Knowing the specific educational benefit that was lost as a result of a specific allegation allows you to craft a settlement offer that does not just “pay off” a complainant to get rid of a case.

• Allows you to craft a “compensatory remedy” that can more successfully result in relevant and tangible benefit and could diffuse further disputes down the road.

• Ex: real remediation of language deficits by a credentialed staff member v. money allocated for summer swimming/recreation program where claim is student will benefit from social interactions with other children.
Come Up With Settlement Terms That Make Sense for the Student

• Stronger negotiating leverage results from knowing the Student’s needs better than your opponent.
• Allows you to forcefully push back on mathematically-calculated monetary demands.
• Start with academics:
  • Starting point is the IEP.
  • Go back to assessments and present levels. Are needs adequately incorporated into the IEP?
  • Look deeper because drafting of IEP could have been weak.
  • Reports the student is currently “doing fine” – not enough.
Don’t Just Address Academics…

• If a judge can find that there was a problem you didn’t address appropriately, they determine some deprivation of educational benefit that is either academic or functional. Anticipate this and craft a response (remedy) that will go directly to this deprivation.

• Behavioral and functional performance equally important as academics.
The Practical Pieces…

• Match the compensatory education to the specific problem (real remediation)
• Consider using your own staff to bridge where the student is actually struggling and what he/she should be doing now so that real gains can be made.
• Consider compensatory services being concurrently provided with current instruction.
  • There is no statute, regulation, or case law mandating compensatory education be provided outside the school day.
  • But be careful of this!
Other Strategies for Success

• Keep the pressure on (within realm of reason).

• Use the 10-day offer to level the playing field and to apply pressure to settle early.

• Can amend any offer up to 10 days prior to hearing.

• Shake the confidence in the remedy...not the potential for victory at hearing.
Consider Maybe Something More…

- Additional training to teachers.
- Parent training/consultation.
- Services during breaks (continuous remediation).
- Prospective Services.
  - Orders that a school provides annual IEPs to students who have aged out of a statutory right to a FAPE.

(Ferren C. v. Sch. Dist. Of Phila., 612 F.3d 712, 718-719 (3d Cir. 2010))
Build on Positive Momentum!

- Everybody can agree on wanting to see the student be more successful educationally.
- Parents and their attorneys don’t always have an idea of what is available/possible.
- The quicker resolution is reached, the faster student can start making up ground where this progress can be seen.
Reflections

SUCCESS

Have a great conference!
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