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Education Law into Practice
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THE COMPETING APPROACHES FOR CALCULATING COMPENSATORY EDUCATION UNDER THE IDEA: THE NEXT UPDATE[a1]

I. Introduction

This article is the latest update of the competing approaches for calculating compensatory education,[1] which has become the primary remedy under the Individuals for Disabilities Education Act for parents who preponderantly prove a denial of the school district's "free appropriate public education" (FAPE) obligation but have not unilaterally placed their child and, thus, have not opted for tuition reimbursement.[2] Indeed, compensatory education has its roots, by way of analogy, in the more established remedy of tuition reimbursement.[3] Yet, these two remedies are, as a federal appeals court reminded, "not interchangeable."[4]

Within the line of case law for compensatory education,[5] the courts have evolved two polar approaches for calculating the amount of compensatory education due to the parents in the wake of the district denial of FAPE.[6] Only three federal circuit courts of appeals have ***622** adopted either of these two approaches. Yet, the overall trend, which is not limited to the other jurisdictions, appears to be toward a broad and not clearly defined intermediate category.

Third Circuit: Quantitative Approach

The first approach is quantitative based on a one-for-one calculation of the extent of the denial of FAPE. The Third Circuit is the primary locus for developing and refining the quantitative (also known as "cookie cutter")[7] approach, although in recent years it appears to be less clear-cut and consistent.[8]

D.C. and Sixth Circuits: Qualitative Approach

More recently, in *Reid v. District of Columbia* the D.C. Circuit Court of Appeals developed the qualitative approach, which more flexibly calculates this equitable remedy in terms of placing the child with disabilities in the same position he or she would have occupied but for the school district's violations of the IDEA.[9] The Sixth Circuit adopted this approach in 2007.[10] On a much more limited basis, an occasional lower court decision within other circuits has adopted this approach.[11]

Intermediate Category

Yet, representing a less defined category and emphasizing the equitable flexibility and fluidity of such remedial issues for impartial hearing officers (IHOs), the Ninth Circuit has adopted a less definitive view, sometimes categorized under

the qualitative approach but more properly put as flexibly intermediate between the two polar approaches.[12] Moreover, an occasional case in one of the polar opposite "camps" illustrates overlap either by approximating the logic or outcome of the other[13] or by, in effect, merging the two to create a hybrid result.[14]

***623** The courts in jurisdictions beyond the Third, Sixth, and D.C. circuits have thus far largely fit in this broad and flexible intermediate area. Some of these cases, both within and beyond the Ninth Circuit, have done so by citing its aforementioned[15] malleable interpretations.[16] Others have done so by cryptically citing *Reid* to reach expansive interpretations of compensatory education that are not clearly quantitative or qualitative.[17] Still others have specifically cited the *Reid* standard to support compensatory education awards that appear to represent either a flexible approach without a particular standard[18] or a relaxed hybrid approach.[19]

***624** The chart, which is Part II of this brief article, outlines the basic elements of the two polar approaches for calculating the appropriate amount of compensatory education. Because the quantitative approach is much more readily understood and *Reid* is cited so frequently without clear differentiation from and definition in the intermediate, Part III provides an annotated summary of the case law for the qualitative approach.

II. The Calculus for the Two Approaches

QUANTITATIVE (I.E., ONE-FOR-ONE)	QUALITATIVE
- duration: the period of denial of FAPE[20]	- individualized fact-specific determination of amount
- alternate options of particularized (i.e., service-unit)[21] or total-package[22] basis--criterion of whether the denial of FAPE had a pervasive effect[23]	"reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"[28]
- reasonably justified estimate[24]	
- deduction at the start for period estimated for reasonable rectification[25]	• 1) What are the child's "specific educational deficits"?
- exclusion for absences?[26]	• 2) Which and how much of these specific deficits resulted from the child's "loss of FAPE"?
- reduction for net inequities in terms of unreasonable parental conduct?[27]	
	• 3) What are "the specific compensatory measures needed to best correct [the] deficits [in item 2]"[29]
	- deduction for reasonable rectification[30] or unreasonable parental conduct?[31]

[The preceding image contains the references for footnotes [20], [21], [22], [23], [24], [25], [26], [27], [28], [29], [30] and [31]]

***625 III. Case Law for the Qualitative Approach**

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

***626** Reid v. District of Columbia, 401 F.3d 516, 196 Educ. L. Rep. 402 (D.C. Cir. 2005)

• The comp ed award "should aim to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA." (*id.* at 523)

• "designing [the child's] remedy will require a fact-specific exercise of discretion" (*id.* at 524).

• "Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE" (*id.* at 524)

• "courts have recognized that in setting the award, equity may sometimes require consideration of the parties' conduct, such as when the school system reasonably 'require[s] some time to respond to a complex problem,' *M.C.,* 81 F.3d at 397, or when parents' refusal to accept special education delays the child's receipt of appropriate services, *Parents of Student W.,* 31 F.3d at 1497." (*id.* at 524)

• "In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place" (*id.* at 524)

• "[the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits" (*id.* at 525).

• "whereas ordinary IEPs need only provide 'some benefit,' compensatory awards must do more-they must *compensate*" (*id.* at 525)

• "what services [the student] needs to elevate him to the position he would have occupied absent the school district's failures" (*id.* at 527).

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

• reversed and remanded to district court because the "compensatory [services] award ... fails to meet *Reid*'s demanding standard of 'an informed and reasonable exercise of discretion"' (*id.* at 11)--but discouraging further remand to IHO to "minimize further delay" (*id.* at 13)

• separately addressed the issue of the student's prospective placement, which requires "insight about the precise types of educational services [the student] needs to progress" (*id.* at 12).

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

• adopted qualitative approach for gifted ed cases under state law

• "the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." (*id.* at 651)

• "As noted by the D.C. Circuit, doing so may require awarding the student more compensatory education time than a one-for-one standard would, while in other situations the student may be entitled to little or no compensatory education, because (s)he has progressed appropriately despite having been denied a FAPE." (*id.* at 651).

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

• adopted the D.C. Circuit's qualitative approach (and its prohibition of delegating the calculation or adjustment to the IEP team)

• "T.D. may well need more than the 125 hours of compensatory education initially awarded by the [IHO], but nothing in the record suggests that he needs hour-for-hour compensation in order to catch up to his peers .... He has been shown to have an IQ score of 105. On the other hand, ... [he] reads at only a fifth-grade level despite the fact that he is now in the seventh grade. Although we are dismayed that no one has yet acted to remedy this deficiency during the two and a half years of pending litigation, we find no basis to claim that T.D., a child of average intelligence, needs over 2,400 hours of remedial instruction in order to arrive on an equal footing with his classmates [as a result of denial of FAPE for two school years and a summer]. Such an award, in the absence of strong evidence in the record suggesting that so drastic a remedy is *necessary, would border on punishment to the School District rather than an equitable remedy for* a child in need." (*id.* at 316-317).

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

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• vacated the IHO's 3,300-hour comp ed award due to lack of "any explanation or factual support for the formula-based award" (*id.* at 126) and scheduled show-cause status conference due to student's age (approximately 24)

• "A compensatory award constructed with the aid of a formula is not per se invalid, however. A formula-based award may in some circumstances be acceptable if it represents an individually-tailored approach to meet a student's unique prospective needs, as opposed to a backwards-looking calculation of educational units denied to a student." (*id.* at 123)

• Upon finding a denial of FAPE but insufficient evidence for calculating a comp ed award, the IHO may "provide the parties additional time to supplement the record" (*id.* at 125).[32]

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

• remanded the case due to the IHO's failure to explain how he arrived at the comp ed award of 375 hours

• "The record in this case contains sufficient evidence of T.B.'s unique educational need to allow the Hearing Officer to craft a compensatory education award that is reasonably calculated to place T.B. in the position he would have been in but for the denial of FAPE" (*id.* at 117).

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

• upheld award amounting to same, previous cookie-cutter total where IHO considered test results as to the child's deficit and expert testimony as to what the child would need to close the gap

• "the [IHO] must engage in a fact-intensive analysis that includes individualized assessments of the student so that the ultimate award is tailored to the student's unique needs." (*id.* at 135).

***628** D.W. v. District of Columbia, 561 F. Supp. 2d 56, 235 Educ. L. Rep. 271 (D.D.C. 2008).

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

Brown v. District of Columbia, 568 F. Supp. 2d 44, 236 Educ. L. Rep. 798 (D.D.C. 2008); *see also* Thomas v. District of Columbia, 407 F. Supp. 2d 102, 206 Educ. L. Rep. 176 (D.D.C. 2005)[33]

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

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

• upheld IHO's denial of compensatory education

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

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

• ordered, upon parent's request at show-cause conference, a new psychoeducational evaluation and vocational assessment in order to craft a compensatory education award

• "That evaluation must be done so the compensatory education plan can be premised on Nesbitt's present abilities, deficiencies, and needs. Simply put, like the hearing officer, I have concluded that Nesbitt is due compensatory education and it is impossible to grant that relief without a conscientious and well-informed evaluation of his present status." (*id.* at 172)

• "I assure him that if [the student] fails to cooperate with the entire evaluation process this case will be promptly dismissed." (*id.* at 172).

Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt, 669 F. Supp. 2d 80, 253 Educ. L. Rep. 347 (D.D.C. 2009) (*Nesbitt III*)[34]

• awarded requested comp ed amount, which was same as rejected one-for-one total, after equation-filled discussion and with revision as to GED goal

***629** • "With the completion of the evaluations, I gave [the student] another opportunity to show cause why he should be awarded a compensatory education plan, and he submitted a response that concluded he was entitled to 3,300 hours of tutoring, the exact same amount specified in the award that I vacated. I set an evidentiary hearing where I expected defendant to provide a witness or a number of witnesses to testify, either from personal knowledge, or, if they were appropriately qualified, as experts about the following topics: (1) the level at which the defendant was functioning when he first attended [the school]; (2) the level to which defendant would have

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progressed during his time at [the school], but for the denial of a FAPE; and (3) why 3,300 hours of tutoring will put the defendant in the position he would have been in but for the denial."

• "Enough of a record and an explanation of [the expert's] qualitative methodology exist for the court to determine that, despite its insufficiencies, the proposed compensatory education plan is 'reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place."'

• "Thus, while I will endorse the attainment of a GED as the framework by which tutors may implement the compensatory education award, the attainment of the GED is neither the purpose of the award nor the likely outcome."

Stanton v. District of Columbia, 680 F. Supp. 2d 201, 255 Educ. L. Rep. 120 (D.D.C. 2010)

• reversed IHO's denial of compensatory education and remanded to the IHO to expeditiously supplement the record with the information needed to "'best correct' [the child's] educational 'deficits"' (citing *Reid*) - the district ultimately did not dispute that it had denied the child FAPE

• "*Reid* certainly does not require plaintiff to have a perfect case to be entitled to a compensatory education award. Once a plaintiff has established that she is entitled to an award, simply refusing to grant one clashes with *Reid* ... A hearing officer may "provide the parties additional time to supplement the record" if she believes there is insufficient evidence to support a specific award. *See* Nesbitt I, 532 F. Supp.2d at 125. Choosing instead to award nothing does not represent the 'qualitative focus' on [the child's] 'individual needs' that *Reid* requires."

Matanuska-Susitna Borough Sch. Dist. v. D.Y., 54 IDELR ¶ 52 (D. Alaska 2010)

• upheld, after supplemental briefing, $50k compensatory education fund equivalent to approximately 300 hours of speech therapist services plus roughly 208 hours of aide services, at the respective rates of $125 and $60 per hour, or 2.7 hours of speech services and 1.9 hours of aide services per week for 3 school years

• equitably calculated to put the child "in the place he would have been in absent the [34 months of] District's LRE and Dynavox violations."

Wheaten v. District of Columbia, 55 IDELR ¶ 12 (D.D.C. 2010), *aff'd mem.*, WL 5372181 (D.C. Cir. 2010)

• denied compensatory education where IHO found that school district's subsequent private placement of the child remedied the denial of FAPE.

Gill v. District of Columbia, 751 F. Supp. 2d 104, 265 Educ. L. Rep. 669 (D.D.C. 2010), *further proceedings*, 770 F. Supp. 2d 112, 268 Educ. L. Rep. 761 (D.D.C. 2011)

• after IHO found denial of FAPE but refused compensatory education based on parents' failure to provide sufficient factual foundation (for qualitative approach), court allowed ***630** parent limited opportunity via its authority to hear additional evidence; however, the court subsequently did not award compensatory education, concluding that the additional evidence was "sketchy and patently insufficient."

Cousins v. District of Columbia, 880 F. Supp. 2d 142, 287 Educ. L. Rep. 901 (D.D.C. 2012)

• reversed IHO's award of no compensatory education, concluding instead that the experts had provided sufficient evidence for each of the *Reid* factors for the qualitative approach.

Phillips v. District of Columbia, 736 F. Supp. 2d 240, 263 Educ. L. Rep. 614 (D.D.C. 2010), *clarifying order*, 2010 WL 11586717 (Dec. 21, 2010), *after remand*, 932 F. Supp. 2d 42, 296 Educ. L. Rep. 366 (D.D.C. 2013)

• vacated IHO's award of 255 hours of compensatory education due to parent's failure (via her expert) to provide information as to how these additional hours of tutoring would provide the educational benefits that likely would have accrued had the district provided FAPE in the first place

• remanded to the IHO "to allow plaintiff to supplement the record in order to establish a reasonably calculated and individually-tailored compensatory education award that demonstrates a causal relationship between [the child's] current educational deficits and his earlier denial of a [FAPE]"

• upheld IHO's "inherent" authority" to order an IEE (at district expense) that would help determine the amount of compensatory education under the *Reid* standard

• upheld IHO's denial of compensatory education, after expert witnesses and additional IHO-arranged expert report, based on conclusion that the child's "current difficulties do not stem from the original denial of a FAPE."

Dep't of Educ., State of Haw. v. R.F., 61 IDELR ¶ 127 (D. Haw. 2013)

• upheld award resulting from a separate compensatory education hearing that provided 16 months of private school services, including two summers of ESY, for a three-year denial of FAPE as complying with the *Reid* approach based on expert testimony and the child's successful experience at the private school.

District of Columbia v. Masucci, 13 F. Supp. 3d 33, 309 Educ. L. Rep. 1023 (D.D.C. 2014)

• granted stay of IHO's order of private school placement as compensatory education due to likelihood of success on appeal that the IHO did not show how this order met standards for qualitative calculation.

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

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

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

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

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

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

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

• ruled that IHO did not provide sufficient explanation of his compensatory education calculus.

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

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

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

• remanding IHO's compensatory education award of OT as not either addressing educational losses or providing reasoned explanation for failing to do so, with suggestion of an order for assessment if needed (and for updating or supplementing the award based on the assessment) - also identified "the time of the new award" at the reference

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point for determining the amount needed to restore the child to the position s/he would have been had the district not denied him a FAPE for the period in question.

Brown v. District of Columbia, 179 F. Supp. 3d 15, 336 Educ. L. Rep. 873 (D.D.C. 2016)

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

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

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

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

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

Lopez-Young v. District of Columbia, 211 F. Supp. 3d 42, 341 Educ. L. Rep. 784 (D.D.C. 2016)

• remanding to IHO for determination of compensatory education award, including authority to order independent educational evaluation (IEE) for this purpose if the parent sufficiently showed its necessity.

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

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

Butler v. District of Columbia, 275 F. Supp. 3d 1, 360 Educ. L. Rep. 1022 (D.D.C. 2017); *see also* Collette v. D.C., 74 IDELR ¶ 251 (D.D.C. 2019)

• remanding to IHO to "figure[e] out both (1) what position a student would be in absent a FAPE denial and (2) how to get the student to that position" [quoting *B.D.*] For the second question, the IHO "will need to first ascertain the student's needs at the time of the award [as the baseline] and for both questions, "[c]urrent assessments of the student can be a critical tool"--giving the IHO the option of allowing additional evidence and/or ordering assessments to obtain the necessary information.

Mr. G. v. Canton Bd. of Educ., 74 IDELR ¶ 8 (D. Conn. 2018)

• upheld IHO's order of .8 hr. of specialized math instruction for each day of student's ninth grade as "reasonably calculated to provide the educational benefits" that would have accrued from the inclusion of math instruction in a special education small group setting for that year.

Wade v. District of Columbia, 322 F. Supp. 3d 123, 358 Educ. L. Rep. 156 (D.D.C. 2019)

• ruling that although cookie cutter approach was inapplicable, the IHO's award of 50 hours of compensatory education was insufficient for two-year FAPE denial of approximately 540 hours.

Butler v. District of Columbia, 77 IDELR ¶ 16 (D.D.C. 2020)

• ruling, after acknowledging the failure of the IHO system, the school district, and the judicial system, that the 20-year-old with multiple disabilities was entitled, five years after the two-year denial of FAPE, to 1100 hours of specialized instruction, 88 hours of OT services, 132 hours of adaptive PE, and 132 hours of orientation and mobility services based on expert evidence.

J.T. v. District of Columbia, 496 F. Supp. 3d 190, 389 Educ. L. Rep. 89 (D.D.C. 2020)

• awarding, except for the first five weeks as reasonable delay, compensatory education as determined via IEE for indefinite failure to provide such a placement for at least the following year (including prospective continuation if not promptly rectified).

Spring Branch Indep. Sch. Dist. v. O.W., 79 IDELR ¶ 101 (S.D. Tex. 2021)

• remanding long-standing case to IHO for determination, per *Reid*, of whether the student had "specific educational deficits resulting from his loss of FAPE" and if so, "the specific compensatory measures needed to best correct those deficits."

White v. District of Columbia, 80 IDELR ¶ 284 (D.D.C. 2022)

• remanded to IHO to determine, per *Reid*, to fashion an appropriate compensatory education award in wake of further developments, including partially reversed FAPE rulings and alleged refusal to implement the IEE-calculated award.

Reyes v. Bd. of Educ. of Prince George's Cnty., 80 IDELR ¶ 286 (D. Md. 2022)

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• estimated that the denial of FAPE amounted to 1,960 hours of specialized instruction, 2,560 hours of support from a dedicated aide, 84 hours of OT, 94.5 hours of adapted PE, and 126 hours of orientation and mobility support

***633** • awarded, per plaintiff expert's qualitative fact-based, and individually tailored recommendation, 1,100 hours of specialized instruction, 88 hours of OT, 100 hours of adapted PE, and 132 hours of orientation and mobility support therapy.

Footnotes

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1 For the most recent earlier version, *see* Perry A. Zirkel, *The Competing Approaches for Calculating Compensatory Education under the IDEA: An Update*, 339 Educ. L. Rep. 10 (2017).

2 *E.g.*, Perry A. Zirkel, *Compensatory Education: The Latest Annotated Update of the Law*, 376 Educ. L. Rep. 850 (2020). This update is the most recent series that started in 1991. Perry A. Zirkel, *Compensatory Educational Services in Special Education Cases,* 67 Educ. L. Rep. 881 (1991).

3 *E.g.*, Perry A. Zirkel, *Compensatory Education under the Individuals with Disabilities Education Act: The Third Circuit's Partially Mis-Leading Position*, 110 Penn. State L. Rev. 879 (2006). Unlike compensatory education, tuition reimbursement is codified in the IDEA, and it has been the subject of Supreme Court decisions. *See, e.g.*, Forest Grove Sch. Dist. v. T.A., 557 U.S. 230 (2009).

4 P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 740, 250 Educ. L. Rep. 517 (3d Cir. 2009).

5 Except for brief mention in relation to the state complaint process (34 C.F.R. § 300.151(b)(1)), the IDEA regulations do not codify compensatory education, leaving its details to the case law under the broad remedial authority that the legislation accords explicitly to the courts and implicitly to hearing and review officers. *See, e.g.*, Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the IDEA: The Latest Update*, 37 J. Nat'l Ass'n of Admin. L. Judiciary 505, 507-08 (2018).

6 The focus here is on the method for calculating compensatory education, not on overlapping issues, such as whether the IDEA allows the hearing officer to delegate the calculation or its adjustment to the IEP team. For examples of the delegation prohibition, which arose in tandem with but is not connected to the qualitative approach, *see* Bd. of Educ. of Fayette Cnty. v. L.M., 478 F.3d 307, 318, 216 Educ. L. Rep. 354 (6th Cir. 2007); Reid v. District of Columbia, 401 F.3d 516, 526, 196 Educ. L. Rep. 402 (D.C. Cir. 2005); Meza v. Bd. of Educ., 56 IDELR ¶ 167 (D.N.M. 2011) (relying on the impartiality requirement for IHOs, specifically the disallowance for IHOs being school district employees). *But see* Mr. I. v. Me. Sch. Admin. Unit No. 55, 480 F.3d 1, 217 Educ. L. Rep. 60 (1st Cir. 2007); Struble v. Fallbrook Union Sch. Dist., 56 IDELR ¶ 4 (S.D. Cal. 2011); *cf.* Sch. Dist. of Phila. v. Williams, 66 IDELR ¶ 214 (E.D. Pa. 2015); T.G. v. Midland Sch. Dist., 848 F. Supp. 2d 902, 282 Educ. L. Rep. 425 (C.D. Ill. 2012); A.L. v. Chi. Pub. Sch. Dist., 57 IDELR ¶ 276 (N.D. Ill. 2011); State of Haw., Dept. of Educ. v. Zachary B., 52 IDELR ¶ 213 (D. Haw. 2009).

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7 Reid v. District of Columbia, 401 F.3d 516, 523, 196 Educ. L. Rep. 402 (D.C. Cir. 2005).

8 *See infra* note 14.

9 401 F.3d 516, 196 Educ. L. Rep. 402 (D.C. Cir. 2005).

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

11 *E.g.*, Petrina W. v. City of Chi. Pub. Sch. Dist. 299, 53 IDELR ¶ 259 (N.D. Ill. 2009).

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

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

14 The Sixth Circuit yielded only partial examples: Woods v. Northport Sch. Dist., 487 F. App'x 968, 978 287 Educ. L. Rep. 746 (6th Cir. 2012) (affirming what appears to be a quantitative calculation while citing the flexibility of the Eleventh rather than Sixth Circuit); Henry Cnty. Bd. of Educ. v. L.M., 76 IDELR ¶ 282 (E.D. Ky. 2020) (upholding what appears to be a quantitative approach upon interpreting the Sixth Circuit decision as flexible rather than the strict Reid standard). Conversely, the Third Circuit provided much more relevant, mixed activity. *E.g.*, G.L. v. Ligonier Valley Sch. Auth., 802 F.3d 601, 604 (3d Cir. 2015); Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 717-18, 259 Educ. L. Rep. 37 (3d Cir. 2010) (citing Reid without adopting the qualitative approach). For recent lower court decisions that appear to use an intermediate approach, *see* Garden Acad. v. S.M., 78 IDELR ¶ 46, at 9 (D.N.J. 2019); Brandywine Heights Area Sch. Dist. v. B.M., 248 F. Supp. 3d 618, 631-32, 347 Educ. L. Rep. 276 (E.D. Pa. 2017); A.W. v. Middletown Area Sch. Dist., 68 IDELR ¶ 247 (M.D. Pa. 2016); Jana K. v. Annville-Cleona Sch. Dist., 39 F. Supp. 3d 584, 608, 313 Educ. L. Rep. 702 (E.D. Pa. 2014); Cent. Sch. Dist. v. K.C., 61 IDELR ¶ 125, at *10 (E.D. Pa. 2013). Yet, other lower court decisions in the Third Circuit during this recent period have adhered more strictly to the quantitative approach. E.g., A.D. v. Upper Merion Sch. Dist., 81 IDELR ¶ __ (E.D. Pa. 2022); Aja N. v. Lower Merion Area Sch. Dist., 81 IDELR ¶ 198 (E.D. Pa. 2022); Kayla W. v. Chichester Sch. Dist., 80 IDELR ¶ 161 (E.D. Pa. 2022); Colonial Sch. Dist. v. N.S., 76 IDELR ¶ 127 (E.D. Pa. 2020); Matthew B. v. Pleasant Valley Sch. Dist., 75 IDELR ¶ 157 (M.D. Pa. 2019); Rayna P. v. Campus Cmty. Sch., 72 IDELR ¶ 214 (D. Del. 2018); A.S. v. Harrison Bd. of Educ., 67 IDELR ¶ 207, reconsideration denied, 68 IDELR ¶ 96 (D.N.J. 2016); Tyler W. v. Perkiomen Sch. Dist., 963 F. Supp. 2d 427 (E.D. Pa. 2013).

15 *Supra* note 12.

16 *E.g.*, S.S. v. Bellflower Unified Sch. Dist., 79 IDELR ¶ 201 (C.D. Cal. 2021); Hood River Cnty. Sch. Dist. v. Student, 79 IDELR ¶ 40 (D. Or. 2021); Dep't of Educ., Haw. V. R.H., 61 IDELR ¶ 127 (D. Haw. 2013); B.T. v. Dep't of Educ., Haw., 676 F. Supp. 2d 982, 989, 254 Educ. L. Rep. 212 (D. Haw. 2010).

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17 *E.g.*, Draper v. Atlanta Sch. Sys., 518 F.3d 1275, 230 Educ. L. Rep. 545 (11th Cir. 2008) (affirming prospective private school placement as compensatory education); I.T. v. Dep't of Educ., Haw., 62 IDELR ¶ 178 (D. Haw. 2013) (awarding partial reimbursement as compensatory education).

18 *E.g.*, Mt. Vernon Sch. Corp. v. A.M., 59 IDELR ¶ 187 (S.D. Ind. 2012) (citing the Reid standard for a flexible approach); T.G. v. Midland Sch. Dist., 848 F. Supp. 2d 902, 924-25, 282 Educ. L. Rep. 425 (C.D. Ill. 2012) (citing the Reid standard with broader flexibility that "defers to the IHO's opinion so long as it is reasonable and supported by the evidence").

19 *E.g.*, E.S. v. Conejo Valley Unified Sch. Dist., 72 IDELR ¶ 180 (C.D. Cal. 2018) (citing the Reid standard along with the more flexible Ninth Circuit standard to allow a quantitative calculation); Pangerl v. Peoria Unified Sch. Dist., 69 IDELR ¶ 133 (D. Ariz. 2016); Maple Heights City Sch. Bd. of Educ., 68 IDELR ¶ 5 (N.D. Ohio 2016) (disfavoring the mechanical but not strictly requiring qualitative approach); Oskowis v. Sedona-Oak Creek Unified Sch. Dist., 67 IDELR ¶ 150 (D. Ariz. 2016) (not minute-for minute but revised on approximately quantitative basis); D.G. v. Flour Bluff Indep. Sch. Dist., 832 F. Supp. 2d 755, 280 Educ. L. Rep. 132 (S.D. Tex. 2011), *vacated on other grounds*, 481 F. App'x 887, 286 Educ. L. Rep. 131 (5th Cir. 2012); B.H. v. W. Clermont Bd. of Educ., 788 F. Supp. 2d 682, 272 Educ. L. Rep. 445 (S.D. Ohio 2011); State of Haw V. Zachary B., 52 IDELR ¶ 213 (D. Haw. 2009); (qualitative approach yielding result that approximates quantitative approach); *cf.* O.A. v. Orcutt Union High Sch. Dist., 81 IDELR ¶ 109 (C.D. Cal. 2022) (upholding qualitative award but adding missed period based on quantitative calculus); S.H. v. Mt. Diablo Unified Sch. Dist., 263 F. Supp. 3d 746, 349 Educ. L. Rep. 625 (N.D. Cal. 2017) (upholding quantitative award based on un-cited flexible approach); Dracut Sch. Comm. v. Bureau of Special Educ. Appeals, 737 F. Supp. 2d 35, 263 Educ. L. Rep. 625 (D. Mass. 2010) (*citing* Puffer v. Raynolds, 761 F. Supp. 838, 853, 67 Educ. L. Rep. 536 (D. Mass. 1988) for award "equal in time and scope" with what the student would have received while eligible). For advocacy of such a flexible hybrid approach, *see* Terry J. Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?*, 45 Urb. Law. 281 (2013).

20 *E.g.*, R.S. v. Bd. of Dir. Of Woods Charter Sch. Co., 806 F. App'x 229 (4th Cir. 2020); Westendorp v. Indep. Sch. Dist. No. 273, 35 F. Supp. 2d 1134, 133 Educ. L. Rep. 97 (D. Minn. 1998). However, the effect of the IDEA's limitation period for filing for the impartial hearing is a significant factor in light of G.L. v. Ligonier Valley Sch. Auth., 802 F.3d 601, 322 Educ. L. Rep. 633 (3d Cir. 2015). *E.g.*, Perry A. Zirkel, Of Mouseholes and Elephants: The Statute of Limitations for Impartial Hearings under the Individuals with Disabilities Education Act, 35 J. Nat'l Ass'n Admin. L. Judiciary 305 (2015). Yet, the period for compensatory education accrues when the district has actual or constructive notice of the FAPE denial. Colonial Sch. Dist. v. N.S., 76 IDELR ¶ 127 (E.D. Pa. 2020) (citing M.C.).

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

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

23 *E.g.*, R.B. v. Downingtown Area Sch. Dist., 509 F. Supp. 3d 339, 391 Educ. L. Rep. 624 (E.D. Pa. 2020); Montgomery Cnty. Intermediate Unit v. C.M., 71 IDELR ¶ 11 (E.D. Pa. 2017); Sch. Dist. of Phila. v. Deborah A., 52 IDELR ¶ 67 (E.D. Pa. 2009).

24 *E.g.*, Pottsgrove Sch. Dist. v. D.H., 72 IDELR ¶ 271 (E.D. Pa. 2018) (with necessary indulgence for rough hourly estimates but requiring "closer attention to monthly, weekly, and daily variations in [the child's] performance and any documentation of the shortcomings at issue").

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25 *E.g.*, M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397, 108 Educ. L. Rep. 522 (3d Cir. 1996) ("the time reasonably required for the school district to rectify the problem"); *see also* A.D. v. Upper Merion Sch. Dist., 81 IDELR ¶ __ (E.D. Pa. 2022); Kayla W. v. Chichester Sch. Dist., 80 IDELR ¶ 161 (E.D. Pa. 2022); Colonial Sch. Dist. v. N.S., 76 IDELR ¶ 127 (E.D. Pa. 2020); Sch. Dist. of Phila. v. Williams, 66 IDELR ¶ 214 (E.D. Pa. 2015); Dudley v. Lower Merion Sch. Dist., 58 IDELR ¶ 12 (E.D. Pa. 2011); Breanne C. v. S. York Cnty. Sch. Dist., 732 F. Supp. 2d 474, 263 Educ. L. Rep. 122 (M.D. Pa. 2010); E. Penn Sch. Dist. v. Scott P., 29 IDELR 1058 (E.D. Pa. 1999), further proceedings, 30 IDELR 129 (E.D. Pa. 1999). For exceptions, *see* Pottsgrove Sch. Dist. v. D.H., 72 IDELR ¶ 271 (E.D. Pa. 2018); Brandywine Heights Area Sch. Dist. v. B.M., 248 F. Supp. 3d 618, 347 Educ. L. Rep. 276 (E.D. Pa. 2017); Tyler W. v. Perkiomen Sch. Dist., 963 F. Supp. 2d 427, 301 Educ. L. Rep. 777 (E.D. Pa. 2013).

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

27 *E.g.*, Garcia v. Bd. of Educ., 520 F.3d 1116, 231 Educ. L. Rep. 25 (10th Cir. 2008); Moubry v. Indep. Sch. Dist. No. 696, 27 IDELR 469 (D. Minn. 1997); *cf.* P.P. v. Nw. Indep. Sch. Dist., 839 F. App'x 848, 387 Educ. L. Rep. 499 (5th Cir. 2020); R.L. v. Miami Dade Cnty. Sch. Bd., 757 F.3d 1173, 307 Educ. L. Rep. 596 (11th Cir. 2014); Torda v. Fairfax Cnty. Sch. Bd., 517 F. App'x 162 (4th Cir. 2013).

28 Reid v. District of Columbia, 401 F.3d at 524 ("the parties must have some opportunity to present evidence regarding [the child's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits."). The court also provided this alternative, "but for" wording: "[what services, if any, were required] to place [the child] in the same position [he] would have occupied but for the district's violations of IDEA." *Id.* at 518. For an example of the adjudicative difficulties, including time-consuming transaction costs of implementing this overall approach, *see* Phillips v. District of Columbia, 932 F. Supp. 2d 42, 296 Educ. L. Rep. 366 (D.D.C. 2013) (upholding IHO's decision denying compensatory education for a denial of FAPE seven years earlier due to parents' failure to provide evidence that met Reid standard after repeated opportunities).

29 Reid v. District of Columbia, 401 F.3d at 525. The court more recently identified the "time of the ... award" as the point for calculating the requisite amount. B.D. v. District of Columbia, 817 F.3d 792, 799, 329 Educ. L. Rep. 612 (D.C. Cir. 2016).

30 J.T. v. District of Columbia, 496 F. Supp. 3d 190, 389 Educ. L. Rep. 89 (D.D.C. 2020); *cf.* Spring Branch Indep. Sch. Dist. v. O.W., 72 IDELR ¶ 11 (S.D. Tex. 2018), *aff'd and rev'd in part on other grounds*, 961 F.3d 781, 378 Educ. L. Rep. 22 (5th Cir. 2020) (excluding period for evaluation and initial IEP meeting).

31 Reid v. District of Columbia, 401 F.3d at 524 (recognizing this equitable consideration but subsuming it within the overall qualitative standard); cf. Cupertino Union Sch. Dist., v. K.A., 75 F. Supp. 3d 1088, 1106, 319 Educ. L. Rep. 352 (N.D. Cal. 2014) (*citing* Parents v. Puyallup Sch. Dist., 31 F.3d at 1497).

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

33 For this court's other, more recent remands to determine the amount of compensatory education, in addition to those excerpted *infra, see* Glass v. District of Columbia, 77 IDELR ¶ 246 (D.D.C. 2020); Gaston v. District of Columbia, 74 IDELR ¶ 279 (D.D.C. 2019); Collette v. District of Columbia, 74 IDELR ¶ 251 (D.D.C. 2019); Middleton v. District of Columbia, 312 F. Supp. 3d 113, 356 Educ. L. Rep. 551 (D.D.C. 2019);Walker v. District of Columbia, 786 F. Supp. 2d 232, 272 Educ. L. Rep. 192 (D.D.C. 2011); Long v. District of Columbia, 780 F. Supp. 2d 49, 270 Educ. L. Rep. 664 (D.D.C. 2011); Wilson v. District of Columbia, 770 F. Supp. 2d 270, 268 Educ. L. Rep. 774 (D.D.C. 2011); Henry v. District of Columbia, 750 F. Supp. 2d 94, 265 Educ. L. Rep. 601 (D.D.C. 2010); Anthony v. District of Columbia, 463 F. Supp. 2d 37, 215 Educ. L. Rep. 758 (D.D.C. 2006).

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

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