Compensatory Education for IDEA Violations: The Silly Putty of Remedies?

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WORKING WITH SILLY PUTTY IS A LITTLE LIKE DOING EQUITY. It is flexible and can take on many shapes. It can be imprinted with the specific shape or picture desired. But if left out instead of kept within the boundaries of its custom-designed egg, it becomes brittle and breaks. When a child with a disability has been denied the special education services that the Individuals with Disabilities Education Act (IDEA) promises, the use of compensatory education is often part of an equitable remedy. Courts have struggled a bit to set standards for such awards without sacrificing the individual focus on the child that is central to IDEA. This article surveys the approaches to compensatory education awards and suggests a calibrated cabining to maintain a malleable and just remedy.

I. Introduction

Our public educational system made a national commitment to appropriately educate students with disabilities through the provision of special education and related services with the passage of sweeping federal legislation in 1975 of what is now known as the Individuals with Disabilities in Education Act (IDEA).1 Since then, school districts in every state receiving federal funds under IDEA must identify children suspected of needing special education, must evaluate them, and must propose services to meet their individual needs through a collaborative procedural structure that treats parents as partners.2

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1. 20 U.S.C. §§ 1400-91 (2006). Although it had a different name at the time of its original passage in 1975 and through 1986 and 2004 amendments, the IDEA designation, adopted in the 1990 amendments, is how the Act is popularly known and that name is used throughout this article.

2. Id. §§ 1412(a)(1)-(5), 1414, 1415.
These provisions currently bring special educational services to over six million children. School districts are charged with providing eligible children with a free appropriate public education (FAPE) in the least restrictive environment (LRE). Services can range from speech therapy to one-on-one aides, provided in a range of settings from the regular classroom to residential schools, depending upon the needs of the individual eligible child. But this commitment is not always adequately discharged, and when it is not, the IDEA provides for a dispute resolution process, including both an administrative due process hearing and judicial review, to remedy IDEA violations.

This article focuses on the increased attention to, and use of, compensatory education as a remedy for IDEA violations. Compensatory education awards are based on a finding of the denial of FAPE, and they require additional services, beyond the prospective entitlement to an appropriate educational program, to address deficits caused by delay or failure to offer appropriate educational services to an eligible child.

While courts have recognized the theoretical need for compensatory education awards for some time, hearing officers or judges have had little to guide them in shaping these awards. Neither the IDEA nor its regulations address the issue. While the courts agree that the remedy is equitable and flexible, they have adopted approaches that differ

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5. See id.
6. Id. § 1415(f)-(i).
7. For remedies generally under the IDEA, see, for example, Perry A. Zirkel, The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update, 31 J. NAT’L ASS’N ADMIN. L. JUDICIARY 1 (2011) [hereinafter Zirkel, Remedial Authority].
8. For the development of compensatory education as the equitable analog to tuition reimbursement, see Perry A. Zirkel, Compensatory Education under the Individuals with Disabilities Education Act: The Third Circuit’s Partially Mis-Leading Position, 110 PENN ST. L. REV. 879 (2006).
9. In contrast, the IDEA, starting with the 1997 amendments and the 1999 regulations, has codified the standards for tuition reimbursement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c) (2012). The only mention of compensatory education consists of brief references in the regulations for the complaint resolution process. 34 C.F.R. § 300.151(b). That process is a separate avenue of dispute resolution under the IDEA that invokes the general oversight authority of the state, rather than the adjudicatory resolution of an individual dispute through the hearing officer and judicial process. See, e.g., Perry A. Zirkel & Brooke L. McGuire, A Roadmap to Legal Dispute Resolution for Students with Disabilities, 23 J. SPECIAL EDUC. LEADERSHIP 100 (2010) (identifying and analyzing the alternate administrative and adjudicatory routes available under the IDEA and § 504).
in their emphases. Some courts have calculated awards primarily on a time-lost basis, which has been called a “quantitative approach.” Others have tried more consciously to define the nature of the deficits that flowed from the violation and the scope of services required to remedy them. This has been labeled the “qualitative approach.”

Still other hearing officers and courts have confined compensatory awards to the well-established area of tuition reimbursement, or made awards with little or no expressed rationale.

Little in the literature offers prescriptive guidance for compensatory education remedies under the IDEA. This article, in Part II, explains


11. See infra Parts IV(B), V. This approach is primarily recognized by the Third Circuit and bases the award directly on the amount of time of the denial of FAPE, but it provides potential equitable adjustments in terms of a deduction for the period of reasonable rectification, reduction where the conduct of the parents changes the balance of equities, and determining the time of the denial by referencing the specific service hours or entire days, as appropriate. Zirkel, Two Competing Approaches, supra note 10, at 550, 552.

12. This approach, which originated in the District of Columbia Circuit, and which the Sixth Circuit has adopted, emphasizes an individualized fact-specific determination of the services “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied from the first place.” Reid v. District of Columbia, 401 F.3d 516, 524 (D.C. Cir. 2005); Zirkel, Two Competing Approaches, supra note 10, at 552.


15. Most of the existing literature tries to describe rather than critically analyze the developments in the area, or it mentions compensatory education only in passing. See, e.g., Elisha Hyman, et al., How IDEA Fails Families Without Means: Causes and Corrections From The Frontlines of Special Education Lawyering, 20 AM. U.J. GENDER
the IDEA’s mandates to provide appropriate special educational services and the various bases for claims that a school district has violated a child’s right to FAPE. Part III describes the adjudicative process for resolving disputes under the IDEA, a process which imposes upon hearing officers and courts the duty to order appropriate relief. Part IV outlines the law supporting equitable relief in IDEA cases, including the use of compensatory education as a part of a remedial order. Part V reviews the dominant approaches and analyzes their strengths and deficiencies. Finally, the article suggests a more workable approach that takes into account lost time and needed services but avoids imposing difficult evidentiary burdens. Such an approach respects both the equitable nature of the remedy and the statutory mandates of the IDEA.

II. School District Obligations under IDEA and Potential IDEA Violations

The IDEA provides federal funding to states that agree to comply with its provisions. All fifty states today receive IDEA funds. The basic requirement of IDEA is that students with disabilities receive FAPE. Congress enacted the original legislation against a background of exclusion of children with disabilities from public education and of failure to diagnose or appropriately serve many such children who were in school.

Potential IDEA violations can arise at multiple points in the process. Each stage—child find, evaluation, eligibility determination, proposals to provide FAPE in the least restrictive environment, and observance


of procedural safeguards—provides the potential basis for a claim of an IDEA violation.

A. Child Find

Included in IDEA is the “child find” obligation to locate, identify, and evaluate all children with disabilities residing within the state, whether or not they are enrolled in public schools. The trigger for this obligation is the reasonable suspicion that the child may be eligible; significantly, it does not depend on a parent’s request for an evaluation. If the evaluation produces a determination that the student has a disability requiring special educational services, the district must offer FAPE to that student.

B. Evaluation

The IDEA provides comprehensive requirements regarding evaluation of a student. Evaluations must generally be completed within sixty days unless state law provides a different deadline. They must use a variety of assessment tools and strategies rather than any single measure. Among other requirements, evaluations must not use racially or culturally discriminatory assessments, must be in the language that will most accurately show what the child knows, and must evaluate the child in all areas of suspected disability.

C. Eligibility

The statutory definition of a student with a disability, although broad, does not include every school-aged child with a physical or mental impairment. The definition has two parts. The first part of the disability definition is categorical, covering both specific classifications, such as:

21. See, e.g., Dep’t of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1195-96 (D. Haw. 2001) (holding that the threshold is low and depends on “whether [the student] should be referred for an evaluation”).
23. Id. § 1414(a)-(c); see also id. § 1412(a)(6)(B) (nondiscriminatory and no single procedure); id. § 1401(34)(C) (transition services include functional vocational evaluation when appropriate). For an overview of the legislation, regulations, and court decisions, see Perry A. Zirkel, The Law of Evaluations under the IDEA: An Annotated Update, Educ. L. Rep. (forthcoming 2013).
25. Id. § 1414(b)(2)(A)-(B).
26. Id. § 1414(b)(3)(A)-(B).
27. Id. § 1401(3). The IDEA confusingly refers to this first of two essential parts as “disability,” which contradicts the essentiality of the second element. Thus, we use the term “classification” here to avoid such confusion.
as “specific learning disabilities, “intellectual disabilities,” “hearing impairment,” and more broadly, “other health impairment.” 28 The second part of the definition requires that the student, “by reason” of the classification, “need[] special education or related services.” 29

Upon completion of the evaluation, the school district convenes the group of personnel, who, with the parent, will determine whether the child is a “child with a disability” and if so, what the child’s educational needs are. 30 This team is charged with developing the individualized education program (IEP) for the eligible child. 31 A decision at this point that a child is not eligible for IDEA services can be the basis for a due process hearing complaint and, if the parent provides sufficient evidence to the contrary, 32 a finding of a violation under the IDEA. 33
D. The IEP and FAPE

If the child is found eligible, the IEP team prepares an IEP, the essential planning document.34 The IEP, among other things, (1) identifies the child’s present levels of academic achievement; (2) provides measurable goals designed to meet the child’s needs resulting from the disability to allow the child to make progress in the general education curriculum and meet other educational needs arising from the disability; and (3) contains a statement of the special education and related services that will be provided.35 Because the IDEA requires that the child be educated in the LRE, i.e., with nondisabled children to the maximum extent appropriate, the IEP must address this requirement as well.36

The substantive standard for FAPE was set by the Supreme Court in its landmark decision in Board of Education v. Rowley.37 The Court set the relatively modest standard of whether the IEP is “reasonably calculated to enable the child to receive educational benefits?”38 Although the lower courts have elaborated somewhat upon this standard,39 it continues to govern disputes over FAPE.40

34. 29 U.S.C. § 1414(d)(1)(A); see also 34 C.F.R. § 300.320.
35. 29 U.S.C. § 1414(d)(1)(A)(i); see also 34 C.F.R. § 300.320.
39. Subsequent lower court decisions have given more bite to the term “educational benefit,” requiring more than a bare minimum. E.g. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 556 (3d Cir. 2010) (education providing “significant learning” and “meaningful benefit” required; “trivial educational benefit” insufficient).
The content of the IEP can be the basis for a variety of parental claims of a district’s failure to provide FAPE. Claims may target the content of the IEP both as to its specificity, and as to the nature and extent of services it provides. Claims may be made as to the appropriateness of the placement decision as either too restrictive under the LRE requirement or because a more specialized or intensive placement is needed in a private school. Claims can also arise where parents accept an IEP but claim delays or failure to implement it.41

E. Procedural Rights and Parental Participation

At each step of the process, the IDEA prescribes parental participation rights.42 Districts must provide notice of these rights at significant decision points.43 Because the parent is an integral and key member of the IEP team, neglect in interactions between team members and parents during the IEP process can violate IDEA and implicate the FAPE obligation. Indeed, as the Supreme Court noted in Rowley, “Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard.”44

Not every procedural misstep, however, amounts to a denial of FAPE. The lower courts have interpreted and applied the procedural side of Rowley via a two-step test: (1) did the district violate one or more of the procedural requirements of the IDEA?; (2) If so, did the

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to the Individuals with Disabilities Education Act Razed Rowley and Raised the Substantive Standard for “Free Appropriate Public Education”? 28 J. NAT’L ASS’N ADMIN. L. JUDICIARY 396 (2008). The operative language has not been altered by Congress. The courts have politely rebuffed arguments that amendments to portions of the IDEA required a different standard. See J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 950-51 (9th Cir. 2009) (noting that since 1982, Congress did not amend the definition of “free appropriate public education” or express disagreement with the “educational benefit” standard from Rowley); Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm., 361 F.3d 80, 83 (1st Cir. 2004) (rejecting argument that “maximum” benefit language in 1997 amendment regarding expectations and achievement of independent adult living altered Rowley standard).

41. FAPE cases, including the interrelated categories of related services, LRE, tuition reimbursement, and compensatory education, account for the vast majority of court decisions under the IDEA. For a broad sampling of decisions, see Perry A. Zirkel, Case Law under the IDEA: 1998 to Present, in INDIVIDUALS WITH DISABILITIES IN EDUCATION ACT: LEGISLATION, REGULATIONS, AND INDICATORS 669-752 (2012).
42. 20 U.S.C. § 1415 (b)-(d).
43. Id. For the lengthy list of the parental provisions in the IDEA, see, e.g., Lynn M. Daggett, Perry A. Zirkel, & LeeAnn L. Gurysh, For Whom the School Bell Tolls But Not the Statute of Limitations: Minors and the Individuals with Disabilities Education Act, 38 U. MICH. J.L. REFORM 717 (2005).
44. Rowley, 458 U.S. at 205-06 (citations omitted).
violation(s) result in educational loss to the child? Congress has codified this approach in the current IDEA. Congress added the following provision in the 2004 amendments of the IDEA:

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a [FAPE] only if the procedural inadequacies—

(i) impeded the child’s right to a [FAPE];
(ii) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a [FAPE] to the parents’ child; or
(iii) caused a deprivation of educational benefit.

The first and third prongs look at the effect of the procedural misstep upon the child’s receipt of FAPE. In contrast, the second prong appears to be the basis for a finding of a denial of FAPE focused on the primary role the IDEA gives to parental participation.

Thus, the kinds of complaints under IDEA that can be made on behalf of a child with a disability, or the child’s parents, can derive from many possible actions or failure to take actions over what can be an extended period of time. The IDEA has provided due process-based procedures to resolve complaints and develop appropriate remedies.

III. Resolving Disputes under the IDEA

A parent can make a complaint about any matter regarding the “identification, evaluation or educational placement of a child,” or concerning the provision of FAPE to the child. When a parent makes a complaint under the IDEA, the statute provides both informal and formal steps to resolution.

45. See, e.g., C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 66-67 (3d Cir. 2010); DiBuo v. Bd. of Educ., 309 F.3d 184, 190 (4th Cir. 2002).
47. Id. § 1415(f)(3)(E).
49. 20 U.S.C. § 1415(b)(6). For discussion of the limitation period and how that may affect remedies like compensatory education, see infra text accompanying notes 61-66. A school district can also utilize the dispute resolution process, although it cannot force the provision of special education services to a child if a parent has refused consent. Id. §1414(a)(1)(D)(i)-(ii).
50. In addition, although not specified in the statute, the regulations since 1992 provide an alternate administrative investigative route referred to as the complaint resolution process. See generally Perry A. Zirkel, Legal Boundaries for the IDEA Complaint Resolution Process, 237 EDUC. L. REP. 565 (2008) (examining the legal parameters for complaint resolution).
First, each state must make voluntary mediation available, at its cost, conducted by a trained and impartial mediator. This step may result in a written, enforceable agreement. Second, the statute requires scheduling a resolution session within fifteen days of the complaint’s filing to identify and discuss the issues. To facilitate resolving the issues, the IDEA prohibits the school district from bringing an attorney to the resolution session if the parents do not attend with legal counsel. If this step results in a settlement agreement, it is enforceable in court.

Failing resolution through either of these two processes, the IDEA provides for an impartial “due process” hearing and, for those states that opt for a second administrative adjudicative tier, the right to appeal to an impartial state review officer. A party can challenge the final state administrative decision in the federal district court. At this step, the court receives the records of the administrative hearing and may take additional evidence. The IDEA directs the court to “grant such relief as [it] determines is appropriate.”

52. Id.
53. Id. § 1415(f)(1)(B).
55. Id. § 1415(f)(1)(B)(iii).
60. 20 U.S.C. § 1415(i)(2)(C)(iii). The remedial authority of hearing and review officers under the IDEA is generally understood to be derivative, by way of extension, of this provision. See Zirkel, Remedial Authority, supra note 7, at 8.
The statutory scheme thus provides multiple points when the parties may consider settling a dispute. To do this, the parties will need to assess the scope of likely remedial orders. Two additional aspects of the dispute resolution process directly affect this assessment for the purposes of conducting successful settlement negotiations.

First, the 2004 amendments to the IDEA provide a two-year statute of limitations unless the state specifically provides for a different period. More specifically, absent such a state law, the complaint must refer to an alleged violation that occurred no more than two years before the date that the parent or school district knew or should have known about the alleged action that forms the basis of the complaint. The IDEA likewise requires that the request for the due process hearing be made within a two-year period. The two explicit exceptions are (1) if the district has misrepresented that it has resolved the problem, or (2) if the district has failed to inform the parents of their rights by failing to provide the mandated statutory notice.

One salient application of the “knew or should have known” accrual definition of the limitations period may be in the area of child find. If a child should have been identified by a school district, evaluated, and provided with services, but was not, it is quite possible for several years to go by during which the child is not receiving special educational services, and then later is identified as having a disability under IDEA. The district’s original failure to evaluate may have caused the denial of FAPE to an eligible child. There may be a real question, however, as to whether and when the parent should have known of the action, or

63. Id. § 1415(f)(3)(C).
64. Id. § 1415(f)(3)(C)-(D). The limited judicial authority to date has been relatively restrictive in interpreting these exceptions. See, e.g., D.K. v. Abington Sch. Dist., 696 F.3d 233, 244-48 (3d Cir. 2012). Moreover, parents’ over-arching arguments for tolling have been largely unsuccessful. See, e.g., Daggett, Zirkel, & Gurysh, supra note 43.
65. Because of the two-part definition of eligibility under IDEA, see supra text accompanying notes 27-29, it is possible for a child to be known to have a disability classification yet not require special education services due to that classification. For a recent case rejecting any remedy for a child find violation using this reasoning, see D.G. v. Flour Bluff Indep. Sch. Dist., 481 Fed. App’x 887, 893 (5th Cir. 2012) (finding that in the absence of evidence that the student, in addition to having a disability classification, required special educational services, student was not eligible and thus had not been denied FAPE through district’s failure to evaluate him).
here, failure to act. So while many other IDEA claims arising out of a particular year’s IEP process may call for a fairly straightforward application of the two-year limitation, child find claims have the potential for generating claims for multiple years of remedial measures.

Second, the IDEA authorizes awarding attorneys’ fees to a prevailing party. For a complaint that goes through the administrative and judicial levels of litigation, this award can be substantial. The statute has a provision that allows a school district to make a formal offer of settlement prior to the due process hearing. If the offer is rejected and the hearing officer finds that the relief finally obtained by the parent is not more favorable than the offer, attorneys’ fees for services after the time the offer was made may not be awarded. This process ups the ante for parents who pursue adversarial resolution, but it involves a gamble by school districts on what relief, including compensatory education, a hearing officer may order if there is a potential violation.

IV. The Power to Grant “Appropriate” Relief

During the first years of implementation of the IDEA, litigation began to address the relief that courts could order under the statute, as well as the remedial authority of impartial hearing officers. Their authority both to declare whether districts met the obligation to provide FAPE and to order prospective relief revising the IEP accordingly was undisputed. However, questions of whether the IDEA permitted recovery of monetary damages or reimbursement for services a parent had paid for during the pendency of the dispute drew judicial attention. The Supreme Court addressed the reimbursement issue in School Committee of the Town of Burlington v. Department of Education. The Court’s ruling that the IDEA authorized tuition reimbursement as an

66. For a recent case applying the two-year limitation to a child find claim, see D.K., 696 F.3d at 244-48.
69. 20 U.S.C. § 1415(i)(3)(D)(i). This provision extends to offers made within the time limits set by the Federal Rule of Civil Procedure 68 at the judicial stage. Id.
70. Id.; see, e.g., Dudley v. Lower Merion Sch. Dist., 58 IDELR ¶ 12, No. 10-2749, 2011 WL 5942120, at *9 (E.D. Pa. Nov. 29, 2011) (holding that because the offer of settlement was a larger amount of compensatory education than the due process hearing produced, the attorneys’ fee award was precluded).
equitable remedy within the court’s discretionary power to grant “appropri-ate” relief forms the foundation for the remedy of compensatory education.72

A. Tuition Reimbursement and Monetary Relief

The Burlington case reached the Supreme Court after a long and protracted history of litigation, appeals, and remands on a number of issues. At its center, however, was the responsibility of a school district for the cost of a private school placement that the child’s parent had arranged while disputing the district’s IEP as inappropriate.73

The Court began its analysis of the tuition reimbursement issue by pointing out that while the IDEA expressed a preference for education to be provided in the public schools, the Act also provided for private school placement at public expense where an appropriate public school setting was not possible.74 The Court concluded that it was “beyond cavil” that a prospective injunction requiring a school district to place a child in a private school at public expense would be authorized under the IDEA’s grant of court authority to provide “appropriate” relief.75

If disputes could be quickly resolved, the Court wrote, such an injunction might be enough.76 But where the course of litigation was likely to extend beyond the typical school year, parents were essentially forced either to permit a child to be educated under what they believed to be an inappropriate IEP or to pay for an appropriate placement.77 If they chose to pay for an appropriate placement, which the Court predicted that “conscientious parents who have adequate means and who are reasonably confident of their assessment normally would,” the parents would have an “empty victory” if they prevailed without recovery of the expenses that should have been borne by the school district.78

The Court rejected the school district’s argument that this reimbursement represented “damages.”79 Instead, the Court explained that the reimbursement remedy only required the school district to

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72. Id. at 369-70.
73. Id. at 370.
74. Id. at 373-74.
75. Id. at 370.
76. Id.
77. Id.
78. Id.
79. Id.
“belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP.”80

The statutory direction to provide “appropriate relief,” in the Court’s interpretation, conferred “broad discretion” upon the courts.81 “Absent other reference,” the Court reasoned, “the only possible interpretation is that the relief is to be ‘appropriate’ in light of the purpose of the Act.”82

The Burlington decision endorsed a broad, equitable approach to remedies for IDEA violations, while also signaling some hostility to the notion that the IDEA allowed or contemplated damage awards. Since the Burlington decision, most of the lower courts have held against recovery of damages for IDEA violations, either directly or via Section 1983.83

Lower court decisions after Burlington continued to analyze claims for tuition reimbursement in equitable terms.84 The Supreme Court reaffirmed Burlington’s force in Florence County School District v. Carter, holding that the placement chosen by the parents must be appropriate but need not be on the state’s approved school list.85

In the 1997 amendments to IDEA, Congress largely codified a multi-step test for the tuition reimbursement remedy and made clear that it was a remedy available to impartial hearing officers.86 The steps of this statutory test specify some of the equitable considerations based on unreasonable parental conduct that, in the adjudicator’s discretion, could warrant reduction or denial of the reimbursement remedy. Such conduct would include bad faith or lack of cooperation by parents with the district’s efforts to evaluate the child and offer services.87

80. Id. at 370-71. In the Court’s view, the IDEA’s legislative history also supported this kind of after-the-fact determination of financial responsibility. Id. at 371.
81. Id. at 370-71.
82. Id.
83. For a look at the law on this issue as of 2002, see Terry Jean Seligmann, A Dil- ler, A Dollar: Section 1983 Damage Claims in Special Education Lawsuits, 36 Ga. L. Rev. 465 (2002). The Third Circuit, one of the few courts that permitted damage claims under Section 1983 at that time, later reversed itself. See A.W. v. Jersey City Pub. Sch., 486 F.3d 791, 802-03 (3d Cir. 2007) (finding no Section 1983 claim under the IDEA).
84. For cases applying equitable principles to deny reimbursement, see Greenland Sch. Dist. v. Amy N., 558 F.3d 150, 159 (1st Cir. 2004); M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68-69 (2d Cir. 2000) (collecting cases).
Other provisions relating to remedies under IDEA have been the subject of restrictive legislative or judicial treatment over recent years. Congress has enacted a variety of limitations upon recovery of attorneys’ fees. The Supreme Court has ruled that the burden of proof in IDEA disputes is on the challenging party, which is the parent where FAPE is at issue. The Court also found that “costs” under IDEA excluded fees for expert witnesses.

Despite what has been largely a constricting trend in interpretation of the IDEA, the Supreme Court recently reaffirmed the broad judicial authority conferred by the provision authorizing “appropriate” relief in its decision in Forest Grove School District v. T.A. In Forest Grove, the district evaluated the child and determined that he was not eligible. A year later, the parent unilaterally enrolled the child in a private school and then filed for an impartial hearing, claiming that the child’s ADHD diagnosis and downward spiraling school performance were the basis for a child find claim. The IDEA’s tuition reimbursement provision by its terms authorizes the remedy for “[a child] who previously received special education and related services under the authority of a public agency.” The issue in Forest Grove was whether that provision categorically barred the remedy for a child who had never “previously received” special education service from the district before the parents had enrolled him in a private placement. Holding that the quoted language did not categorically bar reimbursement, the Court observed that the “appropriate” relief language in the statute authorized the sensible result that a school district also be responsible for wrongfully denying all special education services, not only for furnishing inappropriate services.

While the Supreme Court has not specifically addressed compensatory education as “appropriate relief,” the lower courts drew upon the Supreme Court’s interpretations of “appropriate” relief in Burlington,

88. Id. § 1415(i)(3)(D)–(G).
89. Schaffer, 546 U.S. at 56-58.
92. Id.
93. Id. at 234.
95. Forest Grove Sch. Dist., 557 U.S. at 233.
96. Id.
Carter, and later Forest Grove, to adopt and validate the remedy of compensatory education.

B. Compensatory Education—The Poor Man’s Tuition Reimbursement

The availability of reimbursement has allowed parents with resources to pursue disputes over their child’s FAPE while simultaneously securing what they believe to be appropriate special education. But this remedy does not assist the child whose parents lack either the resources or the knowledge to obtain the needed special education services during the time that FAPE is denied.

Certainly some of the child’s needs should be addressed by an order to revise the IEP to meet the FAPE standard in the future. But given the previous denial of FAPE and the protracted process for determining this improper denial, a prospective order alone is analogous to the “empty victory” Burlington prevented when the Court upheld tuition reimbursement.97 In the case of a child who is not fortunate enough to receive services at parental expense while the dispute is adjudicated, the child’s school experience continues, leaving less time to close gaps left open or widened by the denial of FAPE. Moreover, relying on the future IEP process to address such gaps could leave the parents in the cycle of challenging the adequacy of each following IEP on a yearly basis in order to address deficiencies stemming from already established denials of service. This neither helps the child nor deters the district. Thus, in the wake of Burlington, the lower courts began to recognize claims for compensatory education. As one much-quoted court reasoned, reversing its pre-Burlington stance, “Congress did not intend the child’s entitlement to a free education to turn upon her parent’s ability to ‘front’ its costs.”98

One court concisely captured the essence of the compensatory education remedy, holding that “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 to provide a FAPE to a student.”99

The details of how to fashion this remedy have, however, proved bedeviling.

98. Meiner v. Missouri, 800 F.2d 749, 753 (8th Cir. 1986) (emphasis in original).
Several of the cases involved children who were “aging out” of coverage under the IDEA, or had been completely denied special educational services for a period of time. For example, in *Miener v. Missouri*,100 a father sought compensatory education for two years of services denied while his daughter resided in a state hospital.101 In another case, a twenty-two year old student who was emotionally-disturbed, mentally-retarded, and suffered from profound hearing loss and speech deficiencies made a claim for two years of services.102 The court held that his claim was not moot even though he was beyond the age of entitlement to FAPE under the IDEA because the services could be ordered as compensatory education for the district’s past failures.103

Compensatory education orders addressing a total denial of services and those reaching beyond school age are in some ways simpler than what have become more frequent claims for compensatory education due to partial failures involving a child who is currently getting special education but not FAPE from a district under an IEP. Yet parents are increasingly seeking such orders, and courts and hearing officers routinely entertain them.

For example, one district court ordered eight weeks of summer-level education, including services in a one-on-one format, to address an educational deficit identified due to denial of FAPE.104 The court order provided for delivering the services either during the school year, the summer, or after the student turned twenty-one.105 Other cases approved orders to supply autistic children with compensatory services delivered individually by specially-trained personnel.106

100. 800 F.2d at 753.
101. *Id.* at 751. Ultimately, the court agreed that compensatory education was a possible remedy under IDEA if plaintiff could prove deprivation of FAPE, as the act is now known. *Id.* at 754.
103. *Id.* at 189-90; see also Bd. of Educ. v. Ill. State Bd. of Educ., 79 F.3d 654, 656 (7th Cir. 1996) (allowing a twenty-three year old autistic student to seek compensatory service for two years of alleged denial of FAPE); *Lester H. v. Gilhool*, 916 F.2d 865, 873 (3d Cir. 1990) (ordering thirty months of compensatory education for student beyond age twenty-one where district failed to apply to appropriate schools and placed student inappropriately despite recommending residential placement); *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1290 (11th Cir. 2008) (ordering five years at private school or until high school diploma received for a student aged twenty-one at the time of the Eleventh Circuit’s decision).
105. *Id.*
The tension between compensating for gaps and providing adequate future FAPE makes the task of determining the need for compensatory education a difficult one. Some children who did not receive FAPE nonetheless will have shown progress. Trying to identify a “gap” in the student’s progress can be problematic. For some children, closing the gaps might require no more than a well-conceived IEP that offers future FAPE.

Hearing officers and courts have exercised discretion in crafting either limited or unique compensatory orders, recognizing that compensatory education is an equitable remedy to be shaped to the circumstances. They also have in mind that the overall approach of IDEA contemplates highly individualized assessment of a child’s needs and programming. So, in one case, over the parents’ disagreement, the court sustained an order finding that teacher training for the student’s special education teacher was the appropriate compensatory service.107 In another case, in addition to extended special education at a specialized school, the court required the school district to continue to function as the designated local educational authority responsible for IEP preparation for a student despite his being twenty-one years old and over the school age covered by the IDEA.108

Those shaping orders also look to whether compensatory education will help a particular child. And they examine the equities to decide if an IDEA violation is the cause of deficits. IDEA violations may not be the most salient factor in the educational progress of a child who repeatedly lands in a detention facility, or who is absent from school for large portions of the year.109 In some instances, the parents’ beha-
vior may be more responsible than the district’s missteps for any denial of service.\footnote{These considerations will affect whether a student’s lack of educational progress is wholly due to the denial of FAPE, as opposed to other conduct or circumstances, and affect the scope of a compensatory services award.} These considerations will affect whether a student’s lack of educational progress is wholly due to the denial of FAPE, as opposed to other conduct or circumstances, and affect the scope of a compensatory services award.

The adoption in 2004 of a two-year limitation period for assertion of violations of IDEA is likely to constrain the scope of compensatory education awards in cases arising after those amendments became effective.\footnote{Similarly, the imposition of fairly short time limits for the holding of hearings at the administrative level and for taking appeals to federal district court from administrative decisions may affect the scope of such orders. But it remains true that from the start of a dispute to its final resolution, much time can elapse, especially during a court proceeding. So, despite a speedier dispute resolution process and a statute of limitations, it remains possible for there to be a finding of a denial of FAPE covering a lengthy period. And it appears from reviewing the litigation under IDEA that compensatory education claims are increasing in frequency and resulting in some substantial orders.} The development of standards to guide compensatory educational awards has been a challenge for hearing officers and the lower courts. Within the overall notions of providing “appropriate” relief, applying equitable discretion, and preserving the focus on the individual needs of the child with disabilities, these decision-makers have approached the task in different ways, sometimes arriving at the same points, but not without difficulties flowing from their efforts.

\footnote{escort him to classes, noting that the district “cannot use physical force” and cannot be “compelled to engage in an exercise in futility”); Garcia v. Bd. of Educ., 520 F.3d 1116, 1131 (10th Cir. 2008) (finding no abuse of discretion in denial of award to nineteen-year-old student who has left school and does not want an education).}{110. See Parents of Student W. v. Puyallup Sch. Dist. No. 3, 31 F.3d 1489, 1496-97 (9th Cir. 1994) (upholding denial of requested compensatory education where, although district had violated IDEA by allowing student to decline services without notice to his mother, she had previously declined special education, moved away, and never requested services on return to district, and where child had been able to graduate without more services than those provided for in his annual IEP); French v. N.Y. State Dep’t of Educ., 476 F. App’x 468, 472 (2d Cir. 2011) (holding parent’s obstructionist tactics rather than school district’s actions caused student to be denied FAPE so no compensatory education warranted).}{111. As noted earlier, see supra notes 61-66 and accompanying text, child find obligations carry some risk of claims reaching back in time. For a recent decision applying the two year limitation to claims that included a child find violation, and interpreting the tolling provisions of the two year limitation, see D.K., 696 F.3d at 244-48.}
V. A Remedy In Search of Standards?

One of the hallmarks of IDEA is that determining appropriate special education services turns on the individual circumstances of the child with a disability.112 When the Supreme Court was called upon in Board of Education v. Rowley113 to define FAPE under the IDEA, it adopted an approach that eschewed generalized or categorical analysis in favor of one that focused on the child’s unique needs.114 The Rowley Court adopted a standard that required “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”115 In discussing what educational benefit would be sufficient, the Court noted the individualized nature of such an inquiry:

[t]he Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills.116

For the past thirty years, hearing officers and courts have applied this kind of case by case, student by student analysis, based on individual and comprehensive evaluations and expert opinions, to make judgments as to FAPE.

While this process prevents sorting children into pre-set programs based on the label given to their disability, it also means that resolving disputes involves quantities of evidence from testing, evaluation, and school records. Typically witnesses and experts address the child’s learning needs and the kinds of services that appropriately promise to meet them. The administrative hearing can stretch over several days, and involve substantial investment by both parents and school

112. Statutorily, this fundamental feature flows from the prescribed individualized IEP process. See 20 U.S.C. § 1414(d).
114. Id. at 201.
115. Id. at 202. In the case before it, which involved a first grader who, despite her hearing impairment, was doing well academically, the Court applied this test to find that the school district had provided FAPE without the sign language interpreter services sought by the parent. Id. at 209-10. Advocates for children with disabilities saw the decision as a defeat in several respects, among them the relatively low standard it adopted to judge FAPE. See supra note 38. Both the statute’s more specific amendments and requirements for the IEP and judicial gloss have added variations to the “educational benefit” judgment since then, but it continues to govern. See supra notes 39-40 and accompanying text.
districts in expert fees and attorneys’ fees. The prevailing parents may recover attorneys’ fees but not expert fees.\textsuperscript{116} If appealed, those expenses grow and the timeframe continues.

When a hearing determines that FAPE has been denied, the hearing officer must tackle the further issue of deciding what kind and how much compensatory education is needed. How much has the FAPE deprivation “cost” the child in educational progress? Beyond what a proper IEP for that child will include, what future services will best address that lack of progress? The period of deprivation is clearly relevant, but is it, or should it be determinative? Is the information to craft a compensatory education remedy even capable of being developed through evidence? Can one “know” the degree to which a child would have progressed if the services had been provided? Can one predict whether certain extra services will be able to close the gap? Must one have a second hearing or trial to make these determinations, further complicating the dispute resolution process, its cost, and its length? How can one assure that compensatory education serves its intended function rather than becoming a form of damages and a point for negotiation over monetary exposure?

Those cases in which the proper placement has been denied appear to be the easy ones when it comes to ordering a remedy. The district must offer what it should have offered for the period it failed to offer it—a proper placement. The direct connection between \textit{Burlington’s} rationale and such orders is not hard to see.

So, for example, in one relatively egregious case, a child, Jarron Draper, entered the Atlanta school system in second grade.\textsuperscript{117} When the school district eventually evaluated him several years later, it misdiagnosed him and placed him in a separate classroom for the mildly intellectually disabled.\textsuperscript{118} The district ignored clear signs of Draper’s dyslexia.\textsuperscript{119} He remained in the separate class for several years.\textsuperscript{120} Even after it undertook a reevaluation that identified his specific learning disability, the school system failed to provide appropriate services.\textsuperscript{121} At the time of the administrative hearing, Draper was eighteen and still reading at a third grade level.\textsuperscript{122} By the time of the

\textsuperscript{116} See supra notes 88-90 and accompanying text.
\textsuperscript{117} Draper, 518 F.3d at 1279.
\textsuperscript{118} Id. at 1281-83.
\textsuperscript{119} Id. at 1281.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 1281-82.
\textsuperscript{122} Id. at 1282.
Eleventh Circuit’s decision, he was twenty-one. Characterizing the situation as a “tragic tale,” the court upheld an order by the district court that the school district fund Draper’s attendance at a private school for five years, or until he obtained a high school diploma. Although the district attempted to characterize the award as “suspiciously like” punitive damages, the court found it was instead “reasonably calculated to provide the educational benefits that would have accrued from special education services the school district should have supplied in the first place.”

Representing the “quantitative” approach, the Third Circuit Court of Appeals endorsed the use of the hours of deprivation as the primary measure for an appropriate compensatory education award. The Third Circuit decision in *M.C. v. Central Regional School District* set up as a general rule, subject to equitable adjustment, that the “child is entitled to compensatory education for a period equal to the period of deprivation, excluding only the time reasonably required for the school district to rectify the problem.”

The use of hours of special education denied as the primary determinant for hours of compensatory education ordered has positive as well as some perhaps unanticipated negative consequences. It is, first of all, capable of calculation and of adjustment for periods of a child’s absence from school, or delays not of the school district’s making. It has inherent logic, in that one can see how missing six months of a service could lead to a need for additional services of that kind for a similar period.

But, despite these benefits, the hour-for-hour approach can also result in creation of a pooled fund, control of whose creation and size becomes a goal of the parties and a point for negotiation, and which begins to look more like damages than the furnishing of special educational services denied. At least in Pennsylvania, this approach has led in some instances to the creation of funds from which the parent can draw monies to pay for services as they are provided, when and how the parent chooses. Thus, in one case, the district court found the plaintiff entitled to 2,428 hours of compensatory education, which the court determined should be valued at $75 per hour for a total award

123. [0]Id. at 1279.
124. Id. at 1283, 1290.
125. Id. at 1290 (quoting *Reid*, 401 F.3d at 524).
126. 81 F.3d 389 (3d Cir. 1996).
127. Id. at 397.
of $182,000.\textsuperscript{128} The court then provided that the “[p]arents may decide how the hours should be spent so long as they take the form of any appropriate developmental, remedial or enriching instruction that furthers the goals of [the student’s] IEP.”\textsuperscript{129}

The ability to estimate the size of a compensatory education award, via this quantitative approach, can be positive for the parties yet, at the same time, it seems to monetize the nature of a process designed to focus on educational services. Given the expense of administrative hearings, including experts and attorneys’ fees, for both parents and school districts, knowing the potential “recovery” or “exposure” can foster earlier resolutions and avoid greater expense. It may also allow a school district to more reliably use the IDEA’s offer of settlement process to cut off potential liability of a school district for the parents’ attorneys’ fees that are accrued if parents reject what turns out to be a favorable settlement.

In one recent case, this was the outcome.\textsuperscript{130} The school district made a pre-hearing offer of $37,500 for 500 hours of compensatory education, which the parents declined.\textsuperscript{131} The hearing officer awarded direct services of intensive reading, math instruction, and emotional support, valued at $26,212.\textsuperscript{132} The court upheld the order on the

\textsuperscript{128} Heather D. v. Northampton Area Sch. Dist., 511 F. Supp. 2d 549, 555 (E.D. Pa. 2007). The parents had argued for substantially more compensatory education, and their expert had focused on what he viewed as needed to correct the deficiencies and for the student to achieve her maximum potential. \textit{Id.} at 555, 557. The court instead endorsed the defendant’s approach “which ties an award of compensatory education to services denied in the past, rather than a corrective approach designed to help the student perform in accordance with some speculated potential as “more in line with the standard elucidated by the Third Circuit.” \textit{Id.} at 557. The court, however, added to the defendant’s calculation additional time of ten hours of services per week for longer periods of denial. \textit{Id.} at 559. The valuation per hour for services was also a subject of dispute, with the parents seeking $132 per hour, based on an average of behavior support and academic/vocational instruction services, and the district arguing for $55 per hour. \textit{Id.} at 560.

\textsuperscript{129} \textit{Id.} at 559; see also Keystone Cent. Sch. Dist. v. E.E., 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006) (“his mother shall determine the nature and scope of compensatory experiences for which [E.E.] may use the compensatory entitlement”). The concept of a compensatory education fund of this nature has surfaced outside of Pennsylvania. See Matanuska-Susitna Borough Sch. Dist. v. D.Y., 54 IDELR ¶ 52, No. 3:09-cv-0073JWS, 2010 WL 679437, at *6 (D. Alaska Feb. 24, 2010) (upholding hearing officer’s order for $50,000 “‘comp ed fund,’ on which D.Y. and the IEP can draw to procure direct services to B.Y., evaluations, assessments, training and assistive technology,” going beyond the nature of the speech therapist and aide services that had been denied).

\textsuperscript{130} Dudley, 58 IDELR ¶ 12, 2011 WL 5942120, at *9-10.

\textsuperscript{131} \textit{Id.} at *10.

\textsuperscript{132} \textit{Id.} at *3.
parents’ appeal and denied attorneys’ fees based upon the offer of settlement.133

The use of compensatory education in cases of major and prolonged denial of an appropriate placement, especially to extend the time of services beyond that covered by the IDEA, seems to most directly flow from the purposes of IDEA and the Burlington rationale. The earliest cases upholding compensatory education as a remedy tended to involve such circumstances.134

These types of cases seem to be decreasing, perhaps in part because of the adoption and application of the time limitations on due process complaints. Or, more optimistically, because school districts more frequently identify and evaluate children with disabilities so that they are on IEPs. Increasingly often, the reported cases involve claims that a particular kind of service, such as behavioral support, reading instruction, or speech therapy, was required for FAPE.135

Where the child is on an IEP and the finding is that FAPE for that child involves additional services that were not provided, the rationale for the compensatory education award seems a bit more muddied. Had the parents provided the contested services during the dispute, they would have been able to recoup their cost under the Burlington analysis. So as a matter of equity, parents who are unable to “front” the costs of obtaining those services should not forfeit the right to seek educational compensation for the denied services.

But if the purpose is to “close the gap” left by that denial, then it seems as though something more than just an hour-for-hour calculation is warranted. Will 200 “extra” hours of speech therapy be needed to close that gap, or would the IEP for the next year need to add therapy hours to account for the child’s present level of functioning? Is

133. Id. at 9-10.
134. See, e.g., Pihl, 9 F.3d at 187-89; Bd. of Educ., 79 F.3d at 656 (allowing a twenty-three year old autistic student to seek compensatory service for two years of alleged denial of FAPE); Lester H., 916 F.2d at 873 (ordering thirty months of compensatory education for student beyond age twenty-one where district failed to apply to appropriate schools and placed student inappropriately despite recommending residential placement); Draper, 518 F.3d at 1290 (ordering five years at private school or until high school diploma received for a student aged twenty-one years at the time of decision).
135. See supra notes 104-108 and accompanying text. For a systematic study of hearing officer and court decisions in the wake of a denial of FAPE, see Perry A. Zirkel, Adjudicative Remedies for Denial of FAPE Under the Individuals with Disabilities Education Act: An Update, __ J. NAT’L. ASS’N ADMIN. L. JUDICIARY __, (forthcoming 2013) (finding compensatory education second in frequency and similar in outcomes to tuition reimbursement but often without careful analysis and identifiable standards).
there overload in offering additional hours while the child is receiving FAPE under an IEP? Is there a good distinction between future FAPE and compensatory services for the child still within the age limits covered by IDEA? On the other hand, if a child has regressed in the absence of needed services, might more than the total hours deprived be needed to allow the child to recoup that regression and progress? Might extra hours or extended year programs be in order? Or, perhaps a more intensive and expensive placement is needed?

When the United States Court of Appeals for the District of Columbia considered the method of awarding compensatory education remedy in *Reid v. District of Columbia*,136 it rejected the use of a presumption that each hour without FAPE entitled the student to one hour of compensatory education. Terming this a “cookie-cutter” approach,137 the court viewed it as running counter to the “broad discretion” in IDEA’s remedial language and to the *Rowley* individualized standard set for FAPE.138 Instead, the court endorsed a “qualitative” rather than a quantitative focus, one that, in compensating for past violations, relied on individualized assessments just as did the FAPE determination.139

Echoing the reasoning in *Rowley*, the *Reid* court noted that its “flexible approach” and focus on the child’s needs would produce different results on a case-by-case basis, holding that “some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.”140

A flexible approach would also, in this court’s view, allow for consideration of other equitable factors such as the parties’ conduct.141 To make an appropriate order, the court reasoned, there must be evidence regarding the child’s “specific educational deficits” resulting from the failure to provide FAPE and the “specific compensatory measures” required to “correct those deficits.”142 In the case before it, the hearing officer had ordered one hour per day of compensatory services for the

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136. 401 F.3d 516 (D.C. Cir. 2005).
137. Id. at 527.
138. Id. at 523-24. At least one court, in endorsing the “more flexible approach,” suggested rejection of an hour-for-hour approach was necessary to avoid the remedy resembling “punishment” rather than being “an equitable remedy for a child in need.” *Bd. of Educ. v. L.M.*, 478 F.3d 307, 317 (6th Cir. 2007).
139. *Reid*, 401 F.3d at 524.
140. Id.
141. Id.
142. Id. at 526.
period of denial of FAPE, but had not indicated “why he chose this
formula nor what specific services should be provided.” The district
court deferred to and adopted the hearing officer’s decision, in the
absence of additional evidence provided by the parents to show it
was wrong. But in light of its announced approach, the circuit
court found the district court’s decision arbitrary in the absence of
the necessary findings and so remanded the case.

The court went further on a related issue. The hearing officer’s
order contemplated that the IEP team could decide whether to reduce
or discontinue a compensatory education award based on the student’s
progress. The court viewed this as an improper delegation of the re-
sponsibility of the hearing officer to provide final relief through a bind-
ing award, and as a process that could require repeated appeals if the
parent disagreed with the team’s determination.

It is hard to disagree in theory with the court’s insistence on
individualized and equitably based formulation of compensatory edu-
cation awards. The devil, though, may be in the details. To satisfy the
court’s standards, not only must parents and school districts pro-
vide evidence of what FAPE required, but of the particular effects
of not receiving it for a given period. The need for and type of services
that address those effects, as well as their appropriate duration, must
also be supported, and by more than reference to the actual services
denied over time. Any order that reads too much like an hour-for-hour
award is vulnerable to attack.

Indeed, in the wake of Reid, several cases went through extended
litigation over the bases for a compensatory education order. More-
over, they reveal a largely unsuccessful struggle to reduce the role
that the time period of the FAPE denial plays in making the award.

In Friendship Edison Public Charter School Collegiate Campus v.
Nesbitt, the case drew three separate district court opinions over a pe-
riod of twenty-two months just on the calculation of the compensatory

143. Id. at 520.
144. Id. at 522.
145. Id. at 525.
146. Id. at 526.
147. Id. at 526-27.
148. Although by virtue of the Supreme Court’s decision in Schaffer v. Weast, the
burden of proof in an administrative hearing is generally on the party challenging the
determination, usually the parent, no sane school district defending a case under IDEA
will fail to put forward its evidence on these questions, as the burden of proof will tend
to make a difference only in the rare case of equipoise in the evidence. Schaffer, 546
U.S. 56-58.
education award.149 The hearing officer’s decision ordered the child placed at the charter school’s expense at a non-public special education school, and then directed the IEP team to meet and discuss compensatory education, meetings that apparently failed to make progress.150 Further hearings were held, and in April 2006, the hearing officer ordered the provision of 3,300 hours of tutoring, based on a calculation of 27.5 hours per week for forty weeks over three years.151 The order expressed the hearing officer’s frustration with the failure of the parties to address the Reid criteria with evidence.152 The district court, on the school’s appeal, vacated this “formula-based” award as lacking “precisely what is necessary to conduct the requisite ‘qualitative, fact-intensive’ inquiry used to craft an award ‘tailored to the unique needs of the disabled student.’ ”153 It followed this opinion with an order granting the student’s request for a reevaluation of his present educational status, including a psychoevaluation, an educational evaluation, and a vocational assessment.154

Following the evaluation, the district court held an evidentiary hearing at which the student produced one witness.155 The witness testified that based on the student’s disabilities, his expected progress in an academic year would be about half of that of a student of average ability, if there was no regression.156 The testing showed, however, that the student had not progressed the expected 1.5 grade levels, and had regressed in some areas.157 The witness also testified that he would expect that amount of progress to occur with about three academic years of math and reading tutoring, equivalent to 3,600 hours, of which by the time of the court hearing, the student had already received 1,400 hours.158 This figure, perhaps not coincidentally, was identical to the hearing officer’s original order.


150. Nesbitt, 532 F. Supp. 2d at 122.

151. Id.

152. Id. at 124.

153. Id. at 125 (quoting Branham v. District of Columbia, 427 F.3d 7, 9 (D.C. Cir. 2005)).


155. Nesbitt, 669 F. Supp. 2d at 82.

156. Id. at 82-83.

157. Id. at 83.

158. Id.
On appeal, the district court again questioned whether there was a sufficient, individualized, evidentiary basis. However, this time the court reluctantly admitted that “a formula-based methodology for crafting the compensatory education award may in some circumstances be acceptable if it is not a mechanical calculation, but incorporates a qualitative approach ‘[aimed] to place the disabled [child] in the same position [the child] would have occupied but for the school district’s violation of IDEA.’ ”159 In a somewhat remarkable opinion, the court then proceeded to generate three algebraic formulas to represent the methodology used by the expert and that which the court itself viewed as producing an individualized award of compensatory hours.160 Finding that the award of 3,300 hours had been supported in an individualized inquiry, the court entered the award ordering the remaining tutoring hours.161

In another more truncated sequence that eschewed equations, another District of Columbia district court remanded a case to the hearing officer to explain why his remedy of 375 hours of tutoring was appropriate.162 The court noted that there was evidence in the record both as to the student’s below grade level reading, his failing grades, the appropriateness of tutoring, and a recommendation by the Sylvan Learning Center for tutoring in reading, math, and writing, in excess of 400 hours. All of this, in the court’s view, supported a compensatory education award; what was lacking was an explanation of why the hearing officer set the award as he did.163

159. Id. at 84 (quoting Reid, 401 F.3d at 519).

160. Id. at 85-87. The district court’s first formula to determine the student’s deficits was b—a = y, where “a = the student’s cognitive and educational level expressed as a grade level assessment at the time just prior to when the denial of FAPE began; b = the student’s cognitive and educational level expressed as a grade level assessment at the time the denial of FAPE ended; [and] y = the actual grade-level progress the student did make per annum.” Id. at 85. The second, to convert grade level equivalences to hours, was g*1,200 = n, where “g = grade level progress; [and] n = number of hours for grade level progress,” with 1,200 representing the average hours of instruction per academic year. Id. at 86.


163. Id.
On remand, the hearing officer referred to the evidence showing the student was two years behind grade level and had received only five hours per week of specialized instruction, none by a special education teacher, instead of the fifteen hours per week called for in his IEP, for the period between March and December of the contested year. The hearing officer calculated that 375 hours of instruction had not been provided. Given the closeness of this total to the Sylvan recommendation, he viewed this number of hours as “reasonably calculated ‘to close the two year grade level gap caused by the school’s failure to provide FAPE and meet [the student’s] individual needs.’ 

The district court upheld the award against the charter school’s argument that it was the type of “formulaic cookie-cutter approach” rejected in Reid. Recounting the evidence showing the child’s needs and level of functioning, the court concluded:

While it is true that the Hearing Officer’s award reflects the exact number of service hours that [the charter school] denied [the student], the Hearing Officer conducted a fact-specific inquiry and tailored the award to [the student’s] individual needs by taking into account the results of [testing] and the recommendations of the Sylvan Learning Center.

Thus, even when courts are hostile to using the number of hours of service denied as a yardstick for the compensatory education award, it is recognized as a necessary part of the process, although perhaps not a sufficient one. Given the outcomes of the Reid-governed cases and their additional time and expense of multiple or truncated hearings either at the administrative or district court level, one might question as a functional

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165. Id. at 134.
166. Id. at 134 (quoting hearing officer’s explanation of compensatory education award).
167. Id. at 136-37.
168. Id.
matter the need to mandate such hearings to support an award for
those cases where there is a specific and calculable denial of services.
And given the logical connection between services denied and lack of
progress, a connection that underlies the entire thrust of the IDEA’s
focus on offering appropriate education to these children, there is a
bit of metaphysics in the demand to better define the “gap” and the
needed remediation170 without at least some reliance on the period of
denial.

While one may characterize the treatment of compensatory educa-
tion by the courts as involving two competing or polar approaches,171
the cases discussed here suggest that the courts rely on the same ma-
terials to craft compensatory education awards, although they may be
weighting them differently at least in theory, if not in practice. It
should not be a surprise that the courts for the most part shy away
from statements endorsing rigidity, but embrace yardsticks that assist
in fashioning an enforceable remedy.

For every court case that is reported on the scope of compensatory
education awards, hundreds of matters are decided by administrative
hearing officers and hundreds more are negotiated by the parties out-
side of the hearing or courtroom. A calibrated, predictable approach to
determination of compensatory education awards needs to develop, as
it has for the determination of FAPE violations, so that hearing officers
and parties have guidance in working through and resolving these
matters.

It is not hard to identify the kinds of results to be avoided. First,
IDEA is about educational services, not damages. Awards should
therefore be designed to provide needed services, not to create a
pool of money for parental spending or to up the ante in settlement ne-
gotiations. In this regard, the Third Circuit’s articulated heavy reliance
on an hour-for-hour calculation may veer too closely to compensatory
damages, as opposed to compensatory education. Although perhaps
not the intention or the inevitable result of the Third Circuit’s quanti-
tative approach, the tendency of lawyers to convert harm into mone-

both levels, see, for example, Gill v. District of Columbia, 751 F. Supp. 2d 240 (D.D.
170. Within the understandably limited regulatory period of IDEA hearings and
their finality requirement, the qualitative approach, although intellectually elegant,
would seem to come close to the Rowley Court’s characterization of the commensurate
opportunity formula for FAPE: “an entirely unworkable standard requiring impossible
171. See Zirkel, Two Competing Approaches, supra note 10.
tary recovery seems to be a potential risk if that approach becomes too mechanical.

Where the school district provides compensatory services directly, the damages concern is tempered. But there will be understandable situations where, given a protracted FAPE dispute between the school district and the parent of a child with a disability, that is not a desirable result. To maintain the focus on providing appropriate compensatory education, orders should specify the kinds of services, e.g., an intensive reading instruction or Applied Behavioral Analysis training, to be provided and funded by the district. They should also address the timing for furnishing the services, and deal with who will provide them, or who will control the choice of provider. Such orders offer better congruence with IDEA’s purposes than the creation of a parent-designated fund.

The determination should weigh the extent of the denial of FAPE heavily. This means that courts and hearing officers should be allowed to calculate the hours of services denied and use it as a yardstick for fashioning a remedy. But that calculation should not be the sum of what is measured. Where evidence is available to assess the extent of resulting educational gaps and to support a particular quantity and type of service as appropriately addressing those gaps, it should also be weighed in the mix. Where that evidence suggests that more, fewer, or different services are required from an hour-for-hour award, the award should be modified.

The suggestion here is to treat the overall determination as one that is individualized, and therefore “qualitative” in orientation, but to place legitimate weight on the extent of the denial of FAPE, i.e., on the quantitative or cumulative deprivation. By giving weight to the quantitative aspects of the denial of FAPE, better predictability and less extensive evidentiary proceedings can be expected. By retaining a focus on the individual child, the IDEA’s overriding goals will be served.

Ultimately, the remedy should not be rigid; in accordance with equitable principles, it should allow for the exercise of discretion. These recommendations will allow for adjustments to account for those situations where the child’s lack of progress cannot be laid entirely at the feet of the district, due to absences, delays attributable to parent behavior, or other factors. Both the quantitative and qualitative approaches have, in practice, allowed for this flexibility, which is necessary for an individualized determination.
VI. Conclusion

Silly putty is an amazing and versatile substance. So is the availability of compensatory education as an equitable remedy for IDEA violations. Equity can be a slippery concept, but its great advantage is that it is flexible. Embracing this flexibility in crafting a compensatory education remedy, while endorsing guidelines and factors including the hours and services denied, the child’s progress or lack of it, and the history of behavior inconsistent with provision of effective compensatory education, can keep the remedy from becoming mechanical or brittle while providing a shape to contain it, and allow for more efficient prediction and resolution of FAPE disputes.