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”).1 Designed as an update of previous one of the series, this outline lists the additional and newer outline items and legal citations in grey-highlighted bold typeface, with the other items selectively provided merely for context.2 Published decisions by IDEA impartial hearing officers (IHOs)3 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.4 The outline also includes a limited, sampling of Office for Civil Rights (OCR) letters of findings only to illustrate the overlapping coverage of Section 504.5


2 See the previous articles for the full canvassing of the applicable legal authorities.

3 “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.


A. BACKGROUND CONCEPTS

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

2. analogy to tuition reimbursement: incomplete

3. IDEA 2004 Amendments and 2006 Regulations:

   • continued (from 1997 Amendments) codification, at least in part, of tuition reimbursement remedy

   • one-year statute of limitations for compensatory education claims brought under the state complaint resolution process?

   • indirect springboard for compensatory education in the discipline context

   • only inferable authority under judicial umbrella of IDEA for hearing/review officers, and—under the backup coverage of Section 504 and the ADA—largely OCR

---

10 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).
11 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., Rothsay Pub. Sch. Dist., 68 IDELR ¶ 267 (Minn. SEA 2016); Anchorage Sch. Dist., 68 IDELR ¶ 266 (Alaska SEA 2016): 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 Cty. 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).
12 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”).
16 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
B. THRESHOLD ISSUES

1. the age 21 barrier: shattered, with a limited and disputed exception

2. Eleventh Amendment immunity: inapplicable

3. statute of limitations: two years unless state law but with much longer remedial period for compensatory education?

4. exhaustion doctrine: rather uniform, effective requirement

5. mootness doctrine
   - a bar where the student is no longer eligible as having an IDEA disability
   - possibly a bar when the student has graduated

---


• in most jurisdictions, not a bar when the student has moved, whether within the same state\textsuperscript{26} or out of state\textsuperscript{27}
• 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\textsuperscript{28}
• not a bar when the student has dropped out beyond age of compulsory education\textsuperscript{29}
• not a bar when the parties arrived at a settlement that did not resolve this issue\textsuperscript{30}
• not a bar in child find case where district ultimately evaluated the child, found him eligible, and provided an IEP, even if an appropriate one\textsuperscript{31}
• not a bar where the student has been incarcerated but services or placement is still foreseeable at issue\textsuperscript{32}
• not a bar where the year at issue has ended\textsuperscript{33}
• not necessarily a bar where the IHO granted the alternative requested remedy of an IEE\textsuperscript{34}

6. request required in notice pleading?: not if at the prehearing conference\textsuperscript{35}


\textsuperscript{28} Letter to Whipple, 54 IDELR ¶ 262 (OSEP 2009).

\textsuperscript{29} Garcia v. Bd. of Educ., 520 F.3d 1116, 231 Ed.Law Rep. 25 (10th Cir. 2008).


\textsuperscript{35} Dep’t of Educ., State of Haw. v. E.B., 43 IDELR ¶ 249 (D. Haw. 2007).
C. EVOLVING STANDARDS

1. triggering issues

- threshold level: denial of FAPE must be more than de minimis and need not be in bad faith, but increasingly limited minority view that it must be gross.

- threshold question: must the plaintiff show a specific loss of educational opportunity?

- limited for procedural violations

- includes related services

- includes extracurricular activities

---

36 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 214 (2013).


40 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., 395 F. App’x 824, 263 Ed.Law Rep. 80 (3d Cir. 2010) (“The purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a, FAPE, 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).


• includes implementation, not just formulation, violations

• not for child find violation where the child is not eligible

2. calculation issues

• starting point: when the district or parent knew or should have known of the denial of FAPE

• 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”

- exclusion for comp ed from state complaint resolution process during same period

- another exclusion: absences? - rarely

---


46 For a comparative overview of the two primary approaches, see Perry A. Zirkel, Two Approaches for Calculating Compensatory Education under the IDEA, 257 Ed.Law Rep. 551 (2010).

47 This language derives from the limitations period of the IDEA. See supra note 20 and accompanying text.

48 Pennsylvania has historically been one of the leading states for this approach, but some of the cases seem to be moving toward a qualitative or hybrid approach. See infra notes 52–55.

49 For a decision illustrating the strict hour-for-hour approach for one year, yet applying a qualitative-like or at least contradictory FAPE-benefit analysis, see A.S. v. Harrison Twp. Bd. of Educ., 67 IDELR ¶ 207 (D.N.J. 2016).


51 See, e.g., Indiana Area Sch. Dist., 45 IDELR ¶ 25 (Pa. SEA 2006).

- extent—need not provide a day-for-day compensation for time missed but particularized (i.e., service-unit) basis v. total-package basis

b) expanding alternatives of qualitative approach customized to 1) “specific educational deficits resulting from [child’s] loss of FAPE,” which could be less or even more than “cookie cutter” approach, or 2) relaxed hybrid approach


56 The courts are not necessarily demanding of the specifics of the calculation under the quantitative approach.


• specific formula: sometimes a mystery

• another area of imprecision or confusion: retrospective and prospective FAPE

• role of the equities: not entirely settled but likely yes, including offset issue

• includes stay-put?: unsettled but probably

• need: hardly considered and presumed, except for emerging qualitative approach


59 See, e.g., Williamson Cty. 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 Cty. Sch. Dist., 51 IDELR ¶ 174 (Ga. SEA 2008) (720 hours for 10-year denial), rev’d and remanded, Gwinnett Cty. 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); Waukee 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).

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

Similarly, should the extent of the prospective revision to the IEP affect the calculus for compensatory education? See, e.g., Demar cus L. v. Bd. of Educ., 63 IDELR ¶ 13 (N.D. Ill. 2014) (denying compensatory education partially on this basis).


• T.B. v. Eugene Sch. Dist., 67 IDELR ¶ 185 (D. Or. 2016) (denying offset for transitional and allegedly unofficial private placement based on equities, including district’s continued “negligence” in denying FAPE).

61 See, e.g., Carbondale Elementary Sch. Dist. No. 95, 23 IDELR 280 (Ill. SEA 1995).


• partial credit? effectiveness? - hardly addressed yet68
• not excused by present progress or appropriateness69
• amount for district’s denial of opportunity for meaningful parental participation in the IEP process?70

- amount for prejudicial problem in transition assessment?71
• who has the responsibility, including the burden of proof?72

3. scope issues
• lower limit: child in a permanent vegetative state

• form: includes training?73 consultant?74 paraprofessional?75 tuition reimbursement?76 prospective placement?77 IEP (after age 21)?78

---

66 See, e.g., Bd. of Educ. of City Sch. Dist. of Buffalo, 46 IDELR ¶ 146 (N.Y. SEA 2006) (no need for regression).
67 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.
71 See, e.g., Gibson v. Forest Hills Sch. Dist. Bd. of Educ., 62 IDELR ¶ 261 (S.D. Ohio 2014) (590 hours of specified services at specified rate plus 40 trips @ $50).
73 See, e.g., Sch. Dist. of Phila. v. Williams, 66 IDELR ¶ 214 (E.D. Pa. 2015); Forest Grove Sch. Dist., 59 IDELR ¶ 270 (Or. SEA 2012); Pasadena Indep. Sch. Dist., 58 IDELR ¶ 210 (Tex. SEA 2012).
75 In re Student with a Disability, 64 IDELR ¶ 292 (Miss. SEA 2014) (for LRE violation during ESY).
implementations issues

• distinguishable from and, for denial of FAPE, generally warranted in addition to prospective relief

• awards of both compensatory education and tuition reimbursement for different periods of FAPE denial: stay-put

• award of compensatory education as default for unsuccessful (at Step II) tuition reimbursement: not so far

• when: after school, during the summer, or at some other time “beyond what is required by [his prospective] IEP”?—and, where included in the IEP, as soon as possible

• where: private school?

• who (determines amount): the IHO? an outside expert? mutual agreement or IEP

---


83 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).

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


team\(^9\)? or the parents\(^9\)?

\* enforcement options for failure to implement IHO compensatory education relief include IDEA (w/o exhaustion)\(^9\) and ADA\(^9\)

\* what: same or different? escrow or trust fund?\(^9\)

\* how: bifurcated hearing via second, contingent phase,\(^9\) dismissal w/o prejudice,\(^9\) ordering reopening for this limited purpose\(^9\)

---


89 See, e.g., Keystone Cent. Sch. Dist. v. E.E., 438 F. Supp. 2d 519, 211 Ed.Law Rep. 772 (E.D. Pa. 2006); cf. In re Student with a Disability, 61 IDELR ¶ 89 (N.M. SEA 2013) (parent choice of summer program if collaboration, which is preferable, is not successful).


92 See, e.g., Streck v. Bd. of Educ., 408 F. App’x 411, 266 Ed.Law Rep. 83 (2d Cir. 2010) (ruling that student was entitled to escrow account for $37,778 for additional reading instruction); A.S. v. Harrison Twp. Bd. of Educ., 68 IDELR ¶ 96 (D.N.J. 2016) (permitting order for trust fund for 72 hours of compensatory education); 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); Campus Cnty. Sch. 116 LRP 11057 (Del. SEA 2015) (trust fund $17.50 x 7 hrs. – no. of days); cf. Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 259 Ed.Law Rep. 37 (3d Cir. 2010) (trust fund approved?). But cf. Estate of Butler v. Mountain View Sch. Dist., 61 IDELR ¶ 290 (E.D. Pa. 2013) (rejecting remedy of monetary value of compensatory education in wake of student’s death); Gibson v. Forest Hills Sch. Dist. Bd. of Educ., 62 IDELR ¶ 261 (S.D. Ohio 2014); Millay v. Surry Sch. Dep’t, 56 IDELR ¶ 257 (D. Me. 2011) (rejecting trust fund under the circumstances).

93 See, e.g., Maple Heights City Sch. Bd. of Educ., 68 IDELR ¶ 5 (N.D. Ohio 2016) (ruling that bifurcated hearing was not prejudicial IHO error).


95 Houston Cty. Sch. Dist., 116 LRP 8724 (Ga. SEA 2015).
• who provides? – district personnel\textsuperscript{97} independent consultants, not parents’ experts\textsuperscript{98}

• final possible problems: awards that are too vague to be enforceable\textsuperscript{99} or that are sufficiently clear but not implemented\textsuperscript{100}

• conversely, enforcement may include judicial civil contempt sanctions\textsuperscript{101}

• district’s failure to comply with comp ed award is not a harmless procedural violation\textsuperscript{102}

\footnotesize{97 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).


