

COMPENSATORY EDUCATION: THE NEXT ANNOTATED UPDATE OF THE LAW*

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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”).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

¹ This article appeared in WEST’S EDUCATION LAW REPORTER (Ed.Law Rep.), v. 336, pp. 654–666 (2016). For the earlier articles in this series, see Perry A. Zirkel, *Compensatory Education: An Annotated Update of the Law*, 291 Ed.Law Rep. 1 (2013); Perry A. Zirkel, *Compensatory Education: An Annotated Update of the Law*, 251 Ed.Law Rep. 101 (2010); Perry A. Zirkel, *Compensatory Education Services under the IDEA: An Annotated Update*, 190 Ed.Law Rep., 45 (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).

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.

⁴ 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).

⁵ 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). **For relatively rare hearing officer decisions under Section 504, which provided compensatory education, see Laurel Highlands Sch. Dist., 116 LRP 8832 (Pa. SEA 2016); Solanco Sch. Dist., 115 LRP 10056 (Pa. SEA 2015).**

A. BACKGROUND CONCEPTS

1. definition: equitable remedy⁶ that provides in-kind special education and other related services for denials of a free and appropriate public education (“FAPE”),⁷ or a “replacement of education services the student should have received in the first place.”⁸
2. analogy to tuition reimbursement: incomplete⁹
3. IDEA 2004 Amendments and 2006 Regulations:
 - continued (from 1997 Amendments) codification, at least in part, of tuition reimbursement remedy¹⁰
 - one-year statute of limitations for compensatory education claims brought under the state complaint resolution process?¹¹
 - indirect springboard for compensatory education in the discipline context¹²
 - only inferable authority under judicial umbrella of IDEA for hearing/review officers,¹³ and—under the backup coverage of Section 504 and the ADA¹⁴—largely¹⁵ OCR¹⁶

⁶ See, e.g., *S.S. v. Howard Road Acad.* 562 F. Supp. 2d 126, 235 Ed.Law Rep. 883 (D.D.C. 2008).

⁷ See, e.g., *Lester H. v. Gilhool*, 916 F.2d 865, 868, 63 Ed.Law Rep. 45 (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).

⁸ *Reid v. District of Columbia*, 401 F.3d 516, 518, 196 Ed.Law Rep. 402 (D.C. Cir. 2005).

⁹ 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).

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”).

¹³ See, e.g., Perry A. 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).

¹⁴ See, e.g., *Mrs. C. v. Wheaton*, 916 F.2d 69, 63 Ed.Law Rep. 93 (2d Cir. 1990).

¹⁵ On rare occasions hearing/review officers address compensatory education awards under § 504. See, e.g., *Andover Pub. Sch.*, 28 IDELR 266 (Mass. SEA 1998).

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,¹⁷ with a limited and disputed exception¹⁸
2. Eleventh Amendment immunity: inapplicable¹⁹
3. statute of limitations: two years unless state law²⁰ **but with much longer remedial period for compensatory education?**²¹
4. exhaustion doctrine: rather uniform, effective requirement²²
5. mootness doctrine²³
 - a bar where the student is no longer eligible as having an IDEA disability²⁴
 - possibly a bar when the student has graduated²⁵

¹⁷ See, e.g., *Barnett v. Memphis City Sch. Sys.*, 113 F. App'x 124, 193 Ed.Law Rep. 419 (6th Cir. 2004); *Pace v. Bogalusa City Sch.*, 325 F.3d 609, 175 Ed.Law Rep. 104 (5th Cir. 2003); *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 87 Ed.Law Rep. 341 (1st Cir. 1993).

¹⁸ Compare *Bd. of Educ. of Oak Park v. Ill. State Bd. of Educ.*, 79 F.3d 654, 108 Ed.Law Rep. 32 (7th Cir. 1996); ***J.R. v. Cox-Cruey*, 61 IDELR ¶ 212 (E.D. Ky. 2012)**; *Hilden v. Lake Oswego Sch. Dist.*, 21 IDELR 671 (D. Or. 1994) (parents may not pierce the age-21 barrier for services via the 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).

¹⁹ 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).

²⁰ 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., ***D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 285 Ed.Law Rep. 730 (3d Cir. 2012)**; ***Coleman v. Pottstown Sch. Dist.*, 983 F. Supp. 2d 543, 305 Ed.Law Rep. 141 (E.D. Pa. 2103)**; ***Reg'l Sch. Unit 51 v. Doe*, 920 F. Supp. 2d 168, 294 Ed.Law Rep. 722 (D. Me. 2013)**; *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 Cty. 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 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. Cent. Bucks Sch. Dist.*, 618 F.3d 411, 260 Ed.Law Rep. 573 (3d Cir. 2010). **Finally, the qualitative approach may effectively extend beyond the limitations period for the amount available via the quantitative approach.** See, e.g., ***Cent. Sch. Dist. v. K.C.*, 61 IDELR ¶ 125 (E.D. Pa. 2013)**.

²¹ ***G.L. v. Ligonier Valley Sch. Auth.*, 802 F.3d 601, 322 Ed.Law Rep. 633 (3d Cir. 2015)**; ***K.H. v. N.Y.C. Dep't of Educ.*, 63 IDELR ¶ 295 (E.D.N.Y. 2014)**; *Gwinnett Cty. Sch. Dist. v. A.A.*, 54 IDELR ¶ 316 (N.D. Ga. 2010).

²² 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).

²³ **For a ruling of mootness based on waiver in the adjudicative process, see *J.T. v. Newark Bd. of Educ.*, 564 F. App'x 677, 306 Ed.Law Rep. 675 (3d Cir. 2014).**

²⁴ 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 F. App'x 573, 258 Ed.Law Rep. 40 (5th Cir. 2010).

- in most jurisdictions, not a bar when the student has moved, whether within the same state²⁶ or out of state²⁷
 - not a bar where the student is no longer eligible under Part C or who has moved out of state while eligible under Part C²⁸
 - not a bar when the student has dropped out beyond age of compulsory education²⁹
 - not a bar when the parties arrived at a settlement that did not resolve this issue³⁰
 - **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**³¹
 - **not a bar where the student has been incarcerated but services or placement is still foreseeably at issue**³²
 - **not a bar where the year at issue has ended**³³
 - **not necessarily a bar where the IHO granted the alternative requested remedy of an IEE**³⁴
6. request required in notice pleading?: not if at the prehearing conference³⁵

²⁵ See, e.g., *Barnett v. Memphis City Sch. Sys.*, 113 F. App'x 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* **Frazier v. Fairhaven Sch. Comm.**, 276 F.3d 52, 160 Ed.Law Rep. 336 (1st Cir. 2002); **Holman v. District of Columbia**, 153 F. Supp. 3d 386, 332 Ed.Law Rep. 145 (D.D.C. 2016); *Brooks v. District of Columbia*, 841 F. Supp. 2d 253, 281 Ed.Law Rep. 915 (D.D.C. 2012); **Bell v. Bd. of Educ.**, 52 IDELR ¶ 161 (D.N.M. 2008); *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).

²⁶ 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).

²⁷ 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). *But cf.* *C.N. v. Willmar Pub. Sch. Indep. Sch. Dist. No. 347*, 591 F.3d 624, 252 Ed.Law Rep. 106 (8th Cir. 2010); **A.H. v. Independence Sch. Dist.**, 466 S.W.3d 17, 321 Ed.Law Rep. 1168 (Mo. Ct. App. 2015) (adopting unusual view that parent must file a due process hearing before moving from the delinquent district).

²⁸ Letter to Whipple, 54 IDELR ¶ 262 (OSEP 2009).

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

³⁰ *Flores v. District of Columbia*, 437 F. Supp. 2d 22, 211 Ed.Law Rep. 253 (D.D.C. 2006).

³¹ **Boose v. District of Columbia**, 786 F.3d 1054, 318 Ed.Law Rep. 43 (D.C. Cir. 2015).

³² **Morris v. District of Columbia**, 38 F. Supp. 3d 57, 313 Ed.Law Rep. 515 (D.D.C. 2014).

³³ **Arroyo-Delgado v. Dep't of Educ. of P.R.**, ___ F. Supp. 3d ___, ___ Ed.Law Rep. ___ (D.P.R. 2016).

³⁴ **Fullmore v. District of Columbia**, 40 F. Supp. 3d 174, 313 Ed.Law Rep. 730 (D.D.C. 2014).

³⁵ *Dep't of Educ., State of Haw. v. E.B.*, 45 IDELR ¶ 249 (D. Haw. 2007).

C. EVOLVING STANDARDS

1. triggering issues

- threshold level: denial of FAPE³⁶ must be more than *de minimis*³⁷ and need not be in bad faith,³⁸ but increasingly limited minority view that it must be gross³⁹
- threshold question: must the plaintiff show a specific loss of educational opportunity?⁴⁰
- limited for procedural violations⁴¹
- includes related services⁴²
- includes extracurricular activities⁴³

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).

³⁷ See, e.g., *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 218 Ed.Law Rep. 477 (D.D.C. 2007) (denying compensatory education where *de minimis* denial). However, for the state complaint resolution process, the denial of FAPE is not, at least in terms of "harm," required for compensatory education. *Indep. Sch. Dist. No. 221 v. Minnesota Dep't of Educ.*, 48 IDELR ¶ 222 (Minn. Ct. App. 2007).

³⁸ See, e.g., *M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396, 108 Ed.Law Rep. 522 (3d Cir. 1996); ***Bookout v. Bellflower Unified Sch. Dist.*, 63 IDELR ¶ 4 (C.D. Cal. 2014).**

³⁹ See, e.g., *Mrs. C. v. Wheaton*, 916 F.2d 69, 63 Ed.Law Rep. 93(2d Cir. 1990). More recent decisions in the Second Circuit have interpreted the gross denial standard as only applying to students beyond age 21 by the time of the completion of litigation. ***Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 319 Ed.Law Rep. 641 (2d Cir. 2015)**; *P. v. Newington Bd. of Educ.*, 546 F.3d 111, 238 Ed.Law Rep. 517 (D. Conn. 2007), *aff'd on other grounds*, 546 F.3d 111 (2d Cir. 2008); ***A. v. Hartford Bd. of Educ.*, 68 IDELR ¶ 40 (D. Conn. 2016).**

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).

⁴¹ 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. § 300.513(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 Mass. Bureau of Special Educ. Appeals*, 367 F. Supp. 2d 44, 198 Ed.Law Rep. 217 (D. Mass. 2005).

⁴² See, e.g., *Pittsburgh Bd. of Educ. v. Pa. Dep't of Educ.*, 581 A.2d 681, 63 Ed.Law Rep. 934 (Pa. Commw. Ct. 1990). As an extreme example, a federal court rejected a spending clause challenge to a hearing officer's award, as compensatory education, of "a full-time, one-on-one [autism spectrum disorder] trained psychologist or psychiatrist" for the child based on collaborative arrangements between the parties, concluding that the evidence showed that the child needed this related service. ***Troy Sch. Dist. v. K.M.*, 65 IDELR ¶ 91 (E.D. Mich. 2015).**

⁴³ See, e.g., *Alcorn Cty. Sch. Dist.*, 53 IDELR ¶ 136 (Miss. SEA 2009) (band).

- includes implementation, not just formulation, violations⁴⁴
 - not for child find violation where the child is not eligible⁴⁵
2. calculation issues⁴⁶
- starting point: when the district or parent knew or should have known of the denial of FAPE⁴⁷
 - a) quantitative approach⁴⁸
 - duration: the period of the denial⁴⁹
 - exclusion (in the Third Circuit): “the time reasonably required for the school district to rectify the problem”⁵⁰
 - exclusion for comp ed from state complaint resolution process during same period⁵¹
 - another exclusion: absences? - rarely⁵²

⁴⁴ See, e.g., **M.S. v. Utah Sch. for the Deaf & Blind, 64 IDELR ¶ 11 (D. Utah 2014); Tyler W. v. Upper Perkiomen Sch. Dist., 963 F. Supp. 2d 427, 301 Ed.Law Rep. 777 (E.D. Pa. 2013)**; 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 Cty. 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 F. App’x 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) (loss of benefit). **Moreover, implementation cases cause confusion in terms of the requisite denial of FAPE. See, e.g., S.A. v. N.Y.C. Dep’t of Educ., 63 IDELR ¶ 73 (E.D.N.Y. 2014).**

⁴⁵ D.G. v. Flour Bluff Indep. Sch. Dist., 481 F. App’x 887, 286 Ed.Law Rep. 131 (5th Cir. 2012).

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 52–53.**

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).**

⁵⁰ 81 F.3d at 397. For application of this equitable adjustment, see, e.g., Breanne C. v. S. York Cty. Sch. Dist., 732 F. Supp. 2d 474, 263 Ed.Law Rep. 122 (M.D. Pa. 2010). **For an exception, see Tyler W. v. Perkiomen Sch. Dist., 963 F. Supp. 2d 427, 301 Ed.Law Rep. 777 (E.D. Pa. 2013).**

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

⁵² See, e.g., **Tehachapi Unified Sch. Dist., 67 IDELR ¶ 102 (Cal. SEA 2016) (extended periods)**; 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). For OSEP’s interpretation as to the extent of the district’s FAPE obligation during absences in various specified circumstances, see **Letter to Clarke, 48 IDELR ¶ 77 (OSEP 2007)**; Letter to Balkman, 23 IDELR 646 (OSEP 1995).

- extent—need not provide a day-for-day compensation for time missed⁵³ but particularized (i.e., service-unit)⁵⁴ basis v. total-package⁵⁵ basis⁵⁶
- 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,⁵⁷ or 2) relaxed hybrid approach⁵⁸

⁵³ Student W. v. Puyallup Sch. Dist. No. 3, 31 F.3d 1489, 93 Ed.Law Rep. 547 (9th Cir. 1994).

⁵³ **However, in some cases, a full-day is appropriate rather than a partial approach. See, e.g., Jana K. v. Annville Cleona Sch. Dist., 39 F. Supp. 3d 584, 313 Ed.Law Rep. 702 (M.D. Pa. 2014); Tyler W. v. Perkiomen Sch. Dist., 61 IDELR ¶ 218 (E.D. Pa. 2013).**

⁵⁴ 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 Cty. 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); **Riverside Cty. Office of Educ., 64 IDELR ¶ 155 (Cal. SEA 2014); Methacton Sch. Dist., 64 IDELR ¶ 120 (Pa. SEA 2014)**; Champion 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).

⁵⁵ 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).

⁵⁶ The courts are not necessarily demanding of the specifics of the calculation under the quantitative approach. See, e.g., G.D. v. Wissahickon Sch. Dist., 832 F. Supp. 2d 455, 280 Ed.Law Rep. 71 (E.D. Pa. 2011).

⁵⁷ See, e.g., **B.D. v. District of Columbia, 817 F.3d 792, 329 Ed.Law Rep. 612 (D.C. Cir. 2016); Draper v. Atlanta Indep. Sch. Dist., 518 F. 3d 1275, 230 Ed.Law Rep. 545 (11th Cir. 2008); Cupertino Union Sch. Dist., v. K.A., 75 F. Supp. 3d 1088, 319 Ed.Law Rep. 352 (N.D. Cal. 2014); Cent. Sch. Dist. v. K.C., 61 IDELR ¶ 125 (E.D. Pa. 2013); I.S. v. Town Dist. of Munster, 64 IDELR ¶ 40 (S.D. Ind. 2014); Dep’t of Educ., State of Haw. v. R.H., 61 IDELR ¶ 127 (D. Haw. 2013); 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 Haw. v. Zachary B., 52 IDELR ¶ 213 (D. Haw. 2009); R.M. v. Miami-Dade Cty. Sch. Bd., 55 IDELR ¶ 261 (S.D. Fla. 2010); Pennsbury Sch. Dist. v. C.E., 59 IDELR ¶ 13 (Pa. Commw. Ct. 2012); C.N. v. Neshannock Sch. Dist., 2010 WL 9517602 (Pa. Commw. Sept. 30, 2010); Las Vegas City Sch., 61 IDELR ¶ 238 (Nev. SEA 2013); *cf.* R.P. v. Prescott Unified Sch. Dist., 631 F.3d 1117, 1125, 264 Ed.Law Rep. 618 (9th Cir. 2011) (dicta). **The proof for this approach poses possible difficulties. See, e.g., Phillips v. District of Columbia, 932 F. Supp. 2d 42, 296 Ed.Law Rep. 366 (D.D.C. 2013) (upheld denial after remand and expert evidence); I.T. v. Dep’t of Educ., State of Haw., 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); *cf.* M.S. v. Utah Sch. for the Deaf & Blind, 64 IDELR ¶ 11 (D. Utah 2014) (period of non-implementation was same as period for compensatory education despite reciting qualitative standard). **An assessment order may well be appropriate and necessary. See, e.g., B.D. v. District of Columbia, 817 F.3d 792, 329 Ed.Law Rep. 612 (D.C. Cir. 2016). However, the parent has the burden to show the necessity of this independent evaluation. Lopez-Young v. District of Columbia, ___ F. Supp. 3d ___, ___ Ed.Law Rep. ___ (D.D.C. 2016).******

⁵⁸ See, e.g., Woods v. Northport Sch. Dist. 487 F. App’x 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); **A.W. v. Middletown Area Sch. Dist., 68 IDELR ¶ 247 (M.D. Pa. 2016) (quantitative plus “make whole” relief); Maple Heights City Sch. Bd. of Educ., 68 IDELR ¶ 5 (N.D. Ohio 2016) (disfavoring mechanical but not strictly requiring qualitative approach); Oskowis v. Sedona-Oak Creek Unified Sch. Dist., 67 IDELR ¶ 150 (D. Ariz. 2016) (not minute-for minute but revised on approximately quantitative basis); Jana K. v. Annville-Cleona Sch. Dist., 39 F. Supp. 3d 584, 313 Ed.Law Rep. 702 (E.D. Pa. 2014) (citation and combination of both approaches, obtaining via avowed qualitative approach the basic result that other courts have reached via quantitative analysis); 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 F. App’x 887, 286 Ed.Law Rep. 131 (5th Cir. 2012); Hollister Sch.**

- specific formula: sometimes a mystery⁵⁹
- another area of imprecision or confusion: retrospective and prospective FAPE⁶⁰
- **role of the equities**: not entirely settled but likely yes,⁶¹ **including offset issue**⁶²
- includes stay-put?: unsettled⁶³ but probably⁶⁴
- need: hardly considered⁶⁵ and presumed,⁶⁶ except for emerging qualitative approach⁶⁷

Dist., 60 IDELR ¶ 172 (Cal. SEA 2013); Sch. Dist. of Phila., 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); *cf.* **M.S. v. Utah Sch. for the Deaf & Blind, 64 IDELR ¶ 11 (D. Utah 2014), rev’d on other grounds, 822 F.3d 1128, 331 F.3d 696 (10th Cir. 2016) (reciting qualitative standards but providing quantitative award); Tacoma Sch. Dist., 64 IDELR ¶ 28 (Wash. SEA 2014) (quantitative as default for qualitative approach); Belen Consol. Sch. 63 IDELR ¶ 27 (N.M. SEA 2014) (reciting *Reid* for flexible FAPE standard yielding an approximation of quantitative approach). For advocacy of such a flexible hybrid approach, see Terry J. Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?* 45 URB. LAW. 281 (2013).**

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); 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).

⁶⁰ 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. 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 revisions to the IEP affect the calculus for compensatory education? See, e.g., Demarcus L. v. Bd. of Educ., 63 IDELR ¶ 13 (N.D. Ill. 2014) (denying compensatory education partially on this basis).**

⁶¹ See, e.g., **R.L. v. Miami Dade Cty. Sch. Bd., 757 F.3d 1173, 307 Ed.Law Rep. 596 (11th Cir. 2014); Torda v. Fairfax Cty. Sch. Bd., 517 F. App’x 162 (4th Cir. 2013), cert. denied, 134 S. Ct. 1538 (2014); French v. New York State Dep’t of Educ., 476 F. App’x 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.* **Horen v. Bd. of Educ., 61 IDELR ¶ 103 (N.D. Ohio 2013) (no denial of FAPE where parents impeded IEP process);** Great Valley Sch. Dist., 55 IDELR ¶ 86 (Pa. SEA 2010) (unclear effect).**

⁶² **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).**

⁶³ See, e.g., Carbondale Elementary Sch. Dist. No. 95, 23 IDELR 280 (Ill. SEA 1995).

⁶⁴ **Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 319 Ed.Law Rep. 641 (2d Cir. 2015);** Me. Sch. Admin. Dist. No. 35 v. Mr. R., 321 F.3d 9, 173 Ed.Law Rep. 785 (1st Cir. 2003); **M.G. v. N.Y.C. Dep’t of Educ, 982 F. Supp. 2d 240, 304 Ed.Law Rep. 873 (S.D.N.Y. 2013).** *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).

⁶⁵ 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 F. App’x 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).

- 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.

⁶⁸ **Cupertino Union Sch. Dist. v. K.A.**, 75 F. Supp. 3d 1088, 319 Ed.Law Rep. 352 (N.D. Cal. 2014); **Gibson v. Forest Hills Sch. Dist. Bd. of Educ.**, 62 IDELR ¶ 261 (S.D. Ohio 2014); Phillips v. District of Columbia, 932 F. Supp. 2d 42, 296 Ed.Law Rep. 366 (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.* **Jana K. v. Annville Cleona Sch. Dist.**, 39 F. Supp. 3d 584, 313 Ed.Law Rep. 702 (M.D. Pa. 2014) (recognized as part of qualitative approach but defaulted via quantitative award); **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).

⁶⁹ See, e.g., **D.W. v. District of Columbia**, 561 F. Supp. 2d 56, 235 Ed.Law Rep. 271 (D.D.C. 2008).

⁷⁰ See, e.g., **D.B. v. Gloucester Twp. Sch. Dist.**, 751 F. Supp. 2d 764, 265 Ed.Law Rep. 719 (D.N.J. 2010).

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).

⁷² 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).

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).

⁷⁴ **P. v. Newington Bd. of Educ.**, 546 F.3d 111, 238 Ed.Law Rep. 517 (2d Cir. 2008) (for LRE violation).

⁷⁵ **In re Student with a Disability**, 64 IDELR ¶ 292 (Miss. SEA 2014) (for LRE violation during ESY).

⁷⁶ See, e.g., **Sacramento City Unified Sch. Dist. v. R.H.**, 68 IDELR ¶ 220 (E.D. Cal. 2016); **Ms. M. v. Falmouth Sch. Dep't**, 67 IDELR ¶ 265 (D. Me. 2016); **S.D. v. Portland Sch. Dist.**, 64 IDELR ¶ 74 (D. Me. 2014); **I.T. v. Dep't of Educ., State of Haw.**, 62 IDELR ¶ 178 (D. Haw. 2013); **Reg'l Sch. Unit. 51 v. Doe**, 920 F. Supp. 2d 168, 294 Ed.Law Rep. 722 (D. Me. 2013); **M.M. v. Plano Indep. Sch. Dist.**, 61 IDELR ¶ 170 (E.D. Tex. 2013); **Ravenswood City Sch. Dist. v. J.S.**, 870 F. Supp. 2d 780, 286 Ed.Law Rep. 377 (N.D. Cal. 2012); **Bd. of Educ. v. Ill. State Bd. of Educ.**, 28 IDELR 1175 (N.D. Ill. 1998); **Deer Valley Unified Sch. Dist.**, 54 IDELR ¶ 206 (Ariz. SEA 2010); *cf.* **Foster v. Bd. of Educ. of City of Chicago**, 611 F. App'x 874, 321 Ed.Law Rep. 146 (7th Cir. 2015) (treating reimbursement as one form of compensatory education for jurisdictional purposes); **I.S. v. Town Dist. of Munster**, 64 IDELR ¶ 40 (S.D. Ind. 2014) (finding it permissible, with qualitative approach to determine amount); **M.K-N. v. District of Columbia**, 62 IDELR ¶ 265 (D.D.C. 2013) (labeling problem); **B.H. v. W. Clermont Bd. of Educ.**, 788 F. Supp. 2d 682, 272 Ed.Law Rep. 445 (S.D. Ohio 2011) (confusing conflation). *But cf.* **J.T. v. Dep't of Educ., State of Haw.**, 63 IDELR ¶ 3 (D. Haw. 2014) (concluding it is available but not appropriate based on the equitable factors in this case).

⁷⁷ See, e.g., **Brown v. District of Columbia**, ___ F. Supp. 3d ___, ___ Ed.Law Rep. ___ (D.D.C. 2016); **Dep't of Educ., State of Haw. v. R.H.**, 61 IDELR ¶ 127 (D. Haw. 2013).

⁷⁸ **Ferren C. v. Sch. Dist. of Phila.**, 612 F.3d 712, 259 Ed.Law Rep. 37 (3d Cir. 2010).

- upper limit: postsecondary education?⁷⁹

4. implementation issues

- **distinguishable from and, for denial of FAPE, generally warranted in addition to prospective relief**⁸⁰

- awards of both compensatory education and tuition reimbursement for different periods of FAPE denial⁸¹: stay-put⁸²
- award of compensatory education as default for unsuccessful (at Step II) tuition reimbursement: not so far⁸³
- when: after school, during the summer, or at some other time “beyond what is required by [his prospective] IEP”?⁸⁴—and, where included in the IEP, as soon as possible⁸⁵
- where: private school?⁸⁶
- who (determines amount): the IHO?⁸⁷ an outside expert?⁸⁸ mutual agreement or IEP

⁷⁹ 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, 266 Ed.Law Rep. 83 (2d Cir. 2010) (only for compensatory reading and writing programs and directly related devices); *cf. Stapleton v. Penns Valley Area Sch. Dist.*, 67 IDELR ¶ 268 (M.D. Pa. 2016) (recognized general rule but also possible exceptions). For the distinction between postsecondary education and postsecondary education institutions, see *Wayne Highland Sch. Dist.*, 63 IDELR ¶ 303 (Pa. SEA 2014).

⁸⁰ See, e.g., *Somberg v. Utica Cmty. Sch.*, 67 IDELR ¶ 139 (E.D. Mich. 2016).

⁸¹ 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).

⁸² 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. 2012).

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).

⁸⁵ *Bd. of Educ. v. Ill. State Bd. of Educ.*, 741 F. Supp. 2d 920, 264 Ed.Law Rep. 271 (N.D. Ill. 2010).

⁸⁶ *Fisher v. Bd. of Educ.*, 856 A.2d 552, 191 Ed.Law Rep. 825 (Del. 2004); **Grandview Sch. Dist., 110 LRP 73736 (Wash. SEA 2012)**. For an example of the possible problems of ordering private school placement as the form of compensatory education, see *District of Columbia v. Masucci*, 13 F. Supp. 3d 33, 309 Ed.Law Rep. 1023 (D.D.C. 2014).

⁸⁷ See, e.g., **I.S. v. Town Dist. of Munster, 64 IDELR ¶ 40 (S.D. Ind. 2014)**; *Henry v. District of Columbia*, 750 F. Supp. 2d 94, 265 Ed.Law Rep. 601 (D.D.C. 2010); *Mr. R. v. Me. 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*, 770 F. Supp. 2d 112, 268 Ed.Law Rep. 761 (D.D.C. 2010). In the second case, the court affirmed the hearing officer's denial of compensatory education after the

team⁸⁹? or the parents⁹⁰?

- **enforcement options for failure to implement IHO compensatory education relief include IDEA (w/o exhaustion)⁹¹ and ADA⁹²**
- what: same or different? escrow or trust fund?⁹³
- **how: bifurcated hearing via second, contingent phase,⁹⁴ dismissal w/o prejudice,⁹⁵ ordering reopening for this limited purpose⁹⁶**

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).

⁸⁸ See, e.g., *State of Haw. v. Zachary B.*, 52 IDELR ¶ 213 (D. Haw. 2009); **Grandview Sch. Dist., 110 LRP 73736 (Wash. SEA 2012)** (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); *cf. Belen Consol. Sch. 63 IDELR ¶ 27 (N.M. SEA 2014)* (IEE as reference similar to expert witness).

⁸⁹ **B.B. v. Catahoula Parish Sch. Dist., 62 IDELR ¶ 50 (W.D. La. 2013)** (court remanding determination to IEP team); **Cupertino Union Sch. Dist. v. K.A., 75 F. Supp. 3d 1088, 319 Ed.Law Rep. 352 (N.D. Cal. 2014)** (recommending, not ordering delegation). For IHO authority for such delegation, judicial authority is divided, with the scope of the delegation sometimes the distinguishing factor. See, e.g., *Bd. of Educ. v. L.M.*, 478 F.3d 307, 318, 216 Ed.Law Rep. 354 (6th Cir. 2007), *Reid v. District of Columbia*, 401 F.3d 516, 526, 196 Ed.Law Rep. 402 (D.C. Cir. 2005) (ruling that IHO may not delegate reduction or termination, with the rationale that IHO may not be a district employee); *Meza v. Bd. of Educ.*, 56 IDELR ¶ 167 (D.N.M. 2011) (extending the prohibition to IHO's delegation to the IEP team authority to determine, not just reduce or discontinue, the award). *But see Mr. I. v. Me. Sch. Admin. Unit No. 55, 480 F.3d 1, 217 Ed.Law Rep. 60 (1st Cir. 2007)*; **Struble v. Fallbrook Union Sch. Dist., 56 IDELR ¶ 4 (S.D. Cal. 2011)** (ruling that the IHO may delegate the determination to the IEP team); *cf. Sch. Dist. of Phila. v. Williams*, 66 IDELR ¶ 214 (E.D. Pa. 2015) (delegating to the IEP team to determine the level of speech language services after six-month award); *T.G. v. Midland Sch. Dist.*, 848 F. Supp. 2d 902, 282 Ed.Law Rep. 425 (C.D. Ill. 2012) (upholding IHO's delegation to IEP team to choose reading and writing goals/materials; **A.L. v. Chicago Pub. Sch. Dist., 57 IDELR ¶ 215 (N.D. Ill. 2011)** (finding no delegation problem with choice of reading program in prospective IEP revisions); **State of Haw., Dept. of Educ. v. Zachary B., 52 IDELR ¶ 213 (D. Haw. 2009)** (allowing delegation to school psychologist and tutor within IHO's maximum of once-weekly sessions for 15 months).

⁹⁰ 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).

⁹¹ **D.E. v. Cent. Dauphin Sch. Dist., 765 F.3d 260, 308 Ed.Law Rep. 664 (3d Cir. 2014).**

⁹² **A. v. Hartford Bd. of Educ., 976 F. Supp. 2d 164, 304 Ed.Law Rep. 66 (D. Conn. 2013).**

⁹³ 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 Cmty. 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).

⁹⁴ 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 See, e.g., *Dep't of Educ., State of Haw. v. R.H.*, 61 IDELR ¶ 127 (D. Haw. 2013).

⁹⁶ **Houston Cty. Sch. Dist., 116 LRP 8724 (Ga. SEA 2015).**

- who provides? – district personnel?⁹⁷ independent consultants, not parents’ experts⁹⁸
- final possible problems: awards that are too vague to be enforceable⁹⁹ or that are sufficiently clear but not implemented¹⁰⁰
- conversely, enforcement may include judicial civil contempt sanctions¹⁰¹
- district’s failure to comply with comp ed award is not a harmless procedural violation¹⁰²

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).

⁹⁸ *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).

⁹⁹ *See, e.g., Sch. Bd. of Osceola Cty. v. M.L.*, 30 IDELR ¶ 655 (M.D. Fla. 1999), *aff’d mem.*, 281 F.3d 1285 (11th Cir. 2001); *cf. B.D. v. District of Columbia*, 817 F.3d 792, 329 Ed.Law Rep. 612 (D.C. Cir. 2016) (holding IHO responsible for providing an adequate explanation for not awarding compensatory education or awarding only a limited amount); *Somberg v. Utica Cmty. Sch.*, 67 IDELR ¶ 139 (E.D. Mich. 2016) (regarding IHO’s denial of compensatory education as not entitled to deference due to lack of explanation and justification); *Oskowis v. Sedona-Oak Creek Unified Sch. Dist.*, 67 IDELR ¶ 150 (D. Ariz. 2016) (revising an awarn not supported by the record); *Copeland v. District of Columbia*, 82 F. Supp. 3d 462, 320 Ed.Law Rep. 737 (D.D.C. 2015) (lack of sufficient explanation); *Cupertino Union Sch. Dist. v. K.A.*, 75 F. Supp. 3d 1088, 319 Ed.Law Rep. 352 (N.D. Cal. 2014) (lack of evidentiary support); *L.O. v. E. Allen Cty. Sch. Corp.*, 58 F. Supp. 3d 882, 316 Ed.Law Rep. 754 (N.D. Ind. 2014) (internal contradiction and inconsistency); *Stanton v. Dis. 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, 176 Ed.Law Rep. 815 (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).

¹⁰⁰ *See, e.g., Murphy v. Timberlane Reg’l Sch. Dist.*, 855 F. Supp. 498, 93 Ed.Law Rep. 177 (D.N.H. 1994).

¹⁰¹ *See, e.g., L.J. v. Audubon Bd. of Educ.*, 49 IDELR ¶ 184 (D.N.J. 2008).

¹⁰² *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).