COMPENSATORY EDUCATION: THE NEXT ANNOTATED UPDATE OF THE LAW*

Perry A. Zirkel
Lehigh University

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 yellow-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). **Updated material is yellow-highlighted in bold.** 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, *The Courts' Use of OSEP Policy Interpretations in IDEA Cases*, 342 Ed.Law Rep. 671 (2017)**.

[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 remedy[6] 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: incomplete[9]

3. IDEA 2004 Amendments and 2006 Regulations:

   • continued (from 1997 Amendments) codification, at least in part, of tuition reimbursement remedy[10]

   • 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 context[12]

   • only inferable authority under judicial umbrella of IDEA for hearing/review officers,[13] and—under the backup coverage of Section 504 and the ADA[14]—largely[15] OCR[16]

---

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

[7] *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. *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] *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 ASSN ADMIN. L. JUDICIARY 505 (2018). The limited exception is the occasional state law that expressly authorizes this hearing officer remedy. *E.g.*, MINN. STAT. ANN. § 125A.091(21) (2016).**

[14] *E.g.*, 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] *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 exception[18]

2. Eleventh Amendment immunity: inapplicable[19]

3. statute of limitations: two years unless state law[20] but with much longer remedial period for compensatory education?[21]

4. exhaustion doctrine: rather uniform, effective requirement[22]

5. mootness doctrine[23]

   • a bar where the student is no longer eligible as having an IDEA disability[24]

   • possibly a bar when the student has graduated[25]

---

[17] *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. Mass. 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] *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. *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). Finally, the qualitative approach may effectively extend beyond the limitations period for the amount available via the quantitative approach. *E.g*., *Cent. Sch. Dist. v. K.C*., 61 IDELR ¶ 125 (E.D. Pa. 2013).

[21] ***Avila v. Spokane Sch. Dist*., 852 F.3d 936, 341 Ed.Law Rep. 646 (9th Cir. 2017)**; *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)**. For a recent overview, see Perry A. Zirkel, *The Statute of Limitations for an Impartial Hearing under the IDEA: A Guiding Checklist*, 363 Ed.Law Rep. 483 (2019).**

[22] *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] *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).

[25] *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); *San Dieguito Union High Sch. Dist. v. Guray-Jacobs*, 44 IDELR ¶ 189 (S.D. Cal. 2006); *cf. Dracut Sch.*

- in most jurisdictions, not a bar when the student has moved, whether within the same state[26] or out of state[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[28]
- not a bar when the student has dropped out beyond age of compulsory education[29]
- not a bar when the parties arrived at a settlement that did not resolve this issue[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[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 conference[35]

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] *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] *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); *cf.* J.*N. v. Jefferson Cty. Bd. of Educ.*, 72 IDELR ¶ 209 (N.D. Ala. 2018) (not moot due to pending evaluation).

[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*., 199 F. Supp. 3d 548, 339 Ed.Law Rep. 892 (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 FAPE[36] must be more than *de minimis*[37] and need not be in bad faith,[38] but increasingly narrowed minority view that it must be gross[39]
- threshold question: must the plaintiff show a specific loss of educational opportunity?[40] **what if only a violation of least restrictive environment (LRE), not FAPE?[41]**
- limited for procedural violations[42]
- includes related services[43]
- includes extracurricular activities[44]

---

[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). **According to OSEP, missed instruction due to a child's participation in statewide assessments or due to the parents' keeping the child at home in response to the statewide assessments is not a denial of FAPE. Letter to Kane, 72 IDELR ¶ 75 (OSEP 2018).**

[37] *E.g.*, *Catalan v. District of Columbi*a, 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] *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] *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] Denial of FAPE requires the requisite, second-step substantive or student loss. *E.g.*, *D.A. v. Houston Indep. Sch. Dis*t., 716 F. Supp. 2d 603 (S.D. Tex. 2009); Los Gatos-Saratoga Joint Union High Sch. Dist., 41 IDELR ¶ 227 (Cal. SEA 2004) (lack of supporting evidence); *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"). Moreover, the compensatory education in a parental loss case does not necessarily extend to the student. *E.g., S.A. v. N.Y.C. Dep't of Educ*., 63 IDELR ¶ 73 (E.D.N.Y. 2014).

[41] *E.g., L.H. v. Hamilton Cty. Dep't of Educ*., 900 F.3d 779, 357 Ed.Law Rep. 776 (6th Cir. 2018) (reimbursement); *E.P. v. N. Arlington Bd. of Educ*., 74 IDELR ¶ 80 (D.N.J. 2019) (remand).

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

[43] *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).**

[44] *E.g.*, Alcorn Cty. Sch. Dist., 53 IDELR ¶ 136 (Miss. SEA 2009) (band).

- includes implementation, not just formulation, violations[45]

- not for child find violation where the child is not eligible[46]

2. calculation issues[47]

   - starting point: when the district or parent knew or should have known of the denial of FAPE[48]

   - a) quantitative approach[49]

     - duration: the period of the denial[50]

     - exclusion (in the Third Circuit): "the time reasonably required for the school district to rectify the problem"[51]

     - exclusion for comp ed from state complaint resolution process during same period[52]

     - another exclusion: absences? - rarely[53]

---

[45] *E.g.*, *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); *Tyler W. v. Upper Perkiomen Sch. Dis*t., 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. *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). **Finally, denial of FAPE also applies to the new variant of implementation cases, which concerns capability rather than failure. *E.g.*, *Wade v. District of Columbia*, 322 F. Supp. 3d 123 (D.D.C. 2018).**

[46] *D.G. v. Flour Bluff Indep. Sch. Dist*., 481 F. App'x 887, 286 Ed.Law Rep. 131 (5th Cir. 2012).

[47] For a comparative overview of the two primary approaches, see **Perry A. Zirkel, *Two Approaches for Calculating Compensatory Education under the IDEA*, 339 Ed.Law Rep. 10 (2017).**

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

[49] 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 58–59. **However, the movement is less than complete or consistent. For recent cases that followed the quantitative approach, see, e.g., *Montgomery Cty. Intermediate Unit v. C.M.*, 71 IDELR ¶ 11 (E.D. Pa. 2017); *Sch. Dist. of Phila. v. Post*, 262 F. Supp. 3d 178 (E.D. Pa. 2017).**

[50] 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] 81 F.3d at 397. For application of this equitable adjustment, see, e.g., ***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). For an exception, see *Tyler W. v. Perkiomen Sch. Dist*., 963 F. Supp. 2d 427, 301 Ed.Law Rep. 777 (E.D. Pa. 2013).

[52] *E.g.*, Indiana Area Sch. Dist., 45 IDELR ¶ 25 (Pa. SEA 2006).

[53] *E.g.*, *Neena S. v. Sch. Dist. of Phila.*, 51 IDELR ¶ 210 (E.D. Pa. 2008); Tehachapi Unified Sch. Dist., 67 IDELR ¶ 102 (Cal. SEA 2016) (extended periods); *cf*. Lakeland Sch. Dist., 58 IDELR ¶ 150 (Pa. SEA 2011) (excused, not unexcused absences). *But cf*. ***Rayna P. v. Campus Cmty. Sch*., 72 IDELR ¶ 214 (D. Del. 2018) (partial award extended to long absences w. minimal home instruction);** 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). **More recently, OSEP opined that compensatory**

- extent—need not provide a day-for-day compensation for time missed[54] but particularized (i.e., service-unit)[55] basis v. total-package[56] basis[57]

• 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,[58] or 2) relaxed hybrid approach[59]

---

education does not apply to absences due to parents' refusal for the child to participate in statewide assessments. Letter to Kane, 72 IDELR ¶ 75 (OSEP 2018).

[54] *Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 93 Ed.Law Rep. 547 (9th Cir. 1994). However, in some cases, a full-day is appropriate rather than a partial approach. See, e.g., ***Montgomery Cty. Intermediate Unit v. C.M.*, 71 IDELR 11 (E.D. Pa. 2017);** *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).

[55] *E.g.*, ***R.S. v. Bd. of Dir. of Woods Charter Sch. Co*., 73 IDELR ¶ 252 (M.D.N.C. 2019)**; *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. Dis*t., 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); Champion Sch., 58 IDELR ¶ 207 (Ariz. SEA 2012); Riverside Cty. Office of Educ., 64 IDELR ¶ 155 (Cal. SEA 2014); Poway Unified Sch. Dist., 54 IDELR ¶ 105 (Cal. SEA 2010); City of Chicago Sch. Dist. #299, 60 IDELR ¶ 173 (Ill. SEA 2013); Methacton Sch. Dist., 64 IDELR ¶ 120 (Pa. SEA 2014); 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).

[56] *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).

[57] 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). ***But cf. Pottsgrove Sch. Dist. v. D.H.*, 72 IDELR ¶ 271 (E.D. Pa. 2018) (insufficient documentation w. attention to daily fluctuations).**

[58] *E.g.*, *B.D. v. District of Col*umbia, 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); ***E.S. v. Conejo Valley Unified Sch. Dist*., 72 IDELR ¶ 180 (C.D. Cal. 2018); *Spring Branch Indep. Sch. Dist. v. O.W*., 72 IDELR ¶ 11 (S.D. Tex. 2018); *Brandywine Heights Area Sch. Dist. v. B.M*., 248 F. Supp. 3d 618, 347 Ed.Law Rep. 276 (E.D. Pa. 2017);** *Cupertino Union Sch. Dist., v. K.A*., 75 F. Supp. 3d 1088, 319 Ed.Law Rep. 352 (N.D. Cal. 2014); *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); *Cent. Sch. Dist. v. K.C*., 61 IDELR ¶ 125 (E.D. Pa. 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 (N.M. 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. *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 Columbi*a, 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), *rev'd on other grounds*, 822 F.3d 1128, 331 F.3d 696 (10th Cir. 2016) (period of non-implementation was same as period for compensatory education despite reciting qualitative standard). An assessment order may well be appropriate and necessary. *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*, 211 F. Supp. 3d 42, 341 Ed.Law Rep. 784 (D.D.C. 2016).

[59] *E.g.*, ***Pangerl v. Peoria Unified Sch. Dist.*, __ F. App'x __ (9th Cir. 2019) (not hour-for-hour but no specific formula);** *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

- specific formula: sometimes a mystery[60]
- another area of imprecision or confusion: retrospective and prospective FAPE[61]
- role of the equities: not entirely settled but likely yes,[62] including offset issue[63]
- includes stay-put?: unsettled[64] but probably[65]

IHO); ***Arroyo-Delgado v. Dep't of Educ. of P.R.*, 72 IDELR ¶ 151 (D.P.R. 2018) (same result under qualitative and "totality of circumstances" approaches);** *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. v. A.C*., 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. 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. Raynolds*, 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).; *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).

[60] *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); **Amity Region 5 Bd. of Educ., 74 IDELR ¶ 86 (Conn. SEA 2019) (3 hrs. per week for 16 weeks during the summer, without explanation, for absence of qualified reading instructor for 8 weeks);** 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).

[61] Quaere whether a prospective remedy to provide FAPE must also include compensatory education? *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? E.g., *Demarcus L. v. Bd. of Educ*., 63 IDELR ¶ 13 (N.D. Ill. 2014) (denying compensatory education partially on this basis).

[62] *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); ***S.C. v. Chariho Reg'l Sch. Dist.*, 298 F. Supp. 3d 370 (D.R.I. 2018);** *French v. N.Y.S. 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).

[63] *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).

[64] *E.g.*, Carbondale Elementary Sch. Dist. No. 95, 23 IDELR 280 (Ill. SEA 1995).

[65] *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*

- need: hardly considered[66] and presumed,[67] except for emerging qualitative approach[68]
- partial credit? effectiveness? - hardly addressed yet[69]
- not excused by present progress or appropriateness[70]
- amount for district's denial of opportunity for meaningful parental participation in the IEP process?[71]
- amount for prejudicial problem in transition assessment?[72]
- not for missed instruction or services due to participation in statewide assessments[73]
- who has the responsibility, including the burden of proof?[74]

3. scope issues
   - lower limit: child in a permanent vegetative state
   - form: includes training?[75] consultant?[76] paraprofessional?[77] tuition reimbursement?[78]

C. v. Sch. Dist. of Phila., 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).

[66] *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).

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

[68] 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.

[69] *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), *aff'd on other grounds*, 655 F. App'x 423, 337 Ed.Law Rep. 21 (6th Cir. 2016); *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).

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

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

[72] *E.g.*, *Gibson v. Forest Hills Sch. Dist. Bd. of Educ.*, 62 IDELR ¶ 261 (S.D. Ohio 2014), *aff'd on other grounds*, 655 F. App'x 423, 337 Ed.Law Rep. 21 (6th Cir. 2016) (425 hours of specified services at specified rate plus 40 trips @ $50).

[73] **Letter to Kane, 72 IDELR ¶ 75 (OSEP 2018).**

[74] *E.g.*, ***Somberg v. Utica Cmty. Sch.*, 908 F.3d 162 (6th Cir. 2018) (not parent when based on substantive FAPE and record is sufficient);** *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).

[75] *E.g.*, *Park v. Anaheim Union High Sch. Dist.,* 464 F.3d 1025, 213 Ed.Law Rep. 122 (9th Cir. 2006); *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).

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

[77] ***K.M. v. Tehachapi Unified Sch. Dist.*, 69 IDELR ¶ 241 (E.D. Cal. 2017) (plus transition plan);** In re Student with a Disability, 64 IDELR ¶ 292 (Miss. SEA 2014) (for LRE violation during ESY).

prospective placement?[79] IEP (after age 21)?[80]

- upper limit: postsecondary education?[81]

4. implementation issues

   - distinguishable from and, for denial of FAPE, generally warranted in addition to prospective relief[82]

   - awards of both compensatory education and tuition reimbursement for different periods of FAPE denial[83] or for stay-put violations[84]

   - award of compensatory education as default for unsuccessful (at Step II) tuition reimbursement: not so far[85]

   - when: after school, during the summer, or at some other time "beyond what is required by

---

[78] *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); ***Brantley v. Indep. Sch. Dist. 25*, 26 IDELR 839 (D. Minn. 1997);** *cf. Foster v. Bd. of Educ. of City of Chica*go, 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). **However, tuition reimbursement is distinguishable from compensatory education in the form of "direct funding." *R.S. v. Bd. of Dir. of Woods Charter Sch. Co*., 73 IDELR ¶ 252 (M.D.N.C. 2019).**

[79] *E.g.*, *Brown v. District of Columbia*, 179 F. Supp. 3d 15, 336 Ed.Law Rep. 873 (D.D.C. 2016); *Dep't of Educ., State of Haw. v. R.H.*, 61 IDELR ¶ 127 (D. Haw. 2013).

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

[81] *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), ***further proceedings*, 71 IDELR ¶ 87 (M.D. Pa. 2017)** (not for college tuition). For the distinction between postsecondary education and postsecondary education institutions, see Wayne Highland Sch. Dist., 63 IDELR ¶ 303 (Pa. SEA 2014).

[82] *E.g.*, Somberg v. Utica Cmty. Sch., 67 IDELR ¶ 139 (E.D. Mich. 2016), *aff'd on other grounds*, 908 F.3d 162 (6th Cir. 2018).

[83] *See, e.g.*, ***Orange Unified Sch. Dist. v. C.K.*, 59 IDELR ¶ 74 (C.D. Cal. 2012);** *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 services). For prospective placement as compensatory education, see *Draper v. Atlanta Indep. Sch. Dis*t., 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).

[84] Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 319 Ed.Law Rep. 641 (2d Cir. 2015), ***on remand*, 262 F. Supp. 3d 11 (D. Conn. 2017)** (reimbursement for related services plus compensatory education for same period). For the awarding of both forms of relief for different periods of stay-put, 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).

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

[his prospective] IEP"?[86]— **at parents' convenience within reasonable, specified time limit**[87]—and, where included in the IEP, as soon as possible[88]

- where: private school?[89]

- who (determines amount): the IHO?[90] an outside expert?[91] mutual agreement or IEP team[92]? or the parents[93]?

---

[86] 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).

[87] ***E.g., R.S. v. Bd. of Dir. of Woods Charter Sch. Co*., 73 IDELR ¶ 252 (M.D.N.C. 2019); *see also M.P. v. Campus Cmty. Sch*., 73 IDELR ¶ 38 (D. Del. 2018) (until age 21 in light of amount, age, and time for appeals).**

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

[89] *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).

[90] *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 other 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 Colum*bia, 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 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).

[91] *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.* ***Somberg v. Utica Cmty. Sch*., 69 IDELR ¶ 94 , *further proceedings*, 71 IDELR ¶ 79 (E.D. Mich. 2017) (supervision by special master→1200 hours), *aff'd on other grounds,* 908 F.3d. 162 (6th Cir. 2018); *Gibson v. Forest Hills Sch. Dist. Bd. of Educ*., 62 IDELR ¶ 261 (S.D. Ohio 2014)), *aff'd on other grounds*, 655 F. App'x 423, 337 Ed.Law Rep. 21 (6th Cir. 2016) (reimbursement of expert as part of remedy due to essential role);** *Pitchford v. Salem-Keizer Sch. Dist. No. 24J*, 155 F. Supp. 2d 1213, 156 Ed.Law Rep. 555 (D. Or. 2001) (mediator determination); Belen Consol. Sch. 63 IDELR ¶ 27 (N.M. SEA 2014) (IEE as resource similar to expert witness).

[92] *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, the applicable case law 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); ***Phillips v. Indep. Sch. Dist. No. 2*, 73 IDELR ¶ 119 (E.D. Okla. 2018) (following *Meza* to prohibit delegation to consultant prospectively)**. *But see* Mr. I. v. Me. Sch. Admin. Unit No. 55, 480 F.3d 1, 217 Ed.Law Rep. 60 (1st Cir. 2007); ***Smith v. Cheyenne Mountain Sch. Dist. 12*, 72 IDELR ¶ 173 (D. Colo. 2018) (ordering re-testing to determine whether comp ed was warranted here was not discretionary delegation);** *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).

[93] *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).

- enforcement options for failure to implement IHO compensatory education relief include IDEA (w/o exhaustion)[94] and ADA[95]

- what: same or different? escrow or trust fund?[96]

- how: bifurcated hearing via second, contingent phase,[97] dismissal w/o prejudice,[98] ordering reopening for this limited purpose[99]

- who provides? – district personnel?[100] independent consultants, not parents' experts[101]

- final possible problems: awards that are too vague to be enforceable[102] or that are

---

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

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

[96] *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); ***Doe v. E. Lyme Bd. of Educ*., 262 F. Supp. 3d 11 (D. Conn. 2017) (ordering escrow fund of $203.5K); *L.M. v. Willingboro Twp. Sch. Dist*., 70 IDELR ¶ 34 (D.N.J. 2017) (ordering trust fund of $265K of compensatory education);** *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); *Heather D. v. Northampton Sch. Dist*., 511 F. Supp. 2d 549 (E.D. Pa. 20070 (awarding an education fund of $182,000, representing 2,428 hours x $75/hr. rate); *M.P. v. Campus Cmty. S*ch., 73 IDELR ¶ 38 (D. Del. SEA 2015) (trust fund $70 x 7 hrs. x no. of days since 2/12/18); *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), ***aff'd on other grounds*, 655 F. App'x 423, 337 Ed.Law Rep. 21 (6th Cir. 2016); *Montgomery Cty. Intermediate Unit v. C.M*., 71 IDELR ¶ 11 (E.D. Pa. 2017);** *Millay v. Surry Sch. Dep't*, 56 IDELR ¶ 257 (D. Me. 2011) (rejecting trust fund under the circumstances).

[97] *E.g.*, *Maple Heights City Sch. Bd. of Educ. v. A.C*., 68 IDELR ¶ 5 (N.D. Ohio 2016) (ruling that bifurcated hearing was not prejudicial IHO error).

[98] *E.g.*, *Dep't of Educ., State of Haw. v. R.H*., 61 IDELR ¶ 127 (D. Haw. 2013).

[99] Houston Cty. Sch. Dist., 116 LRP 8724 (Ga. SEA 2015).

[100] 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). **For recent partial support, see *Bd. of Educ. of Albuquerque Pub. Sch. v. Maez*, 69 IDELR ¶ 98 (D.N.M. 2017) (granting preliminary injunction for district personnel rather than IHO's order for private providers)**.

[101] *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.* ***Phillips v. Indep. Sch. Dist. No. 2*, 73 IDELR ¶ 119 (E.D. Okla. 2018);** *Meza v. Bd. of Educ*., 56 IDELR ¶ 167 (D.N.M. 2011) (unlawful delegation of IHO authority to consultants).

[102] *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*., 908 F.3d 162 (6th Cir. 2018) (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 award 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).

sufficiently clear but not implemented[103]

- conversely, enforcement may include judicial civil contempt sanctions[104]
- district's failure to comply with comp ed award is not a harmless procedural violation[105]

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

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

[105] *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).