The Competing Approaches for Calculating Compensatory Education under the IDEA: An Update*

Perry A. Zirkel

INTRODUCTION

Compensatory education has become the primary remedy under the Individuals for Disabilities Education Act for parents who preponderantly prove a denial of the school district's "free appropriate public education" (FAPE) obligation but have not unilaterally placed their child and, thus, have not opted for tuition reimbursement.[1] Indeed, compensatory education has its roots, by way of analogy, in the more established remedy of tuition reimbursement.[2] Yet, the two remedies are generally separate. For example, according to a recent federal appeals court decision, compensatory education is not available for a unilaterally placed private school student.[3]

Within the line of case law for compensatory education,[4] the courts have evolved two

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* This latest version appeared in West's Education Law Reporter (Ed.Law Rep.) at vol. 339, pp. 10–22. The earlier version was published at 257 Ed.Law Rep. 550 (2010). **The updated information is in underlined bold-face font.**

[1] E.g., **Perry A. Zirkel, *Compensatory Education: Another Annotated Update of the Law*., 336 EDUC. L. REP. 654 (2016); Perry A. Zirkel, *Compensatory Education: Another Annotated Update of the Law*., 291 EDUC. L. REP. 1 (2013);** Perry A. Zirkel, *Compensatory Education An Annotated Update of the Law*, 251 EDUC. L. REP. 501 (2010); Perry A. Zirkel, *Compensatory Education Services under the IDEA: An Annotated Update*, 190 EDUC. L. REP. 745 (2004); Perry A. Zirkel & M. Kay Hennessy, *Compensatory Educational Services in Special Education Cases*, 150 EDUC. L. REP. 311 (2001); Perry A. Zirkel, *The Remedy of Compensatory Education under the IDEA,* 95 EDUC. L. REP. 483 (1995); Perry A. Zirkel, *Compensatory Educational Services in Special Education Cases,* 67 EDUC. L. REP. 881 (1991).

[2] See, e.g., Perry A. Zirkel, *Compensatory Education under the Individuals with Disabilities Education Act: The Third Circuit's Partially Mis-Leading Position*, 111 PENN. STATE L. REV. 879 (2006). Unlike compensatory education, tuition reimbursement is codified in the IDEA, and it has been the subject of Supreme Court decisions. See, e.g., *Forest Grove Sch. Dist. v. T.A*., **557 U.S. 230** (2009).

[3] *P.P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 250 Ed.Law Rep. 517 (3d Cir. 2009).

[4] Except for brief mention in relation to the state complaint process **(34 C.F.R. § 300.151(b)(1))**, the IDEA regulations do not codify compensatory education, leaving its details to the case law under the broad remedial authority that the legislation accords explicitly to the courts and implicitly to hearing and

distinct approaches for calculating the amount of compensatory education due to the parents in the wake of the district denial of FAPE.[5] The first approach is quantitative based on a one-for-one calculation of the extent of the denial of FAPE. The Third Circuit is the primary locus for developing and refining the quantitative (also known as "cookie cutter")[6] approach, although the majority of lower courts and hearing/review officers in various jurisdictions tend to use it in its unrefined form.[7]

More recently, the D.C. Circuit Court of Appeals developed the qualitative approach, which more flexibly calculates this equitable remedy in terms of placing the child with disabilities in the same position he or should would have occupied but for the school district's violations of the IDEA.[8] The Sixth Circuit adopted this approach in 2007.[9]

Third, emphasizing the equitable flexibility and fluidity of such remedial issues for impartial hearing officers (IHOs), the Ninth Circuit has adopted a less definitive view, sometimes categorized under the qualitative approach but more properly put as flexibly

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review officers. See, e.g., Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the IDEA: An Update*, 31 J. NAT'L ASS'N OF ADMIN. L. JUDICIARY 1 (2011).

[5] The focus here is on the method for calculating compensatory education, not on overlapping issues, such as whether the IDEA allows the hearing officer to delegate the calculation or its adjustment to the IEP team. For the delegation issue, see, e.g., *Bd. of Educ. of Fayette County 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); ***Meza v. Bd. of Educ.*, 56 IDELR ¶ 167 (D.N.M. 2011). *But see Mr. I. v. Me. Sch. Admin. Unit No. 55*, 480 F.3d 1, 217 Ed.Law Rep. 60 (1st Cir. 2007); *Struble v. Fallbrook Union Sch. Dist.*, 56 IDELR ¶ 4 (S.D. Cal. 2011); *cf. Sch. Dist. of Phila. v. Williams*, 66 IDELR ¶ 214 (E.D. Pa. 2015); *T.G. v. Midland Sch. Dist.*, 848 F. Supp. 2d 902, 282 Ed.Law Rep. 425 (C.D. Ill. 2012); *A.L. v. Chicago Pub. Sch. Dist.*, 57 IDELR ¶ 215 (N.D. Ill. 2011); *State of Haw., Dept. of Educ. v. Zachary B.*, 52 IDELR ¶ 213 (D. Haw. 2009).**

[6] ***Reid v. District of Columbia*, 401 F.3d 516, 523, 196 Ed.Law Rep. 402 (D.C. Cir. 2005).**

[7] **However, recent decisions within and at the Third Circuit seem to signal a movement toward the qualitative approach. See *infra* note 12.**

[8] The seeds of this approach can be found in scattered earlier cases at lower levels. See, e.g., *Sanford Sch. Comm. v. Mr. & Mrs. L*, 34 IDELR ¶ 262 (D. Me. 2001) (harm to the child as a result of loss of FAPE). However, Judge David Tatel gave it full elaboration and federal appellate authority in *Reid v. District of Columbia*, 401 F.3d 516, 196 Ed.Law Rep. 402 (D.C. Cir. 2005).

[9] *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 216 Ed.Law Rep. 354 (6th Cir. 2007).

intermediate between the two polar approaches.[10] Moreover, an occasional case in one of the opposite "camps" illustrates overlap either by approximating the logic or outcome of the other[11] or by, in effect, merging the two to create a **hybrid** result.[12]

Finally, although the dividing lines are far from bright, the courts in most other jurisdictions have **followed one or more of these paths: 1) applied the qualitative approach,**[13]

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[10] E.g., *Park v. Anaheim Union High Sch. Dist*., 464 F.3d 1025, 213 Ed.Law Rep. 122 (9th Cir. 2006) (upholding IHO's award of 30 min./wk. of training for the child's teachers for a period approximating the denial of FAPE, observing that "[t]he testimony was unclear whether Joseph would benefit from direct compensatory education" and that the award was "designed to compensate Joseph for the District's violations by better training his teachers to meet Joseph's particular needs"); Parents of *Student W. v. Puyallup School Dist.*, 31 F.3d 1489, 93 Ed.Law Rep. 547 (9th Cir. 1994) (upholding district court's denial of comp ed for 1.5 year loss of FAPE in light of student's general progress and parent's unreasonable conduct, commenting that "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA."). However, more recently in dicta the Ninth Circuit appeared to endorse specifically the qualitative approach. ***R.P. v. Prescott Unified Sch. Dist*., 631 F.3d 1117, 1125, 264 Ed.Law Rep. 618 (9th Cir. 2011).**

[11] E.g., *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 669 F. Supp. 2d 80, 253 Ed.Law Rep. 347 (D.D.C. 2009) (qualitative approach for quantitative outcome).

[12] E.g., *Ferren C. v. Sch. Dist. of Phila.*, 595 F. Supp. 2d 566, 241 Ed.Law Rep. 771 (E.D. Pa. 2009) (citing case law under both results to shape special-circumstances outcome). **On appeal, the Third Circuit affirmed, citing *Reid* but concluding that the equitable outcome would be on a case-by-case basis. *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712, 259 Ed.Law Rep. 37 (3d Cir. 2010). Some Pennsylvania hearing officers subsequently interpreted this decision as signaling the move from a quantitative to qualitative approach. E.g., *Sch. Dist. of Phila.*, 58 IDELR ¶ 206 (Pa. SEA 2012). For recent decisions that appear to validate this interpretation, see *Jana K. v. Annville-Cleona Sch. Dist*., 39 F. Supp. 3d 584, 608, 313 Ed.Law Rep. 702 (E.D. Pa. 2014); *Cent. Sch. Dist. v. K.C*., 61 IDELR ¶ 125 (E.D. Pa. 2013); *cf. A.W. v. Middletown Area Sch. Dist*., 68 IDELR ¶ 247 (M.D. Pa. 2016). For parallel blurring in Pennsylvania's state courts, a recent IDEA decision cited as support for a one-hour per day award, without distinguishing it, a precedent for the qualitative approach in the context of gifted education. *Pennsbury Sch. Dist. v. C.E.*, 59 IDELR ¶ 13 (Pa. Commw. Ct. 2012). Yet, the courts in New Jersey seem to adhere more strictly to the quantitative approach. E.g., *A.S. v. Harrison Twp. Bd. of Educ*., 67 IDELR ¶ 207 (D.N.J. 2016).**

[13] E.g., *Dep't of Educ., State of Haw. v. R.H*., 61 IDELR ¶ 127 (D. Haw. 2013); *Mt. Vernon Sch. Corp. v. A.M.*, 59 IDELR ¶ 100 (S.D. Ind. 2012); *B.T. v. Dep't of Educ*., 676 F. Supp. 2d 982, 254 Ed.Law Rep. 212 (D. Haw. 2010); *R.M. v. Miami-Dade Cty. Sch. Bd*., 55 IDELR ¶ 261 (S.D. Fla. 2010); *cf. T.G. v. Midland Sch. Dist.*, 848 F. Supp. 2d 902, 282 Ed.Law Rep. 425 (C.D. Ill. 2012) (qualitative approach but with flexible deference for IHO). 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).

2) implemented a relaxed hybrid approach[14] or 3) without conclusively adopting either polar approach, limiting themselves to permitting compensatory education awards an ad hoc basis[15] or to embracing one of the two approaches on a nonprecedential basis.[16]

The chart, which is Part II of this brief article, outlines the basic elements of the two polar approaches for calculating the appropriate amount of compensatory education. **Because in the qualitative approach is cited more frequently and yet is still developing**, Part III provides an annotated summary of the case law for this newer, more elegant, and more difficult approach.

[14] E.g., *Woods v. Northport Sch. Dist*., 487 F. App'x 968, 287 Ed.Law Rep. 746 (6th Cir. 2012); *Pangerl v. Peoria Unified Sch. Dist.,* 69 IDELR ¶ 133 (D. Ariz. 2016); ***Maple Heights City Sch. Bd. of Educ*., 68 IDELR ¶ 5 (N.D. Ohio 2016); *Oskowis v. Sedona-Oak Creek Unified Sch. Dist*., 67 IDELR ¶ 150 (D. Ariz. 2016);** *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. 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).

[15] E.g., *Draper v. Atlanta Sch. Sys.*, 518 F.3d 1275, 230 Ed.Law Rep. 545 (11th Cir. 2008) (affirming prospective private school placement as allowable compensatory education under abuse of discretion review standard for district court's decision).

[16] E.g., *State of Haw. v. Zachary B*., 52 IDELR ¶ 213 (D. Haw. 2009); *Petrina W. v. City of Chicago Pub. Sch. Dist. 299*, 53 IDELR ¶ 259 (N.D. Ill. 2009) (unpublished district court decisions that adopted qualitative approach).

II. THE CALCULUS FOR THE TWO APPROACHES

Quantitative (i.e., one-for-one)	Qualitative
- duration: the period of denial of FAPE[17] - alternate options of particularized (i.e., service-unit)[18] or total-package[19] basis—criterion of whether the denial of FAPE had a pervasive effect[20] - deduction at the start for period estimated for reasonable rectification[21] - exclusion for absences?[22] - reduction for net inequities in terms of unreasonable parental conduct?[23]	- individualized fact-specific determination of amount "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"[24] • 1) What are the child's "specific educational deficits"? • 2) Which and how much of these specific deficits resulted from the child's "loss of FAPE"? • 3) What are "the specific compensatory measures needed to best correct [the]

[17] E.g., *Westendorp v. Indep. Sch. Dist. No. 273*, 35 F. Supp. 2d 1134, 133 Ed.Law Rep. 97 (D. Minn. 1998). **However, the effect of the IDEA's limitation period for filing for the impartial hearing is a significant factor in light of *G.L. v. Ligonier Valley Sch. Auth*., 802 F.3d 601, 322 Ed.Law Rep. 633 (3d Cir. 2015). *See, e.g.*, Perry A. Zirkel, *Of Mouseholes and Elephants: The Statute of Limitations for Impartial Hearings under the Individuals with Disabilities Education Act*, 35 J. NAT'L ASS'N ADMIN. L. JUDICIARY 305 (2015).**

[18] E.g., ***G.D. v. Wissahickon Sch. Dist*., 832 F. Supp. 2d 455, 280 Ed.Law Rep. 71 (E.D. Pa. 2011); *Dudley v. Lower Merion Sch. Dist*., 58 IDELR ¶ 12 (E.D. Pa. 2011); *Breanne C. v. S. York Cty. Sch. Dist*., 732 F. Supp. 2d 474, 263 Ed.Law Rep. 122 (M.D. Pa. 2010);** *Neena S. v. Sch. Dist. of Phila*., 51 IDELR ¶ 210 (E.D. Pa. 2008); *Heather D. v. Northampton Area Sch. Dist.*, 511 F. Supp. 2d 549, 225 Ed.Law Rep. 571 (E.D. Pa. 2007); *D.H. v. Manheim Twp. Sch. Dist*., 45 IDELR ¶ 38 (E.D. Pa. 2005); *Quintana v. Dep't of Educ. of P.R.,* 30 IDELR 503 (P.R. Ct. App. 1998).

[19] E.g., *Keystone Cent. Sch. Dist. v. E.E.*, 438 F. Supp. 2d 519, 211 Ed.Law Rep. 772 (E.D. Pa. 2006); *cf. Sch. Dist. of Phila. v. Deborah A*., 52 IDELR ¶ 67 (E.D. Pa. 2009) (pervasive enough for full day); *Argueta v. District of Columbia*, 355 F. Supp. 2d 408 (D.D.C. 2005) (special ed and related services specified in IEP but that district failed to provide).

[20] *Sch. Dist. of Phila. v. Deborah A*., 52 IDELR ¶ 67 (E.D. Pa. 2009).

[21] See, e.g., *M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397, 108 Ed.Law Rep. 522 (3d Cir. 1996) ("the time reasonably required for the school district to rectify the problem"); *see also* ***Dudley v. Lower Merion Sch. Dist*., 58 IDELR ¶ 12 (E.D. Pa. 2011);** *E. Penn Sch. Dist. v. Scott P*., 29 IDELR 1058 (E.D. Pa. 1999), *further proceedings*, 30 IDELR 129 (E.D. Pa. 1999). **For an exception, see *Tyler W. v. Perkiomen Sch. Dist*., 963 F. Supp. 2d 427, 301 Ed.Law Rep. 777 (E.D. Pa. 2013).**

[22] See, e.g., ***Dudley v. Lower Merion Sch. Dist*., 58 IDELR ¶ 12 (E.D. Pa. 2011);** *cf. Neena S. v. Sch. Dist. of Phila.*, 51 IDELR ¶ 210 (E.D. Pa. 2008) (extended periods). ***But cf.*** **Linda E. v. Bristol Warren Reg'l Sch. Dist., 758 F. Supp. 2d 75, 266 Ed.Law Rep. 718 (D.R.I. 2010) (no deduction for missing inappropriate services)**..

	deficits [in item 2]"[25] - Will there be a deduction for reasonable rectification or unreasonable parental conduct?[26] If so, calculate and explain.

III. CASE LAW FOR THE QUALITATIVE APPROACH

This section provides an annotated chronological compilation of the court decisions that have developed and applied the qualitative approach. This gradual judicial evolution, which is largely but not entirely limited to the courts in the D.C. circuit make clear the complexity, both in terms of the procedure and the substance, of calculating a defensible compensatory education award in accordance with this approach.

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

- The comp ed award "should aim to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA." (*id*. at 523).
- "designing [the child's] remedy will require a fact-specific exercise of discretion" (*id*. at 524)
- "Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE" (*id*. at 524)

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[23] See, e.g., *Garcia v. Bd. of Educ*., 520 F.3d 1116, 231 Ed.Law Rep. 25 (10th Cir. 2008); *Moubry v. Indep. Sch. Dist. No. 696*, 27 IDELR 469 (D. Minn. 1997); **_cf. R.L. v. Miami Dade Cty. Sch. Bd._, 757 F.3d 1173, 307 Ed.Law Rep. 596 (11th Cir. 2014); _Torda v. Fairfax Cty. Sch. Bd._, 517 F. App'x 162 (4th Cir. 2013), _cert. denied_, 134 S. Ct. 1538 (2014)**.

[24] Reid v. District of Columbia, 401 F.3d 516, 524, 196 Ed.Law Rep. 402 (D.C. Cir. 2005). **The court also provided this alternative wording: "[what services, if any, were required] to place [the child] in the same position [he] would have occupied but for the district's violations of IDEA." _Id._ at 518. For the adjudicative difficulties, including time-consuming transaction costs, of implementing this overall approach, see, e.g., _Phillips v. District of Columbia_, 932 F. Supp. 2d 42, 296 Ed.Law Rep. 366 (D.D.C. 2013) (upholding IHO decision denying compensatory education for a denial of FAPE seven years earlier due to parents' failure to provide evidence that met _Reid_ standard after repeated opportunities).**

[25] *Reid v. District of Columbia,* 401 F.3d at 525. **The court more recently identified the "time of the . . . award" as the point for calculating the requisite amount. _B.D. v. District of Columbia_, 817 F.3d 792, 799, 329 Ed.Law Rep. 612 (D.C. Cir. 2016).**

[26] *Reid v. District of Columbia,* 401 F.3d at 524 (recognizing this equitable consideration but subsuming it within the overall qualitative standard); *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 583 F. Supp. 2d 169, 172, 239 Ed.Law Rep. 380 (D.D.C. 2008) (dicta warning about contingency of student cooperation).

- "courts have recognized that in setting the award, equity may sometimes require consideration of the parties' conduct, such as when the school system reasonably 'require[s] some time to respond to a complex problem,' *M.C.,* 81 F.3d at 397, or when parents' refusal to accept special education delays the child's receipt of appropriate services, *Parents of Student W.,* 31 F.3d at 1497." (*id*. at 524)
- "In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*id*. at 524)
- "[the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits" (*id*. at 525)
- "whereas ordinary IEPs need only provide 'some benefit,' compensatory awards must do more-they must *compensate.*" (*id*. at 525)
- "what services [the student] needs to elevate him to the position he would have occupied absent the school district's failures" (*id*. at 527)
- **an IHO may not delegate remedial authority for reducing or discontinuing the amount of compensatory education to the IEP team (i.e., ARD committee), which includes at least one district employee, in light of the IDEA prohibition that the IHO may not be a district employee (*id*. at 526)**

Branham v. District of Columbia, 427 F.3d 7, 202 Ed.Law Rep. 610 (D.C. Cir. 2005)

- reversed and remanded **to district court** because the "compensatory [services] award … fails to meet *Reid*'s demanding standard of 'an informed and reasonable exercise of discretion'" (*id*. at 11)—**but discouraging further remand to IHO to "minimize further delay" (*id.* at 13)**
- separately addressed the issue of the student's prospective placement, which requires "insight about the precise types of educational services [the student] needs to progress" (*id*. at 12)

B.C. v. Penn Manor Sch. Dist., 906 A.2d 642, 212 Ed.Law Rep. 801 (Pa. Commw. Ct. 2006)

- adopted qualitative approach for gifted ed cases under state law
- "the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." (*id*. at 651)
- "As noted by the District of Columbia Circuit, doing so may require awarding the student more compensatory education time than a one-for-one standard would, while in other situations the student may be entitled to little or no compensatory education, because (s)he has progressed appropriately despite having been denied a FAPE." (*id*. at 651)

Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 216 Ed.Law Rep. 354 (6th Cir. 2007)

- adopted the D.C. Circuit's qualitative approach (and its prohibition of delegating the calculation or adjustment to the IEP team)
- "T.D. may well need more than the 125 hours of compensatory education initially awarded by the [IHO], but nothing in the record suggests that he needs hour-for-hour compensation in order to catch up to his peers…. He has been shown to have an IQ score of 105. On the other hand, … [he] reads at only a fifth-grade level despite the fact that he is now in the seventh grade. Although we are dismayed that no one has yet acted to remedy this deficiency during the two and a half years of pending litigation, we find no basis to claim that T.D., a child of average intelligence, needs over 2,400 hours of remedial instruction in order to arrive on an equal footing with his classmates [as a result of denial of FAPE for two school years and a summer]. Such an award, in the absence of strong evidence in the record suggesting that so drastic a remedy is necessary, would border on punishment to the School District rather than an equitable remedy for a child in need." (*id*. at 316-317)

Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt, 532 F. Supp. 2d 121, 229 Ed.Law Rep. 582 (D.D.C. 2008) (*Nesbitt I*)

- vacated the IHO's 3,300-hour comp ed award due to lack of "any explanation or factual support for the formula-based award" (*id*. at 126) and scheduled show-cause status conference due to student's age (approximately 24)
- "A compensatory award constructed with the aid of a formula is not *per se* invalid, however. A formula-based award may in some circumstances be acceptable if it represents an individually-tailored approach to meet a student's unique prospective needs, as opposed to a backwards-looking calculation of educational units denied to a student." (*id*. at 123)
- Upon finding a denial of FAPE but insufficient evidence for calculating a comp ed award, the IHO may "provide the parties additional time to supplement the record" (*id*. at 125).[27]

Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 534 F. Supp. 2d 109, 229 Ed. Law Rep. 645 (D.D.C. 2008) (*Bland I*)

- remanded the case due to the IHO's failure to explain how he arrived at the comp ed award of 375 hours
- "The record in this case contains sufficient evidence of T.B.'s unique educational need to allow the Hearing Officer to craft a compensatory education award that is reasonably calculated to place T.B. in the position he would have been in but for the denial of FAPE." (*id*. at 117)

Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 555 F. Supp. 2d 130, 234 Ed.Law Rep. 91 (D.D.C. 2008) (*Bland II*)

- upheld award amounting to same, previous cookie-cutter total where IHO considered test results as to the child's deficit and expert testimony as to what the child would need to close the gap
- "the [IHO] must engage in a fact-intensive analysis that includes individualized assessments of the student so that the ultimate award is tailored to the student's unique needs." (*id*. at 135)

[27] For a more recent decision supporting additional IHO fact-finding for the calculation question, see *Banks v. District of Columbia*, 720 F. Supp. 2d 83, 261 Ed.Law Rep. 626 (D.D.C. 2010).

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

- ruled that district's failure to provide comp ed was a prejudicial violation and that district's provision of FAPE during the intervening two years did not excuse this obligation

Brown v. District of Columbia, 568 F. Supp. 2d 44, 236 Ed.Law Rep. 798 (D.D.C. 2008); *see also Thomas v. District of Columbia*, 407 F. Supp. 2d 102, 206 Ed.Law Rep. 176 (D.D.C. 2005)[28]

- remanded the case to the IHO for further proceedings to determine "'the amount of compensatory education required to give [the student] the benefits that would likely have accrued had he been given a FAPE'" (*id*. at 54)

Gregory-Rivas v. District of Columbia, 577 F. Supp. 2d 4, 238 Ed.Law Rep. 218 (D.D.C. 2008)

- upheld IHO's denial of compensatory education
- "[The IHO] required that [the parent] establish the type and amount of compensatory services owed to him by [the district] in order to compensate for the services he was denied by [the district]. Because [the parent] failed to make this showing, [the IHO] concluded that any award of compensatory education services would be arbitrary. [His] conclusion and reliance on *Reid* was justified and documented in the record." (*id*. at 10)

Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt, 583 F. Supp. 2d 169, 239 Ed.Law Rep. 380 (D.D.C. 2008) (*Nesbitt II*)

- ordered, upon parent's request at show-cause conference, a new psychoeducational evaluation and vocational assessment in order to craft a compensatory education award
- "That evaluation must be done so the compensatory education plan can be premised on Nesbitt's present abilities, deficiencies, and needs. Simply put, like the hearing officer, I have concluded that Nesbitt is due compensatory education and it is impossible to grant that relief without a conscientious and well-informed evaluation of his present status." (*id*. at 172)
- "I assure him that if [the student] fails to cooperate with the entire evaluation process this case will be promptly dismissed." (*id*. at 172)

Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt, 669 F. Supp. 2d 80, 253 Ed.Law Rep. 347 (D.D.C. 2009) (*Nesbitt III*)[29]

- awarded request comp ed amount, which was same as rejected one-for-one total, after equation-filled discussion and with revision as to GED goal
- "With the completion of the evaluations, I gave [the student] another opportunity to show cause why he should be awarded a compensatory education plan, and he submitted a response that concluded he was entitled to 3,300 hours of tutoring, the exact same amount specified in the award that I vacated. I set an evidentiary hearing where I expected defendant to provide a witness

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[28] For this court's other, more recent remands to determine the amount of compensatory education, in addition to those excerpted *infra*, see *Walker v. District of Columbia*, **786** F. Supp. 2d **232**, 272 Ed.Law Rep. 192 (D.D.C. 2011); *Long v. District of Columbia*, **780** F. Supp. 2d **49**, 270 Ed.Law Rep. 664 (D.D.C. 2011); ***Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 268 Ed.Law Rep. 774 (D.D.C. 2011);** *Henry v. District of Columbia*, 750 F. Supp. 2d 94, 265 Ed.Law Rep. 601 (D.D.C. 2010).

[29] The court subsequently denied the district's motion for a stay pending appeal. *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 704 F. Supp. 2d 50, 259 Ed.Law Rep. 46 (D.D.C. 2010) (rejecting district's argument that projected cost of $198k was irreparable injury).

or a number of witnesses to testify, either from personal knowledge, or, if they were appropriately qualified, as experts about the following topics: (1) the level at which the defendant was functioning when he first attended [the school]; (2) the level to which defendant would have progressed during his time at [the school], but for the denial of a FAPE; and (3) why 3,300 hours of tutoring will put the defendant in the position he would have been in but for the denial."
- "Enough of a record and an explanation of [the expert's] qualitative methodology exist for the court to determine that, despite its insufficiencies, the proposed compensatory education plan is 'reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.'"
- "Thus, while I will endorse the attainment of a GED as the framework by which tutors may implement the compensatory education award, the attainment of the GED is neither the purpose of the award nor the likely outcome."

Stanton v. District of Columbia, 680 F. Supp. 2d 201, 255 Ed.Law Rep. 120 (D.D.C. 2010)
- reversed IHO's denial of compensatory education and remanded to the IHO to expeditiously supplement the record with the information needed to "'best correct' [the child's] educational 'deficits'" (citing *Reid*) – the district ultimately did not dispute that it had denied the child FAPE
- "*Reid* certainly does not require plaintiff to have a perfect case to be entitled to a compensatory education award. Once a plaintiff has established that she is entitled to an award, simply refusing to grant one clashes with *Reid*… A hearing officer may "provide the parties additional time to supplement the record" if she believes there is insufficient evidence to support a specific award. *See Nesbitt I,* 532 F. Supp.2d at 125. Choosing instead to award *nothing* does not represent the 'qualitative focus' on [the child's] 'individual needs' that *Reid* requires."

Matanuska-Susitna Borough Sch. Dist. v. D.Y., 54 IDELR ¶ 52 (D. Alaska 2010)
- upheld, after supplemental briefing, $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
- equitably calculated to put the child "in the place he would have been in absent the [34 months of] District's LRE and Dynavox violations."

Wheaten v. District of Columbia, 55 IDELR ¶ 12 (D.D.C. 2010), *aff'd mem*., WL 5372181 (D.C. Cir. 2010)
- denied compensatory education where IHO found that school district's subsequent private placement of the child remedied the denial of FAPE

Gill v. District of Columbia, 751 F. Supp. 2d 104, 265 Ed.Law Rep. 669 (D.D.C. 2010), *further proceedings*, **770** F. Supp. 2d **112**, 268 Ed.Law Rep. 761 (D.D.C. 2011)
- after IHO found denial of FAPE but refused compensatory education based on parents' failure to provide sufficient factual foundation (for qualitative approach), court allowed parent limited opportunity via its authority to hear additional evidence; however, the court subsequently did not award compensatory education, concluding that the additional evidence was "sketchy and patently insufficient"

B.H. v. W. Clermont Bd. of Educ., **788** F. Supp. 2d **682**, 272 Ed.Law Rep. 445 (S.D. Ohio 2011)
- upheld two years of PT and OT and two of three years of private placement as compensatory education, which was close to quantitative approach, as permissible in qualitative jurisdiction

***Woods v. Northport Pub. Sch.*, 487 F. App'x 968, 287 Ed.Law Rep. 746 (6th Cir. 2012)**
- **upheld, in a relaxed application of the qualitative approach, a 758-hour compensatory education award for two-year denial of FAPE (12 hours for each of 64 weeks of denial) for the child to "reasonably recover" in light of potentially closing window of opportunity, plus upheld requirement that the delivery be via a teacher with autism certification due to this provision in the IEP**

***Cousins v. District of Columbia*, 880 F. Supp. 2d 142, 287 Ed.Law Rep. 901 (D.D.C. 2012)**
- **reversed IHO's award of no compensatory education, concluding instead that the experts had provided sufficient evidence for each of the *Reid* factors for the qualitative approach**

Phillips v. District of Columbia, 736 F. Supp. 2d 240, 263 Ed.Law Rep. 614 (D.D.C. 2010), ***after remand*, 932 F. Supp. 2d 42, 296 Ed.Law Rep. 366 (D.D.C. 2013)**
- vacated IHO's award of 255 hours of compensatory education due to parent's failure (via her expert) to provide information as to how these additional hours of tutoring would provided the educational benefits that likely would have accrued had the district provided FAPE in the first place
- remanded to the IHO "to allow plaintiff to supplement the record in order to establish a reasonably calculated and individually-tailored compensatory education award that demonstrates a causal relationship between [the child's] current educational deficits and his earlier denial of a [FAPE]"
- **upheld IHO's "inherent" authority" to order an evaluation (at district expense) that would help determine the amount of compensatory education under the *Reid* standard**
- **upheld IHO's denial of compensatory education, after expert witnesses and additional IHO-arranged expert report, based on conclusion that the child's "current difficulties do not stem from the original denial of a FAPE"**

***Dep't of Educ., State of Haw. v. R.F.*, 61 IDELR ¶ 127 (D. Haw. 2013)**
- **upheld award resulting from separate compensatory education hearing that provided 16 months of private school services, including two summers of ESY, for a three-year denial of FAPE as complying with the *Reid* approach based on expert testimony and the child's successful experience at the private school**

***District of Columbia v. Masucci*, 13 F. Supp. 3d 33, 309 Ed.Law Rep. 1023 (D.D.C. 2014)**
- **granted stay of IHO's order of private school placement as compensatory education due to likelihood of success on appeal that the IHO did not show how this order met standards for qualitative calculation**

***I.S. ex rel. Sepiol v. Sch. Town of Munster*, 64 IDELR ¶ 40 (N.D. Ind. 2014)**

- **remanded to IHO, in light of expertise, to "determine the amount of compensation required to put [child] in the position he would have been in had he received a [FAPE] during the time periods at issue," specified as from inception of the inappropriate program to the deadline for compliance with the IHO's original order and presuming that in this case that it would be in the form of tuition reimbursement**

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

- **ruled that IHO's granting of parent's other requested remedy of an IEE does not moot the claim for compensatory education to the extent that the challenged reevaluation was inappropriate and resulted in denial of FAPE**

***Cupertino Union Sch. Dist. v. K.A.*, 75 F. Supp. 3d 1088, 319 Ed.Law Rep. 352 (N.D. Cal. 2014)**

- **vacated "essentially day-for-day compensatory education to achieve an undefined level of "educational progress" as lacking evidentiary support and remanding the remedy to the IHO with suggestions to consider ordering a new IEP meeting or referring the matter to mediation and with instructions to focus on the child's "present needs and the degree to which those needs can be rectified by the District's services," including consideration of "any positive effects that the District's limited services provided, balanced against factors—such as physical considerations and removal from school—over which the District had no control"**

***Copeland v. District of Columbia*, 82 F. Supp. 3d 462, 320 Ed.Law Rep. 737 (D.D.C. 2015)**

- **ruled that IHO did not provide sufficient explanation of his compensatory education calculus**

***Kelsey v. District of Columbia*, 85 F. Supp. 3d 327, 320 Ed.Law Rep. 1025 (D.D.C. 2015)**

- **rejected parent's challenge to IHO's compensatory education award of "1.5 hours of services for every hour of services she missed, provided by a professional speech language therapist who has experience with working with older students"—sufficiently explained in accordance with *Reid* qualitative approach**

***B.D. v. District of Columbia*, 817 F. 3d 792, 329 Ed.Law Rep. 612 (D.C. Cir. 2016)**

- **remanding IHO's compensatory education award of OT as not either addressing educational losses or providing reasoned explanation for failing to do so, with suggestion of an order for assessment if needed (and for updating or supplementing the award based on the assessment)-also identified "the time of the new award" at the reference point for determining the amount needed to restore the child to the position s/he would have been had the district not denied him a FAPE for the period in question**

***Brown v. District of Columbia*, 67 IDELR ¶ 169 (D.D.C. 2016)**

- **awarding "robust remedy" of compensatory education in the form of tuition and transportation at present vocational school placement going back 2.3 years**

***Hill v. District of Columbia*, 68 IDELR ¶ 133 (D.D.C. 2016)**

- **in light of 19-year-old's limited remaining period of eligibility and the sufficient record in this case, opting not to remand and instead to order compensatory education of 50 hours of counseling (based on "demonstrated need and the already-significant delay") plus 178.1 hours of academic tutoring (based on 1-to-5 ratio of 890.5 hour total of failure-to-implement denial of FAPE), in addition to notable other relief**

***Damarcus S. v. District of Columbia*, 190 F. Supp. 3d 35, 330 Ed.Law Rep. 823 (D.D.C. 2016)**

- **remanding for re-computing the compensatory education award of 50 hours of behavioral services to be forfeited if not used within a year because (a) the award and its temporal cap lacked sufficient justification, (b) the impact of the behavioral violation was pervasive, and (c) the two other denials of FAPE needed to be included in the qualitative analysis**

***Lopez-Young v. District of Columbia*, F. Supp. 3d , Ed.Law Rep. (D.D.C. 2016)**

- **remanding to IHO for determination of compensatory education award, including authority to order independent evaluation for this purpose if the parent sufficiently showed its necessity**

***Lee v. District of Columbia*, 69 IDELR ¶ 56 (D.D.C. 2017)**

- **remanding to IHO after failing to award compensatory education in wake of denial of FAPE, instructing the IHO either to provide the parties with more time to supplement the record or to order additional assessments as needed**