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Education Law into Practice

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AN ADJUDICATIVE CHECKLIST OF CRITERIA FOR THE TWO PRIMARY REMEDIES UNDER THE IDEA ^{a1}

The Individuals with Disabilities Education Act (IDEA) ¹ accounts for a significant and expanding segment of P--12 education litigation. ² The adjudicative remedies under the IDEA include declaratory relief and purely prospective injunctive relief but do not extend to money damages; however, the two primary remedies are tuition reimbursement and, by partial analogy, ³ compensatory education. ⁴ Both of these remedies are based on a denial of the IDEA's core obligation of a "free appropriate public education" (FAPE). ⁵

The criteria for each of these two remedies are respectively outlined in a flowchart-like sequence. For tuition reimbursement, the basis, as cited in the footnotes, is limited to the underlying IDEA provisions ⁶ and Supreme Court decisions. ⁷ For compensatory education, in the absence of directly applicable *638 authority in the IDEA ⁸ and Supreme Court cases, the basis is a representative sampling of lower court decisions.

Tuition Reimbursement ⁹

1 Threshold equities step:

a) Did the parent provide *timely notice* to the district of their rejection of the proposed placement? ¹⁰

i at either the most recent IEP meeting or in writing at least 10 business days before the parent's "removal" of the child
ii "including stating their concerns and their intent to enroll their child in a private school at public expense"

b) Did the district, prior to the child's removal, request to evaluate the child and the parent refuse to make the child available for this purpose? ¹¹2 *Appropriateness steps*:a) Was the district's proposed placement appropriate, or, more specifically, did the district "make a free appropriate public education available to the child in a timely manner prior to [the parent's unilateral placement]?" ¹²b) If not, was the parent's unilateral placement appropriate ¹³ (even if it does not meet state standards)? ¹⁴

3. Final *equities step*:

a Were the actions of the parent--beyond those in items a)i and a)ii-- unreasonable?¹⁵

a If so, the adjudicator “may” reduce or deny reimbursement.¹⁶

Compensatory Education¹⁷

1 Did the district deny FAPE to the child?

*639 2) If so, which approach applies to calculate the appropriate amount:¹⁸

a Qualitative approach: what amount of compensatory education would place the child in the same position s/he would have occupied but for the school district's violations of IDEA?¹⁹ --primarily D.C. and Sixth Circuits

i) What are the child's “specific educational deficits?”

ii Which and how much of these specific deficits resulted from the child's “loss of FAPE?”

iii What are “the specific compensatory measures needed to best correct [the]deficits [in first bulleted item]?”²⁰

The adjudicator may not delegate this calculation to the IEP team.²¹

a Quantitative approach: hour-for-hour or day-for-day for the period of the denial of FAPE (minus time for reasonable rectification)²² --primarily and decreasingly Third Circuit

a Relaxed approach: either effectively blended²³ or merely cryptic²⁴ --majority of jurisdictions²⁵

Footnotes

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¹ 20 U.S.C. §§ 1400 *et seq.* (2013).

² *E.g.*, Perry A. Zirkel & Brent L. Johnson, *The “Explosion” in Education Litigation: An Updated Analysis*, 265 Ed.Law Rep. 1 (2011) (showing the increasing segment within the P--12 context); *see also* Zorka Karanxha & Perry A. Zirkel, *Longitudinal Trends in Special Education Case Law: Frequencies and Outcomes of Published Court Decisions*, 27 J. SPECIAL EDUC. LEADERSHIP 55 (2014) (showing the continuing increase specific to the IDEA context).

³ *E.g.*, Perry Zirkel, *Compensatory Education under the Individuals with Disabilities Education Act: The Third Circuit's Partially MisLeading Position*, 111 PENN. STATE L. REV. 879, 894 (2006).

- 4 *E.g.*, Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: The Latest Update*, 37 J. NAT'L ASS'N ADMIN. L. JUDICIARY 505 (2018).
- 5 20 U.S.C. §§ 1402(9) and 1412(a)(1) (2014). For the underlying companion to this remedies overview, see Perry A. Zirkel, *An Adjudicative Checklist of Criteria for the Four Dimensions of FAPE under the IDEA*, 346 Ed.Law Rep 18 (2017).
- 6 *Id.* § 1412(a)(10)(C).
- 7 *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 245 Ed. Law Rep. 551 (2009) (ruling that the child's lack of previous enrollment in special education did not preclude application of the reimbursement test); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 86 Ed. Law Rep. 41 (1993) (ruling that parents are not held to the same standards as districts, thus making the second step of the test relatively relaxed); *Sch. Comm. of Burlington v. Mass. Dep't of Educ.*, 471 U.S. 359 (1985) (setting forth the three-part test for tuition reimbursement--appropriateness of district's proposed placement, appropriateness of the parent's unilateral placement, and application of the equities).
- 8 The very limited exception is in the IDEA regulations and is specific instead to the complaint procedures avenue. 34 C.F.R. § 300.151(b)(1).
- 9 *E.g.*, Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA*, 282 Ed.Law Rep. 785 (2012).
- 10 20 U.S.C. § 1412(a)(10)(C)(iii)(I). The exception is where the reason for the lack of timely notice is (a) the parent is illiterate and cannot write in English," (b) the district prevented the parent from providing said notice, or (c) the district did not inform, via the procedural safeguards notice, of this requirement. *Id.*
- 11 The exception is where the parent's compliance would "likely result in physical or serious emotional harm to the child." *Id.*
- 12 20 U.S.C. § 1412(a)(10)(C)(ii).
- 13 This step is only implicit in the IDEA and its regulations. Its basis is *Carter*, which may be viewed as either implicitly incorporated in or a residuum beyond the statutory codification.
- 14 34 C.F.R. § 300.148(c). The issue in *Carter* was a bit broader, referring to whether the parents' private placement met the statutory definition of FAPE, which includes various other criteria, including an IEP according to IEP specifications. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. at 13.
- 15 20 U.S.C. § 1412(a)(10)(C)(iii)(III). The narrow language is: "upon a judicial finding of unreasonableness with respect to actions taken by the parents." *Id.*
- 16 *Id.* § 1412(a)(10)(C)(iii).
- 17 *E.g.*, Perry A. Zirkel, *Compensatory Education: The Next Annotated Update of the Case Law*, 336 Ed. Law Rep. 654 (2016).
- 18 *E.g.*, Perry A. Zirkel, *The Two Competing Approaches for Calculating Compensatory Education under the IDEA: An Update*, 339 Ed.Law Rep. 10 (2017).
- 19 *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d 307, 216 Ed.Law Rep. 354 (6th Cir. 2007).
- 20 The three indicators are from the lead decision for the qualitative approach. *Reid v. Dist. of Columbia*, 401 F.3d 516, 196 Ed.Law Rep. 402 (D.C. Cir. 2005). They serve indirectly to provide guidance only to the extent that the Sixth Circuit relied on the *Reid* decision without specifically incorporating these specifics.
- 21 *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d at 318; *Reid v. Dist. of Columbia*, 401 F.3d at 526.
- 22 *E.g.*, *M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397, 108 Ed.Law Rep. 522 (3d Cir. 1996).
- 23 *E.g.*, *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).

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

25 Reflecting the relatively fluid rather than clearly settled state of the relevant law, some cases in the Sixth and Third Circuits have tended toward this relaxed alternative. *E.g.*, *Woods v. Northport Sch. Dist.* 487 F. App'x 968, 287 Ed.Law Rep. 746 (6th Cir. 2012); *B.H. v. W. Clermont Bd. of Educ.*, 788 F. Supp. 2d 682, 272 Ed.Law Rep. 445 (S.D. Ohio 2011); *Brandywine Heights Area Sch. Dist. v. B.M.*, 69 IDELR ¶ 212 (E.D. Pa. 2017); *Pennsbury Sch. Dist. v. C.E.*, 59 IDELR ¶ 13 (Pa. Commw. Ct. 2012).

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