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Commentary

1COMPENSATORY EDUCATION AN ANNOTATED UPDATE OF THE LAW [FNA1]

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This annotated outline is the latest in a series that provides a cumulatively comprehensive and concise canvassing of the case law concerning compensatory educational services under the Individuals with Disabilities in Education Act (“IDEA”). [FN1] Designed as an update of previous one of the series, this outline lists the **additional and newer outline items and legal citations in bold typeface**, with the other items selectively provided merely for context. [FN2] Published decisions by IDEA impartial hearing officers (IHOs) [FN3] are designated, in the forum part of the citation, as “SEA,” per the conventions of the INDIVIDUALS WITH DISABILITIES EDUCATION LAW REPORT (“IDELR”). Similarly, pertinent U.S. Department of Education policy letters carry the citation designation “OSEP” or “OSERS” for the Department's Office for Special Education Programs and the Office for Special Education and Rehabilitation Services, respectively. [FN4] The outline also includes a limited, sampling of Office for Civil Rights (OCR) letters of findings only to illustrate the overlapping coverage of Section 504. [FN5]

A. Background Concepts

1. definition: equitable remedy [FN6] that provides in-kind special education and other related services for denials of a free and appropriate public *2 education (“FAPE”), [FN7] or a **“replacement of education services the student should have received in the first place.”** [FN8]

2. analogy to tuition reimbursement: incomplete [FN9]

3. IDEA 2004 Amendments and 2006 Regulations:

- continued (from 1997 Amendments) codification, at least in part, of tuition reimbursement remedy [FN10]
 - one-year statute of limitations for compensatory education claims brought under the state complaint resolution process? [FN11]
 - indirect springboard for compensatory education in the discipline context [FN12]
 - only inferable authority under judicial umbrella of IDEA for hearing/review officers, [FN13] and—under the backup coverage of Section 504 and the ADA [FN14]—largely [FN15] OCR [FN16]

B. Threshold Issues

1. the age 21 barrier: shattered, [FN17] with a limited and disputed exception [FN18]

*3 2. Eleventh Amendment immunity: inapplicable [FN19]

3. statute of limitations: two years unless state law? [FN20]

4. exhaustion doctrine: rather uniform, effective requirement [FN21]

5. mootness doctrine

- a bar where the student is no longer eligible as having an IDEA disability [FN22]

- possibly a bar when the student has graduated [FN23]

- ***4 not a bar when the student has moved, whether within the same state [FN24] or out of state [FN25]**

- **not a bar where the student is no longer eligible under Part C or who has moved out of state while eligible under Part C [FN26]**

- not a bar when the student has dropped out beyond age of compulsory education [FN27]

- not a bar where the student's move is after the alleged denial of FAPE but before the final adjudication of the compensatory–education remedy [FN28]

- not a bar when the parties arrived at a settlement that did not resolve this issue [FN29]

6. request required in notice pleading?: not if at the prehearing conference [FN30]

C. Evolving Standards

1. triggering issues

- threshold level: denial of FAPE [FN31] must be more than *de minimis* [FN32] and need not be in bad faith, but circuit split whether it need be gross [FN33]

- **threshold question: must the plaintiff show a specific loss of educational opportunity? [FN34]**

- ***5 limited for procedural violations [FN35]**

- includes related services [FN36]

- includes extracurricular activities [FN37]

- includes implementation, not just formulation, violations [FN38]

- **not for child find violation where the child is not eligible [FN39]**

2. calculation issues [FN40]

- starting point: when the district or parent knew or should have known of the denial of FAPE [FN41]

- (a) quantitative approach
 - duration: the period of the denial
 - exclusion (in the Third Circuit): “the time reasonably required for the school district to rectify the problem” [FN42]
 - <“exclusion for comp ed from state complaint resolution process during same period [FN43]
 - another exclusion: absences?—rarely [FN44]
 - extent—need not provide a day–for–day compensation for time missed [FN45] but particularized (i.e., service–unit) [FN46] basis v. total–package [FN47] basis [FN48]
- (b) **expanding alternatives** of qualitative approach customized to “specific educational deficits resulting from [child’s] loss of FAPE,” which could be less or even more than “cookie cutter” approach, [FN49] **or relaxed hybrid approach** [FN50]
 - *7 specific formula: sometimes a mystery [FN51]
 - another area of imprecision or confusion: retrospective and prospective FAPE [FN52]
 - **role of the equities**: not entirely settled but likely yes [FN53]
 - includes stay–put?: unsettled [FN54] but probably [FN55]
 - need: hardly considered [FN56] and presumed, [FN57] except for emerging qualitative approach [FN58]
 - partial credit? effectiveness?—hardly addressed yet [FN59]
 - *8 not excused by present progress or appropriateness [FN60]
 - **amount for district’s denial of opportunity for meaningful parental participation in the IEP process?** [FN61]
 - who has the responsibility, including the burden of proof? [FN62]
- 3. scope issues
 - lower limit: child in a permanent vegetative state
 - form: includes training? [FN63] consultant? [FN64] tuition reimbursement? [FN65] IEP (after age 21)? [FN66]
 - upper limit: postsecondary education? [FN67]
- 4. implementation issues
 - awards of both compensatory education and tuition reimbursement for different **periods of FAPE denial** [FN68]: **stay put** [FN69]

- award of compensatory education as default for unsuccessful (at Step II) tuition reimbursement: not so far [FN70]
- when: after school, during the summer, or at some other time “beyond what is required by [his prospective] IEP”? [FN71]—**and, where included in the IEP, as soon as possible** [FN72]
- *9 where: private school? [FN73]
- who (determines amount): the IHO? [FN74] an outside expert? [FN75] mutual agreement or IEP team [FN76]? or the parents [FN77]?
- what: same or different? escrow **or trust** fund? [FN78]
- who provides?—district personnel? [FN79] **independent consultants, not parents' experts** [FN80]
- final possible problems: awards that are too vague to be enforceable [FN81] or that are sufficiently clear but not implemented [FN82]
- *10 conversely, enforcement may include judicial civil contempt sanctions [FN83]
- district's failure to comply with comp ed award is not a harmless procedural violation [FN84]

[FNa1] The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 291 Ed.Law Rep. [1] (May 23, 2013).

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[FN1]. For the earlier articles in this series, see Perry A. Zirkel, *Compensatory Education: An Annotated Update of the Law*, 251 Ed. Law Rep. 501 (2010); Perry A. Zirkel, *Compensatory Education Services under the IDEA: An Annotated Update*, 190 Ed. Law Rep. 745 (2004); Perry A. Zirkel & M. Kay Hennessy, *Compensatory Educational Services in Special Education Cases*, 150 Ed. Law Rep. 311 (2001); Perry A. Zirkel, *The Remedy of Compensatory Education under the IDEA*, 95 Ed. Law Rep. 483 (1995); Perry A. Zirkel, *Compensatory Educational Services in Special Education Cases*, 67 Ed. Law Rep. 881 (1991).

[FN2]. See the previous articles for the full canvassing of the applicable legal authorities.

[FN3]. “IHO” herein refers generically to not only impartial hearing officers, but also, in the relatively few states that have retained a second tier for IDEA administrative adjudications, impartial review officers.

[FN4]. For the legal weight of such agency interpretations, see Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?* 171 Ed. Law Rep. 391 (2003).

[FN5]. See *infra* notes 14–16 and accompanying text. For a comprehensive reference, see PERRY A. ZIRKEL, SECTION 504, ADA AND THE SCHOOLS (2004) (available from LRP Publications—www.lrp.com). For a systematic chart showing the similarities with and differences from the IDEA, see **Perry Zirkel, A Comprehensive Comparison of the IDEA and Section 504/ADA, 282 Ed. Law Rep. 767 (2012).**

[FN6]. See, e.g., *S.S. v. Howard Road Acad.* 562 F.Supp.2d 126 [235 Ed.Law Rep. [883]] (D.D.C. 2008).

[FN7]. See, e.g., *Lester H. v. Gilhool*, 916 F.2d 865, 868 [63 Ed.Law Rep. [458]] (3d Cir. 1990) (“to restore [the FAPE] that which had been denied him”). Sometimes the concept is confused with tuition reimbursement. See, e.g., *Brown v. Bartholomew Consol. Sch. Corp.*, 442 F.3d 588, 597 [207 Ed.Law Rep. [601]] (7th Cir. 2006).

[FN8]. *Reid v. District of Columbia*, 401 F.3d 516, 518 [196 Ed.Law Rep. [402]] (D.C. Cir. 2005).

[FN9]. Perry Zirkel, *Compensatory Education under the Individuals with Disabilities Education Act: The Third Circuit's Partially Mis-Leading Position*, 111 PENN. STATE L. REV. 879, 894 (2006).

[FN10]. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). The slight revisions are limited to the exceptions to timely notice (specifically, the addition of a physical harm alternative).

[FN11]. 34 C.F.R. § 300.153(c). The only reference in the legislation and regulations to “compensatory services” is—along with “monetary reimbursement”—as a possible remedy in the complaint resolution process. *Id.* § 300.151(b)(1). For the statute of limitations for the hearing/review process, see *infra* note 19 and accompanying text. For examples of compensatory education awards via this complaint resolution process, see, e.g., *Student with a Disability*, 59 IDELR ¶ 27 (Iowa SEA 2012); *Baltimore City Pub. Sch.*, 58 IDELR ¶ 146 (Md. SEA 2011); *Baltimore City Pub. Sch.*, 56 IDELR ¶ 27 (Md. SEA 2010); *Washington County Pub. Sch.*, 53 IDELR ¶ 105 (Md. SEA 2009); *Student with a Disability*, 59 IDELR ¶ 86 (Mont. SEA 2012); *In re Student with a Disability*, 55 IDELR ¶ 299 (Wyo. SEA 2010); *cf.* *Westview Sch. Corp.*, 51 IDELR ¶ 27 (Ind. SEA 2008) (delegated to IEP team).

[FN12]. 34 C.F.R. § 300.530(e)(3) (in the manifestation determination process, requiring districts to “take immediate step to remedy [the causal implementation] deficiencies”).

[FN13]. See, e.g., Perry Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASSN ADMIN. L. JUDICIARY 1 (2011)

[FN14]. See, e.g., *Mrs. C. v. Wheaton*, 916 F.2d 69 [63 Ed.Law Rep. [93]] (2d Cir. 1990).

[FN15]. On rare occasions hearing/review officers address compensatory education awards under § 504. See, e.g., *Andover Pub. Sch.*, 28 IDELR 266 (Mass. SEA 1998).

[FN16]. See, e.g., *Cle Elum–Roslyn (WA) Sch. Dist.*, 41 IDELR ¶ 271 (OCR 2004). However, OCR's modern policy is usually to avoid deciding FAPE and other substantive issues, relegating such relief to “voluntary” compliance agreements. See, e.g., OCR, *Frequently Asked Questions about Section 504 and the Education of Children with Disabilities–Q/A item 5*, <http://www.ed.gov/about/offices/list/ocr/504faq.html>

[FN17]. See, e.g., *Barnett v. Memphis City Sch. Sys.*, 113 Fed.Appx. 124 [193 Ed.Law Rep. [419]] (6th Cir. 2004).

[FN18]. Compare *Bd. of Educ. of Oak Park v. Illinois State Bd. of Educ.*, 79 F.3d 654 [108 Ed.Law Rep. [32]] (7th Cir. 1996); *Hilden v. Lake Oswego Sch. Dist.*, 21 IDELR 671 (D. Or. 1994) (parents may not pierce the age–21 barrier for services via the stay–put provision), with *Cosgrove v. Bd. of Educ.*, 175 F.Supp.2d 375 (N.D.N.Y. 2001); *Appleton Area Sch. Dist. v. Benson*, 32 IDELR 91 (E.D. Wis. 2000); *Carl B. v. Mundelein High Sch. Dist.*, 20 IDELR 263 (N.D. Ill. 1993)(stay–put may yield compensatory education).

[FN19]. *See, e.g.*, Perry A. Zirkel, *Eleventh Amendment Immunity and Student Suits under the IDEA, Section 504, and the ADA*, 183 Ed. Law Rep. 657 (2004).

[FN20]. **20 U.S.C. § 1415(f)(3)(C) (2005); see also id. § 1415(b)(6)(B).** The language is not entirely clear and includes two narrow, specific exceptions. For the misrepresentation/withholding exceptions, *see, e.g.*, **Sch. Dist. v. Deborah A.**, 52 IDELR ¶ 67 (E.D. Pa. 2009.) The new provision does not directly address the issue of tolling. *See, e.g.*, **D.K. v. Abington Sch. Dist.**, 696 F.3d 233 [285 Ed.Law Rep. [730]] (3d Cir. 2012); Lynn Daggett et al., *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). For the retroactive application of the new limitations period, *compare* **Breanne C. v. S. York County Sch. Dist.**, 665 F.Supp.2d 504 [252 Ed.Law Rep. [864]] (M.D. Pa. 2009), *with* *J.L. v. Ambridge Area Sch. Dist.*, 52 IDELR ¶ 156 (W.D. Pa. 2009). **Sidestepping retroactivity, the Third Circuit recently held that the time period between the December 2004 passage of the IDEA and its July 2005 effective date triggered the two-year statute of limitations. Steven I. v. Central Bucks Sch. Dist.**, 618 F.3d 411 [260 Ed.Law Rep. [573]] (3d Cir. 2010). Finally, although a “look-back” application is easier, the triggering language is in terms of calculating forward after an ambiguous starting point, which arguably extends back to four years. 20 U.S.C. § 1415(b)(6)(B) (“alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known” [emphasis added]). *Compare* *Elizabethtown Sch. Dist.*, 50 IDELR ¶ 24 (Pa. SEA 2008), *with* **Gwinnett County Sch. Dist. v. A.A.**, 54 IDELR ¶ 316 (N.D. Ga. 2010).

[FN21]. *See, e.g.*, Lewis Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Courts' Jurisdiction Requirements under the Individuals with Disabilities Education Act*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 349 (2009).

[FN22]. *See, e.g.*, *M.L. v. El Paso Indep. Sch. Dist.*, 610 F.Supp.2d 582 [244 Ed.Law Rep. [590]] (W.D. Tex. 2009), *aff'd*, 369 Fed.Appx. 573 [258 Ed.Law Rep. [40]] (5th Cir. 2010).

[FN23]. *See, e.g.*, *Barnett v. Memphis City Sch. Sys.*, 113 Fed.Appx. 124 [193 Ed.Law Rep. [419]] (6th Cir. 2004); *cf.* *Fisher v. Friendship Pub. Charter Sch.*, 58 IDELR ¶ 287 (D.D.C. 2011), *reconsideration denied*, 880 F.Supp.2d 149 [287 Ed.Law Rep. [908]] (D.D.C. 2012) (special circumstances). *But see* *Brooks v. District of Columbia*, 841 F.Supp.2d 253 [281 Ed.Law Rep. [915]] (D.D.C. 2012); *cf.* *Dracut Sch. Comm. v. Bureau of Special Educ. Appeals*, 737 F.Supp.2d 35 [263 Ed.Law Rep. [625]] (D. Mass. 2010) (rejecting IHO's authority to extend eligibility after ordering diploma but allowing compensatory education for prior denial of FAPE).

[FN24]. *See, e.g.*, **L.R.L. v. District of Columbia**, 896 F.Supp.2d 69 [290 Ed.Law Rep. [818]] (D.D.C. 2012); **N.P. v. E. Orange Bd. of Educ.**, 56 IDELR ¶ 49 (D.N.J. 2011); *Neshaminy Sch. Dist. v. Karla B.*, 25 IDELR 725 (E.D. Pa. 1997).

[FN25]. *See, e.g.*, **D.F. v. Collingswood Borough Bd. of Educ.**, 694 F.3d 488 [284 Ed.Law Rep. [659]] (3d Cir. 2012); **Indep. Sch. Dist. No. 284 v. A.C.**, 258 F.3d 769 [155 Ed.Law Rep. [1065]] (8th Cir. 2001).

[FN26]. **Letter to Whipple**, 54 IDELR ¶ 262 (OSEP 2009).

[FN27]. *Garcia v. Bd. of Educ.*, 520 F.3d 1116 [231 Ed.Law Rep. [25]] (10th Cir. 2008).

[FN28]. **D.A. v. Houston Indep. Sch. Dist.**, 716 F.Supp.2d 603 (S.D. Tex. 2009).

[FN29]. *Flores v. District of Columbia*, 437 F.Supp.2d 22 [211 Ed.Law Rep. [253]] (D.D.C. 2006).

[FN30]. *Dep't of Educ., State of Hawaii v. E.B.*, 45 IDELR ¶ 249 (D. Haw. 2007).

[FN31]. Due to the retrospective effect of compensatory education, an IHO may not escape making this determination based on the parent's failure to exhaust or cooperate the evaluation or IEP processes if the alleged denial occurred before or separate from these processes. *Peak v. District of Columbia*, 526 F.Supp.2d 32 [228 Ed.Law Rep. [271]] (D.D.C. 2007). **For a frequency analysis of the various judicial remedies for denial of FAPE, including but extending beyond compensatory education, see Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY —(forthcoming 2013).**

[FN32]. For examples of a denial of compensatory education based on this standard, see *Catalan v. District of Columbia*, 478 F.Supp.2d 73 [218 Ed.Law Rep. [477]] (D.D.C. 2007). However, the denial of FAPE is not, at least in terms of “harm,” required for compensatory education via the state complaint process. *Indep. Sch. Dist. No. 221 v. Minnesota Dep't of Educ.*, 48 IDELR ¶ 222 (Minn. Ct. App. 2007).

[FN33]. *Compare M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 396 [108 Ed.Law Rep. [522]] (3d Cir. 1996), *with Mrs. C. v. Wheaton*, 916 F.2d 69 [63 Ed.Law Rep. [93]] (2d Cir. 1990). However, a more recent Second Circuit decision interpreted the gross denial standard as only applying to students beyond age 21 by the time of the completion of litigation. *P. v. Newington Bd. of Educ.*, 546 F.3d 111 [238 Ed.Law Rep. [517]] (2d Cir. 2008).

[FN34]. Most published hearing/review officer and court decisions have not raised or addressed this issue, but a California IHO rejected a compensatory education claim where the defendant–district denied FAPE by failing to find an student with ED eligible but where the plaintiff–parent “presented no specific evidence as to the degree of lost educational opportunity, if any, or what form of compensatory education would be required to address lost educational opportunity.” *Los Gatos–Saratoga Joint Union High Sch. Dist.*, 41 IDELR ¶ 227 (Cal. SEA 2004); *cf. C.W. v Rose Tree Media Sch. Dist.*, 55 IDELR ¶ 123 (3d Cir. 2010) (“**The purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a free appropriate public education, but to compensate students with disabilities who have not received an appropriate education**”); *D.A. v. Houston Indep. Sch. Dist.*, 716 F.Supp.2d 603 (S.D. Tex. 2009) (lack of supporting evidence); *In re Student with a Disability*, 54 IDELR ¶ 240 (Va. SEA 2010) (lack of educational deficit or benefit).

[FN35]. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2). At the same time, said provisions preserve the IHO's authority to order compliance with applicable procedural requirements. 20 U.S.C. § 1415(f)(3)(E)(iii); 34 C.F.R. § 3900.513(a)(3). For an example of denial of compensatory education for a pure, i.e., nonprejudicial, procedural violation, see *Shawsheen Valley Reg'l Vo–Tech. Sch. Dist. v. Commonwealth of Massachusetts Bureau of Special Educ. Appeals*, 367 F.Supp.2d 44 (D. Mass. 2005).

[FN36]. See, e.g., *Pittsburgh Bd. of Educ. v. Pennsylvania Dep't of Educ.*, 581 A.2d 681 [63 Ed.Law Rep. [934]] (Pa. Commw. Ct. 1990).

[FN37]. See, e.g., *Alcorn County Sch. Dist.*, 53 IDELR ¶ 136 (Miss. SEA 2009) (band).

[FN38]. See, e.g., *Madeline P. v. Anchorage Sch. Dist.*, 265 P.3d 308 [274 Ed.Law Rep. [698]] (Alaska 2011)

; *Bd. of Educ. v. Munoz*, 792 N.Y.S.2d 275 [197 Ed.Law Rep. [357]] (App. Div. 2005); *Alcorn County Sch. Dist.*, 53 IDELR ¶ 136 (Miss. SEA 2009); *Richland Springs Indep. Sch. Dist.* 51 IDELR ¶ 144 (Tex. SEA 2008). **However, lack of implementation is not a per se denial of FAPE, although the courts have not established an entirely uniform threshold standard for the basis for compensatory education. See, e.g., *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 [225 Ed.Law Rep. [136]] (9th Cir. 2007) (material failure); *Melissa S. v. Sch. Dist.*, 183 Fed.Appx. 184 [212 Ed.Law Rep. [639]] (3d Cir. 2006) (more than de minimis); *Houston Indep. Sch. Dist. v. Bobby R.* 200 F.3d 341 [141 Ed.Law Rep. [62]] (5th Cir. 2000) (substantial or significant).**

[FN39]. ***D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 Fed.Appx. 887 [286 Ed.Law Rep. [131]] (5th Cir. 2012).**

[FN40]. For a comparative overview of the two primary approaches, see Perry A. Zirkel, *Two Competing Approaches for Calculating Compensatory Education under the IDEA*, 257 Ed. Law Rep. 55 (2010).

[FN41]. This language derives from the limitations period of the IDEA. See *supra* note 20 and accompanying text.

[FN42]. 81 F.3d at 397. **For application of this equitable adjustment, see, e.g., *Breanne C. v. S. York County Sch. Dist.*, 732 F.Supp.2d 474 [263 Ed.Law Rep. [122]] (M.D. Pa. 2010).**

[FN43]. See, e.g., *Indiana Area Sch. Dist.*, 45 IDELR ¶ 25 (Pa. SEA 2006).

[FN44]. See, e.g., *Dudley v. Lower Merion Sch. Dist.*, 58 IDELR ¶ 12 (E.D. Pa. 2011); cf. *Lakeland Sch. Dist.*, 58 IDELR ¶ 150 (Pa. SEA 2011) (excused, not unexcused absences). *But cf. Linda E. v. Bristol Warren Reg'l Sch. Dist.*, 758 F.Supp.2d 75 [266 Ed.Law Rep. [718]] (D.R.I. 2010) (no deduction for missing inappropriate services).

[FN45]. *Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489 [93 Ed.Law Rep. [547]] (9th Cir. 1994).

[FN46]. See, e.g., ***G.D. v. Wissahickon Sch. Dist.*, 832 F.Supp.2d 455 [280 Ed.Law Rep. [71]] (E.D. Pa. 2011); *Dudley v. Lower Merion Sch. Dist.*, 58 IDELR ¶ 12 (E.D. Pa. 2011); *Breanne C. v. S. York County Sch. Dist.*, 732 F.Supp.2d 474 [263 Ed.Law Rep. [122]] (M.D. Pa. 2010); *Ind. Sch. Dist. No. 281 v. Minnesota Dep't of Educ.*, 48 IDELR ¶ 222 (Minn. Ct. App. 2007); *Sch.*, 58 IDELR ¶ 207 (Ariz. SEA 2012); *Poway Unified Sch. Dist.*, 54 IDELR ¶ 105 (Cal. SEA 2010); *City of Chicago Sch. Dist. #299*, 60 IDELR ¶ 173 (Ill. SEA 2013); *Pocono Mountain Sch. Dist.*, 56 IDELR ¶ 182 (Pa. SEA 2011); *Hamshire–Fannett Indep. Sch. Dist.*, 54 IDELR ¶ 239 (Tex. SEA 2010); cf. *Forest Grove Sch. Dist.*, 59 IDELR ¶ 270 (Or. SEA 2012) (various particular services). *But cf. Pennsbury Sch. Dist. v. C.E.*, 59 IDELR ¶ 13 (Pa. Commw. Ct. 2012) (upheld award of one hour per day with recitation of qualitative language).**

[FN47]. See, e.g., *L.T. v. Mansfield Sch. Dist.*, 52 IDELR ¶ 246 (D.N.J. 2009) (compensatory education package that included an administrator and nonacademic periods, amounting to \$10,300 for a 17–day period of FAPE denial); ***In re Student with a Disability*, 54 IDELR ¶ 139 (Kan. SEA 2010).**

[FN48]. **The courts are not necessarily demanding of the specifics of the calculation under the quantitative approach. See, e.g., *G.D. v. Wissahickson Sch. Dist.*, 832 F.Supp.2d 455 [280 Ed.Law Rep. [71]] (E.D. Pa. 2011).**

[FN49]. ***Mt. Vernon Sch. Corp. v. A.M.*, 59 IDELR ¶ 100 (S.D. Ind. 2012); *B.T. v. Dep't of Educ.*, 676**

[F.Supp.2d 982 \[254 Ed.Law Rep. \[212\]\] \(D. Haw. 2010\)](#); [State of Hawaii v. Zachary B.](#), 52 IDELR ¶ 213 (D. Haw. 2009); [R.M. v. Miami–Dade County Sch. Bd.](#), 55 IDELR ¶ 261 (S.D. Fla. 2010); *cf.* [Phillips v. District of Columbia](#),—F. Supp.2d—(D.D.C. 2013) (upheld denial after remand and expert evidence); [I.T. v. Dep't of Educ.](#), [State of Hawaii](#), 59 IDELR ¶ 219 (D. Haw. 2012); [Walker v. District of Columbia](#), 786 F.Supp.2d 232 [272 Ed.Law Rep. [192]] (D.D.C. 2011); [Stanton v. District of Columbia](#), 680 F.Supp.2d 201 [255 Ed.Law Rep. [120]] (D.D.C. 2010) (remanded to IHO based on insufficient information); [Dep't of Educ.](#), 54 IDELR ¶ 271 (Haw. SEA 2010) (record does not provide sufficient information to determine what additional services are warranted). Yet, the calculus or proof need not be exact. *See, e.g.*, [Cousins v. District of Columbia](#), 880 F.Supp.2d 142 [287 Ed.Law Rep. [901]] (D.D.C. 2012).

[FN50]. *See, e.g.*, [Woods v. Northport Sch. Dist.](#) 487 Fed.Appx. 968 [287 Ed.Law Rep. [746]] (6th Cir. 2012); [T.G. v. Midland Sch. Dist.](#), 848 F.Supp.2d 902 [282 Ed.Law Rep. [425]] (C.D. Ill. 2012) (qualitative approach but with flexible deference for IHO); [B.H. v. W. Clermont Bd. of Educ.](#), 788 F.Supp.2d 682 [272 Ed.Law Rep. [445]] (S.D. Ohio 2011); [D.G. v. Flour Bluff Indep. Sch. Dist.](#), 832 F.Supp.2d 755 [280 Ed.Law Rep. [132]] (S.D. Tex. 2011) (qualitative approach yielding result that approximates quantitative approach), *vacated*, 481 Fed.Appx. 887 [286 Ed.Law Rep. [131]] (5th Cir. 2012); [Hollister Sch. Dist.](#), 60 IDELR ¶ 172 (Cal. SEA 2013); [Sch. Dist. of Philadelphia](#), 57 IDELR ¶ 86 (Pa. SEA 2011); *cf.* [Dracut Sch. Comm. v. Bureau of Special Educ. Appeals](#), 737 F.Supp.2d 35 [263 Ed.Law Rep. [625]] (D. Mass. 2010) (citing [Puffer v. Reynolds](#), 761 F.Supp.2d 838, 853 [67 Ed.Law Rep. [536]] (D. Mass. 1988) for FAPE “equal in time and scope” with what a student would have received while eligible).

[FN51]. *See, e.g.*, [Williamson County Bd. of Educ. v. C.K.](#), 52 IDELR ¶ 40 (M.D. Tenn. 2009) (upheld, without discussion, one year of tutoring for violation of up to five years in duration); [Gwinnett County Sch. Dist.](#), 51 IDELR ¶ 174 (Ga. SEA 2008) (720 hours for 10–year denial), *rev'd and remanded*, [Gwinnett Cnty. Sch. Dist.](#), 54 IDELR ¶ 316 (N.D. Ga. 2010); [City of Chicago Sch. Dist. 299](#), 53 IDELR ¶ 274 (Ill. SEA 2009) (undefined one year of compensatory education for FAPE violation of 1.5 years); [Waukeg Cmty. Sch. Dist.](#), 48 IDELR ¶ 26 (Iowa SEA 2007) (otherwise undefined ESY remedy for detailed elaboration of various IEP violations, including BIP provisions); [Indianapolis Pub. Sch.](#), 42 IDELR ¶ 20 (Ind. SEA 2004) (one year w/o further specificity); [Webb Consol. Indep. Sch. Dist.](#), 43 IDELR ¶ 25 (Tex. SEA 2005) (most of the missed hours); *cf.* [Deer–Creek Mackinaw Cmty Unit Sch. Dist. 701](#), 54 IDELR ¶ 138 (Ill. SEA 2010) (conditional independent study courses and monthly parental visits for at least 3–semester denial of FAPE—apparently based on parental request); [Seattle Sch. Dist.](#), 49 IDELR ¶ 86 (Wash. SEA 2007) (unclear approximation based on lack of pertinent parental evidence).

[FN52]. *Quaere* whether a prospective remedy to provide FAPE must also include compensatory education? *See, e.g.*, [Van Duyn v. Baker Sch. Dist.](#), 502 F.3d 811 [225 Ed.Law Rep. [136]] (9th Cir. 2007) (IHO's underlying order); [Mr. I v. Maine Sch. Admin. Dist. No. 55](#), 480 F.3d 1 [217 Ed.Law Rep. [60]] (1st Cir. 2007) (ambiguity of the order at each level).

[FN53]. *See, e.g.*, [French v. New York State Dep't of Educ.](#), 476 Fed.Appx. 468 [283 Ed.Law Rep. [821]] (2d Cir. 2011); [Dep't of Educ. v. M.F.](#), 840 F.Supp.2d 1214 [281 Ed.Law Rep. [886]] (D. Haw. 2011); [T.B. v. San Diego Unified Sch. Dist.](#) 56 IDELR ¶ 152 (S.D. Cal. 2011); *cf.* [Great Valley Sch. Dist.](#), 55 IDELR ¶ 86 (Pa. SEA 2010) (unclear effect).

[FN54]. *See, e.g.*, [Carbondale Elementary Sch. Dist. No. 95](#), 23 IDELR 280 (Ill. SEA 1995).

[FN55]. **Maine Sch. Admin. Dist. No. 35 v. Mr. R.**, 321 F.3d 9 [173 Ed.Law Rep. [785]] (1st Cir. 2003). *But cf.* **T.B. v. San Diego Unified Sch. Dist.**, 56 IDELR ¶ 152 (S.D. Cal. 2011); **Ferren C. v. Sch. Dist.**, 595 F.Supp.2d 566 [241 Ed.Law Rep. [771]] (E.D. Pa. 2009), *aff'd on other grounds*, 612 F.3d 712 [259 Ed.Law Rep. [37]] (3d Cir. 2010).

[FN56]. *See, e.g.*, **B.T. v. Dep't of Educ.**, 676 F.Supp.2d 982 [254 Ed.Law Rep. [212]] (D. Haw. 2010); *cf.* **M.L. v. El Paso Indep. Sch. Dist.**, 369 Fed.Appx. 573 [258 Ed.Law Rep. [40]] (5th Cir. 2010) (not needed, thus moot); **Wenger v. Canastota Cent. Sch. Dist.**, 979 F.Supp. 147 [122 Ed.Law Rep. [434]] (N.D.N.Y. 1997), *aff'd mem.*, 181 F.3d 84 [136 Ed.Law Rep. [226]] (2d Cir. 1999) (lack of regression).

[FN57]. *See, e.g.*, **Bd. of Educ. of City Sch. Dist. of Buffalo**, 46 IDELR ¶ 146 (N.Y. SEA 2006) (no need for regression).

[FN58]. The child's present need would appear to be part of the calculation of compensatory education in those jurisdictions that use this approach. *See supra* note 48 and accompanying text.

[FN59]. **Phillips v. District of Columbia**,—F. Supp. 2d—(D.D.C. 2013) (part of the qualitative calculation for denial of compensatory education); **Dracut Sch. Comm. v. Bureau of Special Educ. Appeals**, 737 F.Supp.2d 35 [263 Ed.Law Rep. [625]] (D. Mass. 2010) (requiring consideration of services received); *cf.* **In re Student with a Disability**, 55 IDELR ¶ 179 (N.Y. SEA 2010) (student difficulty one reason for denial). *But cf.* **Linda E. v. Bristol Warren Reg'l Sch. Dist.**, 758 F.Supp.2d 75 [266 Ed.Law Rep. [718]] (D.R.I. 2010) (no credit for inappropriate services).

[FN60]. *See, e.g.*, **D.W. v. District of Columbia**, 561 F.Supp.2d 56 [235 Ed.Law Rep. [271]] (D.D.C. 2008).

[FN61]. *See, e.g.*, **D.B. v. Gloucester Twp. Sch. Dist.**, 751 F.Supp.2d 764 [265 Ed.Law Rep. [719]] (D.N.J. 2010).

[FN62]. *See, e.g.*, **Henry v. District of Columbia**, 750 F.Supp.2d 94 [265 Ed.Law Rep. [601]] (D.D.C. 2010) (the IHO, with the burden on the district).

[FN63]. *See, e.g.*, **Forest Grove Sch. Dist.**, 59 IDELR ¶ 270 (Or. SEA 2012); **Pasadena Indep. Sch. Dist.**, 58 IDELR ¶ 210 (Tex. SEA 2012).

[FN64]. **P. v. Newington Bd. of Educ.**, 546 F.3d 111 [238 Ed.Law Rep. [517]] (2d Cir. 2008) (for LRE violation).

[FN65]. *See, e.g.*, **Reg'l Sch. Unit 51 v. Doe**,—F. Supp. 2d—(D. Me. 2013); **Bd. of Educ. v. Illinois State Bd. of Educ.**, 28 IDELR 1175 (N.D. Ill. 1998); **Deer Valley Unified Sch. Dist.**, 54 IDELR ¶ 206 (Ariz. SEA 2010); *cf.* **B.H. v. W. Clermont Bd. of Educ.**, 788 F.Supp.2d 682 [272 Ed.Law Rep. [445]] (S.D. Ohio 2011) (confusing conflation).

[FN66]. **Ferren C. v. Sch. Dist.**, 612 F.3d 712 [259 Ed.Law Rep. [37]] (3d Cir. 2010).

[FN67]. *See, e.g.*, **Streck v. Bd. of Educ.**, 642 F.Supp.2d 105 [250 Ed.Law Rep. [178]] (N.D.N.Y. 2009), *revised*, 408 F. App'x 411 (2d Cir. 2010) (only for compensatory reading and writing programs and directly related devices).

[FN68]. *See, e.g.*, **N.L. v. Special Sch. Dist.**, 54 IDELR ¶ 78 (E.D. Mo. 2010); **Blake C. Dep't of Educ.**, 593 F.Supp.2d 1199 [241 Ed.Law Rep. [662]] (D. Haw. 2009); *cf.* **Walker v. District of Columbia**, 786 F.Supp.2d 232 [272 Ed.Law Rep. [192]] (D.D.C. 2011) (separable?). For prospective tuition award as compensatory education, see **Draper v. Atlanta Indep. Sch. Dist.**, 518 F.3d 1275 [230 Ed.Law Rep. [545]] (11th Cir. 2008); **Ravenswood City Sch. Dist. v. J.S.**, 870 F.Supp.2d 780 [286 Ed.Law Rep. [377]] (N.D. Cal. 2012); **Susquehanna Twp. Sch. Dist. v. Frances J.**, 823 A.2d 249 [176 Ed.Law Rep. [815]] (Pa. Commw. Ct. 2003).

[FN69]. *See, e.g.*, **Brennan v. Reg'l Sch. Dist. No. 1**, 531 F.Supp.2d 245 [229 Ed.Law Rep. [513]] (D. Conn. 2008); **Dep't of Educ. v. Ria L.**, 60 IDELR ¶ 9 (D. Haw.).

[FN70]. The Third Circuit recently ruled that compensatory education is not available for a unilaterally placed private school student. **P.P. v. West Chester Area Sch. Dist.**, 585 F.3d 727 [250 Ed.Law Rep. [517]] (3d Cir. 2009).

[FN71]. However, for a case based in part on admittedly insufficient evidence, the award is not clearly additive. *See, e.g.*, **Fulton Cnty. Sch. Dist.**, 58 IDELR ¶ 267 (Ga. SEA 2012).

[FN72]. **Bd. of Educ. v. Illinois State Bd. of Educ.**, 741 F.Supp.2d 920 [264 Ed.Law Rep. [271]] (N.D. Ill. 2010).

[FN73]. **Fisher v. Bd. of Educ.**, 856 A.2d 552 [191 Ed.Law Rep. [825]] (Del. 2004).

[FN74]. *See, e.g.*, **Henry v. District of Columbia**, 750 F.Supp.2d 94 [265 Ed.Law Rep. [601]] (D.D.C. 2010); **Mr. R. v. Maine Sch. Admin. Dist. No. 35**, 295 F.Supp.2d 113 [184 Ed.Law Rep. [273]] (D. Me. 2003); *cf.* **J.T. v. Dep't of Educ.**, 59 IDELR ¶ 4 (D. Haw. 2012) (IHO after neutral appropriate evaluate jointly paid for by the parties); **Fallbrook Union Sch. Dist.**, 58 IDELR ¶ 238 (Cal. SEA 2012) (separate hearing for recommendations of IHO–appointed independent evaluator); **In re Student with a Disability**, 53 IDELR ¶ 312 (N.Y. SEA 2009) (specifying two summers of 1:1 tutoring in reading by certified instructor but rejecting parents' request for 24–week Lindamood Bell program). In recent cases, a court allowed the parent to provide additional evidence after the IHO denied awarding compensatory education for the lack of a factual foundation. **Phillips v. District of Columbia**, 736 F.Supp.2d 240 [263 Ed.Law Rep. [614]] (D.D.C. 2010); **Gill v. District of Columbia**, 751 F.Supp.2d 104 [265 Ed.Law Rep. [669]] (D.D.C. 2010). In the second case, the court affirmed the hearing officer's denial of compensatory education after the parent failed to provide the requisite proof. **Gill v. District of Columbia**, 770 F.Supp.2d 112 [268 Ed.Law Rep. [761]] (D.D.C. 2011).

[FN75]. *See, e.g.*, **State of Hawaii v. Zachary B.**, 52 IDELR ¶ 213 (D. Haw. 2009) (parents' independent experts); *cf.* **Pitchford v. Salem–Keizer Sch. Dist. No. 24J**, 155 F.Supp.2d 1213 [156 Ed.Law Rep. [555]] (D. Or. 2001) (mediator).

[FN76]. *See, e.g.*, **T.G. v. Midland Sch. Dist.**, 848 F.Supp.2d 902 [282 Ed.Law Rep. [425]] (C.D. Ill. 2012). *But cf.* **Meza v. Bd. of Educ.**, 56 IDELR ¶ 167 (D.N.M. 2011) (IHO may not delegate to the IEP team authority to determine, reduce, or discontinue the award due to prohibition of IHO being a district employee).

[FN77]. *See, e.g.*, **Keystone Cent. Sch. Dist. v. E.E.**, 438 F.Supp.2d 519 [211 Ed.Law Rep. [772]] (E.D. Pa. 2006).

[FN78]. *See, e.g., Streck v. Bd. of Educ.*, 408 Fed.Appx. 411 [266 Ed.Law Rep. [83]] (2d Cir. 2010) (ruling that student was entitled to escrow account for \$37,778 for additional reading instruction); *Matanuska–Susitna Borough Sch. Dist. v. D.Y.*, 54 IDELR ¶ 52 (D. Alaska 2010) (upholding, after supplemental briefing under qualitative approach, \$50k compensatory education fund equivalent to approximately 300 hours of speech therapist services plus roughly 208 hours of aide services, at the respective rates of \$125 and \$60 per hour, or 2.7 hours of speech services and 1.9 hours of aide services per week for 3 school years); *cf. Ferren C. v. Sch. Dist.*, 612 F.3d 712 [259 Ed.Law Rep. [37]] (3d Cir. 2010) (trust fund approved?). *But cf. Millay v. Surry Sch. Dep't*, 56 IDELR ¶ 257 (D. Me. 2011) (rejecting trust fund under the circumstances).

[FN79]. Was OSEP implying that district personnel would provide comp ed services in opining that they must meet the same standards for highly qualified teachers as they would for providing other services. Letter to Anonymous, 49 IDELR ¶ 44 (OSEP 2007).

[FN80]. *Dracut Sch. Comm. v. Bureau of Special Educ. Appeals*, 737 F.Supp.2d 35 [263 Ed.Law Rep. [625]] (D. Mass. 2010) (adding “at reasonable rates of pay”). *But cf. Meza v. Bd. of Educ.*, 56 IDELR ¶ 167 (D.N.M. 2011) (unlawful delegation of IEP team authority to consultants).

[FN81]. *See, e.g., Sch. Bd. of Osceola County v. M.L.*, 30 IDELR ¶ 655 (M.D. Fla. 1999), *aff'd mem.*, 281 F.3d 1285 (11th Cir. 2001); *cf. Stanton v. District of Columbia*, 680 F.Supp.2d 201 [255 Ed.Law Rep. [120]] (D.D.C. 2010) (lack of evidentiary basis); *Susquehanna Twp. Sch. Dist. v. Frances J.*, 823 A.2d 249 (Pa. Commw. Ct. 2003) (indefinite period). To avoid such evidentiary and enforcement problems, a federal court recently warned that “[the IHO decision] must provide a detailed explanation as to why or why not compensatory education is warranted and his reasons for developing a particular compensatory program.” *B.T. v. Dep't of Educ.*, 676 F.Supp.2d 982 [254 Ed.Law Rep. [212]] (D. Haw. 2010).

[FN82]. *See, e.g., Murphy v. Timberlane Reg'l Sch. Dist.*, 855 F.Supp. 498 [93 Ed.Law Rep. [177]] (D.N.H. 1994).

[FN83]. *See, e.g., L.J. v. Audubon Bd. of Educ.*, 49 IDELR ¶ 184 (D.N.J. 2008).

[FN84]. *See, e.g., D.W. v. District of Columbia*, 561 F.Supp.2d 56 [235 Ed.Law Rep. [271]] (D.D.C. 2008). *But cf. Dudley v. Lower Merion Sch. Dist.*, 58 IDELR ¶ 12 (E.D. Pa. 2011) (good faith attempt suffices).

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