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Perry A. **Zirkel**, Ph.D., J.D., LL.M.^{aa1}

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COMPENSATORY EDUCATION UNDER THE IDEA: THE LATEST LEGAL UPDATE^{a1}

This annotated outline is the latest in a series that provides a cumulatively comprehensive and concise canvassing of the case law concerning compensatory educational services under the Individuals with Disabilities in Education Act (“IDEA”).¹ Designed as an update of the previous ones in the series, this outline lists the **additional and newer outline items and legal citations in bold typeface**, with the other items selectively provided merely for context.² Published decisions by IDEA impartial hearing officers (IHOs)³ are designated, in the forum part of the citation, as “SEA,” per the conventions of the Individuals with Disabilities Education Law Report (“IDELR”). Similarly, pertinent U.S. Department of Education policy letters carry the citation designation “OSEP” or “OSERS” for the Department's Office for Special Education Programs and the Office for Special Education and Rehabilitation Services, respectively.⁴ The outline also includes a limited, sampling of relevant Office for Civil Rights (OCR) letters of findings only to illustrate the overlapping coverage of Section 504.⁵

***540 A. Background Concepts**

1. definition: equitable remedy⁶ that provides in-kind special education and other related services for denials of a free and appropriate public education (“FAPE”),⁷ or a “replacement of education services the student should have received in the first place.”⁸

2. analogy to tuition reimbursement: incomplete⁹

3. IDEA 2004 Amendments and 2006 Regulations:

- continued (from 1997 Amendments) codification, at least in part, of tuition reimbursement remedy¹⁰
- one-year statute of limitations for compensatory education claims brought under the state complaint resolution process?¹¹
- indirect springboard for compensatory education in the discipline context¹²

- only inferable authority under the judicial umbrella of IDEA for hearing/review officers,¹³ and--under the backup coverage of Section 504 and the ADA¹⁴--largely¹⁵ OCR¹⁶

***541 B. Threshold Issues**

1. the age 21 barrier: shattered,¹⁷ with a limited and disputed exception¹⁸
2. Eleventh Amendment immunity: inapplicable¹⁹
3. statute of limitations: two years unless state law²⁰ but with a much longer remedial period for compensatory education?²¹
4. exhaustion doctrine: rather uniform, effective requirement²²
5. mootness doctrine²³

- a bar where the student is no longer eligible as having an IDEA disability²⁴

- **in most jurisdictions, not** a bar when the student has graduated²⁵

***542** • in most jurisdictions, not a bar when the student has moved, whether within the same state²⁶ or out of state²⁷

- not a bar where the student is no longer eligible under Part C or who has moved out of state while eligible under Part C²⁸

- not a bar when the student has dropped out beyond the age of compulsory education²⁹

- not a bar when the parties arrived at a settlement that did not resolve this issue³⁰

- not a bar in child find case where the district ultimately evaluated the child, found him eligible, and provided an IEP, even if an appropriate one³¹

- not a bar where the student has been incarcerated but services or placement is still foreseeably at issue³²
- not a bar where the year at issue has ended³³
- not necessarily a bar where the IHO granted the alternative requested remedy of an IEE³⁴

6. request required in notice pleading?: not if at the prehearing conference³⁵

C. Evolving Standards

1. triggering issues

- threshold level: denial of FAPE³⁶ must be more than *de minimis*³⁷ and need not be in bad faith,³⁸ but increasingly narrowed minority view that it must be gross³⁹

***543** • threshold question: must the plaintiff show a specific loss of educational opportunity?⁴⁰ what if only a violation of the least restrictive environment (LRE), not FAPE?⁴¹ **Similarly, what if there is a child-find violation in the absence of resulting eligibility?**⁴²

- limited for procedural violations⁴³

- includes related services⁴⁴

- includes extracurricular activities⁴⁵

***544** • includes implementation, not just formulation, violations⁴⁶

- not for child find violation where the child is not eligible⁴⁷

2. calculation issues⁴⁸

- starting point: when the **filing party (or defendant-district?)** knew or should have known of the denial of FAPE⁴⁹

a) quantitative approach⁵⁰

- duration: the period of the denial⁵¹

- exclusion (in the Third Circuit): “the time reasonably required for the school district to rectify the problem”⁵²

***545** - exclusion for comp ed from state complaint resolution process during the same period⁵³

- another exclusion: absences? - rarely⁵⁴

- extent--need not provide a day-for-day compensation for time missed⁵⁵ but particularized (i.e., service-unit)⁵⁶
basis v. total-package⁵⁷ basis⁵⁸

b) qualitative approach customized to 1) “specific educational deficits resulting from [child's] loss of FAPE,” which could be less or even more than “cookie cutter” approach⁵⁹

***546** c) relaxed hybrid approach⁶⁰

• **but within IHO's equitable discretion to deny in light of purposes of the IDEA**⁶¹

***547** • specific formula: sometimes a mystery⁶²

• another area of imprecision or confusion: retrospective and prospective FAPE⁶³

- role of the equities: not entirely settled but likely yes,⁶⁴ including offset issue⁶⁵
- for stay-put?: yes⁶⁶
- *548 • need: hardly considered⁶⁷ and presumed,⁶⁸ except for the emerging qualitative approach⁶⁹
- partial credit? - hardly addressed yet⁷⁰
- saturation point - also rarely considered⁷¹
- not excused by present progress or appropriateness⁷²
- amount for the district's denial of opportunity for meaningful parental participation in the IEP process?⁷³
- amount for prejudicial problem in transition assessment?⁷⁴
- not for missed instruction or services due to participation in statewide assessments⁷⁵
- within IHO authority for violations of disciplinary changes in placement⁷⁶
- who has the responsibility, including the burden of proof?⁷⁷

*549 3. scope issues

- lower limit: child in a permanent vegetative state⁷⁸

- form: includes training?⁷⁹ consultant?⁸⁰ paraprofessional?⁸¹ tuition **or tutoring** reimbursement?⁸² assessments?⁸³ prospective placement?⁸⁴ IEP (after age 21)?⁸⁵
- upper limit: postsecondary education?⁸⁶

***550** 4. related issues

- distinguishable from and, for denial of FAPE, generally warranted in addition to prospective relief⁸⁷
- awards of both compensatory education and tuition reimbursement for different periods of FAPE denial⁸⁸ or for stay-put violations⁸⁹ - **and for the same period**⁹⁰?
- award of compensatory education as default for unsuccessful (at Step II) tuition reimbursement: **limited thus far**⁹¹
- when: after school, during the summer, or at some other time beyond what is required by the prospective IEP⁹²--at parents' convenience within reasonable, specified time limit⁹³--and, where included in the IEP, as soon as possible⁹⁴
- where: private school?⁹⁵
- who (determines amount?): the IHO?⁹⁶ an outside expert?⁹⁷ mutual agreement or IEP team⁹⁸?

***551** • who provides? - district personnel?⁹⁹ independent consultants¹⁰⁰

***552** • who provides? (cont.) - if outside provider, subject to regular progress and attendance reports?¹⁰¹ **or upon child's change to different district?**¹⁰²

- enforcement options for failure to implement IHO compensatory education relief include IDEA (w/o exhaustion)¹⁰³ and ADA¹⁰⁴
- what: same or different? escrow or trust fund?¹⁰⁵
- *553 • how: bifurcated hearing via a second, contingent phase,¹⁰⁶ dismissal without prejudice,¹⁰⁷ ordering reopening for this limited purpose¹⁰⁸
- final possible problems: awards that are too vague to be enforceable¹⁰⁹ or that are sufficiently clear but not implemented¹¹⁰
- conversely, enforcement may include judicial civil contempt sanctions¹¹¹
- the district's failure to comply with a comp ed award is not a harmless procedural violation¹¹²

5. Miscellaneous other issues

- effect on attorneys' fees¹¹³

Footnotes

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^{aa1} Perry A. Zirkel is university professor emeritus of education and law at Lehigh University. He is a past president of the Education Law Association.

¹ For the earlier articles in this series, see Perry A. Zirkel, *Compensatory Education: The Latest Annotated Update of the Law*, 376 Educ. L. Rep. 850 (2020); Perry A. Zirkel, *Compensatory Education: The Next Annotated Update of the Law*, 336 Educ. L. Rep. 654 (2016); 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. 501 (2010); Perry A. Zirkel, *Compensatory Education Services under the IDEA: An Annotated Update*, 190 Educ. L. Rep. 745 (2004); Perry A. Zirkel & M. Kay Hennessy, *Compensatory Educational Services in Special Education Cases*, Educ. L. Rep. 311 (2001); Perry A. Zirkel, *The Remedy of Compensatory Education*

under the IDEA, 95 Educ. L. Rep. 483 (1995); Perry A. Zirkel, *Compensatory Educational Services in Special Education Cases*, 67 Educ. L. Rep. 881 (1991).

- 2 See the previous articles for the full canvassing of the applicable legal authorities.
- 3 “IHO” herein refers generically to not only impartial hearing officers, but also, in the relatively few states that have retained a second tier for IDEA administrative adjudications, impartial review officers. For an overview of the state systems for IDEA administrative adjudication, including jurisdictions that have a second tier and those that have a single tier composed of full-time, administrative law judges, see Jennifer Connolly, Perry A. Zirkel, & Thomas Mayes, *State Due Process Systems under the IDEA: An Update*, 30 J. Disability Pol’y Stud. 156 (2019).
- 4 For the legal weight of such agency interpretations, see Perry A. Zirkel, *The Courts’ Use of OSEP Policy Interpretations in IDEA Cases*, 342 Educ. L. Rep. 671 (2017).
- 5 See *infra* notes 14-16 and accompanying text. For a comprehensive reference, see Perry A. Zirkel, Section 504, ADA and the Schools (2004) (available from LRP Publications - www.lrp.com). For a systematic chart showing the similarities with and differences from the IDEA, see Perry Zirkel, *The Latest Comprehensive Comparison of the IDEA and Section 504/ADA*, 416 Educ. L. Rep. 1 (2023). For relatively rare hearing officer decisions under Section 504, which provided compensatory education, see *Laurel Highlands Sch. Dist.*, 116 LRP 8832 (Pa. SEA 2016); *Solanco Sch. Dist.*, 115 LRP 10056 (Pa. SEA 2015).
- 6 *E.g.*, *S.S. v. Howard Road Acad.*, 562 F. Supp. 2d 126, 235 Educ. L. Rep. 883 (D.D.C. 2008).
- 7 *E.g.*, *Lester H. v. Gilhool*, 916 F.2d 865, 868, 63 Educ. L. Rep. 45 (3d Cir. 1990) (“to restore [the FAPE that] which had been denied him”). Sometimes the concept is confused with tuition reimbursement. *E.g.*, *Brown v. Bartholomew Consol. Sch. Corp.*, 442 F.3d 588, 597, 207 Educ. L. Rep. 601 (7th Cir. 2006).
- 8 *Reid v. District of Columbia*, 401 F.3d 516, 518, 196 Educ. L. Rep. 402 (D.C. Cir. 2005).
- 9 Perry Zirkel, *Compensatory Education under the Individuals with Disabilities Education Act: The Third Circuit’s Partially Mis-Leading Position*, 110 Penn. State L. Rev. 879, 894 (2006).
- 10 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). The slight revisions are limited to the exceptions to timely notice (specifically, the addition of a physical harm alternative).
- 11 34 C.F.R. § 300.153(c). The only reference in the legislation and regulations to “compensatory services” is--along with “monetary reimbursement”--as a possible remedy in the complaint resolution process. *Id.* § 300.151(b)(1). For the statute of limitations for the hearing/review process, see *infra* note 20 and accompanying text. For examples of compensatory education awards via this complaint resolution process, see **Complaint Decision File 23-010C, 2024 WL 413494 (Minn. Ct. App. Feb. 5, 2024)**; *Rothsay Pub. Sch. Dist.*, 68 IDELR ¶ 267 (Minn. SEA 2016); *Anchorage Sch. Dist.*, 68 IDELR ¶ 266 (Alaska SEA 2016); *Student with a Disability*, 59 IDELR ¶ 27 (Iowa SEA 2012); *Baltimore City Pub. Sch.*, 58 IDELR ¶ 146 (Md. SEA 2011); *Baltimore City Pub. Sch.*, 56 IDELR ¶ 27 (Md. SEA 2010); *Washington Cnty. Pub. Sch.*, 53 IDELR ¶ 105 (Md. SEA 2009); *Student with a Disability*, 59 IDELR ¶ 86 (Mont. SEA 2012); *In re Student with a Disability*, 55 IDELR ¶ 299 (Wyo. SEA 2010); *cf.* *Westview Sch. Corp.*, 51 IDELR ¶ 27 (Ind. SEA 2008) (delegated to IEP team).
- 12 34 C.F.R. § 300.530(e)(3) (in the manifestation determination process, requiring districts to “take immediate step to remedy, the causal implementation deficiencies”).

- 13 *E.g.*, Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: The Latest Update*, 37 J. Nat'l Assn Admin. L. Judiciary 505 (2018). The limited exception is the occasional state law that expressly authorizes this hearing officer remedy. *E.g.*, Minn. Stat. Ann. § 125A.091(21) (2016).
- 14 *E.g.*, *Mrs. C. v. Wheaton*, 916 F.2d 69, 63 Educ. L. Rep. 93 (2d Cir. 1990).
- 15 On rare occasions hearing/review officers address compensatory education awards under § 504. *E.g.*, Andover Pub. Sch., 28 IDELR 266 (Mass. SEA 1998).
- 16 *E.g.*, Cle Elum-Roslyn (WA) Sch. Dist., 41 IDELR ¶ 271 (OCR 2004). However, OCR's modern policy is usually to avoid deciding FAPE and other substantive issues, relegating such relief to “voluntary” compliance agreements. *E.g.*, OCR, *Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* - Q/A item 5, <http://www.ed.gov/about/offices/list/ocr/504faq.html>.
- 17 *E.g.*, **Kass v. W. Dubuque Cmty. Sch. Dist.**, 101 F.4th 562 (8th Cir. 2024); *Barnett v. Memphis City Sch. Sys.*, 113 F. App'x 124, 193 Educ. L. Rep. 419 (6th Cir. 2004); *Pace v. Bogalusa City Sch.*, 325 F.3d 609, 175 Educ. L. Rep. 104 (5th Cir. 2003); *Pihl v. Mass. Dep't of Educ.*, 9 F.3d 184, 87 Educ. L. Rep. 341 (1st Cir. 1993). **According to a recent unpublished decision in New York, this non-barring also applies to the enforcement of compensatory education awards. Tobuck v. Banks, 2024 WL 1349693 (S.D.N.Y. Mar. 29, 2024).**
- 18 *Compare Bd. of Educ. of Oak Park v. Ill. State Bd. of Educ.*, 79 F.3d 654, 108 Educ. L. Rep. 32 (7th Cir. 1996); *J.R. v. Cox-Cruey*, 61 IDELR ¶ 212 (E.D. Ky. 2012); *Hilden v. Lake Oswego Sch. Dist.*, 21 IDELR 671 (D. Or. 1994) (parents may not pierce the age-21 barrier for services via the stay-put provision), *with Cosgrove v. Bd. of Educ.*, 175 F. Supp. 2d 375 (N.D.N.Y. 2001); *Appleton Area Sch. Dist. v. Benson*, 32 IDELR 91 (E.D. Wis. 2000); *Carl B. v. Mundelein High Sch. Dist.*, 20 IDELR 263 (N.D. Ill. 1993) (stay-put may yield compensatory education).
- 19 *E.g.*, Perry A. Zirkel, *Eleventh Amendment Immunity and Student Suits under the IDEA, Section 504, and the ADA*, 183 Educ. L. Rep. 657 (2004).
- 20 20 U.S.C. § 1415(f)(3)(C) (2005); *see also id.* § 1415(b)(6)(B). The language is not entirely clear and includes two narrow, specific exceptions. For the misrepresentation/withholding exceptions, *see D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 285 Educ. L. Rep. 730 (3d Cir. 2012); **J.R. v. Ventura Unified Sch. Dist.**, 668 F. Supp. 3d 1054, 425 Educ. L. Rep. 195 (C.D. Cal. 2023); *Coleman v. Pottstown Sch. Dist.*, 983 F. Supp. 2d 543, 305 Educ. L. Rep. 141 (E.D. Pa. 2103); *Reg'l Sch. Unit 51 v. Doe*, 920 F. Supp. 2d 168, 294 Educ. L. Rep. 722 (D. Me. 2013); *Sch. Dist. v. Deborah A.*, 52 IDELR ¶ 67 (E.D. Pa. 2009). The new provision does not directly address the issue of tolling. *E.g.*, *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 285 Educ. L. Rep. 730 (3d Cir. 2012); *Lynn Daggett et al., For Whom the School Bell Tolls But Not the Statute of Limitations: Minors and the Individuals with Disabilities Education Act*, 38 U. Mich. J.L. Reform 717 (2005). Finally, the qualitative approach may effectively extend beyond the limitations period for the amount available via the quantitative approach. *E.g.*, *Cent. Sch. Dist. v. K.C.*, 61 IDELR ¶ 125 (E.D. Pa. 2013).
- 21 *Avila v. Spokane Sch. Dist.*, 852 F.3d 936, 341 Educ. L. Rep. 646 (9th Cir. 2017); *G.L. v. Ligonier Valley Sch. Auth.*, 802 F.3d 601, 322 Educ. L. Rep. 633 (3d Cir. 2015); *K.H. v. N.Y.C. Dep't of Educ.*, 63 IDELR ¶ 295 (E.D.N.Y. 2014); *Gwinnett Cnty. Sch. Dist. v. A.A.*, 54 IDELR ¶ 316 (N.D. Ga. 2010). For a recent overview, *see Perry A. Zirkel, The Statute of Limitations for an Impartial Hearing under the IDEA: A Guiding Checklist*, 363 Educ. L. Rep. 483 (2019).
- 22 *E.g.*, Lewis Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Courts' Jurisdiction Requirements under the Individuals with Disabilities Education Act*, 29 J. Nat'l Ass'n Admin. L. Judiciary 349 (2009).

- 23 For a ruling of mootness based on waiver in the adjudicative process, *see* [J.T. v. Newark Bd. of Educ.](#), 564 F. App'x 677, 306 Educ. L. Rep. 675 (3d Cir. 2014).
- 24 *E.g.*, [M.L. v. El Paso Indep. Sch. Dist.](#), 610 F. Supp. 2d 582, 244 Educ. L. Rep. 590 (W.D. Tex. 2009), *aff'd*, 369 F. App'x 573, 258 Educ. L. Rep. 40 (5th Cir. 2010).
- 25 *E.g.*, [Moynihan v. W. Chester Area Sch. Dist.](#), 813 F. App'x 825 (3d Cir. 2020); [Frazier v. Fairhaven Sch. Comm.](#), 276 F.3d 52, 160 Educ. L. Rep. 336 (1st Cir. 2002); [Holman v. District of Columbia](#), 153 F. Supp. 3d 386, 332 Educ. L. Rep. 145 (D.D.C. 2016); [Brooks v. District of Columbia](#), 841 F. Supp. 2d 253, 281 Educ. L. Rep. 915 (D.D.C. 2012); [Bell v. Bd. of Educ.](#), 52 IDELR ¶ 161 (D.N.M. 2008); [San Dieguito Union High Sch. Dist. v. Guray-Jacobs](#), 44 IDELR ¶ 189 (S.D. Cal. 2006); *cf.* [Dracut Sch. Comm. v. Bureau of Special Educ. Appeals](#), 737 F. Supp. 2d 35, 263 Educ. L. Rep. 625 (D. Mass. 2010) (rejecting IHO's authority to extend eligibility after ordering diploma but allowing compensatory education for prior denial of FAPE). *But see* [Barnett v. Memphis City Sch. Sys.](#), 113 F. App'x 124, 193 Educ. L. Rep. 419 (6th Cir. 2004); *cf.* [Fisher v. Friendship Pub. Charter Sch.](#), 58 IDELR ¶ 287 (D.D.C. 2011), *reconsideration denied*, 880 F. Supp. 2d 149, 287 Educ. L. Rep. 908 (D.D.C. 2012) (special circumstances).
- 26 *E.g.*, [Johnson v. Charlotte Mecklenburg Schs. Bd. of Educ.](#), 20 F.4th 835, 397 Educ. L. Rep. 531 (4th Cir. 2021); [L.R.L. v. District of Columbia](#), 896 F. Supp. 2d 69, 290 Educ. L. Rep. 818 (D.D.C. 2012); [N.P. v. E. Orange Bd. of Educ.](#), 56 IDELR ¶ 49 (D.N.J. 2011); [Neshaminy Sch. Dist. v. Karla B.](#), 25 IDELR 725 (E.D. Pa. 1997).
- 27 *E.g.*, [D.F. v. Collingswood Borough Bd. of Educ.](#), 694 F.3d 488, 284 Educ. L. Rep. 659 (3d Cir. 2012); [Indep. Sch. Dist. No. 284 v. A.C.](#), 258 F.3d 769, 155 Educ. L. Rep. 1065 (8th Cir. 2001); *see also* Letter to Anonymous, 75 IDELR ¶ 162 (OSEP 2019). *But cf.* [C.N. v. Willmar Pub. Sch. Indep. Sch. Dist. No. 347](#), 591 F.3d 624, 252 Educ. L. Rep. 106 (8th Cir. 2010); [A.H. v. Independence Sch. Dist.](#), 466 S.W.3d 17, 321 Educ. L. Rep. 1168 (Mo. Ct. App. 2015) (adopting unusual view that parent must file a due process hearing before moving from the delinquent district).
- 28 Letter to Whipple, 54 IDELR ¶ 262 (OSEP 2009).
- 29 [Garcia v. Bd. of Educ.](#), 520 F.3d 1116, 231 Educ. L. Rep. 25 (10th Cir. 2008).
- 30 [Flores v. District of Columbia](#), 437 F. Supp. 2d 22, 211 Educ. L. Rep. 253 (D.D.C. 2006).
- 31 [Boose v. District of Columbia](#), 786 F.3d 1054, 318 Educ. L. Rep. 43 (D.C. Cir. 2015); *cf.* [J.N. v. Jefferson Cnty. Bd. of Educ.](#), 72 IDELR ¶ 209 (N.D. Ala. 2018) (not moot due to pending evaluation), *aff'd on other grounds*, 12 F.4th 1355, 395 Educ. L. Rep. 744 (11th Cir. 2021).
- 32 [Morris v. District of Columbia](#), 38 F. Supp. 3d 57, 313 Educ. L. Rep. 515 (D.D.C. 2014).
- 33 [Arroyo-Delgado v. Dep't of Educ. of P.R.](#), 199 F. Supp. 3d 548, 339 Educ. L. Rep. 892 (D.P.R. 2016).
- 34 [Fullmore v. District of Columbia](#), 40 F. Supp. 3d 174, 313 Educ. L. Rep. 730 (D.D.C. 2014).
- 35 [Dep't of Educ., Haw. v. E.B.](#), 45 IDELR ¶ 249 (D. Haw. 2007).
- 36 *E.g.*, [del Rosario v. Nashoba Reg'l Sch. Dist.](#), 2023 WL 2711074 (D. Mass. Mar. 30, 2023); [T.L. v. Florence Indep. Sch. Dist.](#), 2020 WL 4434928 (W.D. Tex. July 31, 2020). Moreover, due to the retrospective effect of compensatory education, an IHO may not escape making this determination based on the parent's failure to exhaust or cooperate with the evaluation or IEP processes if

the alleged denial occurred before or separate from these processes. *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 228 Educ. L. Rep. 271 (D.D.C. 2007). For a frequency analysis of the various judicial remedies for denial of FAPE, including but extending beyond compensatory education, see Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J. Nat'l Ass'n Admin. L. Judiciary 214 (2013). According to OSEP, missed instruction due to a child's participation in statewide assessments or due to the parents' keeping the child at home in response to the statewide assessments is not a denial of FAPE. Letter to Kane, 72 IDELR ¶ 75 (OSEP 2018).

- 37 *E.g.*, *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 218 Educ. L. Rep. 477 (D.D.C. 2007) (denying compensatory education where de minimis denial). However, for the state complaint resolution process, the triggering denial of FAPE does not necessarily require substantive "harm." *Indep. Sch. Dist. No. 221 v. Minn. Dep't of Educ.*, 48 IDELR ¶ 222 (Minn. Ct. App. 2007).
- 38 *E.g.*, *M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396, 108 Educ. L. Rep. 522 (3d Cir. 1996); *Bookout v. Bellflower Unified Sch. Dist.*, 63 IDELR ¶ 4 (C.D. Cal. 2014).
- 39 *E.g.*, *Mrs. C. v. Wheaton*, 916 F.2d 69, 63 Educ. L. Rep. 93(2d Cir. 1990). More recent decisions in the Second Circuit have interpreted the gross denial standard as only applying to students beyond age 21 by the time of the completion of litigation. *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 319 Educ. L. Rep. 641 (2d Cir. 2015); *P. v. Newington Bd. of Educ.*, 512 F. Supp. 2d 89, 225 Educ. L. Rep. 639 (D. Conn. 2007), *aff'd on other grounds*, 546 F.3d 111, 238 Educ. L. Rep. 517 (2d Cir. 2008); *A. v. Hartford Bd. of Educ.*, 68 IDELR ¶ 40 (D. Conn. 2016).
- 40 Denial of FAPE requires the requisite, second-step substantive or student loss. *E.g.*, *D.A. v. Houston Indep. Sch. Dist.*, 716 F. Supp. 2d 603 (S.D. Tex. 2009); *Los Gatos-Saratoga Joint Union High Sch. Dist.*, 41 IDELR ¶ 227 (Cal. SEA 2004) (lack of supporting evidence); *cf. C.W. v. Rose Tree Media Sch. Dist.*, 395 F. App'x 824, 828 263 Educ. L. Rep. 80 (3d Cir. 2010) ("The purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a, FAPE, but to compensate students with disabilities who have not received an appropriate education"). Moreover, the compensatory education in a parental loss case does not necessarily extend to the student. *E.g.*, *S.A. v. N.Y.C. Dep't of Educ.*, 63 IDELR ¶ 73 (E.D.N.Y. 2014).
- 41 *E.g.*, *P. v. Newington Bd. of Educ.*, 546 F.3d 111, 238 Educ. L. Rep. 517 (2d Cir. 2008) (consultant services); *cf. L.H. v. Hamilton Cnty. Dep't of Educ.*, 900 F.3d 779, 357 Educ. L. Rep. 776 (6th Cir. 2018) (reimbursement); *E.P. v. N. Arlington Bd. of Educ.*, 74 IDELR ¶ 80 (D.N.J. 2019) (remand but supportive).
- 42 *E.g.*, *Burnett v. San Mateo Foster City Sch. Dist.*, 739 F. App'x 870, 359 Educ. L. Rep. 69 (9th Cir. 2018); *T.B. v. Prince George's Cnty. Bd. of Educ.*, 897 F.3d 566, 356 Educ. L. Rep. 977 (4th Cir. 2018); *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 F. App'x 887, 286 Educ. L. Rep. 131 (5th Cir. 2012).
- 43 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2). At the same time, said provisions preserve the IHO's authority to order compliance with applicable procedural requirements. 20 U.S.C. § 1415(f)(3)(E)(iii); 34 C.F.R. § 3900.513(a)(3). For an example of denial of compensatory education for a pure, i.e., nonprejudicial, procedural violation, see *Shawsheen Valley Reg'l Vo-Tech. Sch. Dist. v. Commonwealth of Mass. Bureau of Special Educ. Appeals*, 367 F. Supp. 2d 44, 198 Educ. L. Rep. 217 (D. Mass. 2005).
- 44 *E.g. Pittsburgh Bd. of Educ. v. Pa. Dep't of Educ.*, 581 A.2d 681, 63 Educ. L. Rep. 934 (Pa. Commw. Ct. 1990). As an extreme example, a federal court rejected a spending clause challenge to a hearing officer's award, as compensatory education, of "a full-time, one-on-one [autism spectrum disorder] trained psychologist or psychiatrist" for the child based on collaborative arrangements between the parties, concluding that the evidence showed that the child needed this related service. *Troy Sch. Dist. v. K.M.*, 65 IDELR ¶ 91 (E.D. Mich. 2015).
- 45 *E.g.*, *Alcorn Cnty. Sch. Dist.*, 53 IDELR ¶ 136 (Miss. SEA 2009) (band).

- 46 *E.g.*, *M.S. v. Utah Sch. for the Deaf & Blind*, 64 IDELR ¶ 11 (D. Utah 2014), *rev'd on other grounds*, 822 F.3d 1128, 331 F.3d 696 (10th Cir. 2016); *Tyler W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 301 Educ. L. Rep. 777 (E.D. Pa. 2013); *Madeline P. v. Anchorage Sch. Dist.*, 265 P.3d 308, 274 Educ. L. Rep. 698 (Alaska 2011); *Bd. of Educ. v. Munoz*, 792 N.Y.S.2d 275, 197 Educ. L. Rep. 357 (App. Div. 2005); *Alcorn Cnty. Sch. Dist.*, 53 IDELR ¶ 136 (Miss. SEA 2009); *Richland Springs Indep. Sch. Dist.*, 51 IDELR ¶ 144 (Tex. SEA 2008). However, lack of implementation is not a per se denial of FAPE, although the courts have not established an entirely uniform threshold standard for the basis for compensatory education. *E.g.*, *Van Duyn v. Baker Sch. Dist.*, 5J, 502 F.3d 811, 225 Educ. L. Rep. 136 (9th Cir. 2007) (material failure); *Melissa S. v. Sch. Dist.*, 183 F. App'x 184, 212 Educ. L. Rep. 639 (3d Cir. 2006) (more than de minimis); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 141 Educ. L. Rep. 62 (5th Cir. 2000) (loss of benefit); *cf. McLaughlan v. Torrance Unified Sch. Dist.*, 79 IDELR ¶ 75 (C.D. Cal. 2021) (material violation but no compensatory education due to insufficient evidence of educational harm). Finally, denial of FAPE also applies to the new variant of implementation cases, which concerns capability rather than failure. *E.g.*, *Wade v. District of Columbia*, 322 F. Supp. 3d 123, 358 Educ. L. Rep. 146 (D.D.C. 2018).
- 47 *Supra* note 42.
- 48 For a comparative overview of the two primary approaches, see Perry A. Zirkel, *The Competing Approaches for Calculating Compensatory Education under the IDEA: The Next Update*, 405 Educ. L. Rep. 621 (2022).
- 49 The limitations period of the IDEA is based on the knowledge of the filing party. *See, e.g.*, *J.R. v. Ventura Unified Sch. Dist.*, 668 F. Supp. 3d 1054, 425 Educ. L. Rep. 195 (C.D. Cal. 2023). However, the Third Circuit, viewing the remedy as not limited by the statute of limitations, identifies the accrual date as when the district has actual or constructive knowledge of the denial. *E.g.*, *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 618-19, 322 Educ. L. Rep. 633 (3d Cir. 2015); *Mary T. v. Sch. Dist. of Phila.*, 575 F.3d 235, 249, 248 Educ. L. Rep. 35 (3d Cir. 2009).
- 50 Pennsylvania has historically been one of the leading states for this approach, but some of the cases seem to be moving toward a qualitative or hybrid approach. See *infra* notes 59-60. However, the movement is less than complete or consistent. For recent cases that followed the quantitative approach, see *Upper Darby Sch. Dist. v. K.W.*, 2023 WL 4826736 (E.D. Pa. July 27, 2023), *aff'd on other grounds*, 2024 WL 3811990 (3d Cir. Aug. 14, 2024); *Kayla W. v. Chichester Sch. Dist.*, 80 IDELR ¶ 161 (E.D. Pa. 2022); *Matthew B. v. Pleasant Valley Sch. Dist.*, 75 IDELR ¶ 157 (E.D. Pa. 2019); *Montgomery Cnty. Intermediate Unit v. C.M.*, 71 IDELR ¶ 11 (E.D. Pa. 2017); *Sch. Dist. of Phila. v. Post*, 262 F. Supp. 3d 178, 349 Educ. L. Rep. 499 (E.D. Pa. 2017).
- 51 For the issue of whether the discrete denial of FAPE had a pervasive effect, see *Upper Darby Sch. Dist. v. K.W.*, 2024 WL 3811990 (3d Cir. Aug. 14, 2024); *R.B. v. Downingtown Area Sch. Dist.*, 509 F. Supp. 3d 339, 349 Educ. L. Rep. 634 (E.D. Pa. 2020); *Tyler W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39, 301 Educ. L. Rep. 777 (E.D. Pa. 2013); *cf. Kayla W. v. Chichester Sch. Dist.*, 80 IDELR ¶ 161 (E.D. Pa. 2022).
- 52 *M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d at 397. For examples of application of this equitable adjustment, see *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). For an 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).
- 53 *E.g.*, *Indiana Area Sch. Dist.*, 45 IDELR ¶ 25 (Pa. SEA 2006).
- 54 *E.g.*, *O.A. v. Orcutt Union High Sch. Dist.*, 81 IDELR ¶ 109 (C.D. Cal. 2022) (during limited added period within hybrid calculus); *Neena S. v. Sch. Dist. of Phila.*, 51 IDELR ¶ 210 (E.D. Pa. 2008) (for extended periods); *cf. Lakeland Sch. Dist.*, 58 IDELR ¶ 150 (Pa. SEA 2011) (for excused, not unexcused absences). *But cf. Butler v. District of Columbia*, 77 IDELR ¶ 16 (D.D.C. 2020) (not for extended medical absences); *Rayna P. v. Campus Cmty. Sch.*, 72 IDELR ¶ 214 (D. Del. 2018) (partial award extended to long

absences w. minimal home instruction); *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). For OSEP's interpretation as to the extent of the district's FAPE obligation during absences in various specified circumstances, *see* Letter to Clarke, 48 IDELR ¶ 77 (OSEP 2007); Letter to Balkman, 23 IDELR 646 (OSEP 1995). More recently, OSEP opined that compensatory education does not apply to absences that were due to parents' refusal for the child to participate in statewide assessments. Letter to Kane, 72 IDELR ¶ 75 (OSEP 2018).

- 55 *Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 93 Educ. L. Rep. 547 (9th Cir. 1994). However, in some cases, a full-day is appropriate rather than a partial approach. *E.g.*, *Montgomery Cnty. Intermediate Unit v. C.M.*, 71 IDELR ¶ 11 (E.D. Pa. 2017); *Jana K. v. Annville Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 313 Educ. L. Rep. 702 (M.D. Pa. 2014); *Tyler W. v. Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 301 Ed. Law Rep. 777 (E.D. Pa. 2013).
- 56 *E.g.*, *R.S. v. Bd. of Dir. of Woods Charter Sch. Co.*, 73 IDELR ¶ 252 (M.D.N.C. 2019), *aff'd mem.*, 806 F. App'x 229 (4th Cir. 2020); *G.D. v. Wissahickon Sch. Dist.*, 832 F. Supp. 2d 455, 280 Educ. L. Rep. 71 (E.D. Pa. 2011); *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); *Ind. Sch. Dist. No. 281 v. Minn. Dep't of Educ.*, 48 IDELR ¶ 222 (Minn. Ct. App. 2007); *Champion Sch.*, 58 IDELR ¶ 207 (Ariz. SEA 2012); *Riverside Cnty. Office of Educ.*, 64 IDELR ¶ 155 (Cal. SEA 2014); *Poway Unified Sch. Dist.*, 54 IDELR ¶ 105 (Cal. SEA 2010); *City of Chi. Sch. Dist. #299*, 60 IDELR ¶ 173 (Ill. SEA 2013); *Methacton Sch. Dist.*, 64 IDELR ¶ 120 (Pa. SEA 2014); *Pocono Mountain Sch. Dist.*, 56 IDELR ¶ 182 (Pa. SEA 2011); *Hamshire-Fannett Indep. Sch. Dist.*, 54 IDELR ¶ 239 (Tex. SEA 2010); *cf. Forest Grove Sch. Dist.*, 59 IDELR ¶ 270 (Or. SEA 2012) (various particular services). *But cf. Pennsbury Sch. Dist. v. C.E.*, 59 IDELR ¶ 13 (Pa. Commw. Ct. 2012) (upheld award of one hour per day with recitation of qualitative language).
- 57 *E.g.*, *L.T. v. Mansfield Sch. Dist.*, 52 IDELR ¶ 246 (D.N.J. 2009) (compensatory education package that included an administrator and nonacademic periods, amounting to \$10,300 for a 17-day period of FAPE denial); *In re Student with a Disability*, 54 IDELR ¶ 139 (Kan. SEA 2010).
- 58 The courts are not necessarily demanding of the specifics of the calculation under the quantitative approach. *E.g.*, *G.D. v. Wissahickon Sch. Dist.*, 832 F. Supp. 2d 455, 280 Educ. L. Rep. 71 (E.D. Pa. 2011). *But cf. Pottsgrove Sch. Dist. v. D.H.*, 72 IDELR ¶ 271 (E.D. Pa. 2018) (insufficient documentation with attention to daily fluctuations).
- 59 *E.g.*, *B.D. v. District of Columbia*, 817 F.3d 792, 329 Educ. L. Rep. 612 (D.C. Cir. 2016); *Draper v. Atlanta Indep. Sch. Dist.*, 518 F.3d 1275, 230 Educ. L. Rep. 545 (11th Cir. 2008); *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 317, 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); *Y.S. v. N.Y.C. Dep't of Educ.*, 2024 WL 4355049 (S.D.N.Y. Sept. 30, 2024); *Mr. and Mrs. G. v. Canton Bd. of Educ.*, 74 IDELR ¶ 8 (D. Conn. 2019); *E.S. v. Conejo Valley Unified Sch. Dist.*, 72 IDELR ¶ 180 (C.D. Cal. 2018); *Spring Branch Indep. Sch. Dist. v. O.W.*, 72 IDELR ¶ 11 (S.D. Tex. 2018), *partially rev'd on other grounds*, 938 F.3d 695, 369 Educ. L. Rep. 639 (5th Cir. 2019); *Z.J. v. Bd. of Educ. of Chi. Sch. Dist. No. 299*, 344 F. Supp. 3d 988, 361 Educ. L. Rep. 749 (N.D. Ill. 2018); *Brandywine Heights Area Sch. Dist. v. B.M.*, 248 F. Supp. 3d 618, 347 Educ. L. Rep. 276 (E.D. Pa. 2017); *Cupertino Union Sch. Dist. v. K.A.*, 75 F. Supp. 3d 1088, 319 Educ. L. Rep. 352 (N.D. Cal. 2014); *I.S. v. Town Dist. of Munster*, 64 IDELR ¶ 40 (S.D. Ind. 2014); *Dep't of Educ., Haw. v. R.H.*, 61 IDELR ¶ 127 (D. Haw. 2013); *Cent. Sch. Dist. v. K.C.*, 61 IDELR ¶ 125 (E.D. Pa. 2013); *Mt. Vernon Sch. Corp. v. A.M.*, 59 IDELR ¶ 100 (S.D. Ind. 2012); *B.T. v. Dep't of Educ.*, 676 F. Supp. 2d 982, 254 Educ. L. Rep. 212 (D. Haw. 2010); *Haw. v. Zachary B.*, 52 IDELR ¶ 213 (D. Haw. 2009); *R.M. v. Miami-Dade Cnty. Sch. Bd.*, 55 IDELR ¶ 261 (S.D. Fla. 2010); *Pennsbury Sch. Dist. v. C.E.*, 59 IDELR ¶ 13 (Pa. Commw. Ct. 2012); *C.N. v. Neshannock Sch. Dist.*, 2010 WL 9517602 (Pa. Commw. Sept. 30, 2010); *Las Vegas City Sch.*, 61 IDELR ¶ 238 (N.M. SEA 2013); *cf. R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125, 264 Educ. L. Rep. 618 (9th Cir. 2011) (dicta). The proof for the strict *Reid* approach poses possible difficulties. *E.g.*, *Phillips v. District of Columbia*, 932 F. Supp. 2d 42, 296 Educ. L. Rep. 366 (D.D.C. 2013) (upheld denial after remand and expert evidence); *I.T. v. Dep't of Educ., Haw.*, 59 IDELR ¶ 219 (D. Haw. 2012); *Walker v. District of Columbia*, 786 F. Supp. 2d 232, 272 Educ. L. Rep. 192 (D.D.C. 2011); *Stanton v. District of Columbia*, 680 F. Supp. 2d 201, 255 Educ. L. Rep. 120 (D.D.C. 2010) (remanded to IHO based on insufficient information); *Dep't of Educ.*, 54 IDELR ¶ 271 (Haw. SEA 2010) (record does not provide sufficient information to determine what additional services are warranted). Yet, the calculus or proof need not be exact. *E.g.*, *Cousins v. District of Columbia*, 880 F. Supp. 2d 142, 287 Educ. L. Rep. 901 (D.D.C. 2012); *cf. M.S. v. Utah Sch. for the Deaf & Blind*, 64 IDELR ¶ 11 (D. Utah 2014), *rev'd on other grounds*, 822 F.3d

1128, 331 F.3d 696 (10th Cir. 2016) (period of non-implementation was same as period for compensatory education despite reciting qualitative standard). An assessment order may well be appropriate and necessary. *E.g.*, **B.D. v. District of Columbia**, 817 F.3d 792, 329 Educ. L. Rep. 612 (D.C. Cir. 2016). However, the parent has the burden to show the necessity of this independent determination. *Lopez-Young v. District of Columbia*, 211 F. Supp. 3d 42, 341 Educ. L. Rep. 784 (D.D.C. 2016).

60 *E.g.*, **Pangerl v. Peoria Unified Sch. Dist.**, 780 F. App'x 505, 370 Educ. L. Rep. 592 (9th Cir. 2019) (not hour-for-hour but no specific formula); **Woods v. Northport Sch. Dist.**, 487 F. App'x 968, 287 Educ. L. Rep. 746 (6th Cir. 2012); *Colonial Sch. Dist. v. N.S.*, 76 IDELR ¶ 127 (E.D. Pa. 2020) (upholding 2 hours per day rather than parents' requested full-day basis); **Hempfield Sch. Dist. v. S.C.**, 2024 WL 384918 (E.D. Pa. Jan. 31, 2024) (citing blended approach in *A.W.* and *Jana K.*); **Hood River Cnty. Sch. Dist. v. Student**, 79 IDELR ¶ 40 (D. Or. 2021) (upholding full year award for violation that affected full year although it ended, via parents' filing, in mid-March); **L.M. v. Henry Cnty. Bd. of Educ.**, 76 IDELR ¶ 282 (E.D. Ky. 2020) (upholding "hour-by-hour" approach under procedural posture significantly different from Sixth Circuit *Fayette Cnty.* decision); **Preciado v. Bd. of Educ. of Clovis Mun. Sch.**, 443 F. Supp. 3d 1289, 379 Educ. L. Rep. 169 (D.N.M. 2020) (citing *Reid* but using purposes of IDEA as overall consideration); **Arroyo-Delgado v. Dep't of Educ. of P.R.**, 72 IDELR ¶ 151 (D.P.R. 2018) (same result under qualitative and "totality of circumstances" approaches); **A.W. v. Middletown Area Sch. Dist.**, 68 IDELR ¶ 247 (M.D. Pa. 2016) (quantitative plus "make whole" relief); **Maple Heights City Sch. Bd. of Educ. v. A.C.**, 68 IDELR ¶ 5 (N.D. Ohio 2016) (disfavoring 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); **Jana K. v. Annville-Cleona Sch. Dist.**, 39 F. Supp. 3d 584, 313 Educ. L. Rep. 702 (E.D. Pa. 2014) (citation and combination of both approaches, obtaining via avowed qualitative approach the basic result that other courts have reached via quantitative analysis); **T.G. v. Midland Sch. Dist.**, 848 F. Supp. 2d 902, 282 Educ. L. Rep. 425 (C.D. Ill. 2012) (qualitative approach but with flexible deference for IHO); **B.H. v. W. Clermont Bd. of Educ.**, 788 F. Supp. 2d 682, 272 Educ. L. Rep. 445 (S.D. Ohio 2011); **D.G. v. Flour Bluff Indep. Sch. Dist.**, 832 F. Supp. 2d 755, 280 Educ. L. Rep. 132 (S.D. Tex. 2011) (qualitative approach yielding result that approximates quantitative approach), *vacated*, 481 F. App'x 887, 286 Educ. L. Rep. 131 (5th Cir. 2012); **Hollister Sch. Dist.**, 60 IDELR ¶ 172 (Cal. SEA 2013); **Sch. Dist. of Phila.**, 57 IDELR ¶ 86 (Pa. SEA 2011); *cf.* **Dracut Sch. Comm. v. Bureau of Special Educ. Appeals**, 737 F. Supp. 2d 35, 263 Educ. L. Rep. 625 (D. Mass. 2010) (citing *Puffer v. Reynolds*, 761 F. Supp. 2d 838, 853, 67 Educ. L. Rep. 536 (D. Mass. 1988) for FAPE "equal in time and scope" with what a student would have received while eligible); **M.S. v. Utah Sch. for the Deaf & Blind**, 64 IDELR ¶ 11 (D. Utah 2014), *rev'd* on other grounds, 822 F.3d 1128, 331 F.3d 696 (10th Cir. 2016) (reciting qualitative standards but providing quantitative award); **Tacoma Sch. Dist.**, 64 IDELR ¶ 28 (Wash. SEA 2014) (quantitative as default for qualitative approach); **Belen Consol. Sch.** 63 IDELR ¶ 27 (N.M. SEA 2014) (reciting *Reid* for flexible FAPE standard yielding an approximation of quantitative approach). 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).

61 *E.g.*, **Garcia v. Bd. of Educ.**, 520 F.3d 1116, 1129, 231 Educ. L. Rep. 25 (10th Cir. 2008); **Garcia v. Albuquerque Inst. of Math & Sci. at UNM**, 2023 WL2527963 (D.N.M. Mar. 15, 2023), *adopted*, 2023 WL 2712249 (D.N.M. Mar. 30, 2023) (upholding denial of compensatory education, which would have been additional to other remedies).

62 *E.g.*, **Williamson Cnty. Bd. of Educ. v. C.K.**, 52 IDELR ¶ 40 (M.D. Tenn. 2009) (upheld, without discussion, one year of tutoring for violation of up to five years in duration); **Amity Region 5 Bd. of Educ.**, 74 IDELR ¶ 86 (Conn. SEA 2019) (3 hrs. per week for 16 weeks during the summer, without explanation, for absence of qualified reading instructor for 8 weeks); **Gwinnett Cnty. Sch. Dist.**, 51 IDELR ¶ 174 (Ga. SEA 2008) (720 hours for 10-year denial), *rev'd and remanded*, **Gwinnett Cnty. Sch. Dist.**, 54 IDELR ¶ 316 (N.D. Ga. 2010); **City of Chi. Sch. Dist. 299**, 53 IDELR ¶ 274 (Ill. SEA 2009) (undefined one year of compensatory education for FAPE violation of 1.5 years); **Waukeet Cmty. Sch. Dist.**, 48 IDELR ¶ 26 (Iowa SEA 2007) (otherwise undefined ESY remedy for detailed elaboration of various IEP violations, including BIP provisions); **Indianapolis Pub. Sch.**, 42 IDELR ¶ 20 (Ind. SEA 2004) (one year w/o further specificity); **Webb Consol. Indep. Sch. Dist.**, 43 IDELR ¶ 25 (Tex. SEA 2005) (most of the missed hours); *cf.* **Deer-Creek Mackinaw Cmty Unit Sch. Dist.** 701, 54 IDELR ¶ 138 (Ill. SEA 2010) (conditional independent study courses and monthly parental visits for at least 3-semester denial of FAPE--apparently based on parental request); **Seattle Sch. Dist.**, 49 IDELR ¶ 86 (Wash. SEA 2007) (unclear approximation based on lack of pertinent parental evidence).

63 The problem is that a prospective order to revise the IEP in the wake of determining that the district denied the child FAPE only corrects the IEP for the near future but does not make the child whole for the FAPE denial in the near past. Yet, courts often confuse

these two remedies, arguably short-changing the child with regard to compensatory education. *E.g.*, *Demarcus L. v. Bd. of Educ.*, 63 IDELR ¶ 13 (N.D. Ill. 2014); *cf.* *Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811, 225 Educ. L. Rep. 136 (9th Cir. 2007) (using compensatory education to discount denial of FAPE); *Mr. I v. Me. Sch. Admin. Dist. No. 55*, 480 F.3d 1, 217 Educ. L. Rep. 60 (1st Cir. 2007) (delegating both to the IEP team without any clarifying guidance).

64 *E.g.*, *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); *French v. N.Y.S. Dep't of Educ.*, 476 F. App'x 468, 283 Educ. L. Rep. 821 (2d Cir. 2011); *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d at 1497; *S.C. v. Chariho Reg'l Sch. Dist.*, 298 F. Supp. 3d 370, 354 Educ. L. Rep. 295 (D.R.I. 2018); *G.D. v. Utica Cmty. Schs.*, 83 IDELR ¶ 12 (E.D. Mich. 2023); *Cupertino Union Sch. Dist. v. K.A.*, 75 F. Supp. 3d 1088, 319 Educ. L. Rep. 352 (N.D. Cal. 2014); *Dep't of Educ. v. M.F.*, 840 F. Supp. 2d 1214, 281 Educ. L. Rep. 886 (D. Haw. 2011); *T.B. v. San Diego Unified Sch. Dist.*, 56 IDELR ¶ 152 (S.D. Cal. 2011); *Hogan v. Fairfax Cnty. Bd. of Educ.*, 645 F. Supp. 3d 554, 250 Educ. L. Rep. 273 (E.D. Va. 2009); *cf.* *Horen v. Bd. of Educ.*, 61 IDELR ¶ 103 (N.D. Ohio 2013) (no denial of FAPE where parents impeded IEP process). **However, the standard for parental inequitable conduct is rather high.** *E.g.*, *M.T. v. Arlington Cent. Sch. Dist.*, 82 IDELR ¶ 63 (S.D.N.Y. 2022).

65 *E.g.*, *Connor J. v. Kennett Consol. Sch. Dist.*, 82 IDELR ¶ 159 (E.D. Pa. 2023) (upholding offset for district's voluntary compensatory services); *T.B. v. Eugene Sch. Dist.*, 67 IDELR ¶ 185 (D. Or. 2016) (denying offset for transitional and allegedly unofficial private placement based on equities, including district's continued "negligence" in denying FAPE).

66 *Lab'y Charter Sch. v. M.R.S.*, 2024 WL 3518306 (3d Cir. July 24, 2024); *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 319 Educ. L. Rep. 641 (2d Cir. 2015), *on remand*, 262 F. Supp. 3d 11, 349 Educ. L. Rep. 472 (D. Conn. 2017); *Me. Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 173 Educ. L. Rep. 785 (1st Cir. 2003); *cf.* *Garden Acad. v. S.M.*, 78 IDELR ¶ 46 (D.N.J. 2021) (substituting reimbursement for a different reason).

67 *E.g.*, *B.T. v. Dep't of Educ.*, 676 F. Supp. 2d 982, 254 Educ. L. Rep. 212 (D. Haw. 2010); *cf.* *M.L. v. El Paso Indep. Sch. Dist.*, 369 F. App'x 573, 258 Educ. L. Rep. 40 (5th Cir. 2010) (not needed, thus moot); *Wenger v. Canastota Cent. Sch. Dist.*, 979 F. Supp. 147, 122 Educ. L. Rep. 434 (N.D.N.Y. 1997), *aff'd mem.*, 181 F.3d 84, 136 Educ. L. Rep. 226 (2d Cir. 1999) (lack of regression).

68 *E.g.*, *Bd. of Educ. of City Sch. Dist. of Buffalo*, 46 IDELR ¶ 146 (N.Y. SEA 2006) (no need for regression).

69 The child's present need would appear to be part of the calculation of compensatory education in those jurisdictions that use this approach. See *supra* note 59 and accompanying text.

70 *Cupertino Union Sch. Dist. v. K.A.*, 75 F. Supp. 3d 1088, 319 Educ. L. Rep. 352 (N.D. Cal. 2014); *Gibson v. Forest Hills Sch. Dist. Bd. of Educ.*, 62 IDELR ¶ 261 (S.D. Ohio 2014), *aff'd on other grounds*, 655 F. App'x 423, 337 Educ. L. Rep. 21 (6th Cir. 2016); *Phillips v. District of Columbia*, 932 F. Supp. 2d 42, 296 Educ. L. Rep. 366 (D.D.C. 2013) (part of the qualitative calculation for denial of compensatory education); *Dracut Sch. Comm. v. Bureau of Special Educ. Appeals*, 737 F. Supp. 2d 35, 263 Educ. L. Rep. 625 (D. Mass. 2010) (requiring consideration of services received); *cf.*, *med J.N. v. Jefferson Cnty. Bd. of Educ.*, 12 F.4th 1355, 395 Educ. L. Rep. 744 (11th Cir. 2021) (no denial of FAPE for child find violation, despite ultimate eligibility, based on sufficient general ed interventions); *Jana K. v. Annville Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 313 Educ. L. Rep. 702 (M.D. Pa. 2014) (recognized as part of qualitative approach but defaulted via quantitative award); *E.P. v. Twin Valley Sch. Dist.*, 517 F. Supp. 3d 347, 393 Educ. L. Rep. 319 (E.D. Pa. 2021) (under Sec. 504 and via IEE). *But cf.* *Upper Darby Sch. Dist. v. K.W.*, 2024 WL 3811990 (3d Cir. Aug. 14, 2024) (no credit for intermittent and ineffective services); *Linda E. v. Bristol Warren Reg'l Sch. Dist.*, 758 F. Supp. 2d 75, 266 Educ. L. Rep. 718 (D.R.I. 2010) (no credit for inappropriate services).

71 *Hood River Cnty. Sch. Dist. v. Student*, 79 IDELR ¶ 40 (D. Or. 2021) (crediting hearing officer for allowing for adjustments based on student's tolerance level); *M.M. v. New York City Dep't of Educ.*, 2017 WL 1194685, at *8 (S.D.N.Y. Mar. 30, 2017) (deference to SRO's application of "diminishing returns" limitation in the award); *Hogan v. Fairfax Cnty. Bd. of Educ.*, 645

F. Supp. 3d 554, 574-75, 250 Educ. L. Rep. 273 (E.D. Va. 2009) (considering “diminishing returns” as a, but not controlling, factor); *cf.* *S.G.W. v. Eugene Sch. Dist.*, 69 IDELR ¶ 181 (D. Or. 2017) (lengthening the expiration due to practicability).

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

73 *E.g.*, *D.B. v. Gloucester Twp. Sch. Dist.*, 751 F. Supp. 2d 764, 265 Educ. L. Rep. 719 (D.N.J. 2010).

74 *E.g.*, *Gibson v. Forest Hills Sch. Dist. Bd. of Educ.*, 62 IDELR ¶ 261 (S.D. Ohio 2014), *aff’d* on other grounds, 655 F. App’x 423, 337 Educ. L. Rep. 21 (6th Cir. 2016) (425 hours of specified services at specified rate plus 40 trips \$50).

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

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

77 *E.g.*, *Somberg v. Utica Cmty. Sch.*, 908 F.3d 162, 359 Educ. L. Rep. 752 (6th Cir. 2018) (not parent when based on substantive FAPE and record is sufficient); *Henry v. District of Columbia*, 750 F. Supp. 2d 94, 265 Educ. L. Rep. 601 (D.D.C. 2010) (effectively on the district to show no entitlement upon denial of FAPE). *But cf.* *Morales v. Newport-Mesa Unified Sch. Dist.*, 768 F. App’x 717, 366 Educ. L. Rep. 633 (9th Cir. 2019) (declined to expand award based on lack of specificity in parent’s claim); *JKG v. Wissahickon Twp. Sch. Dist.*, 78 IDELR ¶ 158 (E.D. Pa. 2021) (parent failed to provide evidentiary foundation); *Whitaker v. Bd. of Educ.*, 77 IDELR ¶ 64 (D. Md. 2020) (parent did not meet her burden to show evidentiary and legal support for requested additional compensatory education); *Hogan v. Fairfax Cnty. Bd. of Educ.*, 645 F. Supp. 3d 554, 250 Educ. L. Rep. 273 (E.D. Va. 2009) (parents met their burden to show that child was entitled to compensatory education, although the court carefully crafted the amount).

78 *E.g.*, *Wenger v. Canastota Cent. Sch. Dist.* 979 F. Supp. 147, 122 Educ. L. Rep. 434 (N.D.N.Y. 1997), *aff’d* mem, 181 F.3d 84, 136 Educ. L. Rep. 226 (2d Cir. 1999).

79 *E.g.*, *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 213 Educ. L. Rep. 122 (9th Cir. 2006); *Sch. Dist. of Phila. v. Williams*, 66 IDELR ¶ 214 (E.D. Pa. 2015); *Forest Grove Sch. Dist.*, 59 IDELR ¶ 270 (Or. SEA 2012); *Pasadena Indep. Sch. Dist.*, 58 IDELR ¶ 210 (Tex. SEA 2012).

80 *P. v. Newington Bd. of Educ.*, 546 F.3d 111, 238 Educ. L. Rep. 517 (2d Cir. 2008) (for LRE violation).

81 *J.B. v. Tuolumne Cnty. Superintendent of Schs.*, 78 IDELR ¶ 188 (E.D. Cal. 2021) (plus various other services); *K.M. v. Tehachapi Unified Sch. Dist.*, 69 IDELR ¶ 241 (E.D. Cal. 2017) (plus transition plan); *In re Student with a Disability*, 64 IDELR ¶ 292 (Miss. SEA 2014) (for LRE violation during ESY).

82 *E.g.*, *Bellflower Unified Sch. Dist. v. Jiminez*, 78 IDELR ¶ 106 (C.D. Cal. 2021); *Sacramento City Unified Sch. Dist. v. R.H.*, 68 IDELR ¶ 220 (E.D. Cal. 2016); *S.D. v. Portland Sch. Dist.*, 64 IDELR ¶ 74 (D. Me. 2014); *I.T. v. Dep’t of Educ., Haw.*, 62 IDELR ¶ 178 (D. Haw. 2013); *Reg’l Sch. Unit. 51 v. Doe*, 920 F. Supp. 2d 168, 294 Educ. L. Rep. 722 (D. Me. 2013); *M.M. v. Plano Indep. Sch. Dist.*, 61 IDELR ¶ 170 (E.D. Tex. 2013); *Bd. of Educ. v. Ill. State Bd. of Educ.*, 28 IDELR 1175 (N.D. Ill. 1998); *Brantley v. Indep. Sch. Dist. 25*, 26 IDELR 839 (D. Minn. 1997); *cf.* *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 379 Educ. L. Rep. 539 (8th Cir. 2020) (continuation prospectively after reimbursement until the student earns the credits expected of her same-age peers); *Foster v. Bd. of Educ. of Chi.*, 611 F. App’x 874, 321 Educ. L. Rep. 146 (7th Cir. 2015) (treating reimbursement as one form of compensatory education for jurisdictional purposes); *Ravenswood City Sch. Dist. v. J.S.*, 870 F. Supp. 2d 780, 286 Educ. L. Rep. 377 (N.D. Cal. 2012) (justifying prospective placement as amounting to reimbursement as compensatory education); *I.S. v. Town Dist. of Munster*, 64 IDELR ¶ 40 (S.D. Ind. 2014) (finding it permissible, with qualitative approach to determine its amount); *M.K.-N. v. District of Columbia*, 62 IDELR ¶ 265 (D.D.C. 2013) (labeling problem); *B.H. v. W. Clermont Bd. of Educ.*,

788 F. Supp. 2d 682, 272 Educ. L. Rep. 445 (S.D. Ohio 2011) (confusing conflation). *But cf.* **Bird v. Banks**, 2023 WL 8258026 (S.D.N.Y. Nov. 29, 2023) (rejecting additional year of direct payment as compensatory damages); **T.S. v. Long Beach Unified Sch. Dist.**, 2023 WL 4542517 (C.D. Cal. July 13, 2023) (upholding IHO's equitable discretion to award tutoring but not tuition reimbursement); *J.T. v. Dep't of Educ., Haw.*, 63 IDELR ¶ 3 (D. Haw. 2014) (concluding it is available but not appropriate based on the equitable factors in this case). However, tuition reimbursement is distinguishable from compensatory education in the form of "direct funding." *R.S. v. Bd. of Dir. of Woods Charter Sch. Co.*, 73 IDELR ¶ 252 (M.D.N.C. 2019), *aff'd*, 806 F. App'x 229 (4th Cir. 2020). Moreover, the problem with awarding tuition reimbursement under the rubric of compensatory education is that it subverts the codified requirements for timely notice and appropriate unilateral placement.

- 83 *E.g.*, **Morales v. Newport-Mesa Unified Sch. Dist.**, 768 F. App'x 717, 366 Educ. L. Rep. 633 (9th Cir. 2019) (upholding award of vocational and assistive technology assessments along with tutoring services).
- 84 *E.g.*, **Brown v. District of Columbia**, 179 F. Supp. 3d 15, 336 Educ. L. Rep. 873 (D.D.C. 2016); *Dep't of Educ., Haw. v. R.H.*, 61 IDELR ¶ 127 (D. Haw. 2013).
- 85 *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712, 259 Educ. L. Rep. 37 (3d Cir. 2010).
- 86 *E.g.*, **Streck v. Bd. of Educ.**, 642 F. Supp. 2d 105, 250 Educ. L. Rep. 178 (N.D.N.Y. 2009), *revised*, 408 F. App'x 411, 266 Educ. L. Rep. 83 (2d Cir. 2010) (only for compensatory reading and writing programs and directly related devices); *cf.* **Perkiomen Sch. Dist. v. R.B.**, 78 IDELR ¶ 222 (E.D. Pa. 2021) (for noncredit transition services at university-based program); *Stapleton v. Penns Valley Area Sch. Dist.*, 67 IDELR ¶ 268 (M.D. Pa. 2016) (recognized general rule but also possible exceptions), further proceedings, 71 IDELR ¶ 87 (M.D. Pa. 2017) (not for college tuition). For the distinction between postsecondary education and postsecondary education institutions, see *Wayne Highland Sch. Dist.*, 63 IDELR ¶ 303 (Pa. SEA 2014).
- 87 *E.g.*, **Somberg v. Utica Cmty. Sch.**, 67 IDELR ¶ 139 (E.D. Mich. 2016), *aff'd* on other grounds, 908 F.3d 162, 359 Educ. L. Rep. 752 (6th Cir. 2018).
- 88 *E.g.*, **Orange Unified Sch. Dist. v. C.K.**, 59 IDELR ¶ 74 (C.D. Cal. 2012); *N.L. v. Special Sch. Dist.*, 54 IDELR ¶ 78 (E.D. Mo. 2010); *Blake C. Dep't of Educ.*, 593 F. Supp. 2d 1199, 241 Educ. L. Rep. 662 (D. Haw. 2009); *cf.* **Walker v. District of Columbia**, 786 F. Supp. 2d 232, 272 Educ. L. Rep. 192 (D.D.C. 2011) (separable services). For prospective placement as compensatory education, *see* **Draper v. Atlanta Indep. Sch. Sys.**, 518 F.3d 1275, 230 Educ. L. Rep. 545 (11th Cir. 2008); **Ravenswood City Sch. Dist. v. J.S.**, 870 F. Supp. 2d 780, 286 Educ. L. Rep. 377 (N.D. Cal. 2012); **Susquehanna Twp. Sch. Dist. v. Frances J.**, 823 A.2d 249, 176 Educ. L. Rep. 815 (Pa. Commw. Ct. 2003).
- 89 **Doe v. E. Lyme Bd. of Educ.**, 790 F.3d 440, 319 Educ. L. Rep. 641 (2d Cir. 2015), *on remand*, 262 F. Supp. 3d 11, 349 Educ. L. Rep. 472 (D. Conn. 2017); **VW v. N.Y.C. Dep't of Educ.**, 81 IDELR ¶ 194 (S.D.N.Y. 2022) (reimbursement plus compensatory education for same period). For the awarding of both forms of relief for different periods of stay-put, *see* **Aja N. v. Upper Merion Area Sch. Dist.**, 81 IDELR ¶ 198 (E.D. Pa. 2022); **Brennan v. Reg'l Sch. Dist. No. 1**, 531 F. Supp. 2d 245, 229 Educ. L. Rep. 513 (D. Conn. 2008); *Dep't of Educ. v. Ria L.*, 60 IDELR ¶ 9 (D. Haw. 2012).
- 90 *E.g.*, **V.W. v. N.Y.C. Dep't of Educ.**, 81 IDELR ¶ 194 (S.D.N.Y. 2022).
- 91 The Third Circuit ruled that compensatory education is not available for a unilaterally placed private school student. **P.P. v. West Chester Area Sch. Dist.**, 585 F.3d 727, 250 Educ. L. Rep. 517 (3d Cir. 2009). *But see* **L.M. v. Henry Cnty. Bd of Educ.**, 75 IDELR ¶ 72 (N.D. Ky. 2019) (awarding compensatory education upon concluding that parents were not entitled to tuition reimbursement due to inappropriate unilateral placement, w/o squarely addressing this issue); **I.S. v. Town Dist. of Munster**, 64 IDELR ¶ 40 (S.D. Ind. 2014) (remanding for amount after determining the private placement was appropriate).

- 92 *But cf.* **L.M. v. Henry Cnty. Bd. of Educ.**, 75 IDELR ¶ 72 (N.D. Ky. 2019), clarification, 76 IDELR ¶ 282 (N.D. Ky. 2020) (in resource setting until new FBA and new IEP).
- 93 *E.g.*, **R.S. v. Bd. of Dir. of Woods Charter Sch. Co.**, 73 IDELR ¶ 252 (M.D.N.C. 2019), *aff'd mem.*, 806 F. App'x 229 (4th Cir. 2020); *see also* **M.P. v. Campus Cmty. Sch.**, 73 IDELR ¶ 38 (D. Del. 2018) (until age 21 in light of amount, age, and time for appeals).
- 94 **Bd. of Educ. v. Ill. State Bd. of Educ.**, 741 F. Supp. 2d 920, 264 Educ. L. Rep. 271 (N.D. Ill. 2010).
- 95 **Fisher v. Bd. of Educ.**, 856 A.2d 552, 191 Educ. L. Rep. 825 (Del. 2004); **Grandview Sch. Dist.**, 110 LRP 73736 (Wash. SEA 2012). For an example of the possible problems of ordering private school placement as the form of compensatory education, see **District of Columbia v. Masucci**, 13 F. Supp. 3d 33, 309 Educ. L. Rep. 1023 (D.D.C. 2014).
- 96 *E.g.*, **I.S. v. Town Dist. of Munster**, 64 IDELR ¶ 40 (S.D. Ind. 2014); **Henry v. District of Columbia**, 750 F. Supp. 2d 94, 265 Educ. L. Rep. 601 (D.D.C. 2010); **Mr. R. v. Me. Sch. Admin. Dist. No. 35**, 295 F. Supp. 2d 113, 184 Educ. L. Rep. 273 (D. Me. 2003); *cf.* **J.T. v. Dep't of Educ.**, 59 IDELR ¶ 4 (D. Haw. 2012) (IHO after neutral appropriate evaluate jointly paid for by the parties); **Fallbrook Union Sch. Dist.**, 58 IDELR ¶ 238 (Cal. SEA 2012) (separate hearing for recommendations of IHO-appointed independent evaluator); **In re Student with a Disability**, 53 IDELR ¶ 312 (N.Y. SEA 2009) (specifying two summers of 1:1 tutoring in reading by certified instructor but rejecting parents' request for 24-week Lindamood Bell program). In other cases, a court allowed the parent to provide additional evidence after the IHO denied awarding compensatory education for the lack of a factual foundation. **Phillips v. District of Columbia**, 736 F. Supp. 2d 240, 263 Educ. L. Rep. 614 (D.D.C. 2010); **Gill v. District of Columbia**, 770 F. Supp. 2d 112, 268 Educ. L. Rep. 761 (D.D.C. 2010). In the second case, the court affirmed the hearing officer's denial of compensatory education after the parent failed to provide the requisite proof. **Gill v. District of Columbia**, 770 F. Supp. 2d 112, 268 Educ. L. Rep. 761 (D.D.C. 2011).
- 97 *E.g.*, **B.D. v. District of Columbia**, 817 F.3d 792, 800, 329 Educ. L. Rep. 612 (D.C. Cir. 2016) (IEE as an option); **J.T. v. District of Columbia**, 496 F. Supp. 3d 190, 389 Educ. L. Rep. 89 (D.D.C. 2020) (IEE); **Haw. v. Zachary B.**, 52 IDELR ¶ 213 (D. Haw. 2009); **Grandview Sch. Dist.**, 110 LRP 73736 (Wash. SEA 2012) (parents' independent experts); *cf.* **Beer v. USD 512 Shawnee Mission**, 82 IDELR ¶ 223 (D. Kan. 2023) (IEE, BCBA, special ed specialist, and 50 hours of in-home tutoring); **Somberg v. Utica Cmty. Sch.**, 69 IDELR ¶ 94, *further proceedings*, 71 IDELR ¶ 79 (E.D. Mich. 2017) (supervision by special master--1200 hours), *aff'd on other grounds*, 908 F.3d 162, 359 Educ. L. Rep. 752 (6th Cir. 2018); **Gibson v. Forest Hills Sch. Dist. Bd. of Educ.**, 62 IDELR ¶ 261 (S.D. Ohio 2014), *aff'd on other grounds*, 655 F. App'x 423, 337 Educ. L. Rep. 21 (6th Cir. 2016) (reimbursement of expert as part of remedy due to essential role); **Pitchford v. Salem-Keizer Sch. Dist. No. 24J**, 155 F. Supp. 2d 1213, 156 Educ. L. Rep. 555 (D. Or. 2001) (mediator determination); **Belen Consol. Sch.** 63 IDELR ¶ 27 (N.M. SEA 2014) (IEE as resource similar to expert witness); **E.P. v. Twin Valley Sch. Dist.**, 517 F. Supp. 3d 347, 393 Educ. L. Rep. 319 (E.D. Pa. 2021) (IEE but under Sec. 504). *But cf.* **Smith v. District of Columbia**, 2023 WL 6291637 (D.D.C. July 31, 2023), *adopted*, 2023 WL 8716810 (Dec. 18, 2023) (upholding denial of compensatory education under B.D. standard w/o IEE based on IHO's alternative procedure of allowing 30 days to supplement the record for this purpose).
- 98 **B.B. v. Catahoula Parish Sch. Dist.**, 62 IDELR ¶ 50 (W.D. La. 2013) (court remanding determination to IEP team); **Cupertino Union Sch. Dist. v. K.A.**, 75 F. Supp. 3d 1088, 319 Educ. L. Rep. 352 (N.D. Cal. 2014) (recommending, not ordering delegation). For IHO authority for such delegation, the applicable case law is divided, with the scope of the delegation sometimes the distinguishing factor. *E.g.*, **Bd. of Educ. 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) (ruling that IHO may not delegate reduction or termination, with the rationale that IHO may not be a district employee); **Meza v. Bd. of Educ.**, 56 IDELR ¶ 167 (D.N.M. 2011) (extending the prohibition to IHO's delegation to the IEP team authority to determine, not just reduce or discontinue, the award); **Phillips v. Indep. Sch. Dist. No. 2**, 73 IDELR ¶ 119 (E.D. Okla. 2018) (following Meza to prohibit delegation to consultant prospectively). *But see* **Mr. I. v. Me. Sch. Admin. Unit No. 55**, 480 F.3d 1, 217 Educ. L. Rep. 60 (1st Cir. 2007); **L.M. v. Henry Cnty. Bd. of Educ.**, 76 IDELR ¶ 282 (E.D. Ky. 2020) (providing appropriate amount of discretion to IEP team, such as crafting a new FBA); **Smith v. Cheyenne Mountain Sch. Dist.** 12, 72 IDELR ¶ 173 (D. Colo. 2018) (ordering re-testing to determine whether comp ed was warranted here was not discretionary delegation); **Struble v. Fallbrook Union Sch. Dist.**, 56 IDELR ¶ 4 (S.D. Cal. 2011) (ruling that the IHO may delegate the determination to the IEP team); *cf.* **Sch. Dist. of Phila. v. Williams**, 66 IDELR ¶ 214 (E.D. Pa. 2015) (delegating to the IEP team to determine the

level of speech language services after six-month award); *T.G. v. Midland Sch. Dist.*, 848 F. Supp. 2d 902, 282 Educ. L. Rep. 425 (C.D. Ill. 2012) (upholding IHO's delegation to IEP team to choose reading and writing goals/materials); *A.L. v. Chi. Pub. Sch. Dist.*, 57 IDELR ¶ 215 (N.D. Ill. 2011) (finding no delegation problem with choice of reading program in prospective IEP revisions); *Haw., Dept. of Educ. v. Zachary B.*, 52 IDELR ¶ 213 (D. Haw. 2009) (allowing delegation to school psychologist and tutor within IHO's maximum of once-weekly sessions for 15 months).

- 99 Was OSEP implying that district personnel would provide comp ed services in opining that they must meet the same standards for highly qualified teachers as they would for providing other services? Letter to Anonymous, 49 IDELR ¶ 44 (OSEP 2007). For recent partial support, see *Bd. of Educ. of Albuquerque Pub. Sch. v. Maez*, 69 IDELR ¶ 98 (D.N.M. 2017) (granting preliminary injunction for district personnel rather than IHO's order for private providers); cf. *W.A. v. Clarksville Montgomery Cnty. Sch. Sys.*, 2024 WL 2702436 (M.D. Tenn. May 24, 2024) (ruling that district would provide the specified services unless it was not proven to be incapable of doing so or does not do so expeditiously).
- 100 *Tilley v. Thomas Edison Charter Sch.*, 2024 WL 3028409 (D. Utah June 17, 2024) (at specified rates); *Dracut Sch. Comm. v. Bureau of Special Educ. Appeals*, 737 F. Supp. 2d 35, 263 Educ. L. Rep. 625 (D. Mass. 2010) ("at reasonable rates of pay"); cf. *Somberg v. Utica Cmty. Sch.*, 908 F.3d 162, 359 Educ. L. Rep. 752 (6th Cir. 2018) (directly overseen by special master in certain circumstances). But cf. *Phillips v. Indep. Sch. Dist. No. 2*, 73 IDELR ¶ 119 (E.D. Okla. 2018); *Meza v. Bd. of Educ.*, 56 IDELR ¶ 167 (D.N.M. 2011) (unlawful delegation of IHO authority to consultants).
- 101 *Price v. Commw. Charter Acad.-Cyber*, 76 IDELR ¶ 94 (E.D. Pa. 2020) (ruling that district may impose such requirements, at least in the context of a parent-selected third-party provider). **In a subsequent, separate ruling, the court concluded that the defendant charter school had fulfilled the hearing officer's compensatory education award.** *Price v. Commw. Charter Acad.-Cyber*, 78 IDELR ¶ 221 (E.D. Pa. 2021).
- 102 *Tilley v. Thomas Edison Charter Sch. N.*, 2023 WL 8602838 (D. Utah Dec. 12, 2023) (ruling that, based on change in circumstances (move to new district), it was equitable for a third party or new district to provide compensatory services at expense of original district).
- 103 *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 308 Educ. L. Rep. 664 (3d Cir. 2014). **However, the avenue for enforcement of the compensatory education award may be exclusively in court.** *E.g.*, *Tobuck v. Banks*, 2024 WL 1349693 (S.D.N.Y. Mar. 29, 2024).
- 104 *A. v. Hartford Bd. of Educ.*, 976 F. Supp. 2d 164, 304 Educ. L. Rep. 66 (D. Conn. 2013); cf. *Jacqueline N. v. Sch. Dist. of Phila.*, 76 IDELR ¶ 8 (2020) (to enforce settlement agreement).
- 105 *E.g.*, *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712, 717-20, 259 Educ. L. Rep. 37 (3d Cir. 2010) (upholding as equitable under the particular circumstances a trust fund of more than \$200,000 to provide the student with three years of compensatory education past her twenty-first birthday); *Streck v. Bd. of Educ.*, 408 F. App'x 411, 266 Educ. L. Rep. 83 (2d Cir. 2010) (ruling that student was entitled to escrow account for \$37,778 for additional reading instruction); *Doe v. E. Lyme Bd. of Educ.*, 262 F. Supp. 3d 11, 349 Educ. L. Rep. 472 (D. Conn. 2017) (ordering escrow fund of \$203.5K), *further proceedings*, 962 F.3d 649, 378 Educ. L. Rep. 42 (2d Cir. 2020) (including various rulings regarding implementation of escrow account and other parental requests, leading to further litigation at the lower court level culminating at 82 IDELR ¶ 109 (D. Conn. 2023); *Matthew B. v. Clarksville Montgomery Cnty. Sch. Sys.*, 2023 WL 2245117 (M.D. Tenn. Apr. 20, 2024) (compensatory education fund of 576 hrs. x \$73.25); *M.P. v. Campus Cmty. Sch.*, 73 IDELR ¶ 38 (D. Del. SEA 2019) (trust fund \$70 x 7 hrs. x no. of days); *Rayna P. v. Campus Cmty. Sch.*, 72 IDELR ¶ 214 (D. Del. 2018) (granting parents' request for compensatory education trust fund for earlier denial of FAPE to same child); *L.M. v. Willingboro Twp. Sch. Dist.*, 70 IDELR ¶ 34 (D.N.J. 2017) (ordering trust fund of \$265K of compensatory education); *A.S. v. Harrison Twp. Bd. of Educ.*, 68 IDELR ¶ 96 (D.N.J. 2016) (permitting order for trust fund for 72 hours of compensatory education); *MatanuskaSusitna Borough Sch. Dist. v. D.Y.*, 54 IDELR ¶ 52 (D. Alaska 2010) (upholding, after supplemental briefing under qualitative approach, \$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); *Heather D. v. Northampton Sch. Dist.*, 511 F. Supp.

2d 549 (E.D. Pa. 2007) (awarding an education fund of \$182,000, representing 2,428 hours x \$75/hr. rate); **K.N. v. Gloucester City Bd. of Educ.**, 78 IDELR ¶ 147 (D.N.J. 2021) (under § 504). *But cf.* **Indep. Sch. Dist. No. 283 v. E.M.D.H.**, 81 IDELR ¶ 36 (D. Minn. 2022), *aff'd on other grounds*, 960 F.3d 1073, 377 Educ. L. Rep. 539 (8th Cir. 2020) (authorizing direct payments to private providers rather than proposed trust fund); **Butler v. Mountain View Sch. Dist.**, 61 IDELR ¶ 290 (E.D. Pa. 2013) (rejecting remedy of monetary value of compensatory education in wake of student's death); **Reyes v. Bd. of Educ. of Prince George's Cnty.**, 80 IDELR ¶ 286 (D. Md. 2022) (rejecting trust fund as tort-like remedy); **L.V. v. N.Y.C. Dep't of Educ.**, 76 IDELR ¶ 279, *adopted*, 77 IDELR ¶ 13 (S.D.N.Y. 2020); **Gibson v. Forest Hills Sch. Dist. Bd. of Educ.**, 62 IDELR ¶ 261 (S.D. Ohio 2014), *aff'd on other grounds*, 655 F. App'x 423, 337 Educ. L. Rep. 21 (6th Cir. 2016); **Montgomery Cnty. Intermediate Unit v. C.M.**, 71 IDELR ¶ 11 (E.D. Pa. 2017); **Millay v. Surry Sch. Dep't**, 56 IDELR ¶ 162, *adopted*, 56 IDELR ¶ 257 (D. Me. 2011) (rejecting trust fund under the circumstances).

- 106 *E.g.*, **Maple Heights City Sch. Bd. of Educ. v. A.C.**, 68 IDELR ¶ 5 (N.D. Ohio 2016) (ruling that bifurcated hearing was not prejudicial IHO error); *cf.* **Dep't of Educ., State of Haw. v. R.F.**, 61 IDELR ¶ 127 (D. Haw. 2013) (reviewing results of separate compensatory education hearing).
- 107 *E.g.*, **Dep't of Educ., Haw. v. R.H.**, 61 IDELR ¶ 127 (D. Haw. 2013).
- 108 **Houston Cnty. Sch. Dist.**, 116 LRP 8724 (Ga. SEA 2015).
- 109 *E.g.*, **Sch. Bd. of Osceola Cnty. v. M.L.**, 30 IDELR ¶ 655 (M.D. Fla. 1999), *aff'd mem.*, 281 F.3d 1285 (11th Cir. 2001); *cf.* **Gallegos v. Albuquerque Pub. Schs.**, 2013 WL 12335298 (D.N.M. Feb. 28, 2023) (remand because IHO did not sufficiently explain how his hour-for-hour calculation met the qualitative standard); **Matthew B. v. Pleasant Valley Sch. Dist.**, 75 IDELR ¶ 157 (E.D. Pa. 2019) (not sufficiently justified); **B.D. v. District of Columbia**, 817 F.3d 792, 329 Educ. L. Rep. 612 (D.C. Cir. 2016) (holding IHO responsible for providing an adequate explanation for not awarding compensatory education or awarding only a limited amount); **Somberg v. Utica Cmty. Sch.**, 908 F.3d 162, 359 Educ. L. Rep. 752 (6th Cir. 2018) (regarding IHO's denial of compensatory education as not entitled to customary deference due to lack of explanation and justification); **Oskowis v. Sedona-Oak Creek Unified Sch. Dist.**, 67 IDELR ¶ 150 (D. Ariz. 2016) (revising an award not supported by the record); **Copeland v. District of Columbia**, 82 F. Supp. 3d 462, 320 Educ. L. Rep. 737 (D.D.C. 2015) (lack of sufficient explanation); **Cupertino Union Sch. Dist. v. K.A.**, 75 F. Supp. 3d 1088, 319 Educ. L. Rep. 352 (N.D. Cal. 2014) (lack of evidentiary support); **L.O. v. E. Allen Cnty. Sch. Corp.**, 58 F. Supp. 3d 882, 316 Educ. L. Rep. 754 (N.D. Ind. 2014) (internal contradiction and inconsistency); **Stanton v. Dis. of Columbia**, 680 F. Supp. 2d 201, 255 Educ. L. Rep. 120 (D.D.C. 2010) (lack of evidentiary basis); **Susquehanna Twp. Sch. Dist. v. Frances J.**, 823 A.2d 249, 176 Educ. L. Rep. 815 (Pa. Commw. Ct. 2003) (indefinite period). To avoid such evidentiary and enforcement problems, a federal court recently warned that "the IHO decision must provide a detailed explanation as to why or why not compensatory education is warranted and his reasons for developing a particular compensatory program." **B.T. v. Dep't of Educ.**, 676 F. Supp. 2d 982, 254 Educ. L. Rep. 212 (D. Haw. 2010). *But cf.* **Preciado v. Bd. of Educ. of Clovis Mun. Sch.**, 443 F. Supp. 3d 128, 367 Educ. L. Rep. 169 (D.N.M. 2020) (D.N.M. 2020) (need not be overly detailed factual analysis for calculation); **Whitaker v. Bd. of Educ.**, 77 IDELR ¶ 64 (D. Md. 2020) (parents did not sufficiently specify reasons and alternative).
- 110 *See, e.g.*, **Streck v. Bd. of Educ.**, 280 F. App'x 66, 235 Educ. L. Rep. 837 (2d Cir. 2008), further proceedings, 408 F. App'x 411, 266 Educ. L. Rep. 83 (2d Cir. 2010).
- 111 *E.g.*, **L.J. v. Audubon Bd. of Educ.**, 49 IDELR ¶ 184 (D.N.J. 2008).
- 112 *E.g.*, **D.W. v. District of Columbia**, 561 F. Supp. 2d 56, 235 Educ. L. Rep. 271 (D.D.C. 2008). *But cf.* **Dudley v. Lower Merion Sch. Dist.**, 58 IDELR ¶ 12 (E.D. Pa. 2011) (good faith attempt suffices).
- 113 *E.g.*, **Bond v. Friendship Pub. Charter Sch. Bd. of Tr.**, 2023 WL 8710370 (D.D.C. Dec. 18, 2023); **Albuquerque Pub. Schs. v. Cabrera**, 2023 WL 6295499 (D.N.M. Sept. 27, 2023); **G.T. v. Campbell Cnty. Bd. of Educ.**, 82 IDELR ¶ 53 (E.D. Ky. 2022); **K.E. v. N.Y.C. Dep't of Educ.**, 81 IDELR ¶ 243 (S.D.N.Y. 2022); **S.H. v. N.Y.C. Dep't of Educ.**, 80 IDELR ¶ 99 (S.D.N.Y. 2022);

J.W. v. Metro. Sch. Dist. of Warren Cnty., 79 IDELR ¶ 220 (N.D. Ind. 2021); **K.S. v. Upper Darby Sch. Dist.**, 79 IDELR ¶ 192 (E.D. Pa. 2021); **Downingtown Area Sch. Dist. v. G.W.**, 77 IDELR ¶ 155 (E.D. Pa. 2020); **Jones v. District of Columbia**, 76 IDELR ¶ 3 (D.D.C. 2020); **D.M. v. Iroquois W. Cmty. Sch. Dist. #10**, 2020 WL 13680026 (C.D. Ill. Jan. 14, 2020).

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