EDUCATION LAW INTO PRACTICE

COMPENSATORY EDUCATION: THE LATEST
ANNOTATED UPDATE OF THE LAW*

by

PERRY A. ZIRKEL, PH.D., J.D., LL.M.**

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 articles in the series, this outline lists the additional and newer outline items and legal citations in 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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** Dr. Zirkel is University Professor Emeritus of Education and Law, Lehigh University, Bethlehem, PA. He is a Past President of the Education Law Association.


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.


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
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A. BACKGROUND CONCEPTS

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

2. analogy to tuition reimbursement: incomplete

3. IDEA 2004 Amendments and 2006 Regulations:
   - continued (from 1997 Amendments) codification, at least in part, of tuition reimbursement remedy
   - one-year statute of limitations for compensatory education claims brought under the state complaint resolution process
   - indirect springboard for compensatory education in the discipline context
   - only inferable authority under judicial umbrella of IDEA for hearing/review officers, and—under the backup coverage of Section 504 and the ADA—largely OCR

compensatory education, see Laurel Highlands Sch. Dist., 116 LRP 8832 (Pa. SEA 2016); Solanco Sch. Dist., 115 LRP 10056 (Pa. SEA 2015).


10. 34 C.F.R. § 300.153(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(c)(3) (in the manifestation determination process, requiring districts to “take immediate steps to remedy, the causal implementation deficiencies”).


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,
B. Threshold Issues

1. the age 21 barrier: shattered, with a limited and disputed exception
2. Eleventh Amendment immunity: inapplicable
3. statute of limitations: two years unless differing state law but with much longer remedial period for compensatory education
4. exhaustion doctrine: rather uniform, effective requirement
5. mootness doctrine
   • a bar where the student is no longer eligible as having an IDEA disability
   • possibly a bar when the student has graduated 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


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- in most jurisdictions, not a bar when the student has moved, whether within the same state or out of state. **26**
- 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. **27**
- 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 a child find case where the 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 are 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**

C. Evolving Standards

1. triggering issues
   - threshold level: denial of FAPE must be more than *de minim*-

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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. D.C.*, 526 F. Supp. 2d 32, 228 Ed.Law Rep. 271 (D.D.C. 2007). For a frequency analysis of the vari-
is 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? Similarly, what if child find violation in the absence of resulting eligibility?

limited for procedural violations includes related services

ous 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. Judic 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).


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).


44. 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 ar-
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- includes extracurricular activities
- includes implementation, not just formulation, violations
- not for child find violation where the child is not eligible

2. calculation issues
- starting point: when the district or parent knew or should have known of the denial of FAPE
- a) quantitative approach
  - duration: the period of the denial
  - exclusion (in the Third Circuit): “the time reasonably required for the school district to rectify the problem”
  - exclusion for comp ed from state complaint resolution process during same period

range 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).


48. 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).

49. This language derives from the limitations period of the IDEA. See supra note 21 and accompanying text. However, there is conflicting authority when the parent is the filing party. E.g., Colonial Sch. Dist. v. N.S., 76 IDELR ¶ 127 (E.D. Pa. 2020) (identifying the accrual being upon the district’s actual and constructive knowledge).

50. 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., Matthew B. v. Pleasant Valley Sch. Dist., 75 IDELR ¶ 157 (E.D. Pa. 2019); 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, 349 Ed.Law Rep. 499 (E.D. Pa. 2017).

51. 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).


53. E.g., Indiana Area Sch. Dist., 45 IDELR ¶ 25 (Pa. SEA 2006).
- another exclusion: absences?—rarely
- extent—need not provide a day-for-day compensation for time missed but particularized (i.e., service-unit) basis v. total-package basis

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


57.  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).


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or 2) relaxed hybrid approach. 60


61. 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. No. 299, 53 IDELR ¶ 274 (Ill. SEA 2009) (undefined one year of compensatory education for FAPE violation of 1.5 years); Waukee Cnty. 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 Cnty 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).

62. Quaere whether a prospective remedy to provide FAPE must also include compensatory education? E.g., Van Dyne 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).


64. 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).

65. E.g., Carbondale Elementary Sch. Dist. No. 95, 23 IDELR 280 (Ill. SEA 1995).


68. E.g., Bd. of Educ. of City Sch. Dist. of Buffalo, 46 IDELR ¶ 146 (N.Y. SEA 2006) (no need for regression).
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qualitative approach
- partial credit? effectiveness?—hardly addressed yet
- not excused by present progress or appropriateness
- amount for district’s denial of opportunity for meaningful parental participation in the IEP process?
- amount for prejudicial problem in transition assessment?
- not for missed instruction or services due to participation in statewide assessments
- within IHO authority for violations of disciplinary changes in placement
- who has the responsibility, including the burden of proof?

3. Scope issues
- lower limit: child in a permanent vegetative state
- form: includes training? consultant? paraprofessional? tuition reimbursement?

69. 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 59 and accompanying text.


74. Letter to Kane, 72 IDELR ¶ 75 (OSEP 2018).

75. Letter to Zirkel, 74 IDELR ¶ 171 (OSEP 2019).


77. Eg., 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).


79. 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)

80. 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 [859]
prospective placement? IEP (after age 21)? upper limit: postsecondary education?

4. implementation issues
distinguishable from and, for denial of FAPE, generally warrant-
ed in addition to prospective relief

awards of both compensatory education and tuition reimbursement for different periods of FAPE denial or for stay-put violations
award of compensatory education as default for unsuccessful (at Step II) tuition reimbursement: not so far


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- when: after school, during the summer, or at some other time
  “beyond what is required by [his prospective] IEP?”
- at parents’ convenience within reasonable, specified time limit
- and, where included in the IEP, as soon as possible
- where: private school
- who (determines amount): the IHO?
- an outside expert?
- mutual agreement or IEP team?

88. 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).


94. B.B. v. Catahoula Parish Sch. Dist., 62 IDELR ¶ 50 (W.D. La. 2013) (court recommending 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. D.C., 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 her...
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- enforcement options for failure to implement IHO compensatory education relief include IDEA (w/o exhaustion) and ADA
- what: same or different? escrow or trust fund?
- how: bifurcated hearing via second, contingent phase, dismissal w/o prejudice, ordering reopening for this limited purpose
- who provides? district personnel, independent consultants,


95. 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).


99. 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).


102. Was OSEP implying that district personnel would provide compensatory education 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. Macz, 69 IDELR ¶ 98 (D.N.M. 2017)
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not parents' experts\textsuperscript{103}

\begin{itemize}
  \item if outside provider, subject to regular progress and attendance reports?\textsuperscript{104}
  \item final possible problems: awards that are too vague to be enforceable\textsuperscript{105} or that are sufficiently clear but not implemented\textsuperscript{106}
  \item conversely, enforcement may include judicial civil contempt sanctions\textsuperscript{107}
  \item district's failure to comply with comp ed award is not a harmless procedural violation\textsuperscript{108}
\end{itemize}

(granting preliminary injunction for district personnel rather than IHO's order for private providers).


