The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act: The Latest Update

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I. INTRODUCTION

This article provides the most recent update of a comprehensive review originally published more than a decade ago, synthesizing the various sources of law specific to the remedial authority of hearing/review officers (H/ROs) under the Individuals with Disabilities Education Act (IDEA).[1] The publisher of the ADMINISTRATIVE LAW REVIEW, which contained the original version, provided permission for the successive updates.

The IDEA is a funding act that dates back to 1975.[2] The primary

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[1] Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act*, 58 ADMIN. L. REV. 401 (2006). For the earlier update, see Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2011).

[2] *See* 20 U.S.C. §§ 1400–1487 (2016). The Individuals with Disabilities Education Act (IDEA) was originally named the Education for All Handicapped Children Act (the Act). *Id.* § 1400(c)(2). Congress reauthorized the Act several times, with successive refinements. The 1990 reauthorization included the name change to the IDEA. For a systematic comparison of the 2004 reauthorization, §

purpose of the IDEA is to provide a free appropriate public education (FAPE) to each child with a disability[3] in the least restrictive environment (LRE).[4] The vehicle for determining and delivering FAPE in the LRE is an individualized education program (IEP).[5]

The cornerstone for resolving disputes between parents and districts as to eligibility, FAPE, and other issues under the IDEA, is an impartial administrative adjudication conducted by an impartial hearing officer (IHO), and in states that have opted for a second tier, appealable to a decision by an RO.[6] The IDEA gives states the choice of having a one-tiered system, consisting solely of an impartial due process hearing, or a two-tiered system, which includes

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504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990, see Perry A. Zirkel, *A Comprehensive Comparison of the IDEA and Section 504/ADA*, 282 EDUC. L. REP. 767 (2012). The implementing regulations for the IDEA are at 34 C.F.R. § 300 (2009). The most recent reauthorization, signed by President Bush on December 3, 2004, went into effect, in relevant part, on July 1, 2005. With limited exceptions, see *infra* note 12 (the reauthorization did not materially change the statutory provisions that provide the basis for the analysis in this Article).

[3] *See* 20 U.S.C. § 1400(d)(1)(A) (2016) (setting forth six purposes of the IDEA). A free appropriate public education (FAPE) consists of special education and related services designed to address the needs of the individual eligible child. *Id.* § 1401(8); *see also* 34 C.F.R. § 300.17(c) (2009) (specifying that FAPE means services that "[i]nclude . . . preschool, elementary school, or secondary school education.").

[4] *See* 20 U.S.C. § 1412(a)(5) (2016); *see also* 34 C.F.R. § 300.114–.117 (2009) (requiring that children with disabilities be educated, within a broad continuum of placements, with nondisabled children to the maximum extent appropriate).

[5] 20 U.S.C. §§ 1401(11), 1414(d) (2016); *see also* 34 C.F.R. §§ 300.22, 300.320–.321 (2009) (defining an individualized educational program (IEP) team and delineating the content of an IEP).

[6] *See* 20 U.S.C. § 1415(b)(6) (2016); *see also* 34 C.F.R. § 300.507(a) (2009) (providing the procedures for instituting an impartial due process hearing). The other dispute resolution mechanism, which is purely administrative and without judicial review, is the state complaint resolution process. 34 C.F.R. § 300.151–.153 (2009); *see generally* Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process: An Update*, 313 EDUC. L. REP. 1 (2015). Mediation is also available as an adjunct to the hearing and review officer process. 34 C.F.R. § 300.506 (2009). For a systematic analysis of the issues, outcomes, and remedies of the state complaint resolution process and those of hearing officers in five of the most active jurisdictions, see Perry A. Zirkel, *The Two Decisional Dispute Resolution Processes under the IDEA: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 169 (2017).

an additional officer level review.[7] Subsequent to exhausting this administrative adjudication, the aggrieved party has the right to judicial review in state or federal court.[8] The IDEA accords judges the authority to award attorneys' fees in specified circumstances,[9] and without further specification, requires them to grant "such relief as the court determines is appropriate."[10] The IDEA and its regulations,[11] however, are largely silent about the remedial authority of the impartial H/ROs.[12]

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[7] 20 U.S.C. § 1415(f)–(g) (2016); *see also* 34 C.F.R. §§ 300.514(b), 300.516 (2009) (indicating situations in which appeal or civil action may be available). A gradually decreased number of states (currently, 10) have a second review-officer tier, with the remaining 34 states opting for a one-tier, state-level hearing officer system. Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3 (2010). This survey also revealed a gradual trend toward full-time ALJs at the first tier. *Id*.

[8] 20 U.S.C. § 1415(i)(2) (2016); *see also* 34 C.F.R. § 300.516(a) (2009) (stating that a party may bring a claim in a "district court of the United States without regard to the amount in controversy").

[9] 20 U.S.C. § 1415(i)(3) (2016); *see also* 34 C.F.R. § 300.517 (2009) (requiring that the fees be reasonable).

[10] 20 U.S.C. § 1415(i)(2)(C)(iii) (2016); 34 C.F.R. § 300.516(c)(3) (2009). For a recent analysis of the boundaries for a court's remedial authority under the IDEA, see Garcia v. Bd. of Educ., 520 F.3d 1116, 1129–31 (10th Cir. 2008).

[11] In contrast to the silence regarding hearing/review officers (H/ROs), the regulations explicitly provide the state complaint process, which is the alternate administrative dispute resolution mechanism, with express remedies, including expense reimbursement and compensatory education. 34 C.F.R. § 300.141(b)(1) (2009).

[12] There are limited exceptions. The first is an injunction, analogous to the judicial authority construed in *Honig v. Doe*, 484 U.S. 305, 328 (1988), to change the placement of the child on an interim basis in narrowly specified, danger-based disciplinary circumstances. 20 U.S.C. § 1415(k)(2) (2016). In contrast with the provision allocating to the IEP team the determination of the other interim placements, 20 U.S.C. § 1415(k)(2) (2016); 34 C.F.R. § 300.531 (2009), the hearing officer's authority for *Honig*-type situations appears to be injunctive, rather than merely declaratory, relief. The 2004 IDEA reauthorization deleted the criteria for such interim placements, suggesting that the hearing officer is not limited to the district proposal. 20 U.S.C. § 1415(k)(3)(B)(ii) (2016). Second, for disciplinary changes in placement more generally, the IDEA expressly authorizes the hearing officer to reinstate the original placement. *Id*.; 34 C.F.R § 300.532(b)(2). A third limited exception is the declaratory or injunctive authority, unless inconsistent with state law, to override a refusal of parental consent to an initial evaluation or re-evaluation. 20 U.S.C. § 1414(a)(1)(C)(ii) (2016); 34 C.F.R. § 300.300(a)(3)(i), (c)(2)(ii) (2009). With regard to initial services, however, the 2004 IDEA

In the expansive litigation under the IDEA,[13] courts have exercised various traditional forms of relief, primarily in the form of the injunction-based, specialized equitable remedies of tuition reimbursement[14] and compensatory education.[15] In contrast, the

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reauthorization codified the administering agency's interpretation that hearing officers lack such overriding authority for parental refusals of consent. 20 U.S.C. § 1414(a)(1)(D)); *see also* Letter to Manasevit, 41 IDELR ¶ 36, at *1–2 (OSEP 2003); Letter to Gagliardi, 36 IDELR ¶ 267, at *2 (OSERS 2001); Letter to Cox, 36 IDELR ¶ 66, at *2 (OSEP 2001) (noting that the U.S. Department of Education's Office of Special Education Programs (OSEP) interpreted the IDEA as permitting the overriding of parental refusal only with regard to evaluations). Third and most significantly, the IDEA specifically grants not only judges, but also hearing officers the authority to issue tuition reimbursement; however, in odd partial contradiction, the IDEA limits the equitable step to "a *judicial* finding of unreasonableness." 20 U.S.C. § 1412(a)(10)(C)(ii), (a)(10)(C)(iii)(III) (2016) (emphasis added); *see also* 34 C.F.R. § 300.148(d)(3) (2009) (implementing the reimbursement limitation). In its recent ruling regarding tuition reimbursement, the Supreme Court incidentally rejected the defendant-district's argument that asserted that the broad remedial authority expressly granted to courts (*supra* note 10 and accompanying text) contradicted this specific remedial authority granted to hearing officers. Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 244 n.11 (2009). Finally, in limiting the hearing officer's authority to find a denial of FAPE on circumscribed, basically prejudicial procedural violations, the 2004 IDEA reauthorization expressly recognized a hearing officer's authority to order a district to comply with the Act's pertinent procedural requirements. 20 U.S.C. § 1415(f)(e)(E) (2016); *see also* 34 C.F.R. § 300.148(c), (d)(3) (2009) (mirroring this provision).

[13] *See* Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731 (2002) (tracing trends in special education case law at the administrative level and published court decisions).

[14] *See* Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 EDUC. L. REP. 785 (2012) (compiling case law for the multi-part test); Thomas A. Mayes & Perry A. Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350 (2001) (analyzing case law in reference to the *Burlington-Carter* test for tuition reimbursement).

[15] *See* Terry Jean Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of remedies?* 45 URB. LAWYER 281 (2013) (advocating a flexible hybrid approach); Perry A. Zirkel, *Compensatory Education Services: The Next Annotated Update of the Law*, 336 EDUC. L. REP. 654 (2016) (canvassing the case law concerning compensatory education); *see also* Perry A. Zirkel, *Two Competing Approaches for Calculating Compensatory Education under the IDEA: An Update*, 339 EDUC. L. REP. 10 (2017) (explaining the case law concerning the quantitative and qualitative approached to calculate compensatory

courts have increasingly agreed that the IDEA, with or without § 1983,[16] does not allow for the legal remedy of money damages.[17]

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education); Perry A. Zirkel, *Compensatory Education Under the Individuals with Disabilities Act*, 110 PENN. ST. L. REV. 879 (2006) (arguing for more consistency between analogous approaches for compensatory education and tuition reimbursement).

[16] *See infra* note 169 (explaining that the appropriate avenue to enforce an H/RO order is in court via a § 1983 action). For related articles, *see e.g.* Terry Jean Seligmann, *A Diller, A Dollar: Section 1983 Damage Claims in Special Education Lawsuits*, 36 GA. L. REV. 405 (2001); Ralph D. Mawdsley, *A Section 1983 Cause of Action Under IDEA? Measuring the Effect of* Gonzaga University v. Doe, 170 EDUC. L. REP. 425 (2002).

[17] *Compare* C.O. v. Portland Pub. Sch., 679 F.3d 1162 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 859 (2013) (interpreting IDEA as not providing money damages), A.W. v. Jersey City Pub. Sch., 486 F.3d 791 (3d Cir. 2007) (reversing the Third Circuit's position, which had previously permitted compensatory damages under the IDEA via § 1983), Diaz-Fonseca v. Commonwealth of Puerto Rico, 451 F.3d 13 (1st Cir. 2006) (interpreting the IDEA as not providing money damages), Ortega v. Bibb Cty. Sch. Dist., 397 F.3d 1321 (11th Cir. 2005) (rejecting the availability of tort-like relief under IDEA as inconsistent with its purpose as a social-welfare mechanism to provide appropriate educational services), Polera v. Bd. of Educ., 288 F.3d 478 (2d Cir. 2002) (discussing the situation in which awarding money damages is the only way to compensate for the grievance from the situation in which the injured party failed to timely pursue effective remedies), Padilla v. Sch. Dist. No. 1, 233 F.3d 1268 (10th Cir. 2000) (opining that, even if damages are available under the IDEA, they should be awarded in a judicial forum and not in an administrative hearing), Thompson v. Bd. of Special Sch. Dist. No. 1, 144 F.3d 574 (8th Cir. 1998) (denying compensatory damages because neither general nor punitive damages are available under the IDEA), Sellers v. Sch. Bd., 141 F.3d 524 (4th Cir. 1998) (rejecting the argument that compensatory and punitive damages should be awarded because the violation of IDEA amounted to educational malpractice), *and* Charlie F. v. Bd. of Educ., 98 F.3d 989 (7th Cir. 1996) (rejecting money damages as inconsistent with the IDEA's structure of elaborate provision for educational services), *with* Goleta Union Elementary Sch. Dist. v. Ordway, 248 F. Supp. 2d 936, 939 (C.D. Cal. 2002) (deducing congressional intent to provide a plaintiff with recovery under § 1983 for violations of the IDEA), Zearley v. Ackerman, 116 F. Supp. 2d 109, 114 (D.D.C. 2000) (joining the Third Circuit's previous position that there is an implied right of action for monetary damages for § 1983 claims premised on IDEA violations), *and* L.C. v. Utah State Bd. of Educ., 57 F. Supp. 2d 1214 (D. Utah 1999) (granting money damages under the IDEA, as well as under § 1983, for violation of due process rights provided under the IDEA). The case law is limited and similarly split with regard to punitive damages. *Compare* T.B. v. Upper Dublin Sch. Dist., 40 IDELR ¶ 67, at *2 (E.D. Pa. 2003) (analogizing the funding conditions of the IDEA to a contract and noting that punitive damages are not available in breach of contract

But what have the courts and other sources of legal authority delineated as the boundaries for H/ROs' remedial authority?

The purpose of this article is to provide an updated demarcation of the legal basis and boundaries of H/ROs' remedial authority under the IDEA and correlative state special education laws.[18] The sources for this synthesis are pertinent court decisions, published H/RO decisions, and interpretations of the Department of Education's Office of Special Education Programs (OSEP) to date.[19] The scope of this article, however, does not extend to the related issues of the deference accorded to[20] or by[21] H/ROs under the IDEA; H/ROs'

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cases), *and* Appleton Area Sch. Dist. v. Benson, 32 IDELR ¶ 91, at *7 (E.D. Wis. 2000) (finding that punitive damages are not available under IDEA), *with* Irene B. v. Phila. Acad. Charter Sch., 38 IDELR ¶ 183, at *12 (E.D. Pa. 2003) (allowing a claim for punitive damages against an individual), *and* Woods v. N.J. Dep't of Educ., 796 F. Supp. 767, 776 (D.N.J. 1992) (quoting 20 U.S.C. § 1415(e)(2) (2016) and citing *Burlington Sch. Comm. v. Mass. Dep't of Educ*., 471 U.S. 359 (1985)) (holding that the IDEA authorized punitive damages, based on the language that the court may "grant such relief as [it] determines is appropriate").

[18] For an empirical analysis of the frequency and outcomes of H/RO as well as court decisions specific to remedies, see Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 220 (2013). For related recommendations for H/ROs, see Perry A. Zirkel, *Appropriate Decisions under the Individuals with Disabilities Education Act*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 243 (2013).

[19] The primary publication for H/RO decisions (designated in the citations as "SEA" inasmuch as the state education agency is responsible for the H/RO system) and Department of Education's Office of Special Education Programs (OSEP) interpretations is the Individuals with Disabilities Education Law Report (IDELR) and its predecessor, the Education of the Handicapped Law Report (EHLR). The representativeness of the IDELR's sampling of H/RO decisions is subject to question. *See* Anastasia D'Angelo, Gary Lutz & Perry A. Zirkel, *Are Published IDEA Hearing Officer Decisions Representative?*, 14 J. DISABILITY POL'Y STUD. 241 (2004) (examining previous hearing officer decisions under IDEA to determine whether they were representative of the outcomes and frequency of published and unpublished opinions). For the extent of authority of OSEP letters, see Perry Zirkel, *Do OSEP Policy Letters Have Legal Weight?* 171 EDUC. L. REP. 391 (2002).

[20] *See* Perry A. Zirkel, *Judicial Appeals of Hearing/Review Officer Decisions under the IDEA*, 78 EXCEPTIONAL CHILD. 375 (2012) (finding high degree of judicial deference to hearing/review officer outcomes); James Newcomer & Perry A. Zirkel, *An Analysis of the Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469 (1999) (tracking court cases concerning special education disputes under the administrative and judicial venues).

[21] In general, H/ROs and courts defer to school districts in staff and

impartiality[22] or, to the extent that it does not directly intertwine with remedial authority,[23] H/ROs' jurisdiction[24] under the IDEA; the statute of limitations for filing for a first- or second-tier administrative proceeding under the IDEA;[25] the finality principle for

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methodology selection cases; *see, e.g.*, Perry Zirkel, *Know Legal Boundaries with Student Evaluation Provisions*, 17 THE SPECIAL EDUCATOR 3 (2002); Perry Zirkel, *Do School Districts Typically Win Methodology Cases*, 13 SPECIAL EDUCATOR 11 (1997); Tara Skibitsky Levinson & Perry Zirkel, *Parents vs. Districts in Selecting the Psychologist: Who Wins?*, 30 COMMUNIQUÉ 10 (2001) (available from the Nat'l Ass'n of Sch. Psychologists).

[22] *See* Peter J. Maher & Perry A. Zirkel, *Impartiality of Hearing and Review Officers under the Individuals with Disabilities Education Act*, 83 N. DAKOTA L. REV. 109 (2007) (updating the Drager & Zirkel article via a checklist format); Elaine A. Drager & Perry A. Zirkel, *Impartiality Under the Individuals with Disabilities Education Act*, 86 EDUC. L. REP. 11 (1993) (synthesizing legal boundaries of impartiality under the IDEA).

[23] *See, e.g.*, Douglas v. Cal. Office of Admin. Hearings, 78 F. Supp. 3d 942 (N.D. Cal. 2015) (vacating H/RO's remedial order for lack of jurisdiction based on interagency agreement under state law); S. Kingston Sch. Comm. v. Joanna S., 62 IDELR ¶ 238 (D.R.I. 2014) (vacating H/RO's remedial order for lack of jurisdiction based on settlement agreement); Indep. Sch. Dist. No. 432 v. J.H., 8 F. Supp. 2d. 1166 (D. Minn. 1998) (invalidating a hearing officer order for lack of jurisdiction); Bd. of Educ. of Ellenville Cent. Sch. Dist., 28 IDELR 337, at *5 (N.Y. SEA 1998) (upholding by review officer of a hearing officer's determination of retained jurisdiction to implement his own injunction). Jurisdiction and remedial authority are overlapping rather than mutually exclusive topics. *See, e.g.*, Letter to Anonymous, 35 IDELR ¶ 35 (OSEP 2000) (discussing IHO's remedial authority in light of IDEA subject matter jurisdiction). Thus, the boundary for is inevitably blurry as to which legal authority to include herein.

[24] For cases dealing with jurisdiction of H/ROs, *see, e.g.*, Va. Office of Prot. & Advocacy v. Virginia, 262 F. Supp. 2d 648 (E.D. Va. 2003); P.N. v. Greco, 282 F. Supp. 2d 221 (D.N.J. 2003); Gary S. v. Manchester Sch. Dist., 241 F. Supp. 2d 111 (D.N.H. 2003); *cf.* Bd. of Educ. v. Johnson, 534 F. Supp. 2d 231 (D. Del. 2008) (ruling that H/ROs lack remedial authority to order services to parentally placed private school students beyond district's limited IDEA's obligations to such students).

[25] For application of the statute of limitations that the 2004 amendments expressly included in the IDEA for the first time, *see, e.g.*, Steven I. v. Cent. Bucks Sch. Dist., 618 F.3d 411 (3d Cir. 2010) (holding that the IDEA's two-year statute of limitations applies to claims predating passage of the IDEA); D.C. v. Klein Indep. Sch. Dist., 711 F. Supp. 2d 793 (S.D. Tex. 2010) (applying the different statute of limitations that the IDEA allows under state law). For a synthesis of this topic prior to the 2004 amendments, see Perry A. Zirkel & Peter J. Maher, *The Statute of Limitations Under the Individuals with Disabilities Act*, 175 EDUC. L. REP. 1 (2003) (surveying cases in which courts or H/ROs have established statutes

H/RO decisions,[26] including whether the IDEA permits interlocutory appeals of H/ROs' interim decisions,[27] or hearing officers' remedial authority under § 504.[28] Moreover, the boundaries of this article are limited to the scope of the H/ROs' remedial authority, not to the standards they use to reach remedies.[29] Finally, this article only addresses H/ROs' remedial authority as a result of, not during,[30] the prehearing and hearing process.

To a large extent, the pertinent legal authorities treat the remedial authority of H/ROs as derived from and largely commensurate with the remedial authority of the courts.[31] The following parts of this

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of limitations under the IDEA via the borrowing analogy).

[26] *See, e.g.*, Perry A. Zirkel, "*Finality" under the Individuals with Disabilities Education Act: Its Meaning and Applications*, 289 EDUC. L. REP. 27 (2013).

[27] *See, e.g.*, M.M. v. Lafayette Sch. Dist., 681 F.3d 1082 (9th Cir. 2012) (ruling that IDEA does not permit judicial appeal of hearing officer's pretrial order).

[28] To date, there is negligible authority specific to this subject. For a comprehensive source that includes hearing officer decisions under § 504, see PERRY A. ZIRKEL, SECTION 504, THE ADA, AND THE SCHOOLS (3d ed. 2013). For one of the rare examples of applicable authority, see *Albuquerque Pub. Sch.*, 38 IDELR ¶ 235, at *20 (N.M. SEA 2002). For the threshold issues of jurisdiction and procedures for Section 504 hearings, see Perry A. Zirkel, *Impartial Hearings under Section 504*, 334 EDUC. L. REP. 51(2016); Perry A. Zirkel, *The Public Schools' Obligation for Impartial Hearings under Section 504*, 22 WIDENER L.J. 135 (2012).

[29] For sources that do explore these issues, see Mayes & Zirkel, *supra* note 14; Zirkel, *supra* note 15. For the similarly separable issue of the clarity and workability of H/RO remedial orders, *see, 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); E.C. v. Lewisville Indep. Sch. Dist., 58 IDELR ¶ 219 (E.D. Tex. 2011).

[30] *See, e.g.*, 34 C.F.R. §§ 300.512(a)(3), (b)(1) (2009) (enforcing a five-day rule for evidence, including evaluations); *Id.* § 300.502(d) (ordering an independent educational evaluation "as part of the hearing"); B.D. v. District of Columbia, 817 F.3d 792 (D.C. Cir. 2016) (strongly suggesting evaluation order if needed for qualitatively correct compensatory education award); S.T. *ex rel.* S.F. v. Sch. Bd. of Seminole Cty, 783 So. 2d 1232 (Fla. Dist. Ct. App. 2001) (concerning authority to order discovery).

[31] For the broad remedial authority of courts under the IDEA, see 20 U.S.C. § 1415(i)(1)(C) (2016) (providing that the reviewing court "shall grant such relief as the court determines is appropriate"). For the corresponding connection to H/ROs, see, *e.g.*, Cocores v. Portsmouth, 779 F. Supp. 203, 205 (D.N.H. 1991) (quoting S-1 v. Spangler, 650 F. Supp. 1427, 1431 (M.D.N.C. 1986), *vacated as moot*, 832 F.2d 294 (4th Cir. 1987)) ("It seems incongruous that Congress intended the reviewing court to maintain greater authority to order relief than the hearing officer . . . ."); Ivan P. v. Westport Bd. of Educ., 865 F. Supp. 74, 80 (D. Conn.

article delineate the specific boundaries of this derived remedial authority in special education cases with respect to each of the major categories of relief—declaratory, injunctive, and monetary—in this order of approximately ascending strength. When the applicable source—court, H/RO, or OSEP—addresses multiple forms of relief, I

1994); Letter to Kohn, 17 IDELR 522 (OSEP 1991) (opining that "[a]lthough Part B does not address the specific remedies an [IHO] may order upon a finding that a child has been denied FAPE, OSEP's position is that, based upon the facts and circumstances of each individual case, an [IHO] has the authority to grant any relief he/she deems necessary"); *cf*. Hesling v. Avon Grove Sch. Dist., 428 F. Supp. 2d 262, 273 (E.D. Pa. 2006) (commenting that "[t]he case law is clear that various forms of equitable relief, including the issuance of a declaratory judgment, can be obtained through the IDEA's administrative proceedings"). Among IDEA H/ROs, the leading, perhaps only, exception to this broad derivative view is the state of Florida, where some of the hearing officers have interpreted Florida law, including its constitution and case law, as precluding their remedial authority with regard to tuition reimbursement and compensatory education. Email from John VanLaningham, Administrative Law Judge, Florida Office of Administrative Hearings, to Perry A. Zirkel, Professor, Lehigh University, Oct. 2, 2010 (on file with the author). The Eleventh Circuit avoided determining whether hearing officers may have less remedial authority than courts specifically with regard to tuition reimbursement, concluding that the issue was not justiciable in the absence of a hearing officer's finding that the parent met the criteria for this remedy. L.M.P. v. Florida Dep't of Educ., 345 F. App'x 428 (11th Cir. 2009). The Supreme Court's recent clarification, in *Forest Grove*, that reinforces the remedial authority of H/ROs (*supra* note 12) and Florida's 2009 legislation that seems to provide a reminder of federal preemption (FLA. STAT. § 1003.571(1) (2013) (requiring the state board of education to comply with the IDEA) may mitigate or eliminate this state-specific restrictive remedial interpretation. Indeed, on remand in *L.M.P.*, the federal district court rejected the ALJ's rationale. L.M.P. v. Sch. Bd. of Broward Cty., 64 IDELR ¶ 66 (S.D. Fla. 2015). However, a recent Florida ALJ decision seems to suggest that the restrictive view may persist. Broward Cty. Sch. Bd., 63 IDELR ¶ 208 (Fla. SEA 2014). Although not explained in this decision, the basis for this jurisdictional denial is a Florida regulation that expressly authorizes IDEA IHOs to award tuition reimbursement. Email from Robert Meale, Administrative Law Judge, Florida Office of Administrative Hearings, Feb. 19, 2015 (on file with the author), citing FLA. ADMIN. CODE ANN. R. 6A-6.03311(7)(c) (2013). Interpreting this regulation as precluding compensatory education is clearly questionable in light of the intrinsic connection between these two remedies and the recognition throughout the rest of the country that the IDEA authorizes IHOs to award both of these forms of equitable relief. *See, e.g.*, Perry A. Zirkel, *Compensatory Education under the Individuals with Disabilities Education Act*, 110 PENN. STATE L. REV. 879, 884 n.31 (2006).

categorize the decision as the strongest relief except when there is separate treatment of each remedy.

II. H/RO AUTHORITY TO ISSUE DECLARATORY RELIEF

It is undisputed that an H/RO has authority to determine: (1) whether a student is covered under one or more of the eligibility classifications of the IDEA;[32] (2) whether a district's evaluation or the parents' independent educational evaluation (IEE) is appropriate;[33] and (3) whether a student's program and placement are appropriate.[34] Thus far, the legal limitations on an H/RO's authority to issue declaratory relief with respect to these questions have been scant. Courts have, however, restricted H/ROs' authority to issue declaratory relief with respect to the following issues.

First, accompanying its even more puzzling general proscription,[35] an early federal district court in the District of

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[32] 34 C.F.R. § 300.507(a)(1) (2009). For the eligibility classifications, see *id.* § 300.8(c).

[33] *Id.* § 300.507(a)(1). For short and comprehensive syntheses, respectively, of the IEE –at-public expense remedy, which is injunctive relief that is often retrospective and that includes this determination at the threshold step, see Perry A. Zirkel, *Independent Educational Evaluation Reimbursements: The Latest Update*, 341 EDUC. L. REP. 445 (2017); Perry A. Zirkel, *Independent Educational Evaluations at District Expense under the Individuals with Disabilities Education Act*, 38 J.L. & EDUC. 323 (2009). For the regulations specific to IEEs, see 34 C.F.R. § 300.502 (2009). In some cases, the remedy is not reimbursement because the parent has requested but not arranged for an IEE. For example, in a recent unpublished decision the Third Circuit concluded that upon finding the district's evaluation inappropriate, the IHO lacks authority to order an expanded district evaluation rather than a publicly funded IEE. M.Z. v. Bethlehem Area Sch. Dist., 521 F. App'x 74 (3d Cir. 2013). For the separable IHO authority to issue an injunction for an IEE during the hearing, see *supra* note 30.

[34] 34 C.F.R. § 300.507(a)(1) (2009). For the FAPE and placement regulations, see *id.* § 300.17, .104, .115–.116. On occasion, the H/RO waffles on the yes-no issue of appropriateness. *See* Lampeter Strasburg Sch. Dist., 43 IDELR ¶ 17, at *2 (Pa. SEA 2005) ("[T]he IEP is appropriate for what it is . . . . But it is wholly lacking . . . . It is not necessarily inappropriate, but it is only marginally appropriate.").

[35] S.G. v. District of Columbia, 498 F. Supp. 2d 304, 313 (D.D.C. 2007) (ruling that the IDEA does not provide for declaratory relief). The court cited its earlier decision in Kaseman v. District of Columbia, 329 F. Supp. 2d 20, 32 (D.D.C. 2004), which indeed included this pronouncement, but only in cryptic

Columbia appears to have limited an H/RO's ability to address a parent's proposed placement when the child is still in the district's placement, as distinguished from a tuition reimbursement case in which the parent has unilaterally placed their child in a private placement. Specifically, in *Davis v. District of Columbia Board of Education*, the court ruled that when the child is still in the district's placement, hearing officers do not have the authority to issue declaratory relief, much less injunctive relief, specific to the appropriateness of the parent's proposed alternative placement.[36] According to this court, in said context, an H/RO is limited to declaring whether the placement that the district has offered is appropriate.[37] If the H/RO's determination is that said placement is inappropriate, the *Davis* interpretation requires the hearing officer to remand the issue to the IEP team to develop an appropriate placement.[38] In rejecting the plaintiff-parent's reliance on an OSEP policy letter that adopted a contrary interpretation,[39] however, the court relied on a consent decree that is specific to the District of Columbia.[40]

Perhaps due to the early date[41] and the limiting legal context[42] of *Davis*, most H/ROs—and courts[43]—have ignored the *Davis* ruling.

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application to a requested injunction for an unripe controversy, thus inferably referring to the general unavailability of advisory opinions).

[36] 530 F. Supp. 1209, 1215 (D.D.C. 1982).

[37] *Id.* at 1211.

[38] The court added that the hearing officer "may, and indeed, should" make a recommendation for an appropriate program or placement. *Id*. at 1212.

[39] Letter to Eig, EHLR 211:174 (OSEP 1980) ("Where 'appropriate' placement is at issue, the hearing officer's scope of authority includes deciding what placement would be appropriate for that child."). In contrast, the Department of Education's Office for Civil Rights (OCR) recognized the local limitation of the *Mills* consent decree in reaching a less broad, but perhaps intermediate, interpretation. District of Columbia Pub. Sch., EHLR 257:208 (OCR 1981).

[40] *Davis*, 530 F. Supp. at 1212–13.

[41] For example, this decision pre-dated the Supreme Court's landmark FAPE decision in Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).

[42] *See supra* notes 39–40 and accompanying text.

[43] For early authority that adopted the *Davis* view, see Hendry Cty. Sch. Bd. v. Kujawski, 408 So. 2d 566 (Fla. Dist. Ct. App. 1986) (overruling the IHO's *sua sponte* order of parents' proposed placement and, citing *Davis*, limiting it to merely recommend a different placement if he finds the district's proposal inappropriate); *cf*. Natrona Cty. Sch. Dist. No. 1 v. McKnight, 764 P.2d 1039 (Wyo. 1988) (citing

Rather, H/ROs have rather routinely considered the appropriateness of a parental prospective placement proposal in cases which the H/ROs declare that the district's placement is inappropriate.[44] In some jurisdictions, state law resolves any problem by specifically authorizing the H/RO to determine a placement even if not proposed by either party.[45]

Davis to support the reversal of IHO's authority to order compensatory education beyond age 21). However, in more recent cases the same court and others have not only declared, but also ordered the parents' proposed placement. Brown v. District of Columbia, 179 F. Supp. 3d 15 (D.D.C. 2016) (ordering a private placement as compensatory education); Q.C-C. v. District of Columbia, 164 F. Supp. 3d 35 (D.D.C. 2015) (ordering, on prospective basis, continuation of unilateral private placement for denial of FAPE); District of Columbia v. Kirksey-Harrington, 54 IDELR ¶ 46 (D.D.C. 2015) (upholding hearing officer's order in favor of parent's request placement, although hearing officer oddly termed it as maintaining rather than changing it); Diatta v. District of Columbia, 319 F. Supp. 2d 57, 65 (D.D.C. 2004) (ordering it under the rubric of compensatory education and characterizing the hearing officer's denial of the requested placement as an abdication of his authority); *see also* Manchester Sch. Dist. v. Christopher B., 807 F. Supp. 860 (D.N.H. 1992) (ordering the district to implement the parents' proposed placement). Presumably extending to H/ROs, the D.C. Circuit Court of Appeals provided the authority and multi-factor standard for court orders for prospective placements. *See, e.g.*, Branham v. Gov't of District of Columbia, 427 F.3d 7 (D.C. Cir. 2005). Citing another D.C. decision after *Davis* that presumably sanctions injunctive authority, a pair of respected commentators concluded the following: "The better view appears to be that the hearing officer is not limited to accepting or rejecting the placement proposed by the [district] and may consider placements proposed by the parents." THOMAS GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 160 (2001) (citing Diamond v. McKenzie, 602 F. Supp. 632 (D.D.C. 1985)). Finally, for the distinctive remedy of ordering placement in a private school, as compensatory education for denial of FAPE, see Ravenswood City Sch. Dist. v. J.S., 870 F. Supp. 2d 780 (N.D. Cal. 2012).

[44] *See, e.g.*, Grossmont Union High Sch. Dist., 44 IDELR ¶ 147, at *26 (Cal. SEA 2005); Vincennes Cmty. Sch., 22 IDELR 840, at *5 (Ind. SEA 1995); Douglas Pub. Sch., 56 IDELR ¶ 28, at *12 (Mass. SEA 2010); Taunton Pub. Sch. 27 IDELR 108, at *5 (Mass. SEA 1997); Maine Sch. Admin. Dist. No. 3, 22 IDELR 1083, at *4 (Me. SEA 1995) (ordering interagency arrangement for residential placement per parents' position); Mountain Lakes Bd. of Educ., 21 IDELR 962, at *3 (N.J. SEA 1994); Foxborough Pub. Sch., 21 IDELR 1204, at *4 (Mass. SEA 1994) (ordering placements that were very similar to parents' proposal).

[45] *See, e.g.*, MASS. GEN. LAWS ch. 71B, § 3 (2011) (authorizing the hearing officer to order "either of [the parties' proposed] placements or services with

A second and more generally accepted limitation is that H/ROs typically decline to declare which side is the prevailing party,[46] except where state law requires H/ROs to include this determination for purposes of awarding attorneys' fees.[47] The rare examples are California and Tennessee, which each requires the hearing officer to make this explicit determination on an issue-by-issue basis.[48]

The third limitation is more indirect and generic in terms of whether an H/RO may use declaratory or other relief to decide an issue *sua sponte*. In the first published decision on point, Pennsylvania's intermediate appellate court only indirectly answered this question in the negative, focusing on the underlying FAPE-denial issue rather than the remedy itself.[49] Based on express limitations in the subsequent 2004 amendments of the IDEA,[50] which may be considered jurisdictional and thus also applying to injunctive relief, a

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modifications, or such alternative programs or services as may be required to assure such development of such child").

[46] *See* Rockport Pub. Sch., 36 IDELR ¶ 27, at 100 (Mass. SEA 2002) (finding it "inappropriate . . . to issue an order with respect to . . . prevailing party status"). *But see* Broward Cty. Sch. Dist., 66 IDELR ¶ 296 (Fla. SEA 2016) (ordering district to pay parents' attorney's fees, mis-citing the state regulation providing such authority for courts); Seattle Sch. Dist., 34 IDELR ¶ 196, at 760 (Wash. SEA 2001) (holding that the district denied the student a FAPE and requiring the district to reimburse the parents for any costs incurred for the student's tuition at a private school).

[47] Another less frequent exception is where a court expressly delegates this determination to the H/RO; *see* Burlington Sch. Comm., 20 IDELR 1103, at *6 (Vt. SEA 1994) (holding that prevailing parents are entitled to attorneys' fees). For the related but separate issue of attorneys' sanctions, which are a form of injunctive relief, see *infra* notes 175–80 and accompanying text.

[48] *See* Clovis Unified Sch. Dist., 36 IDELR ¶ 201, at *19 (Cal. SEA 2001) (citing CAL. EDUC. CODE § 56507(d)); TENN. STAT. ANN. § 49-10-606(e) (2016).

[49] Mifflin Cty. Sch. Dist. v. Special Educ. Due Process Appeals Bd., 800 A.2d 1010 (Pa. Commw. Ct. 2002); *cf.* Saki v. State of Haw., 50 IDELR ¶ 103 (D. Haw, 2008) (applying the limitation in terms of jurisdiction rather than remedies). In distinguishing previous Pennsylvania cases, the *Mifflin* court provided a rather relaxed boundary to *sua sponte* considerations. *Id*. at 1014 (distinguishing Stroudsburg Area Sch. Dist. v. Jared M., 712 A.2d 807 (Pa. Commw. Ct. 1998) and Millersburg Area Sch. Dist. v. Lynda T., 707 A.2d 572 (Pa. Commw. Ct. 1998)). The same court applied this reasoning to injunctive relief. *See infra* note 55 and accompanying text.

[50] 20 U.S.C. § 1415(f)(3)(B) (2012). For the limited exception, which requires the H/RO's approval, see *id*. § 1415(c)(2)(E)(i).

recent published decision reached the same result, again focusing on the underlying claim rather than the remedial issue.[51] The limited exception, according to that court's interpretation of the IDEA's administering agency, is that an H/RO has the authority to decide the child's pendent, or "stay-put," placement under the IDEA,[52] without either party raising the issue, which in this context may amount to declaratory relief.[53] Yet, on occasion, H/ROs exercise such authority without clear consideration of this boundary and its exception. For example, a review officer in New York decided that a plaintiff-child was not eligible for special education even though the parties had stipulated at the hearing that the child was eligible and, thus, it was not an issue on appeal to the review officer.[54]

Finally, a state law may disallow particular prospective placements, which is binding on H/ROs and—according to a recent ruling—courts.[55]

III. H/RO AUTHORITY TO ISSUE INJUNCTIVE RELIEF

Although there is no bright line distinction between declaratory and injunctive relief in this context,[56] the boundaries of H/ROs' injunctive authority have been the subject of more extensive debate than the boundaries of H/ROs' declaratory relief. As a threshold matter, the Pennsylvania courts have applied the same relatively

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[51] C.W.L. v. Pelham Free Sch. Dist., 149 F. Supp. 3d 351 (S.D.N.Y. 2015).

[52] 20 U.S.C. § 1415(j) (2016); 34 C.F.R. § 300.518 (2009).

[53] Letter to Armstrong, 28 IDELR 303, at *3 (OSEP 1997). However, as a New York review officer decision illustrated, a hearing officer may not issue a stay-put ruling after issuing their final decision. Bd. of Educ. of Lindenhurst Union Free Sch. Dist., 48 IDELR ¶ 54 (N.Y. SEA 2007). As to whether the district must provide reimbursement for the stay-put, if it is the unilateral parental, placement, OSEP has opined that such decisions are "best left to State law, hearing officers, and courts." Letter to Philpot, 60 IDELR ¶ 140 (OSEP 2012).

[54] Lansingburgh Sch. Dist., EHLR 508:122 (N.Y. SEA 1986).

[55] Struble v. Fallbrook Union High Sch., 56 IDELR ¶ 4 (S.D. Cal. 2011).

[56] H/ROs in some jurisdictions—for example, Pennsylvania—use the term "order" generically as the caption for the remedies section of their written opinions. As another example of the blurred boundary, an H/RO's declaratory determination that the district's or the parent's proposed program or placement is appropriate in effect amounts to an order to effectuate said program or placement. For more of these forms of relief, see *supra* note 12.

relaxed *sua sponte* limitation, which these courts established for declaratory relief, to H/ROs' injunctive authority.[57] Other jurisdictions have applied this same limitation[58] with similar far from strict latitude.[59] The rest of this Part organizes the applicable rulings in terms of the subject of the injunctive relief, ranging from

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[57] *See, e.g.*, Mars Area Sch. Dist. v. Laurie L., 827 A.2d 1249, 1257–58 (Pa. Commw. Ct. 2003) (disallowing a reviewing officer's evaluation of issues that a hearing officer did not address); Susquehanna Twp. Sch. Dist. v. Frances J., 823 A.2d 249, 252 (Pa. Commw. Ct. 2003) (concluding that a hearing officer's failure to identify a particular issue did not preclude a review officer from addressing, where the parent had raised, it). The federal courts in the same jurisdiction have done likewise. *See, e.g.*, Neshaminy Sch. Dist. v. Karla B., 26 IDELR 827, at *6 (E.D. Pa. 1997) (concluding that a review panel lacked authority to consider an issue not before the hearing officer).

[58] *See, e.g.*, Slack v. Del. Dep't of Educ., 826 F. Supp. 115, 123 (D. Del. 1993); Hiller v. Bd. of Educ., 674 F. Supp. 73 (N.D.N.Y. 1987) (forbidding reviewing panels from deciding issues not raised by the parties); Sch. Bd. of Martin Cty. v. A.S., 727 So. 2d 1071, 1075 (Fla. Ct. App. 1999) (invalidating an H/RO's *sua sponte* order for additional speech therapy, *citing* Hendry Cty. Sch. Bd. v. Kujawski, 498 So. 2d 566 (Fla. Ct. App. 1986); Lofisa S. v. State of Haw. Dep't of Educ., 60 IDELR ¶ 191 (D. Haw. 2013) (reversing and remanding H/RO's tuition reimbursement ruling based on issues not in parent's complaint); Bd. of Educ. of City Sch. Dist. of N.Y., 31 IDELR ¶ 18, at *3 (N.Y. SEA 1998) (vacating a hearing officer decision to the extent it addressed an issue not raised by the parties); Bd. of Educ. of City Sch. Dist. of N.Y., 23 IDELR 744, at *6 (N.Y. SEA 1995); Fairfax Cty. Pub. Sch., 21 IDELR 1214, at *6 (Va. SEA 1995); Crandon Sch. Dist., 17 EHLR 718, at *5 (Wis. SEA 1991) (finding that a hearing officer lacked authority to consider issues not pertaining to the hearing); *cf.* G.K. v. Montgomery Cty. Intermediate Unit, 65 IDELR ¶ 288 (E.D. Pa. 2015) (upholding IHO decision that parents waived right to compensatory education by not raising it either explicitly or by reasonable implication in their complaint).

[59] *See, e.g.*, District of Columbia v. Pearson, 923 F. Supp. 2d 82 (D.D.C. 2013); District of Columbia v. Doe, 611 F.3d 888, 898 (D.D. Cir. 2010) (holding that hearing officer's order to reduce student's suspension was within his authority based on FAPE even after determining the student's misconduct was not a manifestation of his disability); J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74 (N.D.N.Y. 2008) (regarding transition services as implicit within FAPE issue); Lago Vista Unified Sch. Dist., 50 IDELR ¶ 104 (W.D. Tex. 2008) (reversing tuition reimbursement, although also citing alternative grounds); Dep't of Educ. v. E.B., 45 IDELR ¶ 249 (D. Haw. 2006) (ducking *sua sponte* issue); Hyde Park Cent. Sch. Dist. v. Peter C., 21 IDELR 354, at *5 (S.D.N.Y. 1994) (holding that the state review officer did not act beyond his authority by ordering independent evaluations paid for by the school district). As in various other areas of remedial boundaries, the treatment overlaps with subject matter jurisdiction.

evaluations to attorneys' fees.

Another general limitation on the H/RO's remedial authority, typically in the form of injunctive relief, is when the defendant district has already fully rectified the deficiency.[60] For example, in a New York case, the review officer overturned the hearing officer's order to evaluate the student for specific learning disability in math where the parties had agreed to the math evaluation and the district had completed it.[61] Although based on mootness at the judicial review level, a federal district court decision in the District of Columbia adds further support by granting the district's motion for summary judgment because as a result of the hearing officer's decision, the district provided all of the relief to which the parent was entitled.[62]

A final and possibly all-encompassing limitation, applicable to all forms of remedial relief (and attorneys' fees) under the IDEA is for a child find[63] case where the child is not eligible under the two-pronged standard—meeting the criteria for one or more of the recognized classifications and, as a result, needing special education.[64] The lead case thus far is *D.G. v. Flour Bluff Independent School District*,[65] in which the Fifth Circuit reversed the

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[60] For the obverse, see *In re* Student with a Disability, 44 IDELR ¶ 115 (N.M. SEA 2005) (reversing hearing officer's denial of summary judgment to district that, in the motion, offered all of the relief that the parents requested).

[61] Crown Point Cent. Sch. Dist., 46 IDELR ¶ 269 (N.Y. SEA 2007). At the time of the hearing, the parties were awaiting the results, but there was no evidence of undue delay. The review officer's mootness reasoning for the related issue of the effect of the lack of the evaluation on the previous pertinent period, however, was not cogent as a general matter. A remedy is not necessarily futile and, thus, moot just because the annual IEP has expired.

[62] Green v. District of Columbia, 45 IDELR ¶ 240 (D.D.C. 2006).

[63] "Child find" refers to a district's obligation to evaluate a child when it has reason to suspect that the child may be eligible under the IDEA. *See, e.g.*, 34 C.F.R. § 300.111(a)(1)(i), (c)(1) (2009).

[64] Conversely, in child find cases where the child is determined to be eligible, the remedial authority of IHOs is broad. *See, e.g.*, State of Haw. Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190 (D. Haw. 2001) (upholding IHOs authority to award preplacement hospitalization costs as diagnostic or evaluative).

[65] 481 F. App'x 887 (5th Cir. 2012). For a more recent example, see *M.A. v. Torrington Bd. of Educ.*, 980 F. Supp. 2d 245 (D. Conn. 2013), *further proceedings*, 980 F. Supp. 2d 279 (D. Conn. 2014).

award of compensatory education (and attorneys' fees) where the district violated child find but the child was not eligible.[66]

A. Ordering Evaluations

First, the IDEA expressly provides H/ROs with the authority to override lack of parental consent for initial evaluations and reevaluations except where disallowed by state law.[67] There are many examples of such H/RO orders, which can also be seen as declaratory relief.[68]

A Pennsylvania court decision demarcates two applicable boundaries to H/ROs' injunctive authority with regard to evaluations.[69] This decision, though not officially published, concerns gifted students under state law. Nevertheless, it is available in Individuals with Disabilities Education Law Report (IDELR), and Pennsylvania's intermediate appellate court has treated its gifted students cases without notable distinction from its IDEA cases.[70]

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[66] Although this view strictly meets the eligibility definition in the IDEA, it does not square with the IHO's jurisdiction for identification and evaluation issues and with the child find obligation. Moreover, it is not clear how the IHO or court ultimately determines whether the child was eligible at the relevant time, because in a child find case the evaluation either has not been done or is substantially after the point in time that the district had the requisite reasonable suspicion.

[67] Hyde Park Cent. Sch. Dist. v. Peter C., 21 IDELR 354, at *5; *see supra* note 12. The only other pertinent express authorization is for ordering an IEE, but that authorization applies during the hearing. *See supra* note 30; *see also* Conrad Weiser Area Sch. Dist., 27 IDELR 100, at *3–4 (Pa. SEA 1997). For a review officer decision that interpreted the H/RO's injunctive authority for an IEE during the hearing not to be subject to a *sua sponte* limitation, see Board of Education of Hyde Park Central School District, 29 IDELR 658, at *3 (N.Y SEA 1998). For a court decision that upheld the H/RO's authority to order an overdue reevaluation based in part on this IEE authority, see B.J.S. v. State Educ. Dep't, 815 F. Supp. 2d 601 (W.D.N.Y. 2011). For a court decision that held that this H/RO authority does not extend to evaluations in unaccredited and unapproved placements absent clearer necessity, see Manchester-Essex Reg'l Sch. Comm. v. Bureau of Special Educ. Appeals, 490 F. Supp. 2d 49 (D. Mass. 2007).

[68] *See, e.g.*, Houston Indep. Sch. Dist., 36 IDELR ¶ 286, at *6–7 (Tex. SEA 2002); Altoona Area Sch. Dist., 22 IDELR 1069, at *2 (Pa. SEA 1995); Cayuga Indep. Sch. Dist., 22 IDELR 815, at *4 (Tex. SEA 1995) (permitting school districts to request an order overriding parental lack of consent).

[69] Hempfield Sch. Dist. v. Tyler M., 38 IDELR ¶ 68 (Pa. Commw. Ct. 2003).

[70] *See infra* notes 128–30 and accompanying text. For examples of such

First, relying on its aforementioned[71] decision with regard to declaratory relief under the IDEA, this Pennsylvania court invalidated the H/RO's order for the district to conduct a reevaluation because neither party had raised this issue.[72] Second, the Pennsylvania court alternatively reasoned that the review officer panel erred as a matter of law in ordering a reevaluation because the court had concluded that the district's reevaluation was appropriate.[73]

B. Overriding Refusal of Parental Consent for Services

Prior to the most recent reauthorization of the IDEA, H/ROs' authority to override a refusal of parental consent and thus effectively order the provision of special education services to the child was subject to controversy.[74] Congress has made clear, however, that H/ROs and courts do not have such authority with regard to initial placement.[75]

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interchangeable treatment with regard to the statute of limitations, which is adjacent to or overlapping with remedial authority, see *Carlynton Sch. Dist.*, 815 A.2d 666 (Pa. Commw. Ct. 2003) and *Montour Sch. Dist. v. S.T.*, 805 A.2d 29 (Pa. Commw. Ct. 2002). For an example of differentiation with regard to compensatory education, see *Brownsville Area Sch. Dist. v. Student X*, 729 A.2d 198 (Pa. Commw. Ct. 1999).

[71] *See* Mifflin Cty. Sch. Dist. v. Special Educ. Due Process Appeals Bd., 800 A.2d 1010 (Pa. Commw. Ct. 2002) and text accompanying note 45.

[72] Hempfield Sch. Dist. v. Tyler M., 38 IDELR ¶ 68, at *3.

[73] *Id*.

[74] *Compare* Galena Indep. Sch. Dist., 41 IDELR ¶ 221, at *4 (Tex. SEA 2004), *and* Galveston Indep. Sch. Dist., 36 IDELR ¶ 281, at *3–4 (Tex. SEA 2002) (overriding parental lack of consent), *with* Letter to Manasevit, 41 IDELR ¶ 36, at *1–2 (OSEP 2003) (asserting that Congress had a clear intent for parents to have the final say as to whether children enroll in special education), *and* Letter to Cox, 36 IDELR ¶ 66, at *2 (OSEP 2001). In some states, the administering agency used its funding authority to cause a change in state law to codify its position. *See, e.g.*, 22 PA. CODE § 14.162(c) (2006).

[75] 20 U.S.C. § 1414(a)(1)(D) (2016). This limitation appears in the form of a prohibition against the school district providing services "by utilizing the procedures described in" the adjudicative dispute resolution provisions of the IDEA. *Id.* Conversely, this amendment to the IDEA further indirectly limits the remedial authority of H/ROs and courts by immunizing the school district against a resulting claim for denial of FAPE and by excusing the district from its obligation to convene an IEP meeting and develop an IEP. *Id.*

C. Ordering IEP Revisions

It is not unusual for an H/RO to order revisions in a child's IEP.[76] When the basis for a revision order was a defensible determination that the IEP was inappropriate, such relief would clearly seem to be within an H/RO's discretion unless it is deemed to preempt either the IEP team's responsibility[77] or the parents rights.[78] Conversely, a decision by Florida's intermediate appellate court invalidated an H/RO's order for a district to add specified services to the IEP that were at issue when there was no such determination.[79] Reasoning that the H/RO had concluded that the IEP was appropriate, the court ruled that the order to add services to the IEP was beyond the H/RO's authority.[80] Similarly, a federal district court overruled an H/RO's

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[76] *See, e.g.*, Anaheim Union High Sch. Dist., 34 IDELR ¶ 192, at *10 (Cal. SEA 2001); Oxnard Union Sch. Dist., 30 IDELR 920, at *6 (Cal. SEA 1999); Hillsborough Cty. Sch. Bd., 21 IDELR 191, at *17–18 (Fla. SEA 1994); Clarion-Goldfield Cty. Sch. Dist., 22 IDELR 267, at *18 (Iowa SEA 1994); Somerville Pub. Sch., 22 IDELR 764, at *4 (Mass. SEA 1995); IDELR 1150, at *4 (Me. SEA 1994); Indep. Sch. Dist. No. 283, 22 IDELR 47, at *13–14 (Minn. SEA 1994); Pennsbury Sch. Dist., 22 IDELR Brunswick Sch. Dep't, 22 IDELR 1004, at *7 (Me. SEA 1995); Lewiston Sch. Dep't, 21 823, at *4 (Pa. SEA 1995).

[77] *See, e.g.*, T.G. v. Midland Sch. Dist., 848 F. Supp. 2d 902 (C.D. Ill. 2012); Parents of Danielle v. Massachusetts Dep't of Educ., 430 F. Supp. 2d 3 (D. Mass. 2006); Utica Cmty. Sch., 18 IDELR 980, at *3 (Mich. SEA 1991); *In re* Child with Disabilities, 18 IDELR 1135, at *4 (Mo. SEA 1991); Bensalem Twp. Sch. Dist., 17 EHLR 90 (Pa. SEA 1990); *cf.* Greenville Cty. Sch. Dist., 47 IDELR ¶ 55 (S.C. SEA 2006) (viewing the H/RO's revision as harmless error). An alternate limitation is when an H/RO orders a future change in placement not at issue and, thus, in effect *sua sponte*. *See, e.g.*, Wilkes-Barre Area Sch. Dist., 32 IDELR ¶ 17, at *5 (Pa. SEA 2003); cf. Bd. of Educ. of City Sch. Dist. of New York, 21 IDELR 265, at *4 (N.Y. SEA 1994) (dealing with future IEPs). Nevertheless, Congress expressly recognized and preserved H/ROs' authority to order compliance with applicable requirements upon finding procedural violations, thus including but not limited to procedural deficiencies in IEPs. 20 U.S.C. § 1415(f)(3)(E) (2016).

[78] Woods v. Northport Pub. Sch., 487 F. App'x 968 (6th Cir. 2012) (invalidating hearing officer conditioning order to amend IEP upon parent reenrolling the child in the district, while also upholding this condition for implementation of the amended IEP).

[79] Sch. Bd. of Martin Cty. v. A.S., 727 So. 2d 1071 (Fla. Dist. Ct. App. 1999).

[80] *Id.* Citing a previous *Davis*-based decision, the court referred to *sua sponte* grounds, but its rationale can also be seen as *functus officio*, that is, that, by resolving the issue of appropriateness, the H/RO lacked authority to order any

order to revise the student's behavior intervention plan after concluding that the IEP, including the BIP, met the applicable standards for FAPE, although the court's reversal and reasoning were not particularly clear and broad-based.[81] Another federal court avoided this problem by interpreting the hearing officer's order, in the wake of a decision that the IEP provided FAPE in the LRE, as merely confirming the IEP team's authority to proceed to make its proposed modifications, subject to the parent's right to challenge them.[82] More recently, a federal district court relied on the IDEA's provision specific to H/RO remedial authority in FAPE cases[83] to uphold H/RO orders to remedy procedural violations even though the decision was in favor of the district overall in terms of FAPE.[84] An added problem with orders to revise the IEP in cases where the H/RO deems the placement or program appropriate is that such orders may well trigger the issue of the IDEA's fee-shifting provision.[85] Yet, H/ROs sometimes order such revisions, presumably ignorant of such limitations.[86]

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relief. *Id.* at 1074–75.

[81] Lake Travis Indep. Sch. Dist. v. M.L., 50 IDELR ¶ 105 (W.D. Tex. 2007).

[82] L. v. N. Haven Bd. of Educ., 624 F. Supp. 2d 163 (D. Conn. 2009). *Cf.* District of Columbia v. Doe, 611 F.3d 888, 898 (D.C. Cir. 2010) (holding that hearing officer's order to reduce student's suspension was within his authority even after determining the student's misconduct was not a manifestation of his disability because he found that the longer suspension would be a denial of FAPE).

[83] 20 U.S.C. § 1415(f)(3)(E)(iii) (2012).

[84] Dawn G. v. Mabank Indep. Sch. Dist., 63 IDELR ¶ 63 (N.D. Tex. 2014) (citing 20 U.S.C. § 1415(f)(3)(E)(iii)) (2012); *cf.* R.E. v. NY.C. Dep't of Educ., 694 F.3d 167, 188 (2d Cir. 2012) (reinterpreting a prior decision as holding that "[w]hen an IEP adequately provides a FAPE, it is within the discretion of the IHO . . . to amend it to include omitted services"); S.A. v. NY.C. Dep't of Educ., 63 IDELR ¶ 73 (E.D.N.Y. 2014) (upholding H/RO's order of in-home parental training for this compartmentalized FAPE violation).

[85] *See, e.g.,* Dawn G. v. Mabank Indep. Sch. Dist., 63 IDELR ¶ 63 (N.D. Tex. 2014) (ruling that parent was not the prevailing party for purpose of attorney's fees where H/RO ordered relief inconsistent with what the relief the parent sought); Linda T. *ex rel.* William A. v. Rice Lake Area Sch. Dist., 417 F.3d 704 (7th Cir. 2005) (ruling that parent was not the prevailing party for purpose of attorneys' fees where the ordered revisions were *de minimis* in comparison to the primary issue of placement, which the district won).

[86] For examples of instances in which H/ROs ignored limitations on their authority to add services to the IEP, see *In re* Student with a Disability, 48 IDELR

D. Ordering a Particular Student Placement

Reflecting the overlap between declaratory and injunctive relief, the foregoing discussion about the boundaries for H/ROs' authority to declare in favor of a particular placement also applies to their authority to order such a placement.[87]

Moreover, a Tenth Circuit decision forecloses the alternative of delegating the placement decision to the IEP team.[88] At least where

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¶ 146 (N.M. SEA 2007); Huntsville City Bd. of Educ., 22 IDELR 931 (Ala. SEA 1995); Ipswich Pub. Sch. Dist., 44 IDELR ¶ 113 (Mass. SEA 2005); W. Springfield Pub. Sch., 42 IDELR ¶ 22 (Mass. SEA 2004); Portland Sch. Dep't, 21 IDELR 1209 (Me. SEA 1995); Worcester Pub. Sch., 43 IDELR ¶ 213 (Mass. SEA 2005); Bd. of Educ. of Portage Pub. Sch., 25 IDELR 372 (Mich. SEA 1996); Bd. of Educ. of the City Sch. Dist. of the New York, 21 IDELR 472 (N.Y. SEA 1994); Phila. Sch. Dist., 22 IDELR 825 (Pa. SEA 1995); Phila. Sch. Dist., 21 IDELR 1193 (Pa. SEA 1994); Radnor Twp. Sch. Dist., 21 IDELR 878 (Pa. SEA 1994); Houston Indep. Sch. Dist., 21 IDELR 208 (Tex. SEA 1994); Pasadena Indep. Sch. Dist., 21 IDELR 482 (Tex. SEA 1994); Granite Sch. Dist., 22 IDELR 405 (Utah SEA 1995); Loudon Cty.Pub. Sch., 22 IDELR 833 (Va. SEA 1995); *cf.* Taunton Pub. Sch., 54 IDELR ¶ 36 (Mass. SEA 2010) (ordered non-party re-evaluation after determining that the child's program and placement were appropriate). For an unusual example of the obverse, an Illinois hearing officer included in her orders, upon upholding the appropriateness of the district's proposed placement that, "if the guardian chooses to 'home school' this child, it shall be considered as a truancy and reported to appropriate authorities as such." Bd. of Educ. of Harlem Consol. Sch. Dist. No. 122, 44 IDELR ¶ 18, at *10 (Ill. SEA 2005). The exception is for the limited circumstance of hearing officer *Honig*-type injunctions. *See supra* note 12.

[87] *See supra* notes 35–44 and accompanying text. For a peripherally pertinent example of such injunctive relief, see *J.G. v. Baldwin Park Unified Sch. Dist.*, 78 F. Supp. 3d 1286 (C.D. Cal. 2015) (ordering the IEP team to consider a particular placement, which the parent had proposed). For a different variation, a federal court in New York recently ruled that an IHO did not have authority under the IDEA, when combined with New York law, to order the IEP team to consider private placements that were not on the state's approved list. Z.H. v. NY.C. Dep't of Educ., 65 IDELR ¶ 235 (S.D.N.Y. 2015) (citing Antkowiak v. Ambach, 838 F.2d 635 (2d Cir. 1988) and distinguishing tuition reimbursement cases); *see also* Dobbins v. District of Columbia, 67 IDELR ¶ 33 (D.D.C. 2016) (upholding IHO decision that did not order parents' preferred prospective placements in unapproved residential school due to failure to prove that no approved residential placement was appropriate in accordance with D.C. law).

[88] M.S. v. Utah Sch. for the Deaf, 822 F.3d 1128 (10th Cir. 2016) (extending Reid v. District of Columbia). *But cf.* Doe v. Reg'l Sch. Unit No. 21, 60 IDELR ¶ 228 (D. Me. 2013) (distinguishing *Reid* in upholding IHO order for trial period and contingent placement).

the team is composed largely of the district representatives, the court regarded the matter as a conflict of interest and an improper delegation of the IHO's impartial authority.

E. Awarding Tuition Reimbursement

Whether viewed as tied to program or placement, the two forms of relief most specifically associated with the IDEA are tuition reimbursement and compensatory education services.

Tuition reimbursement, used generically to refer to reimbursement for various expenses in addition to or alternative to tuition, such as transportation and other related services, is a well-established remedy under the IDEA. In a pair of decisions,[89] the Supreme Court established what most authorities view as a three-part test: (1) whether the district's proposed placement is appropriate; (2) if not, whether the parents' unilateral placement is appropriate; and (3) if so, equitable considerations.[90] In establishing this set of criteria, the Court made clear that it based this tuition reimbursement remedy on the IDEA authorization for appropriate judicial relief[91] and that said relief was distinguishable from money damages.[92] In its subsequent codification of this case law via the 1997 reauthorization of the IDEA,[93] Congress made clear that the authority to award

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[89] Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); Burlington Sch. Comm. v. Dep't of Educ., 471 U.S. 359 (1985).

[90] *E.g.*, Mayes & Zirkel, *supra* note 14, at 351. Although not foreclosing the possibility of tuition reimbursement without a denial of FAPE, the Third Circuit recently rejected such a residuum for an extended delay in the adjudicatory approval of the appropriateness of an IEP. C.W. v. Rose Tree Media Sch., Dist., 395 F. App'x 824 (3d Cir 2010).

[91] *Burlington Sch. Comm.*, 471 U.S. at 369. Although the Court focused on judicial remedial authority, other sources interpreted the authority as extending to H/ROs. *See, e.g.*, Letter to Van Buiten, EHLR 211:429A (OSEP 1987) (citing S-1 v. Spangler, 650 F. Supp. 1427 (M.D.N.C. 1986)).

[92] *Burlington Sch. Comm.*, 471 U.S. at 370–71 ("Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance . . . .").

[93] This codification arguably preserves the uncodified residuum of *Burlington-Carter*. *See, e.g.*, 64 Fed. Reg. 12, 603 (Mar. 12, 1999). The Supreme Court provided support for this view in Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 243 n.11 (2009) (relying on *Burlington-Carter* to reject defendant district's argument regarding purported conflict between remedial authority provisions of

tuition reimbursement extends to H/ROs.[94]

Before and after the 1997 amendments to the IDEA, H/ROs have routinely applied the relevant three-part test without any other particular boundary.[95] In the only notable—but temporary—judicial limitation, the Third Circuit—in a case that arose before the 1997 amendments—negated an H/RO's equitable reduction of the reimbursement amount.[96] The court declared that unreasonable parental conduct was not a relevant factor, but the court acknowledged that Congress had included it in the applicable calculus for cases arising after 1997.[97] In a recent case, a federal district court illustrated that H/ROs authority under the current IDEA to reduce tuition reimbursement is based on equitable balancing.[98] Even more recently, another federal district court held that—upon finding the rest of the three-part test met—ordering direct retroactive payment to the private school, where the parents had not paid the tuition based on their lack of financial resources, was within the H/RO's equitable authority under the IDEA even though it is not literally "reimbursement."[99] Similarly relying on this flexible

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IDEA). In any event, this decision filled a gap not clearly addressed by either the legislation nor *Burlington-Carter*, ruling that lack of previous enrollment in the district's special education program is one of several equitable factors for, rather than automatic preclusion of, tuition reimbursement. For a systematic flowchart-like compilation of the criteria under this codification, with illustrative case law, see Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 EDUC. L. REP. 785 (2012).

[94] 20 U.S.C. § 1412(a)(10)(C)(ii) (2016); 34 C.F.R. § 300.148(c) (2009). However, in an apparent glitch, Congress limited one of its equitable considerations to a "judicial" finding of parental unreasonableness. 20 U.S.C. § 1412(a)(10)(C)(iii) (2016); 34 C.F.R. § 148(c) (2009). A recent decision interpreted language as nonrestrictive in light of the overall Congressional delegation of tuition reimbursement determinations to IH/ROs and courts. Hogan v. Fairfax Cty. Sch. Bd., 645 F. Supp. 2d 554 (E.D. Va. 2009).

[95] *See, e.g.*, Mayes & Zirkel, *supra* note 14.

[96] Warren G. v. Cumberland Cty. Sch. Dist., 190 F.3d 80, 86 & n.3 (3d Cir. 1999).

[97] *Id*.

[98] Hogan v. Fairfax Cty. Sch. Bd., 645 F. Supp. 2d 554 (E.D. Va. 2009).

[99] Mr. A. v. NY.C. Dep't of Educ., 769 F. Supp. 2d 403 (S.D.N.Y. 2011). For a subsequent decision that seemed broader, see P.K. v. NY.C. Dep't of Educ., 819 F. Supp. 2d 90 (E.D.N.Y. 2011), *aff'd in summary order*, 526 F. App'x 135 (2d Cir. 2013).

equitable authority, a federal district court in the District of Columbia upheld an H/RO's order to reimburse the student's medical trust fund, thereby rejecting the defendant's reliance on the statutory reference to the "parent" as the recipient.[100]

Another published decision that demarcated a specifically pertinent limitation on tuition reimbursement as a remedy was a review officer decision under the IDEA jurisdiction of the Department of Defense Domestic Dependent Elementary and Secondary Schools (DDESS). More specifically, the review officer ruled that: (1) hearing officers' remedial orders are entitled to the general rebuttable presumption of good faith deference;[101] and (2) the reimbursable expenses must be reasonable and do not include the "normal expenses of raising a child."[102] The case was the subject of multiple judicial appeals, but these appeals focused on other issues.[103]

Representing even more limiting authority, a hearing officer in Kansas ruled that tuition reimbursement was not available for a gifted student based on a district's failure to implement the student's IEP.[104] The hearing officer's reasoning and invocation of cited authorities

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[100] District of Columbia v. Vinyard, 971 F. Supp. 2d 103 (D.D.C. 2013).

[101] In contrast to this first part of this review officer's decision, the Ninth Circuit recently ruled that the standard of judicial review of an IHO's tuition reimbursement decision is *de novo*. Ashland Sch. Dist. v. Parents of Student E.H., 587 F.3d 1175 (9th Cir. 2009). For a recent decision where the court upheld the IHO's tuition reimbursement rulings under what appeared to be de novo review, see Ka.D. v. Solana Beach Sch. Dist., 254 IDELR ¶ 310 (E.D. Cal. 2010), *aff'd*, 475 F. App'x 658 (9th Cir. 2012).

[102] *In re* Student with a Disability, 30 IDELR 408, at *16 (DDESS 1998). The review officer also reversed the hearing officer's decision with regard to other injunctive relief, which is separately addressed *infra* notes 142–43 and accompanying text. In contrast, a state appellate court's limitation on the reimbursement remedy in the IDEA's complaint resolution process would not appear to apply to the multi-step standards for H/ROs. Specially, a Minnesota appeals court reversed the state's corrective action of partial tuition (here tutoring) reimbursement because it had only an equivocal, not direct, nexus to the IDEA deficiency, or FAPE violation. Indep. Sch. Dist. No. 192 v. Minnesota Dep't of Educ., 742 N.W.2d 713 (Minn. Ct. App. 2007).

[103] G. v. Fort Bragg Dependent Sch., 324 F.3d 240 (4th Cir. 2003), 343 F.3d 295 (4th Cir. 2003).

[104] Unified Sch. Dist. 259 Wichita Pub. Sch., 39 IDELR ¶ 82, at *15 (Kan. SEA 2003).

were not clear or cogent,[105] but the decision is not necessarily limited to gifted students because Kansas's special education law is the same, in relevant part, for students with disabilities.[106]

Further, in a recent unpublished decision, the Third Circuit Court of Appeals ruled that tuition reimbursement is not available as a remedy for a district's delay for more than one year in processing a parent's request for an IDEA impartial hearing where the ultimate determination was that the district had provided the child with FAPE.[107] The reasoning was that the purpose of this form of relief is to remediate denials of FAPE not to punish districts.[108]

More recently, in a published decision, which borrows from similar rulings for compensatory education,[109] the federal district court in the District of Columbia ruled that hearing officers must provide parents with a flexible opportunity to present evidence of the costs they are seeking for reimbursement.[110]

Faced with an unusual set of facts, Alaska's highest court rejected the reimbursement remedy where the ultimate determination was that the child was not eligible under the IDEA, but as an equitable matter granted reimbursement for the parent's IEE predicated on a "child find" theory, where the district had used the IDEA and delayed its own evaluation.[111]

Finally, the Sixth Circuit ruled that tuition reimbursement is not available under the IDEA where the district offered FAPE and the

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[105] For example, the hearing officer refers to various forms of hostility, but a failure to provide FAPE, whether as a matter of formulation or implementation, certainly suffices for the primary step of the *Burlington-Carter* analysis. Similarly, the hearing officer makes the analogy to punitive damages, but the cited authority, which are IDEA cases, merely distinguish tuition reimbursement from money damages.

[106] *See, e.g.*, Perry A. Zirkel, *State Laws for Gifted Education: An Overview of the Legislation and Regulations*, 27 ROEPER REV. 228, 229 (2005) ("Kansas . . . has laws [for gifted students] that approach the strength and specificity of the primary federal legislation for students with disabilities.").

[107] C.W v. Rose Tree Media Sch. Dist., 395 F. App'x 824 (3d Cir. 2010).

[108] The court's ruling and reasoning for the parent's alternative claim for compensatory education was the same. *Id.*

[109] Gill v. District of Columbia, 751 F. Supp. 2d 104 (D.D.C. 2010).

[110] A.G. v. District of Columbia, 794 F. Supp. 2d 133 (D.D.C. 2011).

[111] J.P. v. Anchorage Sch. Dist., 260 P.3d 285 (Alaska 2011).

parent unilaterally placed the child.[112] Similarly, a federal district court rejected reimbursement, as well as a prospective amendment for residential placement where the issue and ruling were that the proposed IEP was appropriate at the time of its formulation, whereas the hearing officer based his relief on the time of the hearing.[113]

F. Awarding Compensatory Education

Compensatory education, like tuition reimbursement, is a specialized form of injunctive remedy. The courts have established compensatory education as an available equitable remedy under the IDEA via an analogy, albeit an incomplete one,[114] to tuition reimbursement.[115] Although the Third Circuit initially commented, by way of dicta, that H/ROs do not have the authority to award

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[112] N.W. v. Boone Cty. Bd. of Educ., 763 F.3d 611 (6th Cir. 2014); *cf.* Dep't of Educ. State of Haw. v. M.F., 840 F. Supp. 2d 1214 (D. Haw. 2011) (reversing and remanding for determination of step 2 of procedural FAPE analysis and for equities step of reimbursement analysis). The court also rejected the parents' alternative arguments under the IDEA's stay-put provision. *Id*. at 616–18. Similarly, in a case where the district' denied FAPE, a federal court reversed and remanded an H/RO's tuition reimbursement award in the absence of a determination that the unilateral placement was appropriate. J.H. v. Lake Cent. Sch. Dist., 64 IDELR ¶ 98 (N.D. Ind. 2014).

[113] District of Columbia v. Walker, 109 F. Supp. 3d 58 (D.D.C. 2015).

[114] One distinction is that tuition reimbursement requires the parents to prove the appropriateness of their chosen program. Another is that tuition reimbursement, except for the equitable limitations, is essentially an all-or-nothing choice, whereas compensatory education is amenable to careful tailoring. Thus far, neither the courts nor H/ROs have recognized these distinctions in their analyses. To the contrary, the Third Circuit's differential treatment, to whatever extent that it remains differential, lacks an explicit rationale. *See supra* notes 89–90 and accompanying text. M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996). For a suggested approach that is defensibly consistent, see Zirkel 2006, *supra* note 15. *Quaere* whether *Winkelman v. Parma City School District*, 550 U.S. 516 (2007), in which the Supreme Court concluded that parents have independent enforceable rights under the IDEA, supports or counters the purported distinction between tuition reimbursement as the parent's right and compensatory education as the student's right?

[115] *See, e.g.*, Lester H. v. Gilhool, 916 F.2d 865, 872–73 (3d Cir. 1990); Miener v. Missouri, 800 F.2d 749, 754 (8th Cir. 1986) (concluding that Congress gave courts the power to grant a compensatory remedy).

compensatory education,[116] the IDEA administering agency[117] and the courts[118] have established that H/ROs do have such authority under the IDEA.[119] Previous sources have comprehensively canvassed the standards for, and other issues specific to, the award of compensatory education.[120] The foundational element, as the Third Circuit, recently reinforced,[121] is the denial of FAPE.[122]

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[116] *Lester H.*, 916 F.2d at 869.

[117] *See, e.g.*, Letter to Anonymous, 21 IDELR 1061 (OSEP 1994) (advising that a SEA and a hearing officer may require compensatory education); Letter to Kohn, 17 EHLR 522 (OSEP 1991).

[118] *See, e.g.*, Diatta v. District of Columbia, 319 F. Supp. 2d 57 (D.D.C. 2004); Harris v. District of Columbia, 19 IDELR 105 (D.D.C. 1992); Cocores v. Portsmouth Sch. Dist., 779 F. Supp. 203 (D.N.H. 1991); Big Beaver Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commw. Ct. 1992) (finding that the hearing officer had authority to grant compensatory education); *cf.* Bd. of Educ. v. Munoz, 772 N.Y.S.2d 275 (App. Div. 2005) (holding that New York state law requires that the state department of education's decision regarding an H/RO's order of temporary relief be final).

[119] For a curious decision in which the court avoided the issue but evidenced obvious confusion as to the difference between compensatory education and a prospective placement order, see Manchester Sch. Dist. v. Christopher B., 807 F. Supp. 860 (D.N.H. 1992).

[120] Zirkel, notes 15 and 29; Terry J. Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?* 45 URB. LAW. 281 (2013); Perry A. Zirkel & M. Kay Hennessey, *Compensatory Educational Services in Special Education Cases: An Update*, 150 EDUC. L. REP. 311 (2001); Perry A. Zirkel, *Compensatory Education: An 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. 101 (2010); Perry A. Zirkel, *Compensatory Education Services under the IDEA: An Annotated Update*, EDUC. L. REP. Rep. [45 (2004); 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); *see also* James Schwellenbach**,** *Mixed Messages: An Analysis of the Conflicting Standards Used by the United States Circuit Courts of Appeals when Awarding Compensatory Education for a Violation of the Individuals with Disabilities Education Act*, 53 ME. L. REV. 245 (2001).

[121] C.W. v. Rose Tree Media Sch. Dist., 395 F. App'x 824 (3d Cir. 2010) (concluding that "[t]he purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a free appropriate public education, but to compensate students with disabilities who have not received an appropriate education").

[122] Zirkel 2010, *supra* note 15, at 503–04 nn.23–26 and accompanying text. The minority view is that the denial must be gross. *Id*. at 504 n.25. The denial may

Given the focus here—the scope of H/RO remedial authority—it suffices to identify the following sample of possible, but unsettled, boundaries[123] for the courts and, by inference, H/ROs with regard to compensatory education awards: (1) after graduation;[124] (2) during stay-put after age 21;[125] (3) for denying opportunity for meaningful parental participation;[126] and (4) concurrent with tuition reimbursement;[127] and (5) for postsecondary education.[128] Similarly unsettled is who has the burden for the factual foundation for the

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be in terms of insufficient implementation rather than the overall procedural and substantive forms of denial of FAPE. *See, e.g.*, B.B. v. Perry Twp. Sch. Corp., 53 IDELR ¶ 11 (S.D. Ind. 2009).

[123] Each of these issues is subject to split and relatively limited authority.

[124] Zirkel 2010, *supra* note 15, at 503 n. 18; Zirkel, *supra* note 29, at 746 n.30.

[125] Zirkel, *supra* note 29, at 748 n.17. In contrast, the availability of compensatory education after age 21 for violations before age 21 is relatively settled. *Id*. at 748 n.16; Zirkel 2010, *supra* note 15, at 502 n.15. For a recent example, see *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712 (3d Cir. 2010) (upholding compensatory education, in the unusual form of an IEP, after age 21 for denial of FAPE before age 21).

[126] *See, e.g*., D.B. v. Gloucester Twp. Sch. Dist., 751 F. Supp. 2d 764 (D.N.J. 2010), *aff'd*, 489 F. App'x 564 (3d Cir. 2012).

[127] Zirkel 2010, *supra* note 15, at 508 nn.53–54; Zirkel, *supra* note 29, at 755 nn.67–68. A variation of this issue is when the two forms of relief are not awarded for the same period, instead being successive or alternative. For example, the Third Circuit recently ruled that compensatory education is not available for a unilaterally placed child, i.e., as an alternative to tuition reimbursement where the parent proves a denial of FAPE but loses at one of the subsequent steps. P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009). In a case earlier in the year, the same court had rejected compensatory education where the district had made good faith efforts to provide FAPE, leaving ambiguous whether such alternative relief would be available. Mary T. v. Sch. Dist., 575 F.3d 235 (2009). In a more recent and unpublished decision, the same court rejected compensatory education, as an alternative to tuition reimbursement, where the district flagrantly delayed in processing the request for an impartial hearing but the ultimate determination was that the district's IEP was appropriate. C.W. v. Rose Tree Media Sch. Dist., 395 F. App'x 824 (3d Cir. 2010). On the other hand, contributing to the confusion, the Eleventh Circuit affirmed a decision that includes the H/RO's unchallenged choice of remedy, which was prospective tuition reimbursement as a form of compensatory education. Draper v. Atlanta Sch. Sys., 518 F.3d 1275 (11th Cir. 2008).

[128] Zirkel 2010, *supra* note 15, at 508 n.52; Zirkel, *supra* note 29, at 754 n.66.

award.[129] More settled is the limitation that the award may not be either open-ended or in excess of "what is required for compliance with the student's IEP."[130] Similarly settled, and as would apply to any injunctive relief, an H/RO's compensatory education order must not be either *sua sponte*,[131] or so vague as to be unenforceable.[132] Finally, H/ROs have differed widely, but courts have not yet resolved various other scope issues, such as whether an H/RO may retain jurisdiction for implementation[133] and, if not, to whom an H/RO should instead delegate the implementation of the award.[134]

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[129] *Compare* Henry v. District of Columbia, 750 F. Supp. 2d 94 (D.D.C. 2010) (the district and the hearing officer), *with* Gill v. District of Columbia, 770 F. Supp. 2d 112 (D.D.C. 2011), *aff'd mem*., 2011 WL 3903367 (D.C. Cir. 2011) (the parent).

[130] Susquehanna Twp. Sch. Dist. v. Frances J., 823 A.2d 249, 257 (Pa. Commw. Ct. 2003).

[131] *See, e.g.*, Neshaminy Sch. Dist. v. Karla B., 26 IDELR 827 (E.D. Pa. 1997) (granting a motion for summary judgment because the issue of compensatory education was withdrawn from the hearing officer's consideration). Yet, H/ROs continue to transgress this limit, even on occasion in Pennsylvania. *E.g.*, Lampeter Strasburg Sch. Dist., 43 IDELR ¶ 17, at*3 (Pa. SEA 2005); *In re* Student with a Disability, 42 IDELR ¶ 224, at *7–8 (Pa. SEA 2005) (providing the most recent examples).

[132] *See* Zirkel, *supra* note 29, at 756 n.78 (noting that vague awards cause implementation problems); *cf*. Streck v. Bd. of Educ., 280 F. App'x 66 (2d Cir. 2008); Cupertino Union Sch. Dist. v. K.A., 75 F. Supp. 3d 1088 (N.D. Cal. 2014); Copeland v. District of Columbia, 82 F. Supp. 3d 462 (D.D.C. 2015); I.S. v. Town Dist. of Munster, 64 IDELR ¶ 40 (S.D. Ind. 2014) (finding lack of evidentiary or explanatory basis). Conversely, where a hearing officer ordered the district to assure that the student participated, a court recently ruled that a district's good faith attempt to have the student receive the compensatory education sufficed. Dudley v. Lower Merion Sch. Dist., 58 IDELR ¶ 12 (E.D. Pa. 2011).

[133] Zirkel 2010, *supra* note 15, at 508 n.58; Zirkel, *supra* note 29, at 755 n.72.

[134] *Id.* nn.73–75. A leading federal appeals court decision ruled that an H/RO may not delegate remedial authority for reducing or discontinuing the amount of compensatory education to the IEP team, which includes at least one district employee, in light of the IDEA prohibition that the H/RO may not be a district employee. Reid v. District of Columbia, 401 F.3d 516, 526 (D.C. Cir. 2005); *see also* Bd. of Educ. of Fayette Cty. v. L.M., 478 F.3d 307 (6th Cir. 2007), *cert. denied*, 532 U.S. 1042 (2007); Meza v. Bd. of Educ., 56 IDELR ¶ 167 (D.N.M. 2011). The opposing judicial view is that the IEP team is an appropriate forum for resolving the implementation issues of the compensatory education award. *See, e.g.*, Mr. I. v. Maine Sch. Admin. Unit No. 55, 480 F.3d 1 (1st Cir. 2007); Melvin v. Town of Bolton Sch. Dist., 20 IDELR 1189 (D. Vt. 1993), *aff'd mem*., 100 F.3d

Nevertheless, as a general matter courts have agreed that H/ROs have rather wide equitable discretion in their calculus for compensatory education.[135]

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944 (2d Cir. 1996); State of Conn. Unified Dist. No. 1 v. State Dep't of Educ., 699 A.2d 1077 (Conn. Super. Ct. 1997); *cf.* T.G. v. Midland Sch. Dist., 848 F. Supp. 2d 902 (C.D. Ill. 2012); A.L. v. Chicago Pub. Sch. Dist. No. 299, 57 IDELR ¶ 276 (N.D. Ill. 2011); State of Haw. Dep't of Educ. v. Zachary B., 52 IDELR ¶ 213 (D. Haw. 2009) (distinguishing *Reid* and *L.M.*); Struble v. Fallbrook Union High Sch., 56 IDELR ¶ 4 (S.D. Cal. 2011) (upholding remand to IEP team to devise, not reduce or discontinue, the award). A related question is whether the H/RO must or may order such implementation via an escrow fund. Zirkel 2010, *supra* note 15, at 509 n.62; Zirkel, *supra* note 29, at 756 n.77. For recent examples, see *Streck v. Bd. of Educ.*, 642 F. Supp. 2d 105 (N.D.N.Y. 2009), *modified*, 408 F. App'x 411 (2d Cir. 2010) (ordering escrow account for $37,778 for prescribed compensatory reading services for student now at postsecondary institution); Matanuska-Susitna Borough Sch. Dist. v. D.Y., 54 IDELR ¶ 52 (D. Alaska 2010) (upholding, after supplemental briefing under qualitative approach, $50,000 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 three school years)*; cf.* Millay v. Surry Sch. Dep't, 56 IDELR ¶ 162 (D. Me. 2011) (rejecting trust fund under the circumstances).

[135] *See, e.g.*, Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489 (9th Cir. 1994) (holding that compensatory education is an equitable remedy and only to be awarded when appropriate). However, there is some authority that the basis for calculation must be the student's changed needs rather than the student's needs at the time of the denial. *See, e.g.*, Conn. Unified Sch. Dist. v. State Dep't of Educ., 699 A.2d 1077, 1090 (Conn. Super. Ct. 1997) (deciding that the compensatory education program, while unorthodox, is appropriate). Moreover, a federal appeals court recently overturned an H/RO's "cookie cutter" approach, requiring instead a customized calculation qualitatively based on "specific educational deficits resulting from [the child's] loss of FAPE." *Reid*, 401 F.3d at 523, 526; *see also* Branham v. District of Columbia, 427 F.3d 7, 9 (D.C. Cir. 2005) (emphasizing the need for an inquiry that is "qualitative, fact-intensive, and above all, tailored to the unique needs of the disabled student"); *cf.* D.H. v. Manheim Twp. Sch. Dist., 45 IDELR ¶ 38 (E.D. Pa. 2005) (based on "only those needs of the student[] that directly flow from his diagnosed SLD"). In a recent district court decision in the wake of *Reid* and *Branham*, the judge expressed a general preference for H/ROs to make this needs-based determination, subject to judicial review. Thomas v. District of Columbia, 407 F. Supp. 2d 102 (D.D.C. 2005). For a more complete canvassing of the case law concerning the qualitative approach, which present procedural and evidentiary complications for H/ROs, see Zirkel, *Competing Approaches*, *supra* note 15. For the possible need under the qualitative approach for a bifurcated approach at the IHO level based on the analogy to additional evidence upon judicial review, see Gill v. District of Columbia, 751 F. Supp. 2d 104 (D.D.C.

G. Changing Student Grades or Records

H/ROs occasionally face an issue of student records, and their decisions are usually knee-jerk disclaimers without careful research or reasoning.[136] In one of the few pertinent published decisions, a Virginia review officer concluded that H/ROs do not have jurisdiction and thus do not have remedial authority to change the grades of an IDEA student.[137] The review officer reasoned that the Family Educational Rights and Privacy Act ("FERPA") provides a procedure and forum for addressing such matters,[138] a rather unconvincing rationale.[139]

H/ROs' injunctive authority with regard to student records has similarly been subject to very few published decisions. For example, a hearing panel in Missouri cursorily concluded that it lacked authority to expunge student records.[140] In doing so, the panel relied

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2010); Banks v. District of Columbia, 720 F. Supp. 2d 83 (D.D.C. 2010). In a recent decision that allowed a quantitative calculation in a qualitative jurisdiction, the Sixth Circuit also provided notable H/RO latitude in upholding an order requiring delivery by a certified autism teacher in light of the IEP provision and FAPE denial. Woods v. Northport Pub. Sch., 487 F. App'x 968 (6th Cir. 2012).

[136] *See, e.g.*, Bourne Pub. Sch., 37 IDELR ¶ 261, at *5 (Mass. SEA 2002) (denying jurisdiction with the only explanation being, without any cited support, that "[t]his is not a claim for which there is available relief under the IDEA").

[137] Fairfax Cty.Pub. Sch., 38 IDELR ¶ 275, at *12 (Va. SEA 2003).

[138] 20 U.S.C. § 1232g (2016).

[139] The express provisions in the IDEA for student records and the broad-based scope of the IDEA's adjudicative dispute resolution mechanism arguably suggest overlapping, rather than mutually exclusive, jurisdiction between the IDEA and the Family Education Rights and Privacy Act (FERPA), at least when the records issue relates to the identification, evaluation, or placement of the child. *See, e.g.*, 34 C.F.R. §§ 300.613–.621 (2009) (providing an SEA with broad authority to ensure the requirements of the IDEA are met); § 507(a) (allowing for parental due process rights). Quaere whether the requirement for a FERPA hearing for disputes as to whether records are inaccurate or misleading establishes a jurisdictional exception or an exhaustion prerequisite for impartial hearings under the IDEA. 34 C.F.R. § 300.621. In any event, where the H/RO has jurisdiction, remedial authority within the otherwise prescribed boundaries should follow.

[140] Northwest R-1 Sch. Dist., 40 IDELR ¶ 221, at *2 (Mo. SEA 2004). The panel contributed to the questionable-ness of its conclusion by responding to the parents' request for tuition reimbursement merely as follows: "[We] may not place the student in a parochial school or award money damages . . . ." *Id.* at 923.

solely on the fact that it was a panel of limited jurisdiction.[141]

Releasing records is a different remedy from expunging them. In a New Mexico decision, the review officer concluded that H/ROs lack authority under the IDEA to override parents' refusal to release the child's medical records.[142] Citing two published H/RO decisions from other states, the review officer relied on the reasoning that such matters were exclusively within the jurisdiction of FERPA, which is not necessarily persuasive.[143] In any event, the review officer also agreed with dicta in the cited decisions and characterized those decisions as "consistently deplor[ing] the refusal of such releases and express[ing] concern over the results of failures to share relevant information with school personnel."[144]

H. Ordering a Student's Promotion or Graduation

Specific to the remedial authority of H/ROs with regard to promotion and graduation, the IDEA's administering agency has opined that such matters are ultra vires unless clearly related to FAPE or placement, such as where "a student does not receive the services that are specified on his or her IEP that were designed to assist the student in meeting the promotion standards,"[145] But in the absence of such state law delegation, increasing authority seems to suggest that H/ROs face limits in ordering such relief.[146] For example, a

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[141] *Id*.

[142] *In re* Student with a Disability, 40 IDELR ¶ 119, at *9 (N.M. SEA 2003).

[143] *Id*. In addition to the arguable concurrent jurisdiction of the FERPA office and H/ROs (*see supra* note 135), it is not at all clear how FERPA covers a student's medical record where the parents have not released it to the school.

[144] *In re* Student with a Disability, 40 IDELR ¶ 119, at *8.

[145] Letter to Anonymous, 35 IDELR ¶ 35 (OSEP 2000); *cf.* Letter to Davis-Wellington, 40 IDELR ¶ 182, at *1 (OSEP 2003) (opining that promotion and retention standards are a state and local function, although "the IDEA does not prevent a State or local education agency from assigning this decision-making responsibility to the IEP team"). For the related question concerning the failure to provide IEP-specified accommodations for graduation and other district- or state-wide testing, OSEP suggested that the controlling criterion is whether the failure has resulted in a denial of FAPE and that the proper remedy (although not ascribed specifically to an H/RO) is to provide the student with the opportunity to retake the assessment with appropriate accommodations. *Id*.

[146] In contrast, some H/RO decisions have prudentially avoided such

Massachusetts hearing officer avoided deciding whether H/ROs lack authority to order promotions, concluding that waiving the district's summer credit policy was not appropriate for the particular student.[147] More strongly, Pennsylvania's intermediate court concluded that the state law's delegation of graduation authority to school districts preempted an H/RO from accelerating the graduation of a gifted student.[148] Although the factual circumstances correlate more closely to gifted students than to those with disabilities,[149] the court did not specifically limit its decision to gifted students.[150]

Similarly, an H/RO has limited authority to order a school district to allow a child with disabilities to participate in graduation where either the child has not completed graduation requirements[151] or the denial did not violate applicable special education regulations or the child's IEP.[152]

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determinations, thus avoiding the necessity and opportunity for judicial guidance. *See, e.g.*, Arlington Cent. Sch. Dist., 28 IDELR 1130 (N.Y. SEA 1998) (finding that the transition assistance afforded a disabled student was sufficient and graduating the student was proper); *cf*. Conejo Valley Unified Sch. Dist., 29 IDELR 779 (Cal. SEA 1998) (postponing a determination by treating the issue as remedial rather than jurisdictional and, thus, warranting factual development).

[147] Boston Pub. Sch., 24 IDELR 985, at *5 (Mass. SEA 1996). The hearing officer thus found it unnecessary to determine whether she had "the authority to order credits which would in effect promote" the student. *Id*. at *5 n.4.

[148] Saucon Valley Sch. Dist. v. Robert O., 785 A.2d 1069 (Pa. Commw. Ct. 2001).

[149] For example, the court observed that the student needed acceleration, while reasoning that it was "counter-intuitive to consider that [the student's] progress was accelerated by completing fewer credits, albeit faster, than his matriculation peers." *Id*. at 1079.

[150] Specifically, the court relied on its IDEA-related *Woodland Hills* decision; *see infra* note 131 for its preemption rationale. *Id*. at 1078. Nevertheless, the court limited the scope of its ruling by expressly not considering the question of whether the state's review officer panel has "authority to grant credit for pre-high school courses, which could then satisfy the requirements of graduation." *Id*. at 1079 n.20.

[151] Woodland Hills Sch. Dist. v. S.F., 747 A.2d 433, 434 (Pa. Commw. Ct. 2000).

[152] Clovis Unified Sch. Dist., 33 IDELR ¶ 146, at *8–9 (Cal. SEA 2000).

I. Ordering Training of District Personnel

On occasion, H/ROs order training of specified school district personnel without examining whether H/ROs have authority to provide such relief.[153] In one of many examples,[154] a Connecticut hearing officer ordered that a student's IEP be revised to require that all of the student's teachers receive training as to the student's disability, behavior intervention plan, and required services and accommodations.[155] The hearing officer also ordered the training and selection of an aide for the student.[156]

The limited pertinent court decisions subject such orders to question. Specifically, Pennsylvania's intermediate appellate court has ruled that H/ROs lack the authority to order a district to arrange

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[153] *See, e.g.*, Hardin-Jefferson Indep. Sch. Dist., 66 IDELR ¶ 147 (Tex. SEA 2015) (ordering system-wide updated dyslexia evaluation training as part of equitable relief in child find case); Hardin-Jefferson Indep. Sch. Dist., 65 IDELR ¶ 28 (Tex. SEA 2014) (ordering training of child's staff based on lack of implementation); Student with a Disability, 63 IDELR ¶ 205 (Utah SEA 2014) (ordering, for procedural violations that did not result in educational loss to the child, training on the district's child find obligations); Tacoma Sch. Dist., 62 IDELR ¶ 309 (Wash. SEA 2014) (ordering 30-minute training session for all IEP participants at two elementary schools due to failure to consider IEE); Pasadena Indep. Sch. Dist., 58 IDELR ¶ 210 (Tex. SEA 2012) (ordering training to special education and related teaching staff on teaching sexuality to children with autism); Montgomery Cty. Bd. of Educ., 43 IDELR ¶ 234 (Ala. SEA 2005) (ordering training for teachers and administrators on developing IEPs based on individual student needs when the student moves to homebound school from regular school); Portland Pub. Sch. Dist., 44 IDELR ¶ 143 (Or. SEA 2005) (requiring training for staff involved in implementing an IEP); *In re* Student with a Disability, 42 IDELR ¶ 224 (Pa. SEA 2005) (upholding without objection order to train school's special education personnel in specified behavior-related areas); *cf.* Sanford Sch. Comm. v. Mr. & Mrs. L, 34 IDELR ¶ 262 (D. Me. 2001) (identifying that the H/RO ordered training of an additional therapist, but the issue on appeal was the compensatory education part of the order). For an example of an H/RO decision enforcing the limitation on ordering training, see *Cumberland Valley School District*, 42 IDELR ¶ 79 (Pa. SEA 2004), which found an order of training to be an error of law.

[154] *See* San Diego Unified Sch. Dist., 42 IDELR ¶ 249, at *19 (Cal. SEA 2005) (requiring training of specific staff members regarding certain medical conditions and requirements of special education law); Chicago Pub. Sch., 22 IDELR 1008, at *15 (Ill. SEA 1995) (ordering training regarding students with Attention-Deficit/Hyperactivity Disorder and on developing and implementing IEPs).

[155] Greenwich Bd. of Educ., 40 IDELR ¶ 223, at *19 (Ct. SEA 2003).

[156] *Id*.

for training of its employees as a remedy for denial of FAPE because state law delegates staff development to districts.[157] Although the case arose in the context of state regulations for gifted students, which differ in part from the IDEA,[158] this court in subsequent remedy related decisions imported this ruling to the IDEA context.[159] Nevertheless, the Pennsylvania court's preemption rationale is subject to dispute in cases controlled by the federal IDEA, as compared to state special education laws not deemed to be incorporated into federal standards. Thus far, the additional authority is increasingly in opposition to this narrow view,[160] although that concerning the analogous or overlapping next form of relief provides further guidance.

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[157] Saucon Valley Sch. Dist. v. Robert O., 785 A.2d 1069 (Pa. Commw. Ct. 2001).

[158] *See, e.g.*, *id*. at 1075 n.10 (noting the distinction federal law draws between gifted and special education).

[159] *See infra* note 148 and accompanying text (discussing the propriety of an H/RO ordering the hiring of an outside expert).

[160] *Compare* Park v. Anaheim Union High Sch. Dist., 464 F.3d 1025 (9th Cir. 2006) (upholding compensatory education in the form of staff training); Latoya A. v. San Francisco Unified Sch. Dist., 67 IDELR ¶ 38 (N.D. Cal. 2016) (ruling that hearing officer's training order sufficed, in the circumstances of the case, to qualify the plaintiff as prevailing party); S.F. v. McKinney Indep. Sch. Dist., 58 IDELR ¶ 157 (E.D. Tex. 2012) (affirming hearing officer's training order only tangential to ESY relief); Sch. Dist. of Phila. v. Williams, 66 IDELR ¶ 214 (E.D. Pa. 2015) (distinguishing and disagreeing with Pennsylvania court, instead upholding IHO's compensatory education training order under the IDEA); Peter G. v. Chicago Pub. Sch. Dist. No. 299, 38 IDELR ¶ 94 (N.D. Ill. 2003) (upholding implementation of hearing officer's training order without directly determining whether it was ultra vires, especially in the wake of the hearing officer's rejection of parent's FAPE challenge), *with* Chattahoochee Cty. Bd. of Educ., EHLR 508:215 (Ga. SEA 1987) (ruling that hearing officer lacks authority to order specific training of personnel); *cf.* Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist., 375 F.3d 603, 613 (7th Cir. 2004) (dicta criticizing IHO for imposing training and other relief that went beyond remedying the individual child's situation); S.H. v. Mt. Diablo Unified Sch. Dist., F. Supp. 3d (N.D. Cal. 2017) (failure of parent to identify any remedy tailored to the shortcomings of the IEP process). An underlying but separable issue is whether the school district met the FAPE standards based on the training of its teachers. *See, e.g.*, Paris Sch. Dist. v. A.H., 69 IDELR ¶ 243 (W.D. Ark. 2017).

J. Ordering Districts to Hire Consultants

On occasion, H/ROs order districts to hire an outside expert as part of the remedy for denial of FAPE.[161] Yet, H/ROs have not reflected general-cognizance of the increasing case law that points to boundaries in issuing consultant remedies.

In the first case to impose a boundary, a DDESS review officer reversed such an order as "impermissible micro management," and thus "*ultra vires* and a clear abuse of discretion."[162] Although grounded in the statutory prerogatives of the education agency, the ruling is limited for several reasons: (1) DDESS represents a special context; (2) the hearing officer's order included various other forms of non-reimbursement relief, which the review officer's opinion covered only cryptically; and (3) the subsequent judicial appeals

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[161] *See, e.g.*, Los Angeles Unified Sch. Dist., 62 IDELR ¶ 68 (Cal. SEA 2013) (ordering LEA to fund an independent consultant to develop child's transition plan); Las Vegas City Sch., 61 IDELR ¶ 238 (Nev. SEA 2013) (ordering LEA to contract with a recruitment expert); Decatur Cty. Cmty. Sch. Corp., 45 IDELR ¶ 294 (Ind. SEA) (ordering the LEA to retain a consultant with specified skills to develop an FBA and BIP for the student); Waukee Cmty. Sch. Dist., 48 IDELR ¶ 26 (Iowa SEA 2007) (ordering the LEA to obtain assistance from an outside consultant with specified expertise); In re Student with a Disability, 48 IDELR ¶ 146, at *13 (N.M. SEA 2007) (ordering state-approved IEP facilitator of parent's choice for next IEP meeting for "profound" but nonprejudicial procedural violation); Worcester Pub. Sch., 43 IDELR ¶ 213 (Mass. SEA 2005) (finding that the case warranted an outside consultant to determine the expertise required for the student's therapist); Bd. of Educ. of Portage Pub. Sch., 25 IDELR 372 (Mich. SEA 1996) (assigning two consultants); Evolution Acad. Charter Sch., 42 IDELR ¶ 219 (Tex. SEA 2004) (ordering the school to hire an independent expert trained in developing IEPs); Neshaminy Sch. Dist., 29 IDELR 493, 496 (Pa. SEA 1998) (requiring a behavior specialist); Millersburg Area Sch. Dist., 25 IDELR 1266 (Pa. SEA 1997), *aff'd on broader basis sub nom. Millersburg Area Sch. Dist. v. Lynda T.*, 707 A.2d 572 (Pa. Commw. Ct. 1998); *cf.* Grandview Sch. Dist., 110 LRP 73736 (Wash. SEA 2012) (ordering IEE consultants to devise specifics of multi-year private school compensatory education award); W. Springfield Pub. Sch., 42 IDELR ¶ 22 (Mass. SEA 2004) (assigning an on-site case manager). Contrast these cases with the situation in which a district failed to provide sufficient consultant services under the child's IEP. *See, e.g.*, Troy Sch. Dist. v. Boutsikaris, 250 F. Supp. 2d 720 (E.D. Mich. 2003) (upholding the review officer's remedy of compensatory education).

[162] *In re* Student with a Disability, 30 IDELR 408, at *11, *17 (DDESS 1998).

focused on other issues.[163]

Second, in dicta in a case concerning the appropriateness of an IEP, the Seventh Circuit commented on a hearing officer's "extensive relief, including, among other things, the appointment of private consultants who would essentially manage and deliver . . . [the student's] public education."[164] Regarding this relief as supporting the lower court's conclusion regarding the hearing officer not providing due deference to the school personnel's IEP judgments, the Seventh Circuit characterized the hearing officer's remedies as "extreme measures that obviously went beyond remedying . . . [the student's] situation."[165] The degree to which this proportionality limitation applied to the ordered consultants is unclear because the court cited the hearing officer's remedy as illustrative of the hearing officer's overreach; this order mandated that the district must provide disability awareness and sensitivity training for every student in the district.[166] A federal district court's subsequent reversal of a hearing officer's order for neutral facilitator for all future meetings was similarly inconclusive due to the open-endedness of the hearing officer's order and the express limitation to the "particular facts" of case.[167]

In the third and most significant development, Pennsylvania's intermediate appellate court concluded that an H/RO's order that a district hire an outside expert to facilitate the development of a new IEP for the plaintiff-student was *ultra vires* in light of (1) the regulatory delegation of IEP team membership to the school district, (2) the limited scope of the violation, and (3) the regulatory

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[163] *See, e.g.*, G. v. Fort Bragg Dependent Sch., 324 F.3d 240 (4th Cir. 2003) (contrasting a federal FAPE standard with North Carolina's standard), *amended* by 343 F.3d 295 (4th Cir. 2003).

[164] Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist., 375 F.3d 603, 610 (7th Cir. 2004). In an earlier bench decision for another case in the same jurisdiction, the district court arguably approved the IHO's consultant order by concluding that "the only point that I think the hearing officer might have gone too far in specifically ordering [the consultant] without regard to her hourly rate." Bd. of Educ. of New Trier Twp. High Sch. Dist. v. Ill. State Bd. of Educ., 28 IDELR 1175, at *5 (N.D. Ill. 1998).

[165] Alex R. v. Forrestville, 375 F.3d 603, 614.

[166] *Id.*

[167] Pachl ex rel. Pachl v. Seagren, 373 F. Supp. 2d 969, 978 (D. Minn. 2005).

limitations on IEP team composition.[168] The same court has interchangeably applied this limitation in the gifted student and IDEA contexts, but it left the limitation's specific scope unclear in the IDEA context, explicitly ruling only that an H/RO lacked authority to order the district to engage outside experts for students with disabilities "without supporting evidence in the record."[169] Finally, the same Pennsylvania court also applied its *sua sponte* limitation to invalidate an H/RO's order to hire an outside expert.[170]

The more recent decisions have largely ignored these limitations in whole or at in part. For example, a federal district court in Kentucky initially upheld a review officer's order to arrange for the student's private psychologist to attend the IEP meeting, at district expense, to help the team devise and monitor a plan for providing the student with two years of compensatory education.[171] The court concluded that the requirement of the psychologist's attendance was equitable in this particular case, because as the review officer delegated the tailoring of the compensatory education to the team rather than ordering a specific number of hours. The court did not mention the Pennsylvania decisions, but the reason may have been that the school district's argument did not extend beyond the requirements of the IDEA to the possible limitations of state law. After the Sixth Circuit reversed on other grounds,[172] the district court

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[168] Saucon Valley Sch. Dist. v. Robert O., 785 A.2d 1069 (Pa. Commw. Ct. 2001). The court was not clear or convincing with regard to the scope of its rationale. For example, after pointing out that the violation was the district's ejection of the parents from the IEP team, the court reasoned: "Although the . . . [H/RO] may have the implicit authority to remedy non-compliance with the special education regulations, it does not have the authority to impose requirements in addition to those in the regulations." *Id*. at 1078. The conclusion about additional requirements does not seem to square with the court's recognition that the regulations set minimum, not maximum, requirements for IEP team membership. *Id*.

[169] Mifflin Cty. Sch. Dist. v. Special Educ. Due Process Appeals Bd., 800 A.2d 1010, 1015 (Pa. Commw. Ct. 2002); *see* Wilkes-Barre Area Sch. Dist., 32 IDELR ¶ 17, at *5 (Pa. SEA 1999) (demonstrating subsequent application of this limitation).

[170] Mars Area Sch. Dist. v. Laurie L., 827 A.2d 1249, 1257–58 (Pa. Commw. Ct. 2003).

[171] Bd. of Educ. of Fayette Cty. v. L.M., 45 IDELR ¶ 95 (E.D. Ky. 2006).

[172] Bd. of Educ. of Fayette Cty. v. L.M., 478 F.3d 307 (6th Cir. 2007), *cert. denied*, 532 U.S. 1042 (2007).

delegated to the equitable discretion of the review officer to determine whether to require paid attendance of the student's private psychologist or an independent literacy expert as part of its compensatory education award.[173]

Similarly, the both the Second Circuit and three federal district courts recently upheld H/RO orders for inclusion consultants under the rubric of compensatory education.[174] Arguably, the focus on compensatory education in the context of the LRE is particularly amenable to a consultant remedy as compared to a pure FAPE case, but these courts did not limit the H/RO's equitable authority to such situations.

Most recently, while supporting the H/RO's equitable authority to order the district to hire an independent consultant with appropriate credentials at a reasonable rate of pay, the federal district court of Massachusetts ruled that the hearing officer in this case abused his discretion by requiring the district to hire the parents' experts for this purpose.[175]

K. Issuing Enforcement Orders

H/ROs' enforcement authority has been tested for two overlapping subjects—private settlements and H/ROs' prior decisions.[176] Some H/ROs order the enforcement of private

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[173] Bd. of Educ. of Fayette Cty. v. L.M., 49 IDELR ¶ 97 (E.D. Ky. 2008).

[174] P. v. Newington Bd. of Educ., 546 F.3d 111 (2d Cir 2008); Sch. Dist. of Phila. v. Williams, 66 IDELR ¶ 214 (E.D. Pa. 2015); T.G. v. Midland Sch. Dist., 848 F. Supp. 2d 902 (C.D. Ill. 2012); Matanuska-Susitna Borough Sch. Dist. v. D.Y., 2010 WL 679437 (D. Alaska 2010).

[175] Dracut Sch. Comm. v. Bureau of Special Educ. Appeals, 737 F. Supp. 2d 35 (D. Mass. 2010); *see also* Bd. of Educ. of New Trier High Sch. Dist. No. 223 v. Illinois State Bd. of Educ., 28 IDELR 1175 (N.D. Ill. 1998). *But cf.* Meza v. Bd. of Educ., 56 IDELR ¶ 167 (D.N.M. 2011) (unlawful delegation of IEP team authority to consultants).

[176] For an analysis of the separable issue of IDEA settlements generally, see Mark C. Weber, *Settling Individuals with Disabilities Education Act Cases: Making Up Is Hard to Do*, 43 LOY. L.A. L. REV. 641 (2010). For the specific related issue of whether H/ROs have the authority to determine whether parties' private settlement agreements are enforceable, which would fit here under declaratory relief, see Plymouth-Canton Community School v. K.C., 40 IDELR ¶ 178 (E.D. Mich. 2003), in which the court upheld the validity of the agreement and expressed no difficulty with the hearing officer having reached this same

settlement agreements,[177] while other H/ROs interpret the courts' authority as exclusive in this area.[178] There is at least limited judicial support for H/ROs' authority to enforce private settlement agreements.[179] In the lead case, *D.R. v. East Brunswick Board of Education*,[180] the Third Circuit ruled that such agreements are, as a matter of public policy, enforceable as binding contracts.[181] But the Third Circuit did not address the issue of whether H/ROs have authority to enforce the agreements.[182] More recently, the federal district court in Connecticut relied on the *D.R.* public policy rationale in ruling that H/ROs have the authority to enforce private settlement

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conclusion. For the more remotely related matter of whether hearing officers have jurisdiction to resume the hearing process and issue resulting relief after the parties settled the matter during the hearing, see Independent School District No. 432 v. J.H., 8 F. Supp. 2d 1166 (D. Minn. 1998). Finally, as a result of the Supreme Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), hearing officers increasingly face the issue of whether they can and should affirm a private settlement agreement. *See, e.g.*, Rockport Pub. Sch., 36 IDELR ¶ 27, at *5 (Mass. SEA 2002) (recognizing that a hearing officer has no authority to award attorneys' fees).

[177] *See, e.g.*, Ysleta Indep. Sch. Dist., 32 IDELR ¶ 23, at *4 (Tex. SEA 1999) (enforcing the settlement agreement without further relief and without analysis of relevant court decisions); *cf.* Bd. of Educ. of Chippewa Valley Sch. Dist., 27 IDELR 429 (Mich. SEA 1997) (ordering enforcement of the parties' oral agreement).

[178] *See, e.g.*, Agawam Pub. Sch., 36 IDELR ¶ 226, at *2–3 (Mass. SEA 2002) (noting that a Third Circuit opinion regarding the enforceability of a settlement agreement is limited to the purview of a court). The hearing officer in this case alternatively reasoned that the First Circuit was more likely to follow the dissenting opinion in *D.R.*, which favored the interest in assessing and vindicating individual rights over the interest in a speedy and efficient dispute resolution. The hearing officer cited various supporting First Circuit cases. *Id*. at 991 n.6 (citing Roland M. v. Concord Sch. Comm., 910 F.2d 983 (1st Cir. 1990); David D. v. Dartmouth Sch. Comm., 775 F.2d 411 (1st Cir. 1985); Dep't of Educ. v. Brookline Sch. Comm. 772 F.2d 910 (1st Cir. 1983); *cf.* Hillsboro Sch. Dist., 32 IDELR ¶ 190 (Or. SEA 2000) (ruling against authority to enforce mediated settlement agreement).

[179] *See infra* notes 176–177 and accompanying text.

[180] 109 F.3d 896 (3d Cir. 1997); *cf. S*pringfield Local Sch. Dist. Bd. of Educ. v. Jeffrey B., 55 IDELR ¶ 158 (N.D. Ohio 2010); D.B.A. v. Special Sch. Dist. No. 1, 2010 WL 5300946 (D. Minn. Dec. 20, 2010) (upholding H/RO's authority to enforce mediated settlement agreement within limited circumstances).

[181] 109 F.3d at 898.

[182] *Id.* at 900.

agreements.[183] Some of the subsequent case law portrays with this view.[184] Yet, other courts have concluded that enforcement of such an agreement constitutes a breach of contract claim and therefore falls exclusively within judicial jurisdiction.[185] Finally, OSEP has taken the position that since the IDEA does not address this matter, states may adopt their own rules regarding an H/RO's authority to enforce FAPE settlements that do not result from mediation or resolution meetings, so long as those rules are not limited to IDEA disputes.[186]

Additionally, there is limited case law suggesting that hearing officers have the authority to provide consent decree status to a

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[183] Mr. J. v. Bd. of Educ., 32 IDELR ¶ 202, at *12 (D. Conn. 2000).

[184] State *ex. rel*. St. Joseph Sch. v. Missouri Dep't of Elementary & Secondary Educ., 307 S.W.3d 209 (Mo. Ct. App. 2010); Neosho R-V Sch. Dist. v. McGee, 979 S.W.2d 537 (Mo. Ct. App. 1998); *cf*. T.G. v. Palm Springs Unified Sch. Dist., 304 F. App'x 548 (9th Cir. 2009) (requiring exhaustion); J.M.C. v. Louisiana Bd. of Elementary & Secondary Educ., 584 F. Supp. 2d 894 (M.D. Ala. 2008) (requiring exhaustion when settlement agreement not made during mediation or resolution session); I.K. v. Sch. Dist. of Haverford Twp., 961 F. Supp. 2d 674 (E.D. Pa. 2013), *aff'd*, 567 F. App'x 135 (3d Cir. 2014); A.S. v. Office for Dispute Resolution, 88 A.3d 256 (Pa. Commw. Ct. 2014) (ruling that H/RO had jurisdiction to decide whether settlement agreement existed). In a decision that tangentially addressed H/RO authority in this area, a federal district court ruled that FAPE, rather than the contempt standard, applies to determine whether either party breached a settlement agreement. E.D. v. Enter. City Bd. of Educ., 273 F. Supp. 2d 1252, 1259 (M.D. Ala. 2003). The connection is that the issue arose, in the court's description, "where a hearing officer dismisses a request for a due process hearing and issues an order adopting a settlement agreement." *Id*.

[185] H.C. v. Pierrepont Cent. Sch. Dist., 341 F. App'x 687 (2d Cir. 2009); J.K. v. Council Rock Sch. Dist., 833 F. Supp. 2d 436 (E.D. Pa. 2011); Sch. Bd. of Lee Cty. v. M.C., 35 IDELR ¶ 273 (Fla. Dist. Ct. App. 2001); *see also* W. Chester Area Sch. Dist., v. A.M. 164 A.3d 620 (Pa. Commw. Ct. 2017) (agreeing with *J.K.* that neither the IDEA nor its regulations authorize a H/RO to enforce a settlement agreement); *cf*. L.M. v. Lower Merion Sch. Dist., 55 IDELR ¶ 275 (E.D. Pa. 2011); Lara v. Lynwood Unified Sch. Dist., 53 IDELR ¶ 18 (C.D. Cal. 2009) (ruling that federal courts lack jurisdiction to enforce settlement agreements reached outside the IDEA's mediation and resolution-session process). As *J.K. v. Council Rock School District* recognized, the question of H/ROs' jurisdiction is not necessarily the same for the existence as for the enforcement of settlement agreements.

[186] Letter to Shaw, 50 IDELR ¶ 78 (OSEP 2007). The agency added that such situations trigger each state's complaint resolution process the extent that the complaint alleges that the failure to provide the services or placement called for in a settlement agreement constitutes a denial of FAPE. *Id*.

settlement for purposes of attorneys' fees, but only upon proper order.[187]

For enforcement of prior H/RO decisions, typically arising when a school district allegedly fails to implement the prior H/RO's order, the prevailing view is that the appropriate forums are the state complaint resolution process[188] and, alternatively, the courts,[189] rather than the H/RO process.[190] Nevertheless, without addressing this issue, presumably because the defendant-district has not raised it, an occasional court decision enforces an IHO's enforcement of another IHO's remedial order.[191]

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[187] *Compare* A.R. v. NY.C. Dep't of Educ., 407 F.3d 65, 77 (2d Cir. 2005) (ordering attorneys' fees because the plaintiff-appellees received court-ordered consent decrees and there was a material alteration of the legal relationship such that they were "prevailing parties" under the IDEA), *with* Maria C. v. Sch. Dist. of Phila., 142 F. App'x 78, 81 (3d Cir. 2005) (refusing to order attorneys' fees because there was no material alteration of the legal relationship of the parties).

[188] *See, e.g.*, Wyner v. Manhattan Beach Unified Sch. Dist., 223 F.3d 1026, 1028–29 (9th Cir. 2000); Bd. of Educ. of Wappingers Cent. Sch. Dist., 47 IDELR ¶ 115 (N.Y. SEA 2006); Crown Point Cent. Sch. Dist., 46 IDELR ¶ 269 (N.Y. SEA 2006); Newtown Bd. of Educ., 41 IDELR ¶ 201 (Conn. SEA 2004). *But cf.* Lake Travis Indep. Sch. Dist. v. M.L., 50 IDELR ¶ 105 (W.D. Tex. 2007) (allowing H/RO enforcement based on state law). However, parents need not exhaust the state's complaint resolution process before seeking judicial enforcement of an H/RO order. Porter v. Bd. of Trustees, 307 F.3d 1064, 1074 (9th Cir. 2002).

[189] The prevailing view is that the appropriate, if not exclusive, avenue to enforce an H/RO decision is via a § 1983 action in court. *See, e.g.*, Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 279 (3d Cir. 1996); Dominique L. v. Bd. of Educ. of City of Chicago, 56 IDELR ¶ 65 (N.D. Ill. 2011); L.J. v. Audubon Bd. of Educ., 47 IDELR ¶ 100 (D.N.J. 2006); *cf.* Reid v. Sch. Dist. of Phila., 41 IDELR ¶ 268, at 1138 (E.D. Pa. 2004) (enforcing a compensatory education remedy under settlement agreement through § 1983 action). However, this avenue may be only open to parents, not districts. *See, e.g.*, Metro. Sch. Dist. v. Buskirk, 950 F. Supp. 899, 903 (S.D. Ind. 1997).

[190] Although coming close to supporting the H/RO route, an Illinois case distinguishably concerned implementation of an IEP that resulted from an IHO-ordered IEP meeting. Bd. of Educ. v. Illinois State Bd. of Educ., 741 F. Supp. 2d 920 (N.D. Ill. 2010). For the related issue of whether an H/RO has the jurisdiction to reopen the case upon the request of either party for enforcement purposes, see *Bd. of Educ. of Ellenville Cent. Sch. Dist.*, 28 IDELR 337 (N.Y. SEA 1998).

[191] See, e.g., Bd. of Educ. v. H.A., 56 IDELR ¶ 136 (W.D. W. Va. 2011), *aff'd mem.*, 57 IDELR ¶ 157 (4th Cir. 2011).

L. Issuing Disciplinary Sanctions

The authority of hearing officers to issue disciplinary sanctions against either party or the party's legal counsel is a controversial question.[192] Pointing out that the IDEA requires each state education agency (SEA) to ensure that H/ROs have the authority to grant the relief necessary for dispute resolution, the IDEA's administering agency opined that the answer to this question is a matter of state law.[193] In a Michigan case, a hearing officer ordered parents' counsel to pay a district's costs (amounting to $306) based on the parents' counsel's "unexcusable [sic] failure to communicate with the District's counsel in a timely fashion."[194] Questionably assuming that such authority was automatically derivative, the hearing officer cited a case in which a court exercised such authority under the Federal Rules of Civil Procedure.[195] In a Texas case, a hearing officer dismissed a case with prejudice, concluding that a parent and the parent's attorney had engaged in "sanctionable conduct" by filing and dismissing the same special education due process request on four separate occasions as a means to manipulate the hearing settings and abuse the hearing process.[196]

The review officer and court decisions concerning H/ROs' authority to order financial or other sanctions against parties or their attorneys are scant and somewhat surprising. "In Indiana, which is a two-tier state, a review officer upheld a hearing officer's authority to issue a financial sanction of $500 for 'sham objections' and 'egregious delays.'[197] While clarifying that the sanction applied to the parents' attorney, the review officer found the requisite authority

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[192] For a more comprehensive analysis, see Salma A. Khaleq, *The Sanctioning Authority of Hearing Officers in Special Education*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2012).

[193] Letter to Armstrong, 28 IDELR 303 (OSEP 1997) (stating that the remedies that H/ROs must have available to them are a matter of state law).

[194] Bd. of Educ. of Hillsdale Cmty. Sch., 32 IDELR ¶ 162, at 511 (Mich. SEA 1999).

[195] Cypress-Fairbanks Indep. Sch. Dist., 23 IDELR 1041 (S.D. Tex. 1995), *aff'd with reduced amount*, 118 F.3d 245 (5th Cir. 1997).

[196] Ingram Indep. Sch. Dist., 43 IDELR ¶ 124, at 553 (Tex. SEA 2004).

[197] Indianapolis Pub. Sch., 21 IDELR 423, 426 (Ind. SEA 1994).

in state law.[198] Citing this Indiana decision, a hearing officer in Minnesota, which is a one-tier state where administrative law judges serve as hearing officers, ordered a parent's attorney to pay $2,000 to the school district as a disciplinary sanction "for pursuing a [summary judgment] motion without sufficient factual or legal basis."[199] The Minnesota hearing officer reasoned that his statutory responsibility to conduct hearings and the state's equivalent of Rule 11 of the Federal Rules of Civil Procedure implicitly supported his authority to issue sanctions.[200] Significantly albeit separately, the federal district court in Minnesota subsequently upheld such sanctioning authority when a hearing officer ordered another parent's attorney to pay $2,432 as a sanction for filing a frivolous fourth hearing request.[201] The court concluded that the hearing officer's authority to issue sanctions for frivolous hearing conduct was encompassed within the state regulation that granted hearing officers the authority to "do the additional things necessary to comply" with the regulations.[202] Similarly and more specifically, California amended its Administrative Procedures Act in 1997 to authorize administrative law judges, including its IDEA IHOs, to initiate contempt proceedings and to impose fees and costs for frivolous or dilatory tactics.[203] Without expressly relying on this statutory authorization, the courts have generally supported the California IHOs' relatively infrequent use of sanctions.[204]

In contrast, a review officer in New Mexico recently ruled that under that state's law, a hearing officer does not even have the authority to recommend that a court sanction noncompliant parents

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[198] *Id.*

[199] Dist. City 1 & Dist. City 2 Pub. Sch., 24 IDELR 1081 (Minn. SEA 1996).

[200] *Id.* at 1086.

[201] Moubry v. Indep. Sch. Dist. No. 696, 32 IDELR ¶ 90, at 283 (D. Minn. 2000).

[202] *Id.* at 284.

[203] CAL. GOV'T CODE §§ 11455.10–11455.30 (2013).

[204] *See, e.g.*, G.M. v. Drycreek Joint Elementary Sch. Dist., 59 IDELR ¶ 223 (C.D. Cal. 2012) (upholding IHO's decision to partially award attorneys' fees to district for frivolous claim of parent's attorney); K.S. v. Fremont Unified Sch. Dist., 545 F. Supp. 2d 995 (N.D. Cal. 2008) (upholding a hearing officer's sanctions against parent's attorney).

by requiring them to pay the district's attorneys' fees.[205] However, in dicta, the review officer–noted that the 2004 amendments to the IDEA, which did not apply in this case, provided courts with the authority to award attorney's fees to districts in certain circumstances.[206] The review officer also commented, rather ambiguously, that "under current law, administrative officers and courts are permitted to take into account Parents' lack of cooperation with the District in determining whether Parents are entitled to fees should they prevail in a due process proceeding . . . ."[207] Somewhat similarly, an Ohio hearing officer concluded that in light of the exclusive authority of courts to award attorneys' fees under the IDEA, she lacked authority to issue sanctions for attorneys' fees or monetary damages. [208]

Straddling the fence, an Ohio appeals court concluded that H/RO's are entitled to "implied powers similar to those of a court," but that the review officer's dismissal of the parents' case with prejudice based on their failure to comply with the order to submit the child's medical and psychological records was too harsh a sanction.[209] Similarly, the federal district court in New Jersey recently reversed a hearing officer's dismissal based on a *pro se* parent's lack of compliance with state filing requirements, concluding that a lesser form of dismissal would be a more appropriate remedy.[210]

M. Issuing Other Injunctive Relief

H/RO's have issued a rather remarkable range of other injunctions that have not been tested by subsequent review. Examples include (1) an Arkansas hearing officer's order that a school principal have no further contact with a student;[211] (2) another

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[205] Las Cruces Pub. Sch., 44 IDELR ¶ 205, at 1073 (N.M. SEA 2005).

[206] *Id.* at 1070.

[207] *Id.* at 1073. The review officer cited the IDEA regulation for attorneys' fees, which accords courts, not H/ROs, such authority. *Id.*

[208] Solon City Sch. Dist. Bd. of Educ., 116 LRP 32555 (Ohio SEA 2016).

[209] Stancourt v. Worthington City Sch. Dist., 841 N.E.2d 812, 830–31 (Ohio Ct. App. 2005).

[210] D.A. v. Haworth Bd. of Educ., 53 IDELR ¶ 125. at *4 (D.N.J. 2009).

[211] Watson Chapel Sch. Dist., 35 IDELR ¶ 288, at *10 (Ark. SEA 2001). The

Arkansas hearing officer's order that parents reimburse a district for the cost of an inexcusably cancelled evaluation appointment;[212] (3) a California hearing officer's order that parents, who had joint custody but disagreed about their child's education, obtain a family court ruling as to which parent had final educational decision-making authority;[213] (4) a Michigan hearing officer's order for a communication plan with a mutually agreed upon facilitator, and his accompanying recommendation for special expedited appellate procedures;[214] (5) the same hearing officer's order for the parties to reach a remedy with his retention of jurisdiction, and possible expedited hearing to resolve their possible lack of agreement;[215] (6) a Michigan review officer's order that the parent not file another complaint during the year without his written prior approval;[216] and (7) a Pennsylvania review panel's decision ordering a district to provide a parent counseling and training.[217]

Conversely, some H/RO decisions that have denied injunctive authority are similarly open to question.[218] For example, a Pennsylvania review panel ruled that it lacked authority to order an extended school day.[219] It is unclear, however, how to distinguish such relief from an extended school year, which is within the range

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specific scope of the contact was with regard to discipline. *Id.*

[212] Williford Sch. Dist., 29 IDELR 298, at 30 (Ark. SEA 1998).

[213] Capistrano Unified Sch. Dist., 32 IDELR ¶ 53, at 151–52 (Cal. SEA 1999). This remedy was arguably during the hearing and, if so, beyond the scope of this Article. *Id.*

[214] Kalamazoo City Pub. Sch., 2 LRP 9694 (Mich. SEA 1996).

[215] Traverse Sch. Dist., 19 IDELR 572 (Mich. SEA 1993); *cf.* Bd. of Educ. of Oak Park Sch. Dist., 20 IDELR 414 (Mich. SEA 1993) (retaining jurisdiction for one year after what amounted to an interlocutory order).

[216] Walled Lake Consol. Sch., 106 LRP 11737 (Mich. SEA 2005).

[217] Jim Thorpe Area Sch. Dist., 29 IDELR 320 (Pa. SEA 1998). *But cf.* Wilkes-Barre Area Sch. Dist., 32 IDELR ¶ 17, at 40–41 (Pa. SEA 1999) (requiring parental consent before the district could provide parent training and counseling).

[218] *See, e.g.*, Marlin Indep. Sch. Dist., 29 IDELR 285, 289 (Tex. SEA 1998) (disclaiming H/RO authority to discipline or terminate school personnel or to guarantee district employment for the parents); Ludington Area Sch., 20 IDELR 211, 212 (Mich. SEA 1993) (renouncing H/RO authority regarding the appointment of one aide over another qualified individual).

[219] Abington Sch. Dist., 41 IDELR ¶ 49, at 233–34 (Pa. SEA 2003).

of IDEA entitlements.[220] Similarly, a Michigan hearing officer summarily ruled that she did not have authority to order accommodations on a college entrance examination; although she did not provide a direct rationale, her ruling is only supportable to the extent that the student's graduation was bona fide.[221] In a more marginal example, a Massachusetts hearing officer renounced authority to require a student to attend school after the student had reached the state-mandated maximum age, limiting the remedy to a declaration that the district offered the student FAPE, and a strong recommendation that the student and the parent discontinue the student's nonattendance.[222]

Other open questions concern an H/RO's authority to order a SEA to take action. The IDEA's administering agency has opined that such authority depends on state law, but it added that authority may be implicated in certain circumstances by the SEA's general supervisory authority under IDEA.[223] Finally, the 2004 IDEA reauthorization directly addressed H/ROs' injunctive authority in tandem with limiting H/ROs' finding of denial of FAPE based on procedural violations. Specifically, after identifying the three limited situations for such a finding, the amended IDEA provides: "Nothing in this [limitation provision] shall be construed to preclude a hearing officer from ordering a local education agency to comply with procedural requirements . . . ."[224] Thus, while limiting the H/RO's

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[220] *See, e.g.*, 20 U.S.C. § 1412(a)(1) (2016); 34 C.F.R. § 300.106 (2009). A possible distinction, which was not clearly discussed in the panel's opinion is whether the particular student met the applicable standard, which appears to be necessity rather than appropriateness. *See, e.g.*, Phila. Sch. Dist., 41 IDELR ¶ 223, at 906 (Pa. SEA 2004).

[221] Fenton Area Pub. Sch., 44 IDELR ¶ 293, at 1492 (Mich. SEA 2005). The IDEA regulations would appear to cover such accommodations under its IEP transition, if not testing provisions. 34 C.F.R. § 300.347(a)(5), (b) (2009). Nevertheless, the hearing officer's ultimate conclusion was that the child was not eligible, thus making her ruling merely dicta. 44 IDELR ¶ 293, at 1499.

[222] Tewksbury Pub. Sch., 43 IDELR ¶ 148, at 656 (Mass. SEA 2005). This case is problematic because of the general complexity and confusion with regard to transfer of rights. *See generally* Deborah Rebore & Perry Zirkel, *Transfer of Rights Under the Individuals With Disabilities Education Act: Adulthood With Ability or Disability?*, 2000 BYU EDUC. & L.J. 33 (2000).

[223] Letter to Armstrong, 28 IDELR 303 (OSEP 1997).

[224] 20 U.S.C. § 1415(f)(3)(E)(iii) (2016).

decision-making authority, the amendments constitute the first time that the IDEA expressly recognizes the remedial authority of H/ROs.

Thus far, the court decisions that have limited HROs' authority to issue such miscellaneous other injunctive relief are not numerous. First, Pennsylvania's intermediate, appellate court ruled that an H/RO lacks authority to require the district to provide the parent with a translated transcript, concluding that the hearing officer policy manual does not have the force of regulations, i.e., law.[225] In a second case, a federal district court reversed a hearing officer's order that effectively replaced the IEP team with the private company that implemented the child's home-based program—concluding that this arrangement would constitute a potential conflict of interest and was contrary to the district's responsibility.[226] Most recently, another federal district court reversed, as inconsistent with the IDEA, the parts of the IHO's private placement order, in wake of denial of FAPE that: (1) effectively eliminated the district's representative on the IEP team; (2) required sufficient services/supports for student to graduate; (3) effectively limited the district's duties to revise the IEP annually or as otherwise needed; and (4) effectively limited its duties to change the placement of the student in accordance with LRE.[227]

Conversely, a federal appeals court upheld the remedial authority of an H/RO to reduce the length of an exclusion that was not a manifestation of a child's disability after finding the longer exclusion to be a denial of FAPE.[228] Similarly, a federal district court upheld H/RO equitable authority to order a second manifestation determination in the wake of a deficient first one─despite the substantial intervening time period.[229] As a third example of judicial

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[225] Bethlehem Area Sch. Dist. v. Zhou, 976 A.2d 1284 (Pa. Commw. Ct. 2009).

[226] Anchorage Sch. Dist. v. D.S., 688 F. Supp. 2d 883 (D. Alaska 2009).

[227] Nelson v. District of Columbia, 811 F. Supp. 2d 508 (D.D.C. 2011); *cf.* Williamson Cty. Bd. of Educ. v. C.K., 52 IDELR ¶ 40 (M.D. Tenn. 2009) (reversing H/RO's order for parent's expert to be member of the IEP team).

[228] District of Columbia v. Doe, 611 F.3d 888 (D.C. Cir. 2010); *see also* Letter to Ramirez, 60 IDELR ¶ 230 (OSEP 2012).

[229] Bristol Twp. Sch. Dist. v. Z.B., 67 IDELR ¶ 9 (E.D. Pa. 2016). The court did not address the related open question of whether the IDEA regulations' provision authorizing the H/RO to reinstating the child's original placement upon finding a violative manifestation determination that 34 C.F.R. § 300.532(b)(2)(i) (2009) precludes alternative or additional remedial measures. *Id.*

approval of H/RO's equitable discretion, another federal district court upheld a hearing officer's order for a conditional transportation procedure and 50% reimbursement of transportation costs for a child with a seizure disorder where the parent had refused to allow the district to communicate with the child's physician.[230]

Another issue that has thus far focused on general IDEA availability, rather H/RO remedial authority, is audiovisual surveillance of the classroom, which is generally related to alleged abuse of students with disabilities.[231]

N. Overall Limitation

Regardless of the form or content of the relief, courts have made relatively clear that the H/RO's remedy is not valid if it is not sufficiently clear and justified.[232]

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[230] Oconee Cty. Sch. Dist. v. A.B., 65 IDELR ¶ 297 (M.D. Ga. 2015).

[231] B.A. v. State of Mo., 54 IDELR ¶ 77 (D. Mo. 2009) (denying dismissal as a matter of standing); *cf.* C.S. v. Mo. State Bd. of Educ., 656 F. Supp. 2d 1007 (E.D. Mo. 2009); C. v. Mo. State Bd. of Educ., 53 IDELR ¶ 81 (E.D. Mo. 2009); J.T. v. Mo. State Bd. of Educ., 51 IDELR ¶ 270 (E.D. Mo. 2009) (denying dismissal as to whether such surveillance is a related service under the IDEA or a reasonable accommodation under § 504). This line of Missouri cases has left the issue of classroom surveillance open. For a related claim specific to § 504 and the ADA, rather than the IDEA, the First Circuit similarly preserved for further proceedings the availability of ordering the district to allow the child to carry a recording device. Pollack v. Reg'l Sch. Unit 75, 660 F. App'x 1 (1st Cir. 2016).

[232] See, e.g., Streck v. Bd. of Educ., 280 F. App'x 66 (2d Cir. 2008); Somberg v. Utica Cmty. Sch., 67 IDELR ¶ 233 (E.D. Mich. 2016) (viewing IHO's denial of compensatory education as not entitled to deference due to lack of explanation and justification); Cupertino Union Sch. Dist. v. K.A., 75 F. Supp. 3d 1088 (N.D. Cal. 2014) (vacating and remanding IHO compensatory education award for lack of evidentiary support); Copeland v. District of Columbia, 82 F. Supp. 3d 462 (D.D.C. 2015) (ruling that compensatory education award lacked sufficient explanation); L.O. v. E. Allen Cty. Sch. Corp., 58 F. Supp. 3d 882 (N.D. Ind. 2014) (invalidating various IHO orders in the absence of sufficient factual foundation or legal violations); District of Columbia v. Pearson, 923 F. Supp. 2d 82 (D.D.C. 2013) (ruling that any FAPE-related remedial relief requires not only ruling that district denied FAPE but also reasonably specific evidentiary basis); *cf.* I.S. v. Town of Munster, 64 IDELR ¶ 40 (N.D. Ind. 2014) (vacating and remanding for compensatory education award where IHO, without sufficient justification, found denial of FAPE in one year but considered that the subsequent appropriate IEP cured the denial).

IV. OTHER RELIEF

A. Awarding Attorneys' Fees

Although the IDEA expressly grants courts the authority to award attorneys' fees,[233] courts have construed the accompanying statutory silence as implying that H/ROs do not have concomitant authority.[234] In the commentary accompanying the IDEA regulations, the administering agency has added a potential exception where state law expressly provides this authority.[235] In the absence of such state law,[236] H/RO's have consistently followed the judicial interpretation that attorneys' fees are within the court's exclusive domain.[237] The 2004 IDEA amendment that provides for awards of attorneys' fees to prevailing state or local education agencies in limited circumstances does so expressly within the same discretionary authority of courts.[238]

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[233] 20 U.S.C. § 1415(i)(3)(B) (2016); 34 C.F.R. § 300.517 (2009). Oddly, the legislation explicitly includes the hearing officer in the accompanying prohibition for timely offers of settlement. 20 U.S.C. § 1415(i)(3)(D)(i)(III) (2016). For the accompanying regulation, which repeats this language, see 34 C.F.R. § 300.517(c)(2)(C) (2009).

[234] *See, e.g.*, Mr. B. v. E. Granby Bd. of Educ., 201 F. App'x 834, 837 (2d Cir. 2006); Mathern v. Campbell Cty. Children's Ctr., 674 F. Supp. 816, 818 (D. Wyo. 1987).

[235] Attachment I, Fed. Reg. 12,615 (Mar. 12, 1999).

[236] *See, e.g.*, A.L. v. Jackson Cty. Sch. Bd., 127 So. 3d 758 (Fla. Dist. Ct. App. 2013) (ruling that the applicable Florida law does not authorize H/ROs to award attorneys' fees); *cf.* Sch. Bd. of Miami-Dade Cty. v. C.A.F., 194 So.3d 493 (Fla. Dist. Ct. App. 2016) (declining to reach this issue based on premature petition). Although related, the determination of the prevailing party is a separate matter. *See supra* notes 46–48 and accompanying text. Moreover, an H/RO's issuance of a settlement order, which is akin to a consent decree, may have significant effect on prevailing status for attorneys' fees. *See, e.g.*, A.R. *ex rel*. R.V. v. NY.C. Dep't of Educ., 407 F.3d 65 (2d Cir. 2005).

[237] *See, e.g.*, Paradise Valley Unified Sch. Dist., 23 IDELR 287, 289 (Ariz. SEA 1995); San Diego Unified Sch. Dist., 29 IDELR 998, 1004 (Cal. SEA 1998); New Haven Bd. of Educ., 20 IDELR 42, 46 (Conn. SEA 1993); Sch. E. Chicago., 31 IDELR ¶ 45, at 174 (Ind. SEA 1998); In re Student with a Disability, 44 IDELR ¶ 115, at 584 (N.M. SEA 2005); Yankton Sch. Dist., 21 IDELR 772, 774 (S.D. SEA 1994); Klein Indep. Sch. Dist., 29 IDELR 670, 677 (Tex. SEA 1998); Seattle Sch. Dist., 29 IDELR 843, 848 (Wash. SEA 1999) (finding the H/RO did not have authority to award attorneys' fees).

[238] 20 U.S.C. § 1415(i)(3)(B) (2016).

Nevertheless, as an incidental intersection, an H/RO's remedy may have an effect on whether a court determines that a parent is entitled to attorneys' fees. For example, an H/RO recently upheld a district's proposed placement of a child but concluded that the IEP was not sufficiently specific with regard to mainstreaming opportunities at said placement and ordered the IEP team to meet to revise the IEP.[239] The Seventh Circuit ruled that the parent had only attained *de minimis* success, and thus, did not meet the prevailing party requirement for attorneys' fees under the IDEA.[240] As another variation of this intersection, H/RO's may have the authority upon proper order to provide consent decree status to a settlement for purposes of attorneys' fees.[241]

B. Awarding Money Damages

Although a dwindling minority of courts have expressed the view that money damages are available under the IDEA,[242] it is generally accepted that this form of relief is not within H/ROs' authority.[243]

C. Making Strong Recommendations for District Action

A final category of marginal limitations is when an H/RO's written decision includes recommendations that the defendant-district

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[239] Linda T. v. Rice Lake Area Sch. Dist., 417 F.3d 704, 705, 709 (7th Cir. 2005); E.S. v. Skidmore Tynan Indep. Sch. Dist., 47 IDELR ¶ 40 (S.D. Tex. 2006) (unrequested relief).

[240] *Linda T.*, 417 F.3d at 709.

[241] *Cf.* Sanford v. Sylvania City Sch. Bd., 380 F. Supp. 2d 903 (N.D. Ohio 2005). *Compare* A.R. v. NY.C. Dep't of Educ., 407 F.3d 65 (2d Cir. 2005), *with* Maria C. v. Sch. Dist. of Phila., 43 IDELR ¶ 243, at 1170 (3d Cir. 2005).

[242] *See supra* note 17 and accompanying text.

[243] *See, e.g.*, W.B. v. Matula, 67 F.3d 484, 493 (3d Cir. 1995); Baldwin Cty. Bd. of Educ., 39 IDELR ¶ 57, at 1383 (Ala. SEA 2003); Tucson Unified Sch. Dist., 28 IDELR 1037 (Ariz. SEA 1998); Bridgeport Bd. of Educ., 28 IDELR 1043 (Conn. SEA 1998); Fenton Area Pub. Sch., 44 IDELR ¶ 293, at 1499 (Mich. SEA 2005); Marlin Indep. Sch. Dist., 29 IDELR 285 (Tex. SEA 1998); Seattle Sch. Dist., 29 IDELR 843 (Wash. SEA 1999) (holding that an H/RO does not have authority to order compensatory damages); cf. Cinnaminson Twp. Bd. of Educ., 26 IDELR 1378 (N.J. SEA 1997) (same with regard to punitive damages).

take certain action in the wake of ruling in the district's favor.[244] Given the appearance of forceful authority of H/RO's, such dicta is questionable from a purist point of view,[245] though some courts have appeared to endorse this directive guidance.[246]

V. CONCLUSION

With the exception of money damages and attorneys' fees, H/RO's are generally not cognizant or consistent with regard to the boundaries of their remedial authority. The language of the IDEA and its regulations are not particularly helpful in this regard, but a growing body of published administrative and case law provides useful and enforceable demarcations that warrant careful consideration by H/RO's and other interested individuals. The addition of qualifications for H/RO's in the IDEA reauthorization—concerning H/ROs' knowledge and ability to understand special education law, to conduct hearings, and to "render and write decisions"[247]—appears to reinforce the need for H/RO's to be aware of and to act in conformance with the limits on their remedial powers. The codification of the applicable authority, including the boundaries for H/RO's, merits not only the attention of Congress—which has neglected this important area of policymaking as a foundation for state variation—but also customized elaboration in state special education statutes and regulations.

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[244] *See, e.g.*, District of Columbia Pub. Sch., 60 IDELR ¶ 300, 1536–37 (D.C. SEA 2013); Mason City Cmty. Sch. Dist., 36 IDELR 50 (Iowa SEA 2001); Farmington Pub. Sch., 36 IDELR ¶ 109, 473 (Mich. SEA 2001).

[245] *See supra* notes 75–78 and accompanying text.

[246] *See supra* note 38; *see also* Forer v. Warrior Run Sch. Dist., 21 IDELR 450, 452 (Pa. Commw. Ct. 1994).

[247] 20 U.S.C. § 1415(f)(3)(A) (2016).