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

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1 This article appeared in WEST’S EDUCATION LAW REPORTER (Ed.Law Rep.), v. 336, pp. 654–666 (2016).
2 See the previous articles for the full canvassing of the applicable legal authorities.
3 “IHO” herein refers generically to not only impartial hearing officers, but also, in the relatively few states that have retained a second tier for IDEA administrative adjudications, impartial review officers.
A. BACKGROUND CONCEPTS

1. definition: equitable remedy\(^6\) 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\(^16\)

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\(^7\) 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).


\(^10\) 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).


\(^16\) 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,\(^1\) with a limited and disputed exception.\(^1\)\(^8\)

2. Eleventh Amendment immunity: inapplicable\(^1\)\(^9\)

3. statute of limitations: two years unless state law\(^2\)\(^0\) but with much longer remedial period for compensatory education?\(^2\)\(^1\)

4. exhaustion doctrine: rather uniform, effective requirement\(^2\)\(^2\)

5. mootness doctrine\(^2\)\(^3\)
   
   • a bar where the student is no longer eligible as having an IDEA disability\(^2\)\(^4\)
   
   • possibly a bar when the student has graduated\(^2\)\(^5\)

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• in most jurisdictions, not a bar when the student has moved, whether within the same state or out of state.

• 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.

• not a bar when the student has dropped out beyond age of compulsory education.

• not a bar when the parties arrived at a settlement that did not resolve this issue.

• 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.

• not a bar where the student has been incarcerated but services or placement is still foreseeable at issue.

• not a bar where the student has dropped out beyond age of compulsory education.

• not necessarily a bar where the IHO granted the alternative requested remedy of an IEE.

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

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


C. EVOLVING STANDARDS

1. triggering issues

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

- threshold question: must the plaintiff show a specific loss of educational opportunity? what if only a violation of least restrictive environment (LRE), not FAPE?

- limited for procedural violations

- includes related services

- includes extracurricular activities

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36 Due to the retrospective effect of compensatory education, an IHO may not escape making this determination based on the parent’s failure to exhaust or cooperate the evaluation or IEP processes if the alleged denial occurred before or separate from these processes. Peak v. District of Columbia, 526 F. Supp. 2d 32, 228 Ed.Law Rep. 271 (D.D.C. 2007). For a frequency analysis of the various judicial remedies for denial of FAPE, including but extending beyond compensatory education, see Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J. NAT’L ASS’N ADMIN. L. JUDICIARY 214 (2013).


40 Denial of FAPE requires the requisite, second-step substantive or student loss. *E.g.*, *D.A. v. Houston Indep. Sch. Dist.*, 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).


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\textsuperscript{45}

• not for child find violation where the child is not eligible\textsuperscript{46}

2. calculation issues\textsuperscript{47}

• starting point: when the district or parent knew or should have known of the denial of FAPE\textsuperscript{48}

• a) quantitative approach\textsuperscript{49}

  - duration: the period of the denial\textsuperscript{50}

  - exclusion (in the Third Circuit): “the time reasonably required for the school district to rectify the problem”\textsuperscript{51}

  - exclusion for comp ed from state complaint resolution process during same period\textsuperscript{52}

  - another exclusion: absences? - rarely\textsuperscript{53}


\textsuperscript{46} D.G. v. Flour Bluff Indep. Sch. Dist., 481 F. App’x 887, 286 Ed.Law Rep. 131 (5th Cir. 2012).

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

\textsuperscript{48} This language derives from the limitations period of the IDEA. See supra note 20 and accompanying text. 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).

\textsuperscript{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).


\textsuperscript{51} E.g., Indiana Area Sch. Dist., 45 IDELR ¶ 25 (Pa. SEA 2006).

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).


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).


• specific formula: sometimes a mystery\textsuperscript{60}

• another area of imprecision or confusion: retrospective and prospective FAPE\textsuperscript{61}

• role of the equities: not entirely settled but likely yes,\textsuperscript{62} including offset issue\textsuperscript{63}

• includes stay-put?: unsettled\textsuperscript{64} but probably\textsuperscript{65}


\textsuperscript{60} E.g., \textit{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); \textit{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); \textit{Gwinnett Cty. Sch. Dist.}, 51 IDELR ¶ 174 (Ga. SEA 2008) (720 hours for 10-year denial), rev’d and remanded, \textit{Gwinnett Cty. Sch. Dist.}, 54 IDELR ¶ 316 (N.D. Ga. 2010); \textit{City of Chicago Sch. Dist.}, 299, 53 IDELR ¶ 274 (III. SEA 2009) (undefined one year of compensatory education for FAPE violation of 1.5 years); \textit{Waukee Cmty. Cmty Unit Sch. Dist.}, 54 IDELR ¶ 27 (Cal. SEA 2010) (conditional independent study courses and monthly parental visits for at least 3-semester denial of FAPE—apparently based on parental request); \textit{Seattle Sch. Dist.}, 49 IDELR ¶ 86 (Wash. SEA 2007) (unclear approximation based on lack of pertinent parental evidence).

\textsuperscript{61} Quaere whether a prospective remedy to provide FAPE must also include compensatory education? \textit{E.g., Van Duyn v. Baker Sch. Dist.}, 502 F.3d 811, 225 Ed.Law Rep. 136 (9th Cir. 2007) (IHO’s underlying order); \textit{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? \textit{E.g., Demarcus L. v. Bd. of Educ.}, 63 IDELR ¶ 13 (N.D. Ill. 2014) (denying compensatory education partially on this basis).


\textsuperscript{63} \textit{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).

\textsuperscript{64} \textit{E.g., Carbondale Elementary Sch. Dist. No. 95}, 23 IDELR 280 (III. SEA 1995).

• need: hardly considered\textsuperscript{66} and presumed,\textsuperscript{67} except for emerging qualitative approach\textsuperscript{68}

• partial credit? effectiveness? - hardly addressed yet\textsuperscript{69}

• not excused by present progress or appropriateness\textsuperscript{70}

• amount for district’s denial of opportunity for meaningful parental participation in the IEP process?\textsuperscript{71}

• amount for prejudicial problem in transition assessment?\textsuperscript{72}

• not for missed instruction or services due to participation in statewide assessments\textsuperscript{73}

• who has the responsibility, including the burden of proof?\textsuperscript{74}

3. scope issues

• lower limit: child in a permanent vegetative state

• form: includes training?\textsuperscript{75} consultant?\textsuperscript{76} paraprofessional?\textsuperscript{77} tuition reimbursement?\textsuperscript{78}

\textsuperscript{66} E.g., B.T. v. Dep’t of Educ., 676 F. Supp. 2d 982, 254 Ed.Law Rep. 40 (5th Cir. 2010) (not needed, thus moot);
\textsuperscript{67} E.g., Bd. of Educ. of City Sch. Dist. of Buffalo, 46 IDELR ¶ 146 (N.Y. SEA 2006) (no need for regression).
\textsuperscript{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.
\textsuperscript{71} Letter to Kane, 72 IDELR ¶ 75 (OSEP 2018).
\textsuperscript{73} 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).
\textsuperscript{75} 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?\textsuperscript{79} IEP (after age 21)?\textsuperscript{80}

- upper limit: postsecondary education?\textsuperscript{81}

4. implementation issues

- distinguishable from and, for denial of FAPE, generally warranted in addition to prospective relief\textsuperscript{82}

- awards of both compensatory education and tuition reimbursement for different periods of FAPE denial\textsuperscript{83} or for stay-put violations\textsuperscript{84}

- award of compensatory education as default for unsuccessful (at Step II) tuition reimbursement: not so far\textsuperscript{85}

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


\textsuperscript{83} The Third Circuit 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).
• 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).


\(^92\) B.B. v. Cathahoula 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) (remand for order of does not order 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 or 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) (re-ordering 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)\textsuperscript{94} and ADA\textsuperscript{95}

• what: same or different? escrow or trust fund?\textsuperscript{96}

• how: bifurcated hearing via second, contingent phase,\textsuperscript{97} dismissal w/o prejudice,\textsuperscript{98} ordering reopening for this limited purpose\textsuperscript{99}

• who provides? – district personnel?\textsuperscript{100} independent consultants, not parents’ experts\textsuperscript{101}

• final possible problems: awards that are too vague to be enforceable\textsuperscript{102} or that are

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\textsuperscript{97} E.g., Maple Heights City Bd. of Educ. v. A.C., 68 IDELR ¶ 5 (N.D. Ohio 2016) (ruling that bifurcated hearing was not prejudicial IHO error).
\textsuperscript{99} Houston Cty. Sch. Dist., 116 LRIP 8724 (Ga. SEA 2015).
\textsuperscript{100} Was OSEP implying that district personnel would provide comp ed services in opinion 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. Maz, 69 IDELR ¶ 98 (D.N.M. 2017) (granting preliminary injunction for district personnel rather than IHO’s order for private providers).
sufficiently clear but not implemented\textsuperscript{103}

• conversely, enforcement may include judicial civil contempt sanctions\textsuperscript{104}

• district’s failure to comply with comp ed award is not a harmless procedural violation\textsuperscript{105}

\begin{footnotesize}
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\item \textsuperscript{103} E.g., Murphy \textit{v. Timberlane Reg’t Sch. Dist.}, 855 F. Supp. 498, 93 Ed.Law Rep. 177 (D.N.H. 1994).
\item \textsuperscript{104} E.g., L.J. \textit{v. Audubon Bd. of Educ.}, 49 IDELR ¶ 184 (D.N.J. 2008).
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