AGENDA
VIRGINIA SPECIAL EDUCATION HEARING OFFICER AND MEDIATOR TRAINING
September 9 10, 2020
Live Virtual Training

Presented by Perry A. Zirkel
Attorney and Professor Emeritus of Education and Law, Lehigh University

Session I:
Wednesday, September 9, 2020
1:00 p.m. to 4:00 p.m.

12:45 1:00pm **Announcements and Registration**

1:00 2:00 pm **Identification under the IDEA (1.0)**

Checklist reviews of the key components and illustrative case law for the IDEA's individualized child find obligation and eligibility determinations.

2:00 2:30 pm **Free Appropriate Public Education (FAPE) under the IDEA – Pt. 1 (.5)**

Similarly systematic synthesis of the first "face" of FAPE: procedural (two-part test and prospective remedial option)

2:30 2:45 pm **Break**

2:45 3:15 pm **FAPE under the IDEA – Pt. 2 (.5)**

Continuing the systematic synthesis to the remaining three "faces" of FAPE: substantive, failure to implement, and capability to implement

3:15 4:00 pm **Remedies under the IDEA (.75)**

Adjudicative checklist of the two primary remedies under the IDEA: tuition reimbursement and compensatory education

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Session II:
Thursday, September 10, 2020
1:00 p.m. to 4:00 p.m.

1:00 2:30 pm **Year in Review (1.5)**

National update of published case law during the previous 12 months, with emphasis on those in Virginia and Fourth Circuit.

2:30 2:45 pm **Break**

2:45 4:00 pm **COVID-19 Issues under the IDEA (1.25)**

Identification of the leading issues facing IDEA hearing officers as a result of the COVID-19 pandemic, along with an update of the OSEP guidance and case law to date.

Adjudicative Remedies for Denials of FAPE under the IDEA

By Perry A. Zirkel*

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Litigation under the Individuals with Disabilities Education Act (IDEA)[1] has been the major growth area in the case law specific to K-12 education.[2] The bulk of the litigation under the IDEA concerns the Act's central pillar,[3] the obligation of school districts to provide a "free appropriate public education" (FAPE)[4] to students with disabilities,[5] via an individualized education program (IEP).[6] A notable segment of this frequent litigation is the overlapping

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[1] 20 U.S.C.A. §§ 1400 *et seq*. (West 2012). For the related regulations, see 34 C.F.R. §§ 300.1 *et seq*. (2012). Initially enacted in 1975 as funding legislation under the broad title of Education of the Handicapped Act and the specific part called the Education for All Handicapped Children's Act, this law has undergone major amendments during the reauthorizations in 1986, 1990, 1997, and 2004. *See, e.g.,* DIXIE S. HUEFNER & CYNTHIA M. HERR, NAVIGATING SPECIAL EDUCATION LAW AND POLICY 43–49 (2012).

[2] *See, e.g.,* Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Update*, 265 EDUC. L. REP. 1 (2011).

[3] For this metaphor to characterize FAPE, *see, e.g.,* Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1312 (10th Cir. 2008) ("The FAPE concept is the central pillar of the IDEA statutory structure."); *cf.* Petit v. U.S. Dep't of Educ., 675 F.3d 769, 772 (D.C. Cir. 2012) ("The cornerstone of the Act is . . . that schools provide children with a '[FAPE]'"); M.A. v. State-Operated Sch. Dist., 344 F.3d 335, 338 (3d Cir. 2005) ("The cornerstone . . . under the IDEA is the substantive right of disabled children to a '[FAPE]'").

[4] 20 U.S.C.A. §§ 1401(9), 1412(a)(1) (West 2012).

[5] *See, e.g.,* Perry A. Zirkel, *Case Law under the IDEA*, in IDEA: A HANDY DESK REFERENCE TO THE LAW, REGULATIONS AND INDICATORS 669 (2012). The issue typology of this annotated outline corresponds generally to the overall classifications in special education law texts and topical indexes, but each one represents notable variations of these overall themes depending on purpose, level, and judgment. This source separates the category of FAPE from that of remedies, i.e., tuition reimbursement and compensatory education, while expressly acknowledging their integral overlap. In this compilation of IDEA case law, the FAPE classification alone accounts for the majority of the decisions, and these other two overlapping categories add to this majority.

[6] 20 U.S.C.A. §§ 1401(14), 1414(d) (West 2012). Because the IEP is the operational vehicle for FAPE, courts often characterize it with the same metaphors. *See, e.g.,* White *ex rel.* White v. Ascension Parish Sch. Bd., 343 F.3d 373, 378 (5th Cir. 2003) ("The cornerstone of the IDEA is the IEP."); Hines v. Tullahoma City Sch. Sys., Nos. 97–5103, 97–5104, 156 F.3d 1229, 1998 WL 393814, at *1 (6th Cir. June 15, 1998) ("The IEP is the cornerstone of the Act.").

categories for the principal remedies for denials of this FAPE obligation[7]—tuition reimbursement[8] and compensatory education.[9] Additionally, because the IDEA provides a comprehensive system of administrative adjudication via impartial hearing officers (IHOs) and, in states that have selected the statutory option of a second tier, review officers (ROs),[10] the body of pertinent case law extends to IHO and RO decisions.[11]

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[7] Zirkel, *supra* note 5, at 677–709. For an early article providing an overview of the basic IDEA remedies, with emphasis on the judicial level, see Allan Osborne, *Remedies for a School District's Failure to Provide Services under IDEA*, 112 EDUC. L. REP. 1 (1996).

[8] 20 U.S.C. § 1412(a)(10)(C)(ii) (2006); 34 C.F.R. § 300.148(c) (2012); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 (1985). For an empirical analysis of the tuition reimbursement case law, see Thomas Mayes & Perry A. Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350 (2001). For the comprehensive criteria and illustrative case law, see Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 EDUC. L. REP. 785 (2012). In short, the steps in this multi-part analysis are: (1) timely parental notice, (2) FAPE of the district's proposed IEP, (3) appropriateness of the parental placement, and (4) other equities beyond timely notice. *Id*.

[9] The statute does not expressly mention compensatory education, but the case law has clearly established it under the Act's grant of broad equitable authority to adjudicators. *See, e.g.,* Perry A. Zirkel, *Compensatory Education: An Annotated Update of the Law*, 251 EDUC. L. REP. 501 (2010). For the analogy-based relationship of compensatory education with tuition reimbursement, see Perry Zirkel, *Compensatory Education under the Individuals with Disabilities Education Act: The Third Circuit's Partially Mis-Leading Position*, 110 PENN ST. L. REV. 879 (2006). For the prevailing two approaches for determining the appropriate amount of this remedy, which are generally referred to under the rubrics of "quantitative" and "qualitative," see Perry A. Zirkel, *Two Competing Approaches for Calculating Compensatory Education under the IDEA*, 257 EDUC. L. REP. 550 (2010).

[10] 20 U.S.C. § 1415(f)–(j) (2006); 34 C.F.R. §§ 300.507–300.518 (2012). The number of states that have opted for a second tier has gradually dwindled to approximately ten. Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3, 5 (2010).

[11] In addition to the state education agency websites that make these decisions available, a national sampling, akin to the reporter series for federal and state court decisions generally and in specialized subject areas, is available in the INDIVIDUALS WITH DISABILITIES EDUCATION LAW REPORT (IDELR) and in LRP Publications' broader electronic database, *Special Ed Connection*.® For the overall picture of the pertinent case law, see Perry A. Zirkel & Amanda C. Machin, *The Special*

Under the landmark decision for FAPE, *Board of Education v. Rowley*,[12] the Supreme Court established a two-part test for determining whether a school district met this central obligation under the IDEA: 1) "has the [district] complied with the procedures set forth in the Act?," and 2) "is the [IEP] . . . reasonably calculated to enable the child to receive educational benefits?"[13] In interpreting Congressional intent as emphasizing the first of these two sides, the *Rowley* majority seemed to suggest strictness with regard to procedural compliance[14] and a relatively relaxed substantive standard.[15] In the hundreds of FAPE decisions after *Rowley*, the lower courts confirmed and continued the relatively low substantive standard for FAPE despite contrary scholarly commentary based on the successive amendments to the Act.[16] The *Rowley* lower court progeny also developed a relaxed interpretation of its procedural side,

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Education Case Law "Iceberg": An Initial Exploration of the Underside, 41 J.L. & EDUC. 483 (2012). In contrast, the coverage of this article does not extend to the alternate and distinguishable enforcement avenue under the IDEA, the state complaint resolution process. *See, e.g.*, Perry A. Zirkel & Brooke L. McGuire, *A Roadmap to Legal Dispute Resolution for Parents of Students with Disabilities*, 23 J. SPECIAL EDUC. LEADERSHIP 100 (2010) (differentiating the administrative from the adjudicatory routes of dispute resolution under the IDEA as well as under Section 504). The litigation concerning this other enforcement avenue is limited and covered elsewhere. *See* Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process*, 237 EDUC. L. REP. 565 (2011) (canvassing the various primary available legal sources, such as IDEA regulations and U.S. Department of Education policy interpretations, specific to the state complaint resolution process).

[12] 458 U.S. 176 (1982).

[13] *Id.* at 206–07.

[14] *See, e.g.*, *id.* at 206 ("We think that congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.").

[15] This relaxed view is evident in (1) the Court's equating the Act's procedural emphasis with access and its sketchy substantive standard with a "basic floor of opportunity," *id.* at 200–01, and (2) the Court's concluding emphasis on deference to governmental education authorities, *id.* at 208–09.

[16] *See, e.g.,* Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed Rowley and Raised the Substantive Standard for "Free Appropriate Public Education?"*, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 397 (2008).

amounting to another two-part test that connects the two sides: (1) did the district violate one or more procedural requirements of the Act, and, if so, (2) did the violation(s) result in loss of educational benefit to the child?[17]

In the 2004 amendments to the IDEA, Congress codified this procedural standard, with a possible per se exception for "significantly imped[ing] the parent's opportunity to participate in the decision-making process regarding the provision of a [FAPE] . . . to the parent's child."[18] Finally, the courts have also established another type of denial of FAPE[19]—insufficient implementation of the IEP.[20]

The legal literature to date concerning the remedies for denials of FAPE is largely limited.[21] In the only article specifically and

[17] *See, e.g.,* Ridley Sch. Dist. v. M.R., 680 F.3d 260 (3d Cir. 2012); K.E. *ex rel.* K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795 (8th Cir. 2011); L.M. *ex rel.* Sam M. v. Capistrano Unified Sch. Dist., 556 F.3d 900 (9th Cir. 2009); A.C. *ex rel.* M.C. v. Bd. of Educ., 553 F.3d 165 (2d Cir. 2009); Sytsema *ex rel.* Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306 (10th Cir. 2008); Hjortness *ex rel.* Hjortness v. Neenah Joint Sch. Dist., 507 F.3d 1060 (7th Cir. 2007); Nack *ex rel.* Nack v. Orange City Sch. Dist., 454 F.3d 604 (6th Cir. 2006); L.T. *ex rel.* N.B. v. Warwick Sch. Comm., 361 F.3d 80 (1st Cir. 2004); Adam J. *ex rel.* Robert J. v. Keller Indep. Sch. Dist., 328 F.3d 804 (5th Cir. 2003); DiBuo *ex rel.* DiBuo v. Bd. of Educ., 309 F.3d 184 (4th Cir. 2002); Sch. Bd. v. K.C., 285 F.3d 977 (11th Cir. 2002).

[18] 20 U.S.C. § 1415(f)(3)(E)(II) (2006); 34 C.F.R. § 300.513(a)(2) (2012).

[19] Alternatively, this type may be regarded as one of two subsets on the substantive side of FAPE—formulation and implementation.

[20] *See, e.g.,* Woods v. Northport Pub. Sch., 487 F. App'x 968 (6th Cir. 2012); Sumter Cnty. Sch. Dist. 17 v. Heffernan *ex rel.* TH, 642 F.3d 478 (4th Cir. 2011); Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 (9th Cir. 2007); Melissa S. *ex rel.* Karen S. v. Sch. Dist., 183 F. App'x 184 (3d Cir. 2006); L.C. v. Utah State Bd. of Educ., 125 F. App'x 252 (10th Cir. 2005); Alex R. *ex rel.* Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. #221, 375 F.3d 603 (7th Cir. 2004).

[21] Aside from the few specialized articles (*supra* notes 7–9), the bulk of the scholarly commentary addresses IDEA remedies only incidentally. *See, e.g.*, Elisa Hyman, Dean Hill Rivkin, & Steven A. Rosenbaum, *How IDEA Fails Families without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U.J. GENDER SOC. POL'Y & L. 107 (2011) (arguing for various reforms in the private and public enforcement of the IDEA, including statutory codification of the compensatory education remedy); Eloise Pasachof, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413 (2011) (advocating greater public enforcement of the IDEA); Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415 (2011) (deconstructing three procedural

comprehensively addressing IDEA remedies,[22] Zirkel demarcated the development of the Act's broad adjudicatory authorization for "such relief as the court determines is appropriate."[23] More specifically, canvassing the case law, agency policy interpretations, and related legal sources, he identified the major forms of injunctive relief available to IHOs/ROs[24] and courts for denials of FAPE,[25] including: (1) tuition reimbursement; (2) compensatory education; (3) prospective revisions of the IEP; (4) prospective placement; and (5) evaluations.[26] In tracing the boundaries for this remedial authority, the Zirkel article also recited the prevailing judicial view that

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principles for decision-making under the IDEA); Michael Rebell, *Special Education Inclusion and the Courts*, 25 J.L. & EDUC. 523 (1996) (proposing a "community engagement dialogic" model for resolving major educational controversies, such as inclusion under the IDEA). The student law review articles tend to be specific to a particular IDEA remedy and relatively superficial. *See, e.g.*, Katie Harrison, Note, *Direct Tuition Payments under the Individuals with Disabilities Education Act*, 25 J. CIV. RTS. ECON. DEV. 873 (2011) (advocating remedy of direct, as alternative to reimbursed, tuition payment); T. Daris Isbell, Note, *Making Up for Lost Educational Opportunities: Distinguishing between Compensatory Education and Additional Services As Remedies under the IDEA*, 76 BROOK. L. REV. 1717 (2011) (confusing a New York review officer decision's term of "additional services" as a recognized and recommended remedy distinct from compensatory education); Amy D. Quinn, Comment, *Obtaining Tuition Reimbursement for Children with Special Needs*, 80 UMKC L. REV. 1211 (2012) (recommending a purportedly useful template of four factors for deciding tuition reimbursement cases, which do not square with the statute, regulations, or case law).

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

[23] 20 U.S.C. § 1415(i)(2)(C)(iii) (2006); 34 C.F.R. § 300.516(c)(3) (2012).

[24] The pertinent legal authorities treat the remedial authority of IHOs/ROs as derived from and largely commensurate with the remedial authority of the courts. Zirkel, *supra* note 22, at 8 n.29.

[25] The denial of FAPE amounts to the basic form of remedy, which is declaratory relief. Other remedies are specific to IDEA obligations that are generally separable from FAPE denials. *See, e.g.*, Perry A. Zirkel, *Independent Educational Evaluations at District Expense under the Individuals with Disabilities Education Act*, 38 J.L. & EDUC. 223 (2009).

[26] Zirkel, *supra* note 22, at 15–24. Other, more creative and controversial remedies—sometimes included under the rubric of compensatory education—are ordering training of district personnel or district hiring of consultants. *Id.* at 28–32.

monetary damages are not available under the IDEA.[27] Finally, the typology for the present analysis identifies prospective services as a separate remedy, although the Zirkel article treated it as ancillary or subsidiary to IEP revisions and particular placements.[28]

In the absence of any published data on the remedies that IHOs/ROs and courts determine after finding a denial of FAPE, the purpose of this study is to provide a systematic analysis of the pertinent case law. The specific questions are:

(1) What is the relative frequency of the various types of FAPE violations?
(2) What is the relative frequency of the various IDEA remedies?[29]
(3) For the most frequent remedies, does the distribution differ markedly between IHO/RO and court decisions?[30]
(4) Do certain states have a particular propensity for the most frequent remedies?[31]
(5) What has been the adjudicative disposition, or outcomes, of these predominant remedies?[32]

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[27] *Id*. at 5 (citing, *e.g.*, A.W. v. Jersey City Pub. Sch., 486 F.3d 791 (3d Cir. 2007); Diaz-Fonseca v. Puerto Rico, 451 F.3d 13 (1st Cir. 2006); Ortega v. Bibb Cnty. Sch. Dist., 397 F.3d 1321 (11th Cir. 2005); Polera v. Bd. of Educ., 288 F.3d 478 (2d Cir. 2002); Padilla v. Sch. Dist. No. 1, 233 F.3d 1268 (10th Cir. 2000); Thompson *ex rel.* Buckhanon v. Bd. of Special Sch. Dist. No. 1, 144 F.3d 574 (8th Cir. 1998); Sellers v. Sch. Bd., 141 F.3d 524 (4th Cir. 1998); Charlie F. *ex rel.* Neil F. v. Bd. of Educ., 98 F.3d 989 (7th Cir. 1996)).

[28] Prospective services may be viewed as a more limited version and, thus, subsidiary part of 1) what should have been in the IEP or what was in the IEP but not implemented, or 2) what the child should receive as a placement as the result of a denial of FAPE. However, the line between prospective and retrospective is far from a bright one, especially given the blurry boundaries for compensatory education. *See, e.g.,* Mr. I v. Maine Sch. Admin. Unit No. 55, 480 F.3d 1, 26 (1st Cir. 2007) (fusing and confusing compensatory education with purely prospective revisions to the IEP).

[29] "Frequency" in this context is limited to instances where the remedy being at issue, i.e., addressed by the IHO/RO or court, in the wake of a denial of FAPE. Thus, the count does not include instances where the IHO/RO or court opinion mentioned or discussed the remedy but did not rule on it.

[30] *Id*.

[31] *Id.*

[32] Thus, here the conversion is from the remedy being at issue to its outcome,

(6) Does any other, more qualitative[33] trend emerge as notable?

I. METHOD

Because it provides the broadest national sampling of IHO/RO and court case law under the IDEA, *Special Ed Connection*®[34] served as the database for this study.[35] The resulting sample selection consisted of two steps. The first step was to screen all of the decisions from January 1, 2000[36] to December 20, 2012[37] listed under the following overlapping headings in the topical index: FAPE Generally – 200.030; Procedural Violations as Denial – 200.035; Reasonably Calculated to Provide FAPE – 200.040; Calculation of Educational Benefit – 200.015; and Right to FAPE – 200.050.[38] The purpose of the initial review was to sift out the various cited decisions where the HO/RO or court concluded that the defendant district[39] did not violate its FAPE obligations[40] or otherwise did not

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i.e., whether the IHO/RO or court granted, denied, or disposed of it otherwise in its final order.

[33] In this context, "qualitative" is simply in contrast to "quantitative," although recognizing the ultimate overlap of these two research approaches.

[34] *See supra* note 11.

[35] For the resulting citations provided *infra*, "IDELR" refers to the decisions available in the hard-copy reporter series, whereas "LRP" refers to those decisions available only in the electronic database. Moreover, following customary use, citations to IHO/RO decisions are designated by "SEA," because state education agencies are responsible for providing the aforementioned (*supra* text accompanying note 10) one- or two-tier system for administrative adjudications under the IDEA.

[36] The selection of this starting date provided for the most recent period of at least a decade marked by the turn of the century.

[37] The ending date was the time of the data collection. Thus, some of the cases decided within the last few months of 2012 were not included in the sample due to the time lag in publishing decisions. This limited incompleteness warranted a projected figure for the final year in the frequency chart of Figure 1.

[38] Although the overall topical heading "Free Appropriate Public Education (FAPE)" included other subheadings, an exploratory sampling of each one revealed that the cases where the IHO/RO or court found a denial of FAPE were already included in the comprehensive coverage of the selected subheadings.

[39] Although the usage consistently herein follows the customary plaintiff-parent and defendant-district typology for IDEA cases, this user-friendly characterization obscures nuances of adjudicative level, possible parent-child differences (e.g., Winkelman v. Parma Sch. Dist., 550 U.S. 516 (2007)), and the

find a denial of FAPE[41] under the IDEA.[42] The second step was carefully reading and coding each of the remaining FAPE-denial decisions in terms of two key variables.[43] One variable was the type of FAPE denial, using the following four categories:[44]

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occasional case in this study's sample where the district filed for the impartial hearing.

[40] The incidental finding—without specifically tallying the exact numbers—in screening the decisions under these topical headings was that the FAPE decisions in favor of districts clearly outnumbered those in favor of the parents. This trend comports with that of a more systematic sampling of IDEA decisions. Zirkel, *supra* note 5, at 677–709.

[41] In some cases, FAPE overlaps with "child find," the obligation to evaluate a child reasonably suspected as qualifying for an evaluation and/or eligibility under the IDEA, including compliance with the regulatory criteria for its timing and scope. *See, e.g.*, Perry A. Zirkel, *The Law of Evaluations under the IDEA: An Annotated Update*, EDUC. L. REP. (forthcoming 2013). Thus, the screening included determining which cases to exclude as not fitting within this FAPE overlap.

[42] As a threshold matter, decisions under Section 504 or other legal bases were excluded. *See*, *e.g.*, Nixon v. Greenup Cnty. Sch. Dist., 890 F. Supp. 2d 753 (E.D. Ky. 2012); Wiles v. Dep't of Educ., 555 F. Supp. 2d 1143 (D. Haw. 2008); Fox Chapel Area Sch. Dist., 59 IDELR ¶ 208 (Pa. SEA 2012). Second, cases that were specific to FAPE but decided under the IDEA's complaint resolution process were excluded. *See*, *e.g.*, Student with a Disability, 109 LRP 13190 (Mont. SEA 2009); Student with a Disability, 45 IDELR ¶ 293 (Haw. SEA 2006); Shakopee Indep. Sch. Dist. No. 720, 45 IDELR ¶ 171 (Minn. SEA 2005). Third, decisions that were specific to FAPE under the IDEA but inconclusive were excluded. *See*, *e.g.*, D.F. *ex rel.* N.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595 (2d Cir. 2005) (remanded to district court for reconsideration); R.S. v. Montgomery Twp. Bd. of Educ., 59 IDELR ¶ 47 (D.N.J. 2012); Banks *ex rel.* D.B. v. District of Columbia, 720 F. Supp. 2d 83 (D.D.C. 2010); Hunter v. District of Columbia, 51 IDELR ¶ 34 (D.D.C. 2008) (remanding to the IHO for final determination). Finally, the exclusions also extended the various decisions under the IDEA limited to technical adjudicative issues rather than the merits of FAPE. *See*, *e.g.*, K.C. v. Bd. of Educ., 48 IDELR ¶ 6 (D. Md. 2007) (additional evidence); A.H. v. State of New Jersey Dep't of Educ., 46 IDELR ¶ 252 (D.N.J. 2006) (exhaustion); Bd. of Educ., 46 IDELR ¶ 173 (N.Y. SEA 2003) (statute of limitations); Woodland Sch. Dist. 50, 36 IDELR ¶ 115 (Ill. SEA 2002) (mootness).

[43] At this step, the relatively few cases that had more than one decision specific to FAPE and its remedy, such as an affirmance, modification, or reversal upon appeal, were limited to the final decision on the merits. For example, the report for the IHO's decision in *McKinney Independent School District*, 54 IDELR ¶ 33 (Tex. 2010) cross-referenced subsequent judicial decisions in the same case; thus, the coding was limited to the court's affirmance in *S.F. v. McKinney Independent School District*, 58 IDELR ¶ 157 (E.D. Tex. 2012), *magistrate's report adopted*, 59

(1) Procedural;
(2) Substantive;
(3) Implementation; and
(4) Combination.[45]

The other variable was the type of remedy at issue and ruled upon in the case, i.e., where the parent sought one or more of the following forms of relief as an order from the IHO/RO or court.[46] More specifically, the typology of IDEA remedies for coding in this study was follows:[47]

- Tuition and related reimbursement[48]

IDELR ¶ 261 (E.D. Tex. 2012). Similarly excluded were decisions solely concerning attorneys' fees, which is not only a separable issue but also exclusive to the court segment of the cases. Finally, where the IHO/RO or court opinion addressed various issues, the coding was limited to the rulings specific to the FAPE-denial and its remedy.

[44] The coding also included a catchall "not ascertainable" category for the relatively few cases where the IHO/RO or court opinion did not specify, either explicitly or implicitly, the basis for the FAPE denial.

[45] In these cases, the denial of FAPE was premised on separable procedural and either substantive-formulation or substantive-implementation grounds (i.e., violations of each side of the two-part *Rowley* test, *supra* text accompanying note 13, or in combination with the implementation standard, *supra* text accompanying note 20).

[46] "At issue" here is purposely broad, referring to all FAPE-denial cases where the IHO/RO or court expressly made a determination of the remedy, which may have been to grant, deny, partially grant and partially deny, or remand (for either further proceedings or to the IEP team) it.

[47] All of these remedies are in addition to the basic declaratory relief that the district has denied the child FAPE. Moreover, the first three of them tend to be more retrospective, whereas the remaining three are more prospective, although these chronological orientations are overlapping rather than mutually exclusive.

[48] "Tuition and related reimbursement" is used herein for two reasons—one as a general reminder and the other as a special consideration. First, per the model in Zirkel, *supra* note 8, this remedy, which stems from the Supreme Court's decisions in *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985), and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), is generally understood to extend broadly to various expenses beyond or in lieu of tuition, such as tutoring, related services, or assistive technology. Second, the issue of reimbursement or payment for independent educational evaluations (IEEs) posed a special consideration here. More specifically, the blurry boundary between these

- Compensatory education;[49]
- Money damages;[50]
- Prospective IEP revisions;
- Prospective services;[51] and
- Evaluation.[52]

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related remedies resulted in a special coding resolution. The broad category of "tuition and related reimbursement" extended here to include the four IHO decisions that treated the IEE issue as inseparably part of the FAPE denial. *See*, *e.g.*, Monrovia Unified Sch. Dist., 108 LRP 10494 (Cal. SEA 2008); Chicago Pub. Sch., 44 IDELR ¶ 294 (Ill. SEA 2005). However, the coding excluded IEE reimbursement or payment rulings where this relief was based on the parallel but separable multi-part test, which is premised on the appropriateness of the evaluation rather than the appropriateness of the IEP. For this separate test and case law, see, e.g., Zirkel *supra* note 25; Perry A. Zirkel, *Independent Educational Evaluation Reimbursement: A Checklist*, 231 EDUC. L. REP. 21 (2008).

[49] The boundary for this remedy is also blurry, perhaps because it is still evolving and has yet to receive Supreme Court or congressional clarification. For purposes of coding, the coverage was broad, including cases where the IHO/RO or court ordered some other relief, such as prospective placement, under the express or at least implicit treatment as compensatory education. *See*, *e.g.*, Pickens Cnty. Sch. Dist., 110 LRP 2301 (Ga. SEA 2009) (ordering residential placement expressly as compensatory education); Tyler Indep. Sch. Dist, 60 IDELR ¶ 59 (Tex. SEA 2012) (ordering, without labeling it as compensatory education, continued private placement for a prescribed period in addition to tuition reimbursement where parent requested both compensatory education and tuition reimbursement).

[50] Although unavailable in most jurisdictions now, this remedy was included as a category in the data collection for the sake of completeness, especially given that the precedents accumulated largely during this almost 13-year period. *See supra* note 27. However, given its minimal frequency, it became part of the Miscellaneous Other category in the reporting of the results. *See infra* note 64.

[51] *See supra* note 26 and accompanying text. "Services" in this context is broad, extending to personnel, such as an aide, and equipment, such as assistive technology devices. *See*, *e.g.*, Boston Pub. Sch., 59 IDELR ¶ 178 (Mass. SEA 2012). This category overlapped with compensatory education, which made it difficult to distinguish the two, especially in cases where the written opinion did not refer expressly to compensatory education. For example, New York review officer decisions have blurred these two types of remedies under the term "added services." *See*, *e.g.*, Student with a Disability, 50 IDELR ¶ 120 (N.Y. SEA 2008).

[52] Similar to the exclusion or coding of IEE reimbursement, "evaluation" was here reserved for decisions where the IHO/RO or court found a denial of FAPE and ordered this remedy as part of the relief directly for this denial, not for some other, separable reason. *See*, *e.g.*, K.I. v. Montgomery Pub. Sch., 805 F. Supp. 2d 1283, 57 IDELR ¶ 93 (M.D. Ala. 2011) (ordering reevaluation for new IEP); Boston Pub.

The resulting sample[53] consisted of 224 decisions. Of these decisions, 140 (63%) were at the IHO or RO level, with the remaining 84 (38%) at the court level.[54] Figure 1 shows the frequency of these decisions per year, which approximates the rising trajectory of special education and FAPE case law more generally.[55]

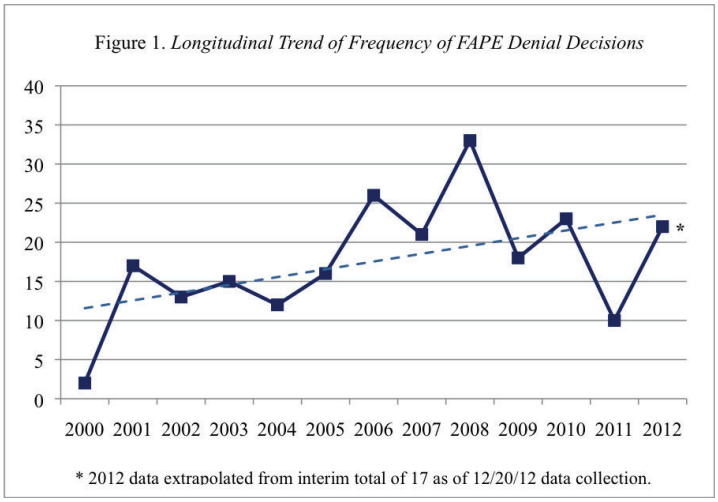
Sch., 59 IDELR ¶ 178 (Mass. SEA 2012) (ordering evaluation to determine new IEP, including whether the child needed the prospective service of a 1:1 aide); Roswell Indep. Sch. Dist., 36 IDELR ¶ 19 (N.M. SEA 2001) (ordering evaluation to determine not only IEP but also compensatory education). In a few of these cases, typically premised on the IDEA's child find obligation, the explicit finding of a denial of FAPE was only marginal. *See*, *e.g.*, Hawkins v. District of Columbia, 49 IDELR ¶ 213 (D.D.C. 2008) (finding denial of FAPE in upholding IHO's order for an evaluation to determine eligibility).

[53] The reference to "sample" is based on the understanding that the population consists of a larger number of decisions that either escape this rather broad net of topical index categories or, inevitably, does not appear in this database. *See* Zirkel & Machin, *supra* note 11, at 508–09. Although the size of the sample serves to mitigate this limitation, representativeness remains an issue. *See*, *e.g.*, Anastasia D'Angelo, J. Gary Lutz, & Perry A. Zirkel, *Are Published IDEA Hearing Officer Decisions Representative?* 14 J. DISABILITY POL'Y STUD. 241 (2004).

[54] Rounding of decimals more than .5% accounts here and elsewhere in this study for sums that are slightly more or less than 100%.

[55] *See*, *e.g.*, Zirkel & Johnson, *supra* note 2, at 5–6 (special education court decisions); Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731 (2002) (special education court and IHO/RO decisions); Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. SPECIAL EDUC. LEADERSHIP 22 (2008) (special education IHO/RO decisions); Zirkel, *supra* note 5, at 677–709 (FAPE court decisions).

Figure 1.



The states where these cases most frequently arose were: (1) New York—thirty-five (16%); (2) California—thirty-two (14%); (3) Hawaii—twenty-two (10%); (4) Pennsylvania—nineteen (8%); (5) New Jersey—thirteen (6%); (6) Texas—eleven (5%); and (7) Alaska—ten (4%),[56] again approximating the pattern for IDEA and FAPE cases more generally.[57]

II. RESULTS

The distribution of the FAPE violations for the 224 decisions was, in order of frequency, as follows:

(1) Substantive—ninety-eight (44%);
(2) Procedural—eighty-two (37%);[58]

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[56] Thus, these seven states accounted for 63% of the 224 decisions.

[57] *See supra* note 55 and accompanying text. The major exceptions were the District of Columbia, which only accounted for eight (4%) of the cases in this sample but is one of the top two jurisdictions for the IDEA and FAPE cases more generally, and Alaska, which is in the lower group of jurisdictions for these cases more generally.

[58] Aligned with the recent codification (20 U.S.C. § 1415(f)(3)(E) (2006) and 34 C.F.R. § 300.513(a)(2) (2012)), the most common procedural violation was denial of a meaningful opportunity for parental participation. *See, e.g.*, D.B. v.

(3) Combination—twenty-seven (12%);[59]
(4) Implementation—nine (4%); and
(5) Not ascertainable—eight (4%)[60]

Thus, substantive and procedural violations respectively predominated, with insufficient implementation being the basis in relatively few cases and with the particular basis for the denial of FAPE being unclear in a similarly low proportion of the cases.

The distribution of the 294 "remedial rulings,"[61] in order of frequency of each type, is presented in Table 1. Because some of the decisions had more than one remedy at issue,[62] the proportional frequencies varied in relation to the total number of remedial rulings and decisions, respectively.[63]

Gloucester Twp. Sch. Dist., No. 10–4630, 2012 WL 2930226 (3d Cir. July 19, 2012); Dep't of Educ., 55 IDELR ¶ 300 (Haw. SEA 2010); Acton-Agua Dulce Unified Sch. Dist., 36 IDELR ¶ 36 (Cal. SEA 2001).

[59] Of these twenty-seven cases, twenty-three were based on the combination of procedural and substantive-formulation grounds, and the remaining four were based on the combination of procedural and substantive-implementation grounds.

[60] In some of these cases, the basis was the overlapping issue of child find, but without any indication of whether the adjudicator considered the denial of FAPE as procedural or substantive. *See, e.g.*, Scott v. District of Columbia, 45 IDELR ¶ 160 (D.D.C. 2006). The other cases in this limited category included decisions where the district conceded the denial of FAPE, *e.g.,* N.R. v. Dep't of Educ., 52 IDELR ¶ 92 (S.D.N.Y. 2009), or the adjudicator did not include sufficient information to make this classification, *e.g.*, San Dieguito Union High Sch. Dist. v. Guray-Jacobs, 44 IDELR ¶ 189 (S.D. Cal. 2005).

[61] This term is used here to differentiate the ruling in the decision for each type of remedy at issue. For the potential significant difference among various units of analysis, *see, e.g.*, Perry A. Zirkel & Caitlin A. Lyons, *Restraining the Use of Restraints for Students with Disabilities: An Empirical Analysis of the Case Law*, 10 CONN. PUB. INTEREST L.J. 323, 337 (2011). Customizing the differentiated model to the specific purposes of this analysis, the units are: 1) "decision," which here is the same as the case; 2) "remedial ruling," which here refers to the frequency of each type of remedy at issue in the decision (*see supra* note 29 and text accompanying note 46); and 3) "outcome," which refers to the adjudicator's disposition of the remedy at issue (*see infra* text accompanying notes 72–81).

[62] The respective totals of 294 and 224 resulted in an average of 1.31 remedial rulings per decision.

[63] The second column in Table 1 presents raw frequencies, whereas the third and fourth columns present the proportional frequencies in terms of the respective frames of reference. Moreover, the figures in the final column add up to more than 100% due to the multiple remedies at issue in some of the decisions.

Table 1. Frequency of Types of Remedies

Type of Remedy	Frequency	Proportion of All Rulings (n=294)	Proportion of All Decisions (n=224)
Tuition and Related Reimbursement	n = 105	36%	47%
Compensatory Education	n = 88	30%	39%
Prospective IEP Revisions	n = 42	14%	19%
Prospective Services	n = 24	8%	11%
Prospective Placement	n = 22	7%	10%
Evaluation	n = 8	3%	4%
Miscellaneous Other[64]	n = 5	2%	2%

Table 1 reveals that the most frequent, or predominant, remedies are (1) tuition and reimbursement and (2) compensatory education. More specifically, tuition reimbursement accounted for almost half of all the decisions and more than a third of all the remedial rulings, while compensatory education accounted for an additional 39% and 30% of the decisions and rulings, respectively. The frequency of the other types of remedies was at a markedly lower level.

For the two predominant remedies of tuition and related reimbursement and compensatory education, Table 2 presents the relative frequencies of rulings in the two successive adjudicative

[64] For the decisions in this catchall category, see D.B. v. Gloucester Twp. Sch. Dist., No. 10–4630, 2012 WL 2930226 (3d Cir. July 19, 2012) (denying availability of money damages under the IDEA); Anchorage Sch. Dist. v. M.P., 45 IDELR ¶ 253 (Alaska Super. Ct. 2006) (not specifying a remedy beyond declaratory relief); Tempe Union High Sch. Dist., 42 IDELR ¶ 223 (Ariz. SEA 2005) (upholding order for the district to re-do the manifestation determination review); Warwick Sch. Comm., 36 IDELR ¶ 179 (R.I. SEA 2002); Klein Indep. Sch. Dist., 34 IDELR ¶ 140 (Tex. SEA 2000) (ordering reinstatement of the student).

forums under the IDEA. Because some of the decisions only addressed other types of remedies, the percentages do not add up to 100.[65] Moreover, because some of the decisions addressed more than one of these two remedies, the cells in each column are not mutually exclusive.[66]

Table 2. Proportion of Predominant Remedies by Adjudicative Forum

Adjudicative Forum	Tuition and Related Reimbursement	Compensatory Education
Court Decisions (n=84)	52% (n=44)	39% (n=33)
IHO/RO Decisions (n=140)	44% (n=61)	39% (n=55)

This table shows that the courts face tuition and related reimbursement more frequently than do IHOs/ROs,[67] but these two forums do not differ in their relative frequency of compensatory education.[68]

For these two predominant remedies, Table 3 presents the relative proportions for each of the seven most frequent states.[69]

[65] The percentages here represent the number of remedial rulings for each of these two types divided by the number of decisions in the respective forums, thus corresponding for comparison purposes to the final column of Table 1.

[66] This lack of independence precluded the use of inferential statistics (e.g., chi square analysis) for comparison of the two forums.

[67] This notable difference upon "eye-balled" examination is not necessarily generalizable in terms of statistical significance.

[68] The aforementioned (*supra* note 42) exclusion of the few IHO/RO decisions that were subject to an IDELR-published judicial appeal, thus limiting the sample to final decisions, serves as another cautionary consideration in this comparison.

[69] *See supra* note 56 and accompanying text.

Table 3. Proportion of Predominant Remedies by State[70]

Most Frequent States	Tuition and Related Reimbursement (45% of Decisions)	Compensatory Education (39% of Decisions)
New York (n=35)	63% (n=22)	23% (n=8)
California (n=32)	38% (n=12)	41% (n=13)
Hawaii (n=22)	77% (n=17)	18% (n=4)
Pennsylvania (n=19)	32% (n=6)	89% (n=17)
New Jersey (n=13)	69% (n=9)	8% (n=1)
Texas (n=11)	36% (n=4)	55% (n=6)
Alaska (n=10)	30% (n=3)	20% (n=2)

Upon comparing proportions for the two types of remedies to those for the total sample of decisions, Hawaii, New Jersey, and New York appear to have a particular propensity for tuition and related reimbursement; while Pennsylvania and, to a lesser extent, Texas have a propensity for compensatory education.[71]

Whereas the foregoing analyses were based on the remedy being at issue, the next table presents the distribution of outcomes, or dispositions, for these two most frequent remedies—i.e., whether the IHO/RO or court (1) granted the request fully, (2) granted it partially, (3) denied it altogether, or (4) disposed of it inconclusively.[72]

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[70] The percentages for the two remedies columns in this table are based on the number of rulings per type of remedy in each state as the numerator, and the respective total number of remedial rulings for the state as the denominator.

[71] This conclusion is purposely qualified in terms of "appears" because the comparisons are not subject to inferential statistical analysis, see *supra* note 66, and the cell sizes are limited—particularly for the last few states. Conversely, it appears that the frequency was disproportionately low in Alaska for tuition reimbursement, and in Hawaii, New York, and Alaska for compensatory education.

[72] For the meaning of inconclusive in this context, see *infra* note 78.

Table 4. Disposition of Predominant Remedies

Remedy	Granted in Full	Granted in Part[73]	Denied	Inconclusive[74]
Tuition and Related Reimbursement[75] (n=105)	72 (69%)	16 (15%)	11 (10%)	6 (6%)
Compensatory Education[76] (n=88)	52 (59%)	15 (17%)	8 (9%)	13 (15%)

Table 4 reveals that the pattern is similar for both remedies. More specifically, the plaintiff-parents were fully successful in more or less than two-thirds of the decisions, partially successful in approximately one-sixth of the decisions, and entirely unsuccessful in approximately one-tenth of the decisions upon the denial of FAPE. [77] First, the higher full-success rate for tuition reimbursement

[73] This outcome category included a few limited compensatory education awards that were inferably only partial.

[74] For compensatory education, this outcome category consisted of two ultimately separable groupings: (a) those decisions reserved for further adjudicative proceedings (e.g., Long v. District of Columbia, 780 F. Supp. 2d 49 (D.D.C. 2011) (remanding to IHO)) to determine whether the plaintiff-parent was entitled to compensatory education, and (b) those decisions delegated to the non-adjudicative mechanisms (e.g., J.T. v. Dep't of Educ., 112 LRP 28283 (D. Haw. May 31, 2012) (ordering jointly paid IEE); Bd. of Educ. of Cent. Syosset Sch. Dist., 101 LRP 699 (N.Y. SEA 2001) (remanding to IEP team to determine the amount of compensatory education)). For tuition reimbursement, the category included the occasional remand to apply one of the requisite steps to determine entitlement. *See, e.g.*, M.S. v. Fairfax County Sch. Bd., 553 F.3d 315 (4th Cir. 2009); Mr. and Mrs. M. *ex rel*. K.M. v. Ridgefield Bd. of Educ., 47 IDELR ¶ 258 (D. Conn. 2007).

[75] This category includes reimbursement for not only tuition in its narrow sense but also related services, tutoring, and the relatively few IEE-at-public-expense decisions. *See supra* note 48.

[76] Similarly broad in scope, this category included rulings where the order was in the form of other relief (e.g., prospective placement) that was reasonably inferably intended as compensatory education. *See supra* note 49.

[77] Without the inconclusive rulings, the proportions are even closer to each other for the remaining three outcomes; for each of these two remedies, the proportions are as follows:

- Tuition and related reimbursement: 72% 16% 11%
- Compensatory education: 70% 20% 9%

corresponded to the higher proportion of inconclusive decisions for compensatory education.[78] Second, in several of these cases, the fully or partially successful ruling for tuition reimbursement, or compensatory education, was in a decision that provided for contrary other rulings regarding FAPE issues and their remedies, thus providing mixed outcomes overall and mitigating the meaning of success.[79] Third, the denials reflect not only the specific application of the equities,[80] but also non-automatic equation of denial of FAPE with retrospective relief.[81]

Finally, in response to the final question of the study,[82] two qualitative observations stand out. First is the notable lack, especially but not exclusively in the decisions at the IHO/RO level, of careful treatment in the remedies section of the written opinions of these cases. In clear contrast with the factual findings and legal conclusions with regard to denial of FAPE, the analysis of what relief the parent is entitled to in terms of type and amount is in several cases limited to a brief order. With the exception of tuition reimbursement, systematic legal analysis, with applicable citations, is more often than not absent.[83] Second and as an interrelated matter, in

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[78] Specifically, the difference between the two remedies was 9% for each of these outcome categories.

[79] *See, e.g.*, R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167 (2d Cir. 2012); Larson v. Indep. Sch. Dist., No. 361, 40 IDELR ¶ 231 (D. Minn. 2004); Anchorage Sch. Dist. v. D.S., 688 F. Supp. 2d 883 (D. Alaska 2009); Morgan Hill Unified Sch. Dist., 110 LRP 24090 (Cal. SEA 2010); Bridgewater-Raynham Reg'l Sch. Dist., 49 IDELR ¶ 88 (Mass. SEA 2007).

[80] *See, e.g.*, Dep't of Educ. v. M.F., 840 F. Supp. 2d 1214 (D. Haw. 2011) (remanding to determine based on enumerated equities).

[81] *See, e.g.*, Garcia v. Bd. of Educ., 520 F.3d 1116 (10th Cir. 2008) (assuming, without deciding, that the authorities denied the child of FAPE but denying equitable relief—in this case, compensatory education—in light of the student's truancy and, thus, lack of benefit).

[82] *See supra* note 33 and accompanying text.

[83] *See, e.g.*, Waukee Cmty. Sch. Dist., 48 IDELR ¶ 26 (Iowa SEA 2007), *aff'd sub nom.* Waukee Cmty. Sch. Dist. v. Douglas L., 51 IDELR ¶ 15 (S.D. Iowa 2008) (ending in cryptic order to provide extended school year as compensatory education for extensive and detailed denial of FAPE affirmed upon judicial appeal without any analysis of the remedial issue); Oktibbeha Cnty. Sch. Dist., 37 IDELR ¶ 57 (Miss. SEA 2002) (ordering compensatory education during summer for full year denial of FAPE without explanation and citation); Rancocas Valley Reg'l Bd. of Educ., 41 IDELR ¶ 46 (N.J. SEA 2004) (awarding unspecified amount of

cases where there was no unilateral placement, the limitation of the remedy to prospective relief was notable in the absence of any consideration of compensatory education.[84]

III. DISCUSSION

Given its importance to not only the parent and child but also the district in terms of both justice and cost, the remedy obviously merits careful attention in the written opinions of IHOs/ROs and courts under the IDEA. This limited study is merely exploratory, intended to stimulate more systematic quantitative and qualitative analysis of the remedial issue of not only FAPE but other issues under the IDEA, such as child find, eligibility, and least restrictive environment.[85]

The first finding, which merely served as a transition to the analysis of remedies,[86] was that FAPE violations were largely, in order of frequency, (1) substantive, (2) procedural, or (3) the combination of these two types,[87] which the *Rowley* Court originally differentiated.[88] Implementation is a more recent and infrequent issue, likely because it is more obvious and, thus, subject to resolution short of a final adjudicative decision, such as via settlement. The predominance of substantive violations may seem at odds with the procedural primacy of *Rowley*, but appears to be

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compensatory education for identified period of denial of FAPE prior to unilateral placement); Tyler Indep. Sch. Dist., 60 IDELR ¶ 259 (Tex. SEA 2012) (ordering continuing placement at private school without explaining whether this prospective component is compensatory education and how the IHO calculated it in relation to the denial of FAPE).

[84] Of the 119 decisions where tuition reimbursement was not at issue, almost half did not consider compensatory, or retrospective, relief.

[85] The corresponding study of remedies for claims under Section 504 and the ADA, which are partially on behalf of students also covered by the IDEA and which also extend to students only eligible under the broader definition of disability under Section 504 and the ADA, also merits attention. Although not widely understood, the adjudicative avenue for parents under Section 504 extends to the IHO mechanism. *See, e.g.*, Perry A. Zirkel, *The Public Schools' Obligation for Impartial Hearings under Section 504*, 22 WIDENER L.J. 135 (2012).

[86] In light of its limitations, this exploratory study did not extend to addressing whether the frequency or outcomes of remedies differed according to the type of FAPE violation.

[87] *See supra* notes 58–60 and accompanying text.

[88] *See supra* notes 12–15 and accompanying text.

explainable in terms of the post-*Rowley* hybridization of the two types[89] and ultimate overlap between them.[90]

The second finding was that the most frequent remedies for FAPE violations were (1) tuition reimbursement[91] (47% of the decisions) and (2) compensatory education (39% of the decisions).[92] The first-place predominance of tuition reimbursement in these FAPE-denial cases is not surprising in light of the relatively longstanding and systematic criteria for this remedy, which includes denial of FAPE as a key criterion[93] and the high-stakes nature of this remedy.[94] Similarly, the lesser predominance of compensatory

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[89] *See supra* notes 17–18 and accompanying text.

[90] Akin to the mixed question of fact and law, which denial of FAPE ultimately is, procedural and substantive are far from mutually exclusive in the world of special education. For example, the lack or insufficiency of measurable goals, a transition plan, and—at least where specified in corollary state special education laws—a functional behavioral analysis or behavior intervention plan are not merely procedural in terms of specified IEP ingredients but also substantive in terms of reasonable calculation of educational benefit.

[91] For economy of expression, the Discussion uses "tuition reimbursement," which is the customary label for this remedy, to represent what the earlier sections of the Article refer to—as a reminder of the breadth and imprecision of its actual scope—as "tuition and related reimbursement."

[92] *See supra* Table 1.

[93] 20 U.S.C. § 1412(a)(10)(C)(ii) (2006). This codification was put in place by the 1997 Amendments of the IDEA, which in turn were attributable to the successive Supreme Court decisions in *School Committee of Burlington v. Department of Education of the Commonwealth of Massachusetts*, 471 U.S. 359 (1985), and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993). For a flow-chart-like canvassing of the criteria, see Zirkel, *supra* note 8.

[94] Although some of these cases concerned lesser expenses, such as tutoring, tuition at a rate of $90,000 for a year for a day placement and much more for a residential placement are not difficult to find. *See, e.g.*, Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E. *ex rel.* Roxanne B., 702 F.3d 1227, 1239 n.6 (10th Cir. 2012) (noting total cost of $9,800 per month for residential placement); R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 180 (2d Cir. 2012) (noting tuition of $90,000 per year for day placement); C.L. *ex rel.* H.M. v. N.Y.C. Dep't of Educ., 60 IDELR ¶ 138 (S.D.N.Y. 2013) (noting annual tuition of $125k for day placement). At the outer extreme, a federal district court decision reported that as a result of an IHO decision, Hawaii spent approximately $250,000 per year for each of two children with autism, which inferably included private residential placement for each child. Mark H. v. Lemahieu, 372 F. Supp. 2d 591, 595 (D. Haw. 2005), *rev'd*, 513 F.3d 922 (9th Cir. 2008). The resulting protracted litigation reportedly resulted in a $4.4 million settlement. Mary Vorsino, *State to Pay 4.4 Million in Landmark*

education is in line with (1) its lack of recognition in the IDEA,[95] (2) its relatively recent and less completely crystallized state in case law,[96] and (3) its ready amenability in the wake of a FAPE-denial when the parent has not unilaterally placed the child.[97] Conversely, the variety of other forms of relief fits with the broad equitable authorization under the IDEA[98] and the prospective implications of a denial of FAPE.[99]

The third finding is that courts address tuition reimbursement more frequently than IHOs/ROs do but that these two adjudicative forums do not differ for the frequency of compensatory education claims.[100] The higher frequency for tuition reimbursement may be due, at least in part, to the more immediate and direct high stakes nature of this remedy, causing the increased likelihood of judicial appeal of the IHO/RO ruling; more specifically, a tuition reimbursement order is directly for a prompt lump-sum payment of what may well be a relatively high amount,[101] thus being of major concern for both the parent and the district. In contrast, compensatory education—although quite flexible and varied in form[102]—is often in the form of services to be delivered over a

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Settlement, HONOLULU STAR ADVERTISER (Aug. 29, 2012), http://www.staradvertiser.com/s?action=login&f=y&id=167809065.

[95] The legislation does not specifically mention this remedy, and the regulations do so only via passing reference to "compensatory services" for the alternate avenue of the complaint resolution process. 34 C.F.R. §§ 300.151(b)(1), 300.153(c) (2012).

[96] *See supra* note 9.

[97] First, unlike tuition reimbursement, compensatory education does not require a second prerequisite hurdle in terms of the appropriateness of the parent's placement since there is none. Second, in the absence of a unilateral placement, compensatory education would appear to be the default remedy in terms of retrospective relief.

[98] *See supra* note 23 and accompanying text.

[99] When an IHO/RO or court concluded that the district has not provided FAPE in the requisite specific terms of procedural, substantive, and/or implementation violations, the district has the basis and incentive for correcting the problem in the future to avoid further noncompliance and its costly consequences. Even in cases where the sole remedial issue is tuition reimbursement or compensatory education, which are retrospective, the prospective effect is implicit.

[100] *See supra* notes 67–68 and accompanying text.

[101] *See supra* notes 91 and 94.

[102] *See* Zirkel, *supra* note 9, at 508–09.

relatively indefinite or protracted period.[103]

The fourth finding is that the states of Hawaii, New Jersey, and New York appear to have a particular propensity for tuition and related reimbursement, while Pennsylvania and, to a lesser extent, Texas, have a particular propensity for compensatory education.[104] Part of the tuition reimbursement propensity among these states may well be a reflection of their high special education litigation rates.[105] Another possible contributing factor is systemic dysfunction in terms of providing appropriate special education services in the state as a whole[106] or in population centers in these states.[107] For compensatory education, the likely reasons for the particular

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[103] *See, e.g.*, Bell v. Bd. of Educ., 52 IDELR ¶ 161 (D.N.M. 2008) (ordering tutoring and other educational assistance of fifteen hours per week for fifteen months); Bakersfield City Sch. Dist., 51 IDELR ¶ 142 (Cal. SEA 2008) (ordering one hour of social skills training per week for 12 months); Elizabethtown Area Sch. Dist., 50 IDELR ¶ 24 (Pa. 2008) (affirming compensatory education award of 720 hours presumably during student's remaining period of eligibility).

[104] *See supra* note 71 and accompanying text.

[105] Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis,* 21 J. SPECIAL EDUC. LEADERSHIP 21, 31 (2008) (finding that the states with the highest number of IDEA hearings in relation to their special education enrollments were New York, New Jersey, and Hawaii).

[106] *See, e.g.,* Mark H. v. Lemahieu, 513 F.3d 922, 925 (9th Cir. 2008) (characterizing Hawaii, including a 1994 consent decree, as having "long struggled to provide adequate services to special needs students in compliance with state and federal law").

[107] *See, e.g.*, Amanda M. Fairbanks, *Tug of War Over Costs to Educate the Autistic*, N.Y. TIMES (April 18, 2009), http://www nytimes.com/2009/04/19/education/19autism html?_r=0 (reporting that cost of special education students' private school tuition to New York City's school district increased from $57.6 million in 2007 to $88.9 million in 2008); Pam Belleck, *Public Pays for the Learning-Disabled to Attend Private Schools*, N.Y. TIMES (Oct. 27, 1996), http://www.nytimes.com/1996/10/27/nyregion/public-pays-for-the-learning-disabled-to-attend-private-schools.html?pagewanted=all&src=pm (reporting that increasing number of parents in New York City are bringing and winning tuition reimbursement claims, reflecting in and contributing to the school system's weaknesses). Conversely, the high availability and use of private schools for special education placement may be a contributing factor in New Jersey. *See, e.g.*, *Data Tables for OSEP State Reported Data – Table B3-2 (2011)*, INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) DATA, https://www.ideadata.org/arc_toc13.asp#partbLRE (last visited Mar. 28, 2013) (showing that New Jersey as the state with the highest percentage of parental private placements).

propensity in certain states is more difficult to divine, but it may be due in part to the relaxed jurisdictional standards for compensatory education.[108] However, these findings and their explanations are only tentative, because the analysis was limited to the seven most frequent states for these remedies, and the cell sizes for the lower half of them (e.g., Texas) were quite small.[109]

The fifth finding is that the parents were fully successful in the clear majority of the rulings for both of these remedies, with the difference in favor of a higher proportion for tuition reimbursement matched by the higher percentage of inconclusive rulings for compensatory education.[110] As a moderating threshold consideration, because the remedy is a consequential component of the overall issue of FAPE, these outcomes results are skewed.[111] More specifically, due to the integral overlap of these two remedies and denial of FAPE, the majority in favor of parents for tuition reimbursement or compensatory education is actually a minority in favor of parents in terms of their overall claim. Viewed alternatively, because denial of FAPE is an essential element of the test for tuition reimbursement or compensatory education,[112] the outcomes of the

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[108] *Compare* M.C. *ex rel.* J.C. v. Central Reg'l Sch. Dist., 81 F.3d 389, 396 (3d Cir. 1996) (requiring only a more than *de minimis* denial of FAPE), *with* Mrs. C. v. Wheaton, 916 F.2d 69, 75 (2d Cir. 1990) (requiring a gross denial of FAPE). Other factors must also be significant and interacting, because (1) in contrast with Pennsylvania's relatively high proportion of compensatory education rulings, New Jersey, the other Third Circuit decision in this analysis, had a relatively low proportion of such rulings, and (2) the standard in New York has become more unsettled and relaxed during the period of this study, *see e.g.,* P. *ex rel.* Mr. P v. Newington Bd. of Educ., 512 F. Supp. 2d 89, 112 (D. Conn. 2007), *aff'd*, 546 F.3d 111 (2d Cir. 2008) (interpreting the gross denial standard to apply only in cases where the student is beyond age twenty-one).

[109] Additionally, a more comprehensive and intensive follow-up study would allow for examining the frequency and outcomes of the other types of remedies, which may have an interactive effect with tuition reimbursement and compensatory education.

[110] *See supra* notes 77–78 and accompanying text.

[111] These interpretations are tentative, depending on the intervening consideration of the typology of issues (*supra* note 5) and the units of analysis (*supra* note 61).

[112] Although the multi-part of decisional framework of tuition reimbursement more obviously includes denial of FAPE, the analogous and more direct analysis for compensatory education encompasses the same foundational ingredient. *See*

cases where parents sought either remedy are different and less favorable to the notable extent that the ruling is in favor of districts in the clear majority of the higher number of cases classified under FAPE.[113] Given this restriction, the majority proportion in favor of parents for both remedies is not surprising, especially in light of the relatively relaxed standard for the second appropriateness step for tuition reimbursement[114] and the aforementioned[115] absence of any corresponding prerequisite for compensatory education. Similarly, the notable minority of partially granted/partially denied requests for tuition reimbursement and compensatory education, which approximates one-sixth of the rulings for each remedy, fits with their clearly equitable nature.[116] Finally, the lower parent-favorable proportion for compensatory education rulings, as compared with tuition reimbursement, is not surprising given its higher proportion of inconclusive rulings, i.e., where the adjudicator delegates the determination to further proceedings or processes.[117]

The final findings, in the form of qualitative observations, were that in the cases for the remedies other than tuition reimbursement 1) the written treatment was often far from thorough, and 2) the exclusive use of purely prospective remedies was more frequent than expected.[118] These interrelated observations suggest the need for

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supra notes 8–9.

[113] *See supra* note 40. The number of FAPE cases is sufficiently higher to infer that the overall majority is in favor of districts, but the specific proportions would require tabulating a combination of the FAPE with the tuition reimbursement and compensatory education categories, which is not available in the literature to date.

[114] Per the multi-part test outlined, *supra* note 8, this step refers to the parents' unilateral, as contrasted with the district's proposed, placement. For the comparatively relaxed standard, see, e.g., Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); *see also* 34 C.F.R. § 300.148(c) (2012).

[115] *See supra* note 97.

[116] This equitable nature is based not only on the overall broad remedial authorization in the IDEA (*supra* note 23 and accompanying text) but also the express equities elements in the Supreme Court's and Congress's tuition reimbursement analysis (*supra* note 8) and the judicial recognition of compensatory education as an analogous remedy (*supra* note 9).

[117] *See supra* note 78.

[118] *See supra* notes 83–84 and accompanying text.

improvement.[119] For example, when the aforementioned[120] delegation of compensatory education was to IEP teams, the adjudicator often ignored the relatively strong case law authority against doing so.[121] Similarly, the failure of these IDEA adjudicators, particularly the IHOs/ROs, to identify and apply the case law concerning the standards for compensatory education more generally[122] and the boundaries for the their remedies, such as prospective placement,[123] is in stark contrast to the review norm of a "thorough and careful" opinion.[124] Yet, the limits of improvement

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[119] Other remedial issues warrant systematic study and careful consideration among scholars and adjudicators. For example, a leading consultant-trainer has suggested that the prospective order of the IHO/RO, upon finding a denial of FAPE, should specify what the new IEP must include to rectify its identified deficiencies. For this purpose, he recommended that the IHO during the prehearing process have the parties clarify the remedy issue and forewarn them of the need for an evidentiary record as its basis. Interview with Lynwood Beekman, Director, Special Education Solutions, in Albany, N.Y. (Nov. 2, 2013). For an analogous suggestion, another leading expert on IDEA dispute resolution included in his proposal for a binding arbitration alternative the recommendation that the decision be in the form of a good IEP. S. James Rosenfeld, *It's Time for An Alternative Dispute Resolution Procedure*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 361, 374 (2012).

[120] See *supra* text accompanying note 117.

[121] Bd. of Educ. v. L.M., 478 F.3d 307, 317–18 (6th Cir. 2007); Reid *ex rel.* Reid v. District of Columbia, 401 F.3d 516, 527 (D.C. Cir. 2005) (ruling, based on the impartiality and finality requirements, that IHOs/ROs may not delegate to the IEP the decision to discontinue or terminate the compensatory education award). This case law might be distinguishable as either being specific to jurisdictions that follow the qualitative approach or as being limited to termination or reduction, as per T.G. v. Midland Sch. Dist. 7, 848 F. Supp. 2d 902 (C.D. Ill. 2012), although the original rationale in *Reid* would seem to exceed such attempted boundaries. *Cf.* Anchorage Sch. Dist. v. D.S., 688 F. Supp. 2d 883 (D. Alaska 2009) (reversing the part of the IHO's order delegating approval authority to private provider for new IEP); Slack v. Del. Dep't of Educ., 826 F. Supp. 115, 121–22 (D. Del. 1993) (ruling that decision that left the resolution to "a mechanism for evaluating the effectiveness of whatever private placement is utilized" violated the finality requirement). In any event, such careful consideration is largely missing in the cases in this study's sample.

[122] *See supra* note 9.

[123] *See* Zirkel, *supra* note 22, at 10 (citing Davis v. District of Columbia Bd. of Educ., 530 F. Supp. 1209, 1215 (D.D.C. 1982).

[124] *See, e.g.*, M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217, 241 (2d Cir. 2012); Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1047 (9th Cir. 2012). For a more

are not only systemic but also structural. More specifically, IHOs/ROs in many states face systemic limits in terms of either compensation or specialization,[125] and they face a challenging time limit.[126] For courts, the presence of congestion and the lack of specialization are obvious. Structurally, both IHOs/ROs and courts are largely reactive mechanisms, which are largely dependent on the parties' action and which have limitations on raising issues or ordering relief *sua sponte*.[127] The lack of attorneys with special expertise in IDEA cases in many parts of the country[128] and the expanded permissibility of *pro se* representation by parents[129] contribute to the less than complete and optimal use of compensatory education.

IV. CONCLUSION

For the parties in a FAPE case, if the adjudicator determines that the district has violated the applicable standards for denial, the most significant part of the decision is the explanation and expression of the remedy. For the parent, it represents closure in terms of equitable justice that provides appropriate relief not only prospectively but also

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detailed view of the norms for IHO/RO decision-making, see Perry A. Zirkel, *"Appropriate" Decisions under the Individuals with Disabilities Education Act*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 242 (2013). For the case law setting for the standards specific to compensatory education awards, see *id.* at 259 nn.75–76.

[125] Although there is an occasional exception, the part-time IHOs tend to have limited compensation, and the full-time IHOs/ROs tend to have such varied and broad jurisdiction that counters specialization in IDEA issues. *See, e.g.*, Zirkel & Scala, *supra* note 10, at 6.

[126] 34 C.F.R. § 300.515 (2012) (45 days for IHO and 30 days for RO except for specific extensions in response to party request).

[127] *See* Zirkel, *supra* note 22, at 11–14. The identified case law is specific to IHOs/ROs but also at least inferably applies to courts based on their institutional structure.

[128] *See, e.g.,* Perry A. Zirkel, *Lay Advocates and Parent Experts Under the IDEA*, 217 EDUC. L. REP. 19, 21–23 (2007); Kay Seven & Perry A. Zirkel, *In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow* 9 GEO. J. POVERTY L. & POL'Y 193, 219–203 (2002).

[129] Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007).

retrospectively.[130] For the district, it represents the corresponding consequences in terms of both equity and expense. Yet the systematic investigation and improvement of the remedial orders at both adjudicative levels under the IDEA, with special but not sole attention to the evolving efficacy of IHOs/ROs,[131] have yet to receive adequate attention. This exploratory study is intended to stimulate more thorough and thoughtful efforts in this direction.

[130] Although implementation of the order is obviously in the future, the denial was in the past (possibly, depending on the circumstances since the initial filing, continuing to the present). Thus, the use of "prospectively" and "retrospectively" in this context respectively refer to fixing the child's IEP for the period subsequent to the order and compensating the child for the period previous to the order.

[131] Perry A. Zirkel, Zorka Karanxha, & Anastasia D'Angelo, *Creeping Judicialization of Special Education Hearings: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27 (2007).

THE AFTERMATH OF *ENDREW F.*:

AN OUTCOMES ANALYSIS TWO YEARS LATER*

by

Perry A. Zirkel, Ph.D., J.D., LL.M.**

The Supreme Court's decision in *Endrew F. v. Douglas County School District RE-1*,[1] issued on March 22, 2017, has been the subject of widespread attention.[2] This attention includes my four previous successive analyses.[3]

The first one provided an objective dissection of the holding and potentially significant dicta of this case.[4] The holding in *Endrew F.* was the refined substantive standard for "free

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[1] 137 S. Ct. 988 (2017).

[2] For a representative sampling of the initial stage in the continuing line of professional literature, see Perry A. Zirkel, *The Aftermath of* Endrew F. O*ne Year Later: An Updated Outcomes Analysis*, 352 Ed.Law Rep. 448, 453 nn.36–37 (2018). For more recent views, see Diana Autin, Maria Docherty, & Lauren Agoretus, Endrew F. *Supreme Court Case: Strengthening the Voices of Families at IEP Meetings*, 48 EXCEPTIONAL PARENT 38 (Mar. 2018); Janet R. Decker, Francesca Hoffman, & Suzanne Eckes, *Behavior Intervention Plans: More Important Than Ever after "Endrew,"* 18 PRINCIPAL LEADERSHIP 56 (Jan. 2018); Miriam Kurtzig Freedman, *Waterstone's Endrew F.: Symbolism and Reality from the Schools' Perspective,* 47 J.L & EDUC. 517 (2018); Rachel B. Hitch, *Flags on the Play: We're on the Same Team*, 48 J.L & EDUC. 87 (2019); Shawn K. O'Brien, *Did* Endrew F. *Change the "A" in FAPE: Questions and Implications for School Psychologists*, 46 COMMUNIQUÉ 1 (Feb. 2018); Angela M. Prince, Mitchell L. Yell, & Antonis Katsiyannis, Endrew F. v. Douglas County School District: *The U.S Supreme Court and Special Education*, 53 INTERVENTION & SCH. CLINIC 321 (2018); H. Rutherford Turnbull, Ann P. Turnbull, & David H. Cooper, *The Supreme Court,* Endrew*, and the Appropriate Education of Students with Disabilities*, 84 Exceptional Child. 124 (2018).

[3] After the initial analysis, the three succeeding empirical snapshots were at successive six-month intervals. For the most recent of this series, see Perry A. Zirkel, *The Aftermath of* Endrew F.*: An Updated Outcomes Analysis Eighteen Months Later*, 361 Ed.Law Rep. 488 (2019).

[4] Perry A. Zirkel, *The Supreme Court's Decision in* Endrew F. v. Douglas County School District RE-1: *A Meaningful Raising of the Bar?*, 341 Ed.Law Rep. 545 (2017).

appropriate education" (FAPE)[5]: "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[6] The various dicta included (1) the emphasis on the "reasonable," not ideal, dimension[7]; (2) the clarification that the refined standard is "markedly more demanding than [the some benefit test]"[8]; (3) the least restrictive environment (LRE) distinction, including passing marks and grade advancement for fully integrated context and the "appropriately ambitious" analogy for "challenging objectives" for the remaining placement options of the LRE continuum[9]; and (4) reiteration of judicial deference to school authorities but with the expectation of a "cogent" justification.[10]

The next three articles provided successive empirical analyses of the outcomes of the post-*Endrew F*. lower court substantive FAPE rulings after six months,[11] twelve months,[12] and eighteen months.[13] The more recent analysis of this pair, which subsumed the results of the earlier analyses,[14] identified sixty-six cases in which the impartial hearing officer (IHO) or, in the relatively few jurisdictions with a second tier,[15] the review officer (RO) relied on the pre-*Endrew*

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[5] FAPE is the core obligation under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. §§ 1401(9) and 1412(a)(1) (2017).

[6] *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. at 999 and 1002.

[7] *Id.* at 999.

[8] *Id.* at 1000.

[9] *Id.*

[10] *Id*. at 1001-02.

[11] Perry A. Zirkel, Endrew F. *after Six Months: A Game Changer?*, 348 Ed.Law Rep. 585 (2017).

[12] Zirkel, *supra* note 2.

[13] Zirkel, *supra* note 3.

[14] As a result, a few of the cases were subject to appeals, which eliminated the earlier rulings in the same case.

F. substantive FAPE standard under *Board of Education v. Rowley*[16] and the court addressed the same issue under the *Endrew F*. refinement. Inasmuch as two cases each had two relevant rulings for a pair of successive IEPs, the total "n" of relevant rulings was sixty-eight. The primary finding of the analysis was that only ten (14%) of these sixty-eight rulings had a different outcome upon the court's re-visitation and that this effect was limited to a remand in half of these ten cases. Consequently, only five (7%) of the sixty-eight rulings were reversals, and—oddly—two of them changed from the parent's to the district's favor.[17]

The purpose of this brief article is to provide a follow-up of the eighteen-month analysis by extending it another half year, thus accumulating to the two-year period ending on March 22, 2019. The search and selection procedure was the same as in the previous analyses,[18] including the exclusion of cases that cited *Endrew F.* without applying its substantive standard.[19] Additionally, causing this analysis to be the final snapshot in this series, the cases fitting within the continuing pre-post scope dwindled toward the end of this period in relation to the increasing and predominating number of decisions in which the hearing or review officer decision was

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[15] The number of states that opted for a second tier under the IDEA decreased from twenty-four in 1992 to seven in 2018. Jennifer Connolly, Thomas Mayes, & Perry A. Zirkel, *State Due Process Hearing Systems under the IDEA: An Update*, J. DISABILITY POL'Y STUD. (in press 2019). The most prominent of the dwindling minority of two-tier jurisdictions, due to its relatively high adjudicative activity under the IDEA, is New York.

[16] *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206–07 (1982): The IEP must be "reasonably calculated to enable the child to receive educational benefits."

[17] *Colonial Sch. Dist. v. G.K.*, 72 IDELR ¶ 69 (E.D. Pa. 2018); *Bd. of Educ. of Albuquerque Pub. Sch. v. Maez,* 70 IDELR ¶ 157 (D.N.M. 2017). Conversely, in the remaining fifty-eight rulings, which were the same before and after *Endrew F*., ten were in the parents' favor. Zirkel, *supra* note 3, at 490.

[18] Zirkel, *supra* note 3, at 489; Zirkel, *supra* note 2, at 449; Zirkel, *supra* note 9, at 588.

[19] *E.g.*, *Somberg v. Utica Cmty. Sch.,* 908 F.3d 162, 359 Ed.Law Rep. 752 (6th Cir. 2018) (background for, but distinguished from, issue of compensatory education); *Philips v. Indep. Sch. Dist. No. 3*, 73 IDELR ¶ 119 (E.D. Okla. 2018) (background for issue of residential placement and remedies); *Avaras v. Clarkstown Cent. Sch. Dist.,* 73 IDELR ¶ 50 (S.D.N.Y. 2018) (background for procedural FAPE); *M.P. v. Campus Cmty. Sch.*, 73 IDELR ¶ 38 (D. Del. 2018) (background for compensatory education).

after, rather than before, the date of *Endrew F*.[20]

Results

The Appendix provides the cumulative listing of the 84 cases and 88 rulings for the entire two-year period.[21] The format is the same as the listings in the previous analysis,[22] including differentiating the superseded rulings[23] via cross-outs and the new entries via bold font. The complete compilation is included here because this final snapshot provides the complete picture for the ample two-year period.

The resulting overall distribution of net changes in the 88 relevant rulings for the two-year period was as follows[24]:

- No Change: 85% (65 "D-upheld" rulings + 10 "P-upheld" rulings)
- Remanded: 6% (5 rulings)
- Reversed: 9% (8 rulings, including 3` that were originally in favor of P[25])

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[20] *E.g.*, *C.F. v. Radnor Twp. Sch. Dist*., 74 IDELR ¶ 48 (E.D. Pa. 3/14 2019); *Mr. & Mrs. G. v. Canton Bd. of Educ*., 74 IDELR ¶ 8 (D. Conn. 3/11 2019); *A.W. v. Techachapi Unified Sch. Dist*., 74 IDELR ¶ 11 (E.D. Cal. 3/7 2019); *J.A. v. Smith Cty. Sch. Dist*., 364 F. Supp. 3d 803, __ Ed.Law Rep. __ (M.D. Tenn. 3/6 2019); *Dennis v. Lubbock-Cooper Indep. Sch. Dist*., 74 IDELR ¶ 18 (N.D. Tex. 3/1 2019); *A.H. v. Smith*, 73 IDELR ¶ 234 (D. Md. 2/8 2019); *Nathan M. v. Harrison Sch. Dist. No. 2*, 73 IDELR ¶ 148 (D. Colo. 2018); *D.S. v. Parsippany Troy Hills Bd. of Educ.*, 73 IDELR ¶ 143 (D.N.J. 2018); *Y.N. v. Bd. of Educ. of Harrison Cent. Sch. Dist*., 73 IDELR ¶ 73 (S.D.N.Y. 2018); *M.G. v. N. Hunterdon-Vorhees Reg'l High Sch. Dist. Bd. of Educ.*, 73 IDELR ¶ 46 (D.N.J 2018); *Carr v. New Glarus Sch. Dist*., 73 IDELR ¶ 36 (W.D. Wis. 2018); *Montuori v. District of Columbia*, 73 IDELR ¶ 12 (D.D.C. 2018). This shifting forward beyond the pre-post window has continued after the ending date of this two-year analysis. *E.g., R.F. v. Cecil Cty. Pub. Sch.,* 919 F.3d 237 (4th Cir. 2019); *E.P. v. N. Arlington Bd. of Educ*., 74 IDELR ¶ 80 (D.N.J. 2019); *D.F. v. Smith*, 74 IDELR ¶ 75 (D. Md. 2019).

[21] The net effect, after further proceedings, including appeals, was that four of the cases each had two relevant rulings.

[22] Zirkel, *supra* note 3, at 493–497. The column headings in the Appendix consists of the case citation, the jurisdiction's *Rowley* benefit standard prior to *Endrew F*., the pre and post outcomes in terms of the parent (P) or the district (D), and comments focusing on the *Endrew F.* dicta used in the direct explanation of the ruling.

[23] *See supra* note 14.

[24] These 88 rulings were based on 84 cases, because four of the cases each addressed substantive FAPE for two IEPs with different outcomes. See Appendix - rows 17 (*G.S. v. Fairfield Bd. of Educ*.), 50 (*Z.B. v. District of Colum*bia), 68 (*Smith v. District of Columbia*), and 80 (*In re Butte Sch. Dist. No. 1*).

Restricting the analysis to the rulings that were originally in favor of the district based on the presumption that those in favor of the plaintiff would be unchanged by the supposed elevation of the standard did not at all ameliorate this pattern; specifically, the distribution for these 75 rulings was: no change – 65 (87%); 5 (7%) – remanded, and 5 (7%) – reversed. Finally, the rulings during the most recent-six month interval, which are the bold font entries in the Appendix, largely continued the pattern of the prior three intervals in both frequency and outcomes.[26]

Moreover, as the entries in the "benefits jurisdiction" and "comments" columns in the Appendix show, the cases during the most recent interval also largely reinforced the prior pattern. First, courts in various circuits, which largely but not entirely had previously been in the definitively "meaningful" category, continued the conclusion that *Endrew F*. did not represent a change in their substantive standard.[27] Second, the previous "some" and "meaningful" benefit jurisdictions did not yield an empirically significant distinction, although the lack of clarity between the two standards and among the various jurisdictions seems to preclude such

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[25] See Appendix – rows 23 (*Bd. of Educ. of Albuquerque Pub. Sch. v. Maez*), 80 (*Butte Sch. Dist. No. 1*), and 81 (*Colonial Sch. Dist. v. G.K.*).

[26] The number of rulings was 25, basically continuing the uneven plateau between the range from 19 for the second six-months interval to 34 for the first six months. The proportion of decisions (80%) with no change (i.e., P or D upheld) was similarly well within the range of 71% to 94% for the previous intervals, and the differences are not likely significant due to the limited numbers for each interval, the corresponding variance in the other two outcomes (i.e., percentages of remands and reversals), and the differential effect of counting v. negating rulings that were subject to subsequent decisions during the two-year period.

[27] *E.g*., rows 65 (Second Circuit), 67 (Third Circuit), 71 (First Circuit), and 76 (Fifth Circuit). For the prior intervals, see rows 3, 56 (First Circuit); rows 28, 45, 47, 55 (Second Circuit); rows 32, 60 (Third Circuit); and row 42 (Ninth Circuit). *But cf*. row 30 (Eleventh Circuit) and 50 (D.C. Circuit) – some benefit jurisdictions).

differentiation. Third, the lower courts' treatment of *Endrew F.* remains rather cursory, with scattered, rather than skewed, use of its various dicta.[28]

Discussion

In light of the "ponderous" process of adjudication under the IDEA,[29] it has taken two years to rather fully apply the pre-post process with the pattern being relatively consistent and confirmatory. The cumulative conclusion that *Endrew F*. is not a "game changer"[30] in terms of pre-post judicial rulings.[31] The express conclusions in various cases that *Endrew F*. did not materially change the applicable substantive standard reinforced the empirical results.[32] Indeed, a surprising number of substantive FAPE cases within the most recent six-month interval continued to use the *Rowley* benefit standard without any mention of *Endrew F*. or its progress standard.[33]

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[28] Although none of the dicta or factors (*supra* text accompanying notes 7–10) was dominant, the most frequent ones increasingly were (1) reasonable as compared with ideal, which rooted in *Rowley*, and (2) the LRE distinction, although not applied on a nuanced and differentiated basis.

[29] *Honig v. Doe*, 484 U.S. 305, 322 (1988) (citing *Burlington Sch. Comm. v. Mass. Dep't of Educ*., 471 U.S. 359, 370 (1985).

[30] Zirkel, *supra* note 11, at 587.

[31] Not only have the reversals for the two-year period been limited to 8 of the 88 rulings, but also 3 of them were in the opposite direction, thus further limiting the purported standard-raising effect. *See supra* note 25 and accompanying text. However, the general tendency of courts to uphold the outcomes of IDEA hearing officers tmay have tempered the precedential effect of a new Supreme Court standard. Perry A. Zirkel & Cathy Skidmore, *Judicial Appeal of Due Process Hearing Rulings: The Extent and Direction of Decisional Change*, 29 J. DISABILITY POL'Y STUD. 22 (2018) (finding that 70% of a random sample of IDEA rulings, including but not limited to FAPE, had a slight or no change between the hearing officer level and final court decision).

[32] *See supra* note 27 and accompanying text. These pronouncements were not limited to the circuits that were previously in the meaningful category, extending, for example, to the Second and Ninth Circuits. *E.g.,* Ronald D. Wenkart, *The* Rowley *Standard: A Circuit-by-Circuit Review of How* Rowley *Has Been Interpreted*, 247 Ed.Law Rep. 1, 2–3 (classifying the Second and Ninth Circuits as applying both standards); Mitchell L. Yell & David Bateman, Endrew F. v. Douglas County School District *(2017): FAPE and the Supreme Court*, 50 TEACHING EXCEPTIONAL CHILD. 7, 10 (Sept.-Oct. 2017) (classifying the Ninth Circuit as mixed and the Second Circuit as a "some" benefit jurisdiction).

The lack of a significant difference between the former "some" and "meaningful" benefit jurisdictions is likely attributable to the limited variance in the outcome changes and the fuzziness of the consistency and criteria among these jurisdictions.[34] Yet, the reasons for the lower courts' continuing cursory rather than nuanced application of *Endrew F*.[35] are less obvious. Possible contributing factors may be the general congestion in the federal courts or less than penetrating analyses in the parties' briefs.[36] The increased prominence of *Endrew F*.'s reasonable, not ideal, caveat in the most recent interval of cases[37] reinforces the lack of change from *Rowley*, which first established this distinction in its rejection of a maximization standard[38] and its formulation of a "reasonably calculated" holding.[39] The lower courts' corresponding increased but still superficial use of the LRE distinction leaves in limbo the wide segment of students with disabilities who are neither like Amy Rowley, i.e., fully integrated in the regular

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[33] *E.g*., *E.M. v. Lewisville Indep Sch. Dist*., ___ F. App'x ___ (5th Cir. 2019); *A.L. v. v. Mamaroneck Union Free Sch. Dist*, 73 IDELR ¶ 48 (S.D.N.Y. 2018); *Alamo Heights Sch. Dist*., 73 IDELR ¶ 71 (W.D. Tex. 2018) (Oct. 12); *A.B. v. Clear Creek Indep. Sch. Dist*., 73 IDELR ¶ 3 (S.D. Tex. 2018); *M.C. v. Mamaroneck Union Free Sch. Dist*., 73 IDELR ¶ 48 (S.D.N.Y. 2018); *cf*. *Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D*., 739 F. App'x 79 (2d Cir. 2018) (ancillary evidentiary issues). For an example from the end of the previous six-month interval, see *K.G. v. Cinnaminson Twp. Bd. of Educ*., 73 IDELR ¶ 19 (D.N.J. 2018). Although all three of these circuits were among those that had ruled that their previous standard complied with *Endrew F*., it is notable that these decisions did not more clearly replace their "benefit" wording with the "progress" formulation or at least cite *Endrew F*.

[34] As noted in the previous analysis (Zirkel, *supra* note 3, at 452 n.22), various jurisdictions were subject to unclear and inconsistent categorization. Moreover, the operational difference between the two standards is indistinct. For example, the some benefit jurisdiction of *Endrew F*. originally formulated its definition based on the Third Circuit's meaningful benefit formulation. *Urban v. Jefferson Cty. Sch. Dist. No.* 1, 89 F.3d 720, 727, 110 Ed.Law Rep. 1089 (10th Cir. 1996) (citing *Polk v. Cent. Susquehanna Intermediate Unit*, 853 F.2d 171, 182, 48 Ed.Law Rep. 336 (3d Cir. 1988)).

[35] *See supra* note 28 and accompanying text. Overall, the courts' selection appears to be more result-oriented reinforcement rather than disciplined analysis.

[36] For additional considerations, see Zirkel, *The Aftermath of* Endrew F.*: An Updated Outcomes Analysis One Year Later*, 352 Ed.Law Rep. 448, 453 (2019) (observing the less than nuanced analysis in the *Rowley* progeny and, thus far, the *Endrew F.* literature).

[37] *See supra* note 28.

[38] *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 476 U.S. at 198.

[39] *Id*. at 28.

classroom and capable of achieving at grade level, nor like Endrew, i.e., "not fully integrated in the regular classroom *and* not able to achieve on grade level."[40]

Thus, from an empirical perspective focused on judicial outcomes, the prevailing professional interpretations in the special education literature[41] appear to be inflated. However, effects of *Endrew F*. at the significant latent levels of participant perceptions at the IEP table, hearing officer decisions, and/or settlements remains an open question for further research.[42]

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[40] *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. at 1000 (emphasis supplied). Moreover, this facile distinction fails to address the child with a disability who is fully integrated but, unlike Amy Rowley, without a reasonable prospect of "progressing smoothly in the regular curriculum." *Id*.

[41] For a critique of such published interpretations, see Perry A. Zirkel, *Professional Misconceptions of the Supreme Court's Decision in* Endrew F.*,* 47 COMMUNIQUÉ (forthcoming 2019).

[42] Even for filings for due process hearings, the proportion of cases that reach the adjudicated level, much less subject to judicial appeal, is relatively small. *E.g.,* Perry A. Zirkel, *Trends in Impartial Hearings under the IDEA: A Follow-up Analysis*, 303 Ed.Law Rep. 1 (2014) (increasing filings to adjudication ratio of IDEA hearings).

Appendix. Relevant Judicial Rulings in the 24 Months after Endrew F. *(3/22/17–3/21/19)*

Case Citation	Decision Date	Benefit Jurisdiction	Outcome Effect	Comments
1. *Davis v. District of Columbia*, 244 F. Supp. 3d 27 (D.D.C. 2017)	3/23	some	D – upheld	appropriately ambitious/challenging objectives (w/o LRE distinction)
2. *Brandywine Heights Area Sch. Dist. v. B.M.*, 248 F. Supp. 3d 618 (E.D. Pa. 2017)	3/28	meaningful	D – upheld	LRE distinction: appropriately ambitious/challenging objectives
3. *C.D. v. Natick Pub. Sch. Dist.*, ~~69 IDELR ¶ 213 (D. Mass. 2017)~~ 70 IDELR ¶ 120 (D. Mass. 2017)	~~[3/28]~~ 7/21	~~unclear~~ meaningful	~~[D remanded]~~ D – upheld	not materially different at least for this case
4. *A.G. v. Bd. of Educ. of Arlington Cent. Sch. Dist.*, 69 IDELR ¶ 210 (S.D.N.Y. 2017)	3/29	unclear	D – upheld	
5. *E.D. v. Colonial Sch. Dist.*, 69 IDELR ¶ 245 (E.D. Pa. 2017)	3/31	meaningful	D – upheld	not substantive different; LRE distinction: annual promotion/passing marks
6. *Paris Sch. Dist. v. A.H.,* 69 IDELR ¶ 243 (W.D. Ark. 2017)	4/3	unclear	P – upheld	limited to behavior plans (possible higher entitlement); stagnation
7. *K.M. v. Tehachapi Unified Sch. Dist.,* 69 IDELR ¶ 241 (E.D. Cal. 2017)	4/5	unclear	D – upheld	
8. *N.G. v. Tehachapi Unified Sch. Dist.,* 69 IDELR ¶ 279 (E.D. Cal. 2017)	4/12	unclear	D – upheld	marginal case (largely focused on FBA-entitlement issue)
9. *C.M. v. Warren Indep. Sch. Dist.,* 69 IDELR ¶ 282 (E.D. Tex. 2017)	4/18	meaningful	D – upheld	LRE distinction
10. *T.M. v. Quakertown Cmty. Sch. Dist.*, 69 IDELR ¶ 276 (E.D. Pa. 2017)	4/19	meaningful	D – upheld	"the benefit must be substantial, not minimal"[?]; judicial deference
11. *D.B. v. Ithaca Sch. Dist.*, 690 F. App'x 778 (2d Cir. 2017)	5/23	unclear	D – upheld	marginal case (peripheral mention in short opinion)
12. *E.G. v. Great Valley Sch. Dist.*, 70 IDELR ¶ 3 (E.D. Pa. 2017)	5/23	meaningful	D – upheld	cogent justification
13. *M.C. v. Antelope Valley Union High Sch. Dist.,* 858 F.3d 1189 (9th Cir. 2017)	5/30	meaningful	D – remanded	"taking into account the progress of his nondisabled peers [?], and the child's

				potential"
~~**14.** *E.R. v. Spring Branch Indep. Sch. Dist.*, 2017 WL 3017282 (S.D. Tex. 2017), *adopted*, 70 IDELR ¶ 158 (S.D. Tex. 2017)~~	~~6/15~~ ~~7/5~~	~~unclear~~	~~D – upheld~~	~~meaningful; appropriately ambitious (w/o LRE distinction); reasonable> ideal; applied to § 504[?]~~
14. *C.G. v. Waller Indep. Sch. Dist*., 697 F. App'x 816 (5th Cir. 2017)	6/22	unclear	D – upheld	appropriately ambitious (w/o LRE distinction)
15. *Albright v. Mountain Home Sch. Dist*., 70 IDELR ¶ 95 (W.D. Ark. 2017) (*Albright I*)	7/5	some	D – upheld	
16. *Parker C. v. W. Chester Area Sch. Dist*., 70 IDELR ¶ 94 (E.D. Pa. 2017)	7/6	meaningful	D – upheld	deference; LRE distinction (grades/ promotion)
17. *G.S. v. Fairfield Bd. of Educ.*, 70 IDELR ¶ 93 (D. Conn. 2017)	7/7	unclear	P – upheld (yr.1) D – upheld (yr.2)	applicable to Step 2 of tuition reimbursement
18. *I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Sch.,* 863 F.3d 966 (8th Cir. 2017)	7/14	some	D – upheld	marginal case (largely focused on state law; no guarantee
19. *Avaras v. Clarkstown Cent. Sch. Dist.,* 70 IDELR ¶ 129 (S.D.N.Y. 2017)	7/17	unclear	P – upheld (review officer)	not applied at Step 2 of tuition reimbursement
20. *Dallas Indep. Sch. Dist. v. Woody,* 865 F.3d 303 (5th Cir. 2017)	7/27	unclear	P – upheld	marginal case (largely focused on timing of IEP offer)
21. *Unknown Party v. Gilbert Unified Sch. Dist.,* 70 IDELR ¶ 131 (D. Ariz. 2017)	7/31	meaningful	D – upheld	odd posture (parents sought easier program, with district using *Endrew F*'s higher std.; stagnation
22. *Bd. of Educ. of Albuquerque Pub. Sch. v. Maez*, 70 IDELR ¶ 157 (D.N.M. 2017)	8/1	some	P – rev'd → D	no guarantee; cogent justification; appropriately ambitious (LRE distinction); meaningful[?]
~~**24.** *J.R. v. N.Y.C. Dep't of Educ.*, 70 IDELR ¶ 151 (S.D.N.Y. 2017)~~	~~8/9~~	~~meaningful~~	~~D – upheld (review officer)~~	~~appropriately ambitious (LRE distinction)~~
23. *Benjamin A. v. Unionville-Chadds Ford Sch. Dist.,* 70 IDELR ¶ 150 (E.D. Pa. 2017)	8/14	meaningful	D – upheld	
~~**26**. *Sean C. v. Oxford Area Sch. Dist.,* 70 IDELR ¶ 146 (E.D. Pa. 2017)~~	~~8/14~~	~~meaningful~~	~~D – upheld~~	~~not ideal; LRE distinction (grades/ promotion); not substantively different (citing *Colonial SD*)~~
24. *M.L. v. Smith*, 867 F.3d 487 (4th Cir. 2017)	8/15	some	D – upheld	declines to address effect except "circumstances" does not include

				child's religion
~~28. *F.L. v. Bd. of Educ. of Great Neck U.F.S.D.,* 274 F. Supp. 3d 94 (S.D.N.Y. 2017)~~	~~8/15~~	~~meaningful~~	~~D – upheld (review officer)~~	
25. *J.R. v. Smith,* 70 IDELR ¶ 178 (D. Md. 2017)	8/21	some	D – upheld	
~~30. *K.D. v. Downingtown Area Sch. Dist.,* 70 IDELR ¶ 203 (E.D. Pa. 2017)~~	~~9/1~~	~~meaningful~~	~~D – upheld~~	~~LRE distinction; "potential" factor; deference; not substantive different from meaningful benefit~~
26. *Pocono Mountain Sch. Dist. v. J.W.,* 70 IDELR ¶ 200 (E.D. Pa. 2017)	9/8	meaningful	P – upheld	stagnation
27. *Tamalpais Union High Sch. Dist. v. D.W.,* 271 F. Supp. 3d 1152 (N.D. Cal. 2017)	9/21	unclear	D – upheld[43]	appropriately ambitious w/o LRE distinction)
~~33. *Barney v. Akron Bd. of Educ.,* 70 IDELR ¶ 227 (N.D. Ohio 2017)~~	9/22	unclear	D – upheld (review officer)	appropriately ambitious (w/o LRE distinction); "potential" factor
28. *S.B. v. N.Y.C. Dep't of Educ*., 70 IDELR ¶ 221 (S.D.N.Y. 2017)	9/28	unclear	D – rev'd → P (review officer)	"careful consideration of the child's [PELs]"; lack of thorough HO/RO decisions in applying preexisting 2d Cir. substantive std.
29. *Denny v. Bertha-Hewit Pub. Sch*., 70 IDELR ¶ 220 (D. Minn. 2017)	9/29	some	D – upheld	
30. *S.M. v. Hendry Cty. Sch. Bd*., 70 IDELR ¶ 249 (M.D. Fla. 2017)	10/5	some	D – upheld	markedly different standard but continuing deference to HO
31. *Methacton Sch. Dist. v. D.W*., 70 IDELR ¶ 247 (E.D. Pa. 2017)	10/6	meaningful	P – upheld	
32. *Montgomery Cty. Intermediate Unit No. 23 v. C.M*., 71 IDELR ¶ 11 (E.D. Pa. 2017)	10/12	meaningful	P – upheld	substantively similar to prior std. (in 3d Cir.)
33. *Bd. of Educ. of Wappingers Cent. Sch. Dist. v. M.N*., 71 IDELR ¶ 9 (S.D.N.Y. 2017)	10/13	unclear	P – upheld	[state substantive stds.]
34. *N.B. v. N.Y.C. Dep't of Educ*., 711 F. App'x 29 (2d. Cir. 2017)	10/17	unclear	D – upheld (review officer)	[deference to the SRO]

[43] The hearing officer addressed three IEPs, ruling for the parent for one of them. However, the court only used *Endrew F*. in its rejection of the parent's challenge to one of the other two, not for its rejection of the district's challenge to the third IEP.

~~**41**. *E.F. v. Newport Mesa Unified Sch. Dist.*, 138 S. Ct. 169 (2017)~~	~~10/22~~	~~meaningful~~	~~D – remanded~~	
35. *D.B. v. Fairview Sch. Dist*., 71 IDELR ¶ 36 (E.D. Pa. 2017)	10/31	meaningful	D – upheld	deference (though marginal due to mix of procedural FAPE issues)
36. *Edmonds Sch. Dist. v. A.T.*, 299 F. Supp. 3d 1135 (W.D. Wash. 2017)	11/7	meaningful	P – upheld	
37. *N.P. v. Maxwell*, 711 F. App'x 713 (4th Cir. 2017)	12/8	some	D – remanded[44]	
38. *J.P. v. City of N.Y. Dep't of Educ*., 717 F. App'x 30 (2d Cir. 2017)	12/19	unclear	D – upheld	reasonable, not ideal – implicitly same std. as re-cited *Walczak*
39. *M.E. v. N.Y.C. Dep't of Educ.*, 71 IDELR ¶ 125 (S.D.N.Y. 2018)	1/26	unclear	D – upheld	
40. *Endrew F. v. Douglas Cty. Sch. Dist.*, 290 F. Supp. 3d 1175 (D. Colo. 2018)[45]	2/12	some	D – rev'd → P	extensive quotations incl. ambitious goals and, at end, equal opp'ty/ behavioral dicta – wrong std. for unilateral placement but stipulation
41. *Pavelko v. District of Columbia*, 288 F. Supp. 3d 301 (D.D.C. 2018)	2/13	some	D – upheld	reasonable, not ideal
42. *E.F. v. Newport Mesa Unified Sch. Dist.*, 726 F. App'x 535 (9th Cir. 2018)	2/14	meaningful	D – upheld	"Our standard comports with *Endrew*'s clarification of *Rowley*."
43. *J.K. v. Missoula Pub. Sch.*, 713 F. App'x 666 (9th Cir. 2018)	2/23	meaningful	D – upheld	
44. *Smith v. Cheyenne Mountain Sch. Dist. 12*, 71 IDELR ¶ 185 (D. Colo. 2018)	3/6	some	D – upheld	snapshot
45. *Mr. P v. W. Hartford Bd. of Educ.*, 885 F.3d 735 (2d Cir. 2018)	3/23	unclear	D – upheld	not materially different from pre-existing 2d Cir. standard (*Walczak*)
46. *MB v. City Sch. Dist. of New Rochelle*, 72 IDELR ¶ 12 (S.D.N.Y. 2018)	3/29	unclear	D – upheld (review officer)	reasonable>ideal; more than de minimis–"merely clarified *Rowley*"

[44] On remand, the hearing officer reversed the original ruling (changing the outcome from in favor of D to in favor of P). Prince George's Cty. Pub Sch., 118 LRP 44789 (Md. SEA May 3, 2018).

[45] Subsequent to this decision, the district filed an appeal with the Tenth Circuit and, a few months later (on 6/24/18) the parties reportedly agreed to a settlement of $1.3 million.

47. *C.S. v. Yorktown Cent. Sch. Dist.*, 72 IDELR ¶ 7 (S.D.N.Y. 2018)	3/30	unclear	D – upheld (review officer)	citing *Mr. P* as no sig. difference – LRE distinction
48. *Sauers v. Winston-Salem/Forsyth Cty. Bd. of Educ.*, 72 IDELR ¶ 10 (M.D.N.C. 2018)	3/30	some	D – remanded (review officer)	relying on *N.P.*
49. *Rosaria M. v. Madison City Bd. of Educ.*, 325 F.R.D. 429 (N.D. Ala. 2018)	3/30	unclear	D – upheld	appropriately ambitious
~~**57.** *Colonial Sch. Dist. v. G.K.*, 72 IDELR ¶ 69 (E.D. Pa. 2018)~~	~~4/30~~	~~meaningful~~	~~P rev'd → D~~	~~no guarantee (not progress but reasonable calculation)~~
50. *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018)	5/1	some	D – remanded D – upheld	"raised the bar"–ambitious, with challenging objectives; reasonable > ideal
51. *Geniviva v. Hampton Twp. Sch. Dist.*, 72 IDELR ¶ 57 (W.D. Pa. 2018)	5/23	meaningful	D – upheld	marginal – mostly LRE
52. *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018)	6/4	some	D – rev'd→ P	marginal – mostly procedural
53. *J.M. v. Matayoshi*, 729 F. App'x 585 (9th Cir. 2018)	6/29	meaningful	D – upheld	brief decision
54. *M.L. v. Smith*, 72 IDELR ¶ 218 (D. Md. 2018)	8/7	some	D – upheld	increased services distinguishing *Endrew F.*
55. *F.L. v. Bd. of Educ. of Great Neck U.F.S.D.*, 735 F. App'x 38 (2d Cir. 2018)	8/24	meaningful	D – upheld	unchanged std. – LRE distinction (not integrated)
56. *Spencer v. Burriville Sch. Comm.*, 118 LRP 35117 (D.R.I. 2018), ***adopted sub nom N.S. v. Burrillville Sch. Comm.*, 73 IDELR ¶ 127 (D.R.I. 2018)**	8/24 11/13	meaningful	D – upheld	same std. and, in any event, met – LRE distinction substantively equivalent std.
57. *J.G. v. New Hope Solebury Sch. Dist.,* 72 IDELR ¶ 240	8/27	meaningful	D – upheld	ambitious goals within overall std.
58. *Pottsgrove Sch. Dist. v. D.H.,* 72 IDELR ¶ 271 (E.D. Pa. 2018)	9/12	meaningful	P – upheld	snapshot – remanded on other grounds
59. *S.M. v. Arlotto,* 73 IDELR ¶ 74 (D. Md. 2018)	9/14	some	D – upheld	not best
60. *K.D. v. Downingtown Area Sch. Dist.,* 904 F.3d 248 (3d Cir. 2018)	9/18	meaningful	D – upheld	unchanged std. incl. potential; LRE distinction (not fully integrated);

				reasonable>ideal; deference to school authorities>DCL
61. *I.W. v. District of Columbia*, 73 IDELR ¶ 52 (D.D.C. 2018)	9/18	some	D – remanded	individualization (here, lack of explanation)
62. *I.O. v. Smith*, 73 IDELR ¶ 15 (D. Md. 2018)	**9/25**	**some**	**D – upheld**	**reasonable, not ideal – cogent and responsive explanation**
63. *McKnight v. Lyon Cty. Sch. Dist.*, 73 IDELR ¶ 13 (D. Nev. 2018)	**9/25**	**meaningful**	**D – upheld**	**passing grades though not passing ESSA tests (marginal case)**
64. *S.H. v. Rutherford Cty. Sch.*, 334 F. Supp. 3d 868 (M.D. Tenn. 2018)	**9/26**	**unclear**	**D – rev'd → P**	**primary reliance on review std. for HO decisions**
65. *E.E. v. N.Y.C. Dep't of Educ.*, 73 IDELR ¶ 9 (S.D.N.Y. 2018)	**9/27**	**unclear**	**D – upheld (review officer)**	**deference + *Mr. P* (no change in std.)**
66. *J.R. v. N.Y.C. Dep't of Educ.*, 748 F. App'x 382 (2d Cir. 2018)	**9/27**	**meaningful**	**D – upheld (review officer)**	
67. *Rogers v. Hempfield Sch. Dist.*, 73 IDELR ¶ 7 (E.D. Pa. 2018)	**9/27**	**meaningful**	**D – upheld**	**parallel std., citing *K.D.* (3d Cir. 2018)**
68. *Smith v. District of Columbia*, 73 IDELR ¶ 6 (D.D.C. 2018)	**9/28**	**some**	**D – rev'd → P D – remanded**	**lack of individualization insufficient HO explanation**
69. *Cook v. Little Rock Sch. Dist.*, 73 IDELR ¶ 43 (E.D. Ark. 2018)	**10/2**	**some**	**D – upheld**	**marginal use of *Endrew F.***
70. *Matthews v. Douglas Cty. Sch. Dist. RE-1*, 73 IDELR ¶ 42 (D. Colo. 2018)	**10/4**	**some**	**D – upheld**	
71. *Johnson v. Boston Pub. Sch.*, 906 F.3d 182 (1st Cir. 2018)	**10/12**	**meaningful**	**D – upheld**	**no change in pre-existing standard in First Circuit**
72. *A.C. v. Capistrano Unified Sch. Dist.*, 73 IDELR ¶ 94 (C.D. Cal. 2018)	**10/30**	**meaningful**	**D – upheld**	
73. *S.C. v. Oxford Area Sch. Dist.*, 751 F. App'x 220 (3d Cir. 2018)	**11/2**	**meaningful**	**D – upheld**	**reasonable>ideal or guaranteed**
74. *Albright v. Mountain Home Sch. Dist.*, 73 IDELR ¶ 93 (W.D. Ark. 2018) (*Albright II*)	**11/5**	**some**	**D – upheld**	
75. *Doe v. Belchertown Pub. Sch.*, 347 F. Supp. 3d 90 (D. Mass. 2018)	**11/13**	**meaningful**	**D – upheld**	**reasonable>ideal**
76. *E.R. v. Spring Branch Indep. Sch. Dist.*,	**11/28**	**unclear**	**D – upheld**	**reasonable; snapshot; no material**

909 F.3d 754 (5th Cir. 2018)				**difference from *Michael F.*; imprecise re LRE distinction**
77. *R.Z.C. v. N. Shore Sch. Dist,*. 755 F. App'x 658 (9th Cir. 2018)	**12/17**	**meaningful**	**D – upheld**	**cogent explanation (vel non)**
78. *S.W. v. Abington Sch. Dist.*, 73 IDELR ¶ 179 (E.D. Pa. 2018)	**12/17**	**meaningful**	**D – upheld**	
79. *Renee J. v. Houston Indep. Sch. Dist.*, 333 F.3d 674 (5th Cir. 2019)	**1/16**	**unclear**	**D – upheld**	**reasonable; marginal case (unclear whether procedural FAPE)**
80. *In re Butte Sch. Dist. No. 1*, 73 IDELR ¶ 198 (D. Mont. 2019)	**1/28**	**meaningful**	**P – rev'd→D(yr.1) D – upheld (yr. 2)**	**reasonable > ideal (faulting student)**
81. *Colonial Sch. Dist. v. G.K.*, F. App'x (3d Cir. 2019)	**2/13**	**meaningful**	**P – rev'd→D**	**reasonable > ideal; snapshot test**
82. *Barney v. Akron Bd. of Educ.*, F. App'x (6th Cir. 2019)	**2/25**	**unclear**	**D – upheld (review officer)**	
83. *R.S. v. Highland Park Indep. Sch. Dist.*, 74 IDELR ¶ 10 (N.D. Tex. 2019)	**3/8**	**unclear**	**D – upheld**	
84. *S.S. v. Brick Twp. Sch. Dist. Bd. of Educ.*, 74 IDELR ¶ 51 (D.N.J. 2019)	**3/19**	**meaningful**	**D – upheld**	

AN ADJUDICATIVE CHECKLIST FOR CHILD FIND AND ELIGIBILITY UNDER THE IDEA*

Perry A. Zirkel

Under the Individuals with Disabilities Education Act (IDEA),[1] the two overlapping[2] threshold issues are child find and eligibility.[3] Intended primarily but not exclusively for impartial hearing officers under the IDEA, this checklist provides a snapshot of the current adjudicative criteria and applicable authority for each of these initial components. Similar to the corresponding checklists for the subsequent components of FAPE[4] and remedies,[5] it is organized in flowchart-type sequence. In light of the relatively settled standards and limited litigation in comparison to FAPE and, in cases of denial of FAPE, its remedies, this checklist is relatively short.[6]

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[1] 20 U.S.C. §§ 1400 *et seq*. (2016).

[2] The intersection of these two overlapping components of the IDEA is the required evaluation. For the applicable regulations and case law, see, e.g., Perry A. Zirkel, *The Law of Evaluations under the IDEA: An Annotated Update*, 368 Ed.Law Rep. 594 (2019).

[3] *E.g.,* Perry A. Zirkel, *Special Education Law: Illustrative Basics and Nuances of Key IDEA Components,* 38 TEACHER EDUC. & SPECIAL EDUC. 263, 264–69 (2015). This checklist does not extend to the parallel child find and eligibility requirements under Section 504. *E.g., Culley v. Cumberland Valley Sch. Dist.*, 758 F. App'x 301, 364 Ed.Law Rep. 84 (3d Cir. 2019); Perry A. Zirkel, *Identification of 504-Only Student: An Alternative Eligibility Form*, 357 Ed.Law Rep. 39 (2018).

[4] Perry A. Zirkel, *An Adjudicative Checklist of the Criteria for the Four Dimensions of FAPE under the IDEA*, 346 Ed.Law Rep. 18 (2017).

[5] Perry A. Zirkel, *An Adjudicative Checklist of the Criteria for the Two Primary Remedies under the IDEA*, 354 Ed.Law Rep. 637 (2018).

[6] However, the application of these identifiable but imprecise standards is not at all simple or automatic, requiring careful findings and coalescing assessment of the pertinent individual circumstances.

Child Find[7]

1. Did the school district have reasonable suspicion that the child might be eligible under the IDEA?[8]

2. If so, did the district initiate the evaluation of the child within a reasonable period of time?[9]

3. Is a violation of ## 1 or 2 remediable as a denial of FAPE in the absence of eligibility?[10]

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[7] For the latest case law specific to the two dimensions of this ongoing affirmative obligation of school districts under the IDEA, see Perry A. Zirkel, *Child Find under the IDEA: An Updated Analysis of the Judicial Case Law*, 48 COMMUNIQUÉ 14 (June 2020). For prior case law, see, e.g., Perry A. Zirkel, *Child Find under the IDEA: An Empirical Analysis of the Judicial Case Law*, 45 COMMUNIQUÉ 4 (May 2017); Perry A. Zirkel, *"Child Find": The Lore v. the Law*, 307 Ed.Law Rep. 574 (2014).

[8] *E.g.*, Perry A. Zirkel, *The "Red Flags" of Child Find under the IDEA: Separating the Law from the Lore*, 23 EXCEPTIONALITY 192 (2015) (finding that courts typically only find reasonable suspicion upon a combination of various indicators and then in only about one in three cases). For one of the recently controversial indicators, Perry A. Zirkel, *Response to Intervention and Child Find: A Legally Problematic Intersection?,* 84 EXCEPTIONAL CHILD. 368 (2018). **For a Virginia case finding a violation in the disciplinary context, see Sch. Bd. v. Brown, 769 F. Supp. 2d 928 (E.D. Va. 2010).**

[9] *E.g.,* Perry A. Zirkel, *Child Find: The "Reasonable Period" Requirement*, 311 Ed.Law Rep. 576 (2015) (finding that the prevailing judicial range, depending on the circumstances, is 1–2 months). For a recent decision that focused on not the proactivity during, rather than length of, the period, see *Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.3d 781, 378 Ed.Law Rep. 22 (5th Cir. 2020). For a critique of this rulings, see Perry A. Zirkel, *The Fifth Circuit's Latest Child Find Ruling: Fusion and Confusion*, 377 Ed.Law Rep. 464 (2020).

[10] *E.g.*, *Burnett v. San Mateo Foster City Sch. Dist.*, 739 F. App'x 870, 359 Ed.Law Rep. 69 (9th Cir. 2018); ***T.B. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d 566, 356 Ed.Law Rep. 977 (4th Cir. 2018)**, *cert. denied*, 139 S. Ct. 1307 (2019); Durbrow v. Cobb Cty. Sch. Dist., 887 F.3d 1182, 353 Ed.Law Rep. 33 (11th Cir. 2018); *D.G. v. Flour Bluff Indep. Sch. Dist.,* 481 F. App'x 887, 286 Ed.Law Rep. 131 (5th Cir. 2012); *cf. J.N. v. Jefferson Cty. Bd. of Educ.*, 75 IDELR ¶ 153 (N.D. Ala. 2019) (declining compensatory education and attorneys' fees in wake of general education interventions). "Remediable" in this context usually refers to the major adjudicative remedies under the IDEA. *See supra* note 5. For an under-utilized alternative, see Perry A. Zirkel, *Safeguarding Procedures under the IDEA: Restoring the Balance in the Adjudication of FAPE*, 39 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2020) (recommending prospective orders of policy change or tailored training). In contrast, it does not extend to voluntary school district action or remediation via the IDEA's complaint procedure mechanism. *E.g.*, Perry A. Zirkel, *The Complaint Procedures Avenue of the IDEA*, 30 J. SPECIAL EDUC. LEADERSHIP 88 (Sept. 2017).

Eligibility[11]

1. Is the proof preponderant that the child meets the IDEA criteria for one or more of the recognized classifications?[12]

2. If so, is the proof preponderant that the result is an adverse effect on educational performance?[13]

3. If so, is the proof preponderant that the classification results[14] in the need for special education?[15]

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[11] A not entirely settled issue, which should be reserved for the rare case that the evidence is in equipoise rather than preponderant, is which party has the burden of persuasion in eligibility cases? *See, e.g.*, *E.P. v. N. Arlington Bd. of Educ*., 74 IDELR ¶ 80 (D.N.J. 2019) (putting the burden on the district per Third Circuit case law dating back to before the Supreme Court's *Schaffer* decision).

[12] Subject to additions in corollary state special education laws, the IDEA specifies ten classifications, such as emotional disturbance (ED), other health impairments (OHI), and specific learning disabilities (SLD), and allows states to add, within ages 3–9, the classification of developmental delay. 20 U.S.C. § 1401(3) (2016). The IDEA regulations add the combined classifications of deaf-blindness multiple disabilities. 34 C.F.R. §§ 300.8(a)(1) (2018). The regulations also, by way of definition, set forth the criteria for each classification. *Id*. § 300.8(c)(1)–(13). For the case law specific to some of the most litigated classifications, see PERRY A. ZIRKEL, THE LEGAL MEANING OF SPECIFIC LEARNING DISABILITY FOR SPECIAL EDUCATION ELIGIBILITY (2008); Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability: The Latest Case Law*, 46 COMMUNIQUÉ 14 (May 2018); Perry A. Zirkel, *Checklist for Identifying Students As Eligible under the IDEA Classification of Emotional Disturbance: An Update*, 286 Ed.Law Rep. 7 (2013); *cf*. Perry A. Zirkel, *RTI and Other Approaches to SLD Identification under the IDEA: A Legal Update,* 40 LEARNING DISABILITY Q. 165 (2017); Perry A. Zirkel, *ADHD Checklist for Identification under the IDEA and Section 504/ADA: An Update*, 366 Ed.Law Rep. 585 (2019).

[13] This bridging criterion is actually part of the classification step, being expressly specified in the regulatory definition of each non-combined one except SLD, which implicitly incorporates it. For the split of judicial interpretations of the scope of "educational performance, *compare*, *e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 217 Ed.Law Rep. 60 (1st Cir. 2015) (broadly extending to social skills), *with C.B. v. Dep't of Educ*., 322 F. App'x 20, 246 Ed.Law Rep. 58 (2d Cir. 2009) (academics only).

[14] 20 U.S.C. § 1401(3)(A)(ii) ("by reason thereof, needs special education and related services"). For a recent example of the causal criterion, see *Durbrow v. Cobb Cty. Sch. Dist.,* 887 F.3d 1182, 353 Ed.Law Rep. 33 (11th Cir. 2018); ***cf. T.B. v. Prince George's Cty. Bd. of Educ*., 897 F.3d 566, 356 Ed.Law Rep. 977 (4th Cir. 2018),** *cert. denied*, 139 S. Ct. 1307 (2019) (lack of motivation).

[15] *E.g.*, *William V. v. Copperas Cove Indep. Sch. Dist.,* 774 F. App'x 253 (5th Cir. 2019), *on remand*, 75 IDELR ¶ 124 (W.D. Tex. 2019). More generally, as the aforementioned (*supra* note 12) case law analyses reveal, the primary decisional criterion most often is the need for special education. For other recent examples, *compare R.Z.C. v. N. Shore Sch. Dist.*, 755 F. App'x 658, 353 Ed.Law Rep. 673 (9th Cir. 2018); *M.G. v. Williamson Cty. Sch.,* 720 F. App'x 280, 353 Ed.Law Rep. 673 (6th Cir. 2018); *D.L. v. Clear Creek Indep. Sch. Dist.,* 695 F. App'x 733, 347 Ed.Law Rep. 751 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1439 (2018); ***Greenhill v. Loudoun Cty. Sch. Bd*., 76 IDELR ¶ 44 (E.D. Va. 2020)** (finding lack of need for special education), *with L.J. v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 341 Ed.Law Rep. 60 (9th Cir. 2017) (finding need for special education). For the difficulty of determining this need as compared with general education interventions, including 504 plans, see *Hoover City Bd. of Educ. v. Leventry*, 75 IDELR ¶ 32 (N.D. Ala. 2019) (ordering IEP team to reconsider possible eligibility of child

with diagnosis of PTSD and conversion disorder, including pseudo seizures, based on more in-depth assessment information).

"CHILD FIND": THE LORE V. THE LAW*

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The relatively extensive and continuing case law illustrates that "child find" under the Individuals with Disabilities Education Act (IDEA)[1] and, as a secondary matter, Section 504 of the Rehabilitation Act[2] is subject to incomplete understanding and implementation.[3] Part of the problem is that the meaning of child find in the original version of the IDEA focused on its collective application[4] whereas the meaning has shifted in recent decades to its individual meaning.[5] To clarify the modern meaning, the following items use a law v. lore approach,[6] comparing prevalent perceptions and practices with an objective synthesis of the relevant

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* This article appeared in *West's Education Law Reporter* (Ed.Law Rep.), v. 307, pp. 574–80 (2014). Updated material is highlighted in yellow.

[1] 20 U.S.C. §§ 1401 *et seq*. (2014).

[2] 20 U.S.C. §§ 705(20) and 794 (2014).

[3] The footnotes of this Article provide an ample sampling of the ongoing pertinent case law. For a recent trends analysis of the frequency and outcomes of the relevant rulings from 1994 through 2016, see Perry A. Zirkel, *Child Find Under the IDEA: An Empirical Analysis of the Judicial Case Law*, 45 COMMUNIQUÉ 4 (May 2017).

[4] The reference to "institutional" in this context refers to the local education agency obligation to provide continuing public notices about the availability of evaluation and services for the many children with disabilities legally or practically excluded from the school system.

[5] As shown *infra*, this modern meaning refers to the obligation to evaluate the child upon reasonable suspicion of eligibility and to proceed from the time of reasonable suspicion to initiate the evaluation, via the requisite consent, within a reasonable period. The specific boundaries of both components are not bright lines. Perry A. Zirkel, *The Law of Evaluations under the IDEA: An Annotated Update*, 297 Ed.Law Rep. 637 (2013) (illustrating the overlap between the period for consent and the subsequent period for completion and between evaluation and FAPE).

[6] E.g., Perry A. Zirkel, *The "Red Flags" of Child Find under the IDEA: Separating the Law from the Lore*, 23 EXCEPTIONALITY 192 (2015); Perry A. Zirkel, *Lore v. Law: Prevailing Beliefs and Objective Knowledge*, 13 PRINCIPAL LEADERSHIP 50 (Oct. 2012). For other applications of this approach, see, e.g., Sarah Betesh, Bridget Brown, Candace Thompson, & Perry A. Zirkel, *Lore Versus Law: The Misconceived IDEA*, 41 COMMUNIQUÉ 8 (Nov. 2012); Lauren Collins & Perry A. Zirkel, *Functional Behavior Assessments and Behavior Intervention Plans: Legal Requirements and Professional Recommendations*, 19 J. POSITIVE BEHAV. INTERVENTIONS 180 (2017); Perry A. Zirkel, *Lore v. Law for School Psychologists*, 41 COMMUNIQUÉ 10 (June 2013); Perry A. Zirkel, *The Common Lore of Section 504*, 54 IN CASE 4 (Summer 2012); Perry A. Zirkel, *Teacher Evaluation: A Case of "Loreful" Leadership?* 13 PRINCIPAL LEADERSHIP 46 (Mar. 2013); Perry A. Zirkel, The Common Lore About RTI, RTI Action Network, http://www.rtinetwork.org/learn/what/common-lore-about-rti].

legislation,[7] regulations,[8] agency interpretations,[9] and case law.[10] The items are grouped into three sequential categories, those that are general, those specific to reasonable suspicion, and the fewer items specific to reasonable period. For each pair of item, the first one, which is in regular font represents the "lore," and the second one, which is in italics, represents the "law." Each contains inevitable variance, and they provide you with the opportunity to examine and assess your own perceptions, practices, and interpretations.

GENERAL

1. **Lore:** The IDEA specifically spells out the modern meaning of child find (i.e., after the original requirement providing access for excluded students with disabilities collectively).

Law: *Not so. The IDEA legislation*[11] *and regulations*[12] *only indirectly and incompletely set forth the modern meaning of child find. Instead, a long line of case law has established this individualized meaning.*

2. **Lore:** The modern, individualized meaning of child find is limited to the obligation to evaluate a child upon reasonable suspicion of eligibility.

Law: *Not quite. The limitation to evaluation, as separate from eligibility, is technically correct,*

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[7] See *supra* notes 1–2.

[8] 34 C.F.R. §§ 300.1 *et seq*. (2015). For the corresponding regulations for Section 504, see 34 C.F.R. §§ 104.1 *et seq*. (2015).

[9] The administering agency for the IDEA within the U.S. Department of Education is the Office of Special Education Programs (OSEP). Its counterpart for Section 504 in relation to students is the Office for Civil Rights (OCR). For a systematic overview, see Perry A. Zirkel, *A Comprehensive Comparison of the IDEA and Section 504/ADA*, 282 Ed.Law Rep. 767 (2012).

[10] The case law here is limited to court decisions, because they—along with the other cited sources—provide the framework for the hearing and review officer decisions, which have relatively negligible precedential weight.

[11] 20 U.S.C. § 1412(a)(3)(A) (2014) (requiring states to identify, locate, and evaluate children with disabilities, including those who are homeless or wards of the state); *id*. § 1412(a)(10)(A) (providing specificity for child find of parentally placed private school children).

[12] 34 C.F.R. § 300.111 (2015) (adding migrant children and "[c]hildren who are suspected of being a child [eligible], even though they are advancing from grade to grade"; *id*. §§ 300.131–300.134 (paralleling statutory specifics for parentally placed private school children) and 300.140 (providing exception from non-jurisdiction of hearing officer process).

but the courts have added a second, related obligation—to initiate the evaluation process within a reasonable period of time.[13]

REASONABLE SUSPICION[14]:

3. **Lore:** For the first, reasonable-suspicion obligation, an absolute red flag is a written request from the parent to evaluate the child.

Law: *No. If the district has no reason to suspect that the child is eligible, the district may decline to conduct the evaluation provided that it gives the parents written notice that includes the basis for the refusal and notification of their procedural safeguards.*[15] (*However, in such circumstances, the child is entitled to the IDEA protections against disciplinary changes in placement.*[16])

4. **Lore:** Aside from a parent's formal referral without the district's requisite response, the strongest "red flag" in terms of the courts' review of reasonable suspicion child find claims is low or declining grades.

Law: *No, this factor alone, or even in combination with others, without other connected evidence that would raise a reasonable suspicion of not only 1) the criteria for one or more IDEA classifications, but also 2) the resulting need for special education, more often than not does not suffice, particularly when district personnel provide alternate reasons for such*

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[13] See, e.g., *E.D. v. Colonial Sch. Dist.,* 69 IDELR ¶ 245 (E.D. Pa. 2017); *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 236 Ed.Law Rep. 679 (W.D. Tex. 2008); *New Paltz Cent. Sch. Dist. v. St. Pierre*, 307 F. Supp. 2d 394, 186 Ed.Law Rep. 753 (S.D.N.Y. 2004). For OSEP support, see, e.g., Letter to Weinberg, 55 IDELR ¶ 250 (OSEP 2009).

[14] For a more detailed analysis, see Zirkel 2015, *supra* note 6.

[15] 71 Fed. Reg. 46,636 (Aug. 14, 2006) (OSEP commentary accompanying the latest IDEA regulations); Letter to Anonymous, 20 IDELR 998 (OSEP 1998). *But cf.* ***J.Y. v. Dothan City Bd. of Educ.*, 63 IDELR ¶ 33 (M.D. Ala. 2014)** ("The education agency's obligations upon a parent's initiation of a request for evaluation do not depend on whether agency employees would themselves have thought a referral for evaluation to be warranted").

[16] 34 C.F.R. § 300.534(b)(2) (2015).

performance.[17] *Instead, the most potent factor in this case law is therapeutic hospitalization.*[18]

5. **Lore:** The use of response to intervention (RTI) or other such intervention leads to district vulnerability to losing litigation based on child find.[19]

Law: *Quite the contrary, in the majority of cases, the use of interventions—whether formally part of an RTI process or, much more often, part of either an earlier school-based systematic process or simply a classroom teacher's individual efforts—has counted against an alleged reasonable-suspicion child find violation.*[20] *The key is whether they have been sufficiently successful.*

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[17] *Compare P.J. v. Eagle-Union Cmty. Sch. Corp.*, 202 F.3d 274 (7th Cir. 1999); *Price v. Upper Darby Sch. Dist.*, 68 IDELR ¶ 214 (E.D. Pa. 2016); *T.C. v. Lewisville Indep. Sch. Dist.*, 67 IDELR ¶ 215, *adopted*, 67 IDELR ¶ 250 (E.D. Tex. 2016); ***Jefferson Cty. Bd. of Educ. v. Lolita S.*, 977 F. Supp. 2d 1091, 304 Ed.Law Rep. 280 (N.D. Ala. 2013)**; *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 2d 635, 279 Ed.Law Rep. 229 (S.D.N.Y. 2011); *Strock v. Indep. Sch. Dist. No. 281*, 49 IDELR ¶ 273 (D. Minn. 2008); *Reid v. District of Columbia*, 310 F. Supp. 2d 137, 287 Ed.Law Rep. 454 (D.D.C 2004), *rev'd on other grounds,* 401 F.3d 516, 196 Ed.Law Rep. 402 (D.C. Cir. 2005); *Hoffman v. E. Troy Sch. Dist.*, 38 F. Supp. 2d 750, 133 Ed.Law Rep. 897 (E.D. Wis. 1999) (not a violation), *with Jana K. v. Annville-Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 313 Ed.Law Rep. 702 (E.D. Pa. 2014); *El Paso Indep. Sch. Dist. v. Richard R. ex rel. R.R.*, 567 F. Supp. 2d 918, 236 Ed.Law Rep. 679 (W.D. Tex. 2008); *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 234 Ed.Law Rep. 660 (D.D.C. 2008) (violation).

[18] *Compare Krebs v. New Kensington-Arnold Sch. Dist.,* 69 IDELR ¶ 9 (W.D. Pa. 2016); *Lauren G. v. W. Chester Area Sch. Dist.*, 906 F. Supp. 2d 375, 292 Ed.Law Rep. 680 (E.D. Pa. 2012); *Reg'l Sch. Dist. No. 9 Bd. of Educ. v. Mr. M.*, 53 IDELR ¶ 8 (D. Conn. 2009); *Integrated Design & Elec. Acad. v. McKinley*, 570 F. Supp. 2d 28, 237 Ed.Law Rep. 194 (D.D.C. 2008); *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 234 Ed.Law Rep. 660 (D.D.C. 2008); *Heather D. v. Northampton Area Sch. Dist.*, 511 F. Supp. 2d 549, 225 Ed.Law Rep. 571 (E.D. Pa. 2007), *with Munir v. Pottsville Area Sch. Dist.*, 59 IDELR ¶ 35 (E.D. Pa. 2012), *aff'd on other grounds,* 723 F.3d 423, 295 Ed.Law Rep. 529 (3d Cir. 2013).

[19] See, e.g., David W. Walker & David Daves, *Response to Intervention and the Courts: Litigation-Based Guidance*, 21 J. DISABILITY POLICY STUD. 40 (2010).

[20] *Compare Demarcus L. v. Bd. of Educ.*, 63 IDELR ¶ 13 (N.D. Ill. 2014) (RTI); *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 285 Ed.Law Rep. 730 (3d Cir. 2012); *A.P. v. Woodstock Bd. of Educ.*, 370 F. App'x 202, 258 Ed.Law Rep. 58 (2d Cir. 2010); *Bd. of Educ. of Fayette Cty. v. L.M.*, 478 F.3d 307, 216 Ed.Law Rep. 354 (6th Cir. 2007); *E.J. v. San Carlos Elementary Sch. Dist.,* 803 F. Supp. 2d 1024, 274 Ed.Law Rep. 979 (N.D. Cal. 2011); *Jackson v. Nw. Local Sch. Dist.*, 55 IDELR ¶ 71 (S.D. Ohio 2010), *adopted,* 55 IDELR ¶ 104 (S.D. Ohio. 2010), *with Greenwich Bd. of Educ. v. G.M.,* 68 IDELR ¶ 8 (D. Conn. 2016) (RTI); *Cent. Sch. Dist. v. K.C.,* 61 IDELR ¶ 125 (E.D. Pa. 2013); *Hupp v. Switzerland Sch. Dist.,* 912 F. Supp. 2d 572, 293 Ed.Law Rep. 352 (S.D. Ohio 2012); El *Paso Indep. Sch. Dist. v. Richard R. ex rel. R.R.,* 567 F. Supp. 2d 918, 236 Ed.Law Rep. 679 (W.D. Tex. 2008); *Colvin v. Lowndes Cty. Sch. Dist.,* 114 F. Supp. 2d 504, 147 Ed.Law Rep. 601 (N.D. Miss. 1999).

6. **Lore:** Providing the student with a 504 plan is also likely to lead to losing child find litigation.

Law: *In the vast majority of court decisions to date, the districts' implementation of a Section 504 eligibility process, usually with the non-rigorous result of a 504 plan, has not been a major contributing factor to the judicial outcome of the case.*[21] *The limited exception may be within the context of a disciplinary change in placement to the extent that in a recent unpublished decision the court interpreted the 504 eligibility meeting as triggering protection when a "teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the . . . other supervisory personnel of the agency."*[22]

7. **Lore:** The reasonable-suspicion meaning of child find applies to disciplinary changes in placement, i.e., the "deemed to know" child protection.

Law: *This conclusion may no longer be legally valid. The reason is that in the most recent IDEA amendments, Congress—while keeping the parent- and personnel-triggering protections—eliminated the one where "the behavior or performance of the child demonstrates the need for such services."*[23] *However, unless the defendant district cogently raises this argument, courts*

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[21] See, e.g., *R.E. v. Brewster Cent. Sch. Dist.*, 180 F. Supp. 3d 262, 337 Ed.Law Rep. 62 (S.D.N.Y. 2016); *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 F. App'x 887, 286 Ed.Law 131 (5th Cir 2012); *Scarsdale Union Free Sch. Dist. v. R.C.*, 60 IDELR ¶ 195 (S.D.N.Y. 2013); *Munir v. Pottsville Area Sch. Dist.*, 59 IDELR ¶ 35 (E.D. Pa. 2012), *aff'd on other grounds,* 723 F.3d 423, 295 Ed.Law Rep. 529 (3d Cir. 2013); *Simmons v. Pittsburg Unified Sch. Dist.*, 63 IDELR ¶ 158 (N.D. Cal. 2014); *Strock v. Indep. Sch. Dist.*, 49 IDELR ¶ 273 (D. Minn. 2008). However, after a sufficient period of time the 504 plan proves to be ineffective, this factor switches direction in terms of a child find violation. See, e.g., *Simmons v. Pittsburg Unified Sch. Dist.*, 63 IDELR ¶ 158 (E.D. Cal. 2014).

[22] *Anaheim Union High Sch. Dist. v. J.E.*, 61 IDELR ¶ 107 (E.D. Cal. 2013).

[23] 20 U.S.C. § 1415(k)(5)(B) (2014). For a more comprehensive comparison of the changes in the 2004 IDEA amendments and the 2006 IDEA regulations, see Perry A. Zirkel, *Suspensions and Expulsions of Students with Disabilities: The Latest Requirements*, 214 Ed.Law Rep. 445 (2007). For deemed to know cases prior to the latest regulations, see, e.g., *S.W. v. Holbrook Pub. Sch.,* 221 F. Supp. 2d 222, 170 Ed.Law Rep. 565 (D. Mass. 2002); *Colvin Lowndes Cty. Sch. Dist.*, 114 F. Supp. 2d 504, 147 Ed.Law Rep. 601 (N.D. Miss. 1999).

are not likely to recognize and rely on this nuance.[24]

8. **Lore:** For courts, in determining reasonable suspicion, the opinions of outside experts, such as physicians, psychologists, and professors generally has more weight than those of teachers and other school personnel.

Law: *In general, courts give more credence to the school personnel because the controlling criteria are expertise in the need for special education and familiarity with the child in the school context.*[25] *The outside experts often fall short based on these criteria.*[26]

REASONABLE PERIOD[27]:

9. **Lore:** Once the district has the requisite reasonable suspicion, the reasonable period to request parental consent for the evaluation is approximately 1–2 weeks.

Law: *No. The reasonable period varies considerably depending on the particular*

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[24] See, e.g., *Artichoker v. Todd Cty. Sch. Dist*., 69 IDELR ¶ 58 (D.S.D. 2016).

[25] See, e.g., *Richard S. v. Wissahickon Sch. Dist.*, 334 F. App'x 508, 249 Ed.Law Rep. 755 (3d Cir. 2009); *Price v. Upper Darby Sch. Dist*., 68 IDELR ¶ 214 (E.D. Pa. 2016); *J.S. v. Scarsdale Union Free Sch. Dist*., 826 F. Supp. 2d 635, 279 Ed.Law Rep. 229 (S.D.N.Y. 2011); *E.J. v. San Carlos Elementary Sch. Dist*., 803 F. Supp. 2d 1024, 274 Ed.Law Rep. 979 (N.D. Cal. 2011); *Krista P. v. Manhattan Sch. Dist*., 255 F. Supp. 2d 873, 176 Ed.Law Rep. 671 (N.D. Ill. 2003); *Hoffman v. E. Troy Sch. Dist.*, 38 F. Supp. 2d 750, 133 Ed.Law Rep. 897 (E.D. Wis. 1999).

[26] See, e.g., *Perrin v. Warrior Run Sch. Dist*., 66 IDELR ¶ 225 (M.D. Pa. 2015); *Demarcus L. v. Bd. of Educ*., 63 IDELR ¶ 13 (N.D. Ill. 2014); *Daniel P. v. Downingtown Area Sch. Dist*., 57 IDELR ¶ 224 (E.D. Pa. 2011).

[27] For a more detailed analysis, see Perry A. Zirkel, *Child Find: The "Reasonable Period" Requirement*, 311 Ed. Law Rep. 576 (2015).

circumstances of the case, but a 1–2 week period is stricter than the courts find to be fatal.[28]

10. **Lore:** Even if the district exceeds the reasonable period standard, it is a *per se*, i.e., automatic substantive violation of the IDEA.

Law: *No, the courts consider the violation to be procedural, thus in some cases—depending on the circumstances—amounting to harmless error.*[29]

MISCELLANEOUS OTHER:

11. **Lore:** If the court concludes that the district violated its child find obligation, the remedy is limited to an order to evaluate the child.

Law: *In some cases, an evaluation order may be the remedy.*[30] *However, because the district violated its duty for a timely evaluation and other events have typically transpired before the court's decision, the consequences—depending on subsequent circumstances—may warrant*

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[28] For violations, see, e.g., *C.C. v. Beaumont Indep. Sch. Dist*., 65 IDELR ¶ 109 (E.D. Tex. 2015) (3.5 mos. until obtaining consent); *A.W. v. Middletown Area Sch. Dist*., 65 IDELR ¶ 9 (E.D. Pa. 2015) (approx. 11 months until initiating the evaluation); *Long v. District of Columbia*, 780 F. Supp. 2d 49, 270 Ed.Law Rep. 664 (D.D.C. 2011) (2.6 years until completion of evaluation); *D.A. v. Houston Indep. Sch. Dist.*, 716 F. Supp. 2d 603 (N.D. Tex. 2009), *aff'd on other grounds*, 629 F.3d 450, 264 Ed.Law Rep. 50 (5th Cir. 2010) (2 months until initiating evaluation); *Reg'l Sch. Dist. No. 9 Bd. of Educ. v. Mr. M*., 53 IDELR ¶ 8 (D. Conn. 2009) (almost 7 months until initiating evaluation); *El Paso Indep. Sch. Dist. v. Richard R. ex rel. R.R*., 567 F. Supp. 2d 918, 236 Ed.Law Rep. 679 (W.D. Tex. 2008) (13 months until initiating evaluation). For non-violations, see, e.g., *W.A. v. Hendrick Hudson Sch. Dist.,* 219 F. Supp. 3d 421 (S.D.N.Y. 2016) (2.5 months); *Dallas Indep. Sch. Dist. v. Woody*, 178 F. Supp. 3d 443, 336 Ed.Law Rep. 786 (N.D. Tex. 2016) (3 months until offering and 7 months until completing evaluation); *M.N. v. Katonah-Lewisboro Unified Free Sch. Dist*., 68 IDELR ¶ 158 (S.D.N.Y. 2016) (2 months).

[29] See, e.g., *P.P. v. W. Chester Area Sch. Dist*., 585 F.3d 727, 250 Ed.Law Rep. 517 (3d Cir. 2009) (student would have remained in private school); *T.B. v. Prince George's Cty. Bd. of Educ.*, 70 IDELR ¶ 47 (D. Md. 2016) (not special education need); *Horen v. Bd. of Educ*., 63 IDELR ¶ 264 (N.D. Ohio 2013) (parents refused to participate in the entire process); *Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 270 Ed.Law Rep. 664 (D.D.C. 2011) (parents refused consent); *E.M. v. Pajaro Valley Unified Sch. Dist*., 53 IDELR ¶ 41 (N.D. Cal. 2008) (court upheld district's resulting determination that student was not eligible).

[30] See, e.g., *E.D. v. Colonial Sch. Dist.,* 69 IDELR ¶ 245 (E.D. Pa. 2017); *Artichoker v. Todd Cty. Sch. Dist*., 69 IDELR ¶ 58 (D.S.D. 2016); *Indep. Sch. Dist. No. 413 v. H.M.J*., 123 F. Supp. 3d 1100, 327 Ed.Law Rep. 213 (D. Minn. 2015); *Scott v. Dist. of Columbia*, 45 IDELR ¶ 160 (D.D.C. 2006); *Colvin Lowndes Cty. Sch. Dis*t., 114 F. Supp. 2d 504, 147 Ed.Law Rep. 601 (N.D. Miss. 1999); *Paul T. v. S. Huntington Union Free Sch. Dist.*, 14 N.Y.S.3d 627, 320 Ed.Law Rep. 373 (Sup. Ct., Suffolk Cty. 2015).

compensatory education[31] *or even tuition reimbursement.*[32] *Moreover, the court may also award attorneys' fees*.[33]

12. **Lore:** If the court concludes not only that the district violated its child find obligation but also that the child was not eligible, the parent is still entitled to compensatory education and/or attorneys' fees.

Law: *Not necessarily, depending on the court. In the lead case contrary to this view, the Fifth Circuit ruled that neither compensatory education nor attorneys' fees were available because the violation was a harmless procedural error, reasoning that "[the] IDEA does not penalize school*

[31] See, e.g., *Krawietz v. Galveston Indep. Sch. Dist.,* 69 IDELR ¶ 207 (S.D. Tex. 2017); *Brandywine Area Sch. Dist. v. B.M.*, 69 IDELR ¶ 202 (E.D. Pa. 2017); *Cent. Sch. Dist. v. K.C.,* 61 IDELR ¶ 125 (E.D. Pa. 2013); *M.J.C. v. Special Sch. Dist. No. 1*, 58 IDELR ¶ 288 (D. Minn. 2012); *Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 270 Ed.Law Rep. 664 (D.D.C. 2011).

[32] See, e.g., *Greenwich Bd. of Educ. v. G.M.,* 68 IDELR ¶ 8 (D. Conn. 2016); *Scarsdale Union Free Sch. Dist*., 60 IDELR ¶ 195 (S.D.N.Y. 2013); *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 234 Ed.Law Rep. 660 (D.D.C. 2008).

[33] See, e.g., *Williamson Cty. Bd. of Educ. v. C.K.*, 52 IDELR ¶ 288 (M.D. Tenn. 2009).

districts for not timely evaluating students who do not need special education."[34]

13. **Lore:** For students in private schools, child find only applies to parentally placed (i.e., voluntarily w/o any claim of eligibility or FAPE), not unilaterally placed, students, and this child find obligation applies only to the district where the private school is located.

Law: *No. For parentally placed students, the 2004 amendments of the IDEA imposed a child find obligation for the limited equitable-participation purpose on the district of location.*[35] *However, the district of residence continues to have the more general child find obligation to any student in a private school upon parental request for "the purpose of having a program of FAPE*

[34] *D.G. v. Flour Bluff Indep. Sch. Dist*., 481 F. App'x 887, 893, 286 Ed.Law Rep. 13 (5th Cir 2012). More specifically, the court concluded: "Because D.G. was not 'eligible for IDEA's benefits' during the ninth grade—the 2008–09 school year—he may not recover for the [district's] not evaluating him at that time." *Id*. For cases that are partially relevant, see *S.H. v. Lower Merion Sch. Dist*., 729 F.3d 248, 297 Ed.Law Rep. 58 (3d Cir. 2013) (rejecting child find claim where parent asserted and district acknowledged misidentification); *T.B. v. Bryan Indep. Sch. Dist*., 628 F.3d 240, 263 Ed.Law Rep. 490 (5th Cir. 2010) (denying attorneys' fees where hearing officer ordered evaluation, including possible child find violation, but evaluation had not yet occurred); *D.S. v. Neptune Twp. Bd. of Educ*., 264 F. App'x 186, 232 Ed.Law Rep. 107 (3d Cir. 2008) (denying attorneys' fees where parent obtained hearing officer decision ordering IEE and evaluation but district ultimately determined child was not eligible under the IDEA); *D.F. v. Sacramento Unified Sch. Dist*., 63 IDELR ¶ 164 (E.D. Cal. 2014) (denying attorneys' fees where hearing officer ruled that district's did not provide requisite timely evaluation but also that child was not eligible); *Cent. Sch. Dist. v. K.C*., 61 IDELR ¶ 125 (E.D. Pa. 2013) (dicta that student would not be entitled to ensatory education if determined ineligible under the IDEA); *Henry v. Friendship Edison P.C.S.,* 880 F. Supp. 2d 5, 287 Ed.Law Rep. 896 (D.D.C. 2012) (denying attorneys' fees where hearing officer found child find violation and ordered evaluation and denied other requested relief, but either due to lack of consent or other reasons the evaluation had not been implemented); *J.P. v. Anchorage Sch. Di*st., 260 P.3d 285, 271 Ed.Law Rep. 1077 (Alaska 2011) (reimbursement of IEE but not for tutoring). *But cf. M.A. v. Torrington Bd. of Educ*., 980 F. Supp. 2d 245, 304 Ed.Law Rep. 384 (D. Conn. 2013), *further proceedings*, 980 F. Supp. 2d 279, 304 Ed.Law Rep. 418 (D. Conn. 2014) (denying tuition reimbursement where not eligible under IDEA but granting partial attorneys' fees); *Boose v. District of Columbia*, 786 F.3d 1054, 318 Ed.Law Rep. 43 (D.C. Cir. 2014) (ruling the child find issue is not moot in terms of compensatory education where district subsequently conducted the evaluation, found the child eligible, and provided an IEP). A recent amendment to the special education regulations in the state of Washington, which extends to definition of eligible student for the purpose of providing the requisite procedural safeguards, would not seem, in that jurisdiction, to change the substantive effect of this line of case law. WASH. ADMIN. CODE § 392-172A-01035(1)(b) (2012).

[35] 20 U.S.C. § 1412(a)(10)(A)(ii)(II) (2014). This obligation may extend to full FAPE based on state law. E.g., S*pecial Sch. Dist. No. 1 v. R.M.M*., __ F.3d __ (8th Cir. 2017).

made available [by the district] to the child."[36] *Moreover, this obligation extends to children in private schools whose parents are residents of other countries.*[37]

14. **Lore:** Child find does not extend to a) migrant students, b) homeless children, c) preschool children, or d) home-schooled students.

Law: *Correct in terms of home-schooled children only.*[38] *Child find clearly extends to migrant, homeless, and other school-age children even if not enrolled.*[39] *It also applies to preschool children.*[40]

15. **Lore:** Section 504 does not provide a corresponding individualized obligation of child find.

Law: *Quite the contrary, both the regulations and the courts make sufficiently clear that child find applies for the broader definition of disability under Section 504 just as it does for the narrower scope of eligibility under the IDEA. The Section 504 regulations expressly require evaluation for individuals who, by reason of an impairment that substantially limits a major life activity "need or are believed to need special education or related services."*[41] *Similarly, the*

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[36] For supporting case law, see, e.g., *District of Columbia v. Vinyard*, 971 F. Supp. 2d 103, 302 Ed.Law Rep. 1064 (D.D.C. 2013); *I.H. v. Cumberland Valley Sch. Dist*., 842 F. Supp. 2d 763, 281 Ed.Law Rep. 1057 (M.D. Pa. 2013); *J.S. v. Scarsdale Union Free Sch. Dist.,* 826 F. Supp. 2d 635, 279 Ed.Law Rep. 229 (S.D.N.Y. 2011); *Dist. of Columbia v. Abramson*, 493 F. Supp. 2d 80 (D.D.C. 2007); *cf*. *R.M.M. v. Minneapolis Pub. Sch.*, 70 IDELR ¶ 64 (D. Minn. 2017) (for purposes of equitable services or FAPE under state law); *Moorestown Twp. Bd. of Educ. v. S.D*., 811 F. Supp. 2d 1057, 222 Ed.Law Rep. 207 (D.N.J. 2011) (student with IEP, thus effectively reevaluation). For the latest repetition of OSEP Policy, see Letter to Eig, 52 IDELR ¶ 136 (OSEP 2009).

[37] Letter to Sarzynski, 66 IDELR ¶ 51 (OSEP 2015).

[38] 34 C.F.R. § 300.300(d)(4) (2015); *see also Fitzgerald v. Camdenton R-III Sch. Dist*., 439 F.3d 773, 206 Ed.Law Rep. 837 (8th Cir. 2006); *Durkee v. Livonia Cent. Sch. Dist.*, 487 F. Supp. 2d 313, 221 Ed.Law Rep. 129 (W.D.N.Y. 2007).

[39] See *supra* notes 11–12. See, e.g., *Hawkins v. District of Columbia*, 539 F. Supp. 2d 108, 231 Ed.Law Rep. 76 (D.D.C. 2008) (ruling that district violated child find for student who was resident of the district but who did not enroll in school).

[40] See, e.g., *Metro. Nashville & Davidson Cty. Sch. Sys. v. Guest*, 900 F. Supp. 905, 104 Ed.Law Rep. 634 (M.D. Tenn. 1995). The required age range now starts at age 3, whereas at the time of this case, it was optional for each state at the preschool level. The outcome is the same.

[41] 34 C.F.R. § 104.35 (2013) (emphasis added). The accompanying procedural safeguards regulation repeats this quoted language. *Id*. § 104.36.

courts have concluded that Section 504 imposes an individualized child find duty upon school districts. For example, citing Third Circuit precedents, a federal district court in Pennsylvania ruled: "In establishing a [Section 504] claim, a plaintiff must demonstrate that the defendants knew or should have known about the disability."[42] *As an example of corresponding agency enforcement, OCR recently found a district in violation of its child find obligation under Section 504, resulting in a resolution agreement that included as the remedy compensatory education and staff training.*[43]

[42] *D.G. v. Somerset Hills Sch. Dist.*, 559 F. Supp. 2d 484, 496, 235 Ed.Law Rep. 112 (D.N.J. 2008) (emphasis added) (refusing to dismiss IDEA-alternative § 504 claim for student with depressive disorder). For other examples where courts recognized this duty but decided in favor of the district for an insufficient factual foundation, see *B.M. v. S. Callaway R-II Sch. Dist.*, 732 F.3d 882, 297 Ed.Law Rep. 712 (8th Cir. 2013) (summarily rejecting §504 claim where district' efforts to evaluate the student with behavioral problems under the IDEA did not amount to bad faith or gross misjudgment); *G.C. v. Owensboro Pub. Sch.*, 711 F.3d 623, 290 Ed.Law Rep. 527 (6th Cir. 2013) (summarily rejecting sole § 504, i.e., w/o IDEA, child find claim for student with behavioral problems).

[43] Gadsden Cty. (NC) Pub. Sch., 65 IDELR ¶ 22 (OCR 2014).

Child Find: The "Reasonable Period" Requirement*

Perry A. Zirkel**

The identification stage under the Individuals with Disabilities Education Act (IDEA)[1] includes not only eligibility but also child find.[2] Unlike child find under the original 1975 legislation, which concerned the institutional need to made free appropriate public education (FAPE) available to eligible students beyond as well as within the schools, the modern meaning is an individual matter.[3] More specifically, the courts have filled in the gaps within the relatively cryptic references to child find in the current IDEA legislation[4] and regulations[5] to establish two successive components of child find that culminate in the obligation to evaluate the child for eligibility.[6] The first triggering component is *reasonable suspicion*, i.e., determining when the school district had reason to suspect that the child might qualify under the essential eligibility elements under the IDEA.[7] The second, successive component is initiating the evaluation of the

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* A slightly earlier version of the article appeared in *West's Education Law Reporter*, v. 311, pp. 576–580 (2015). The limited updates are highlighted in yellow.

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[1] 20 U.S.C. §§ 1401 *et seq*. (2013).

[2] For the broader sequence of overlapping obligations, the IDEA refers to "identification, evaluation, and educational placement" along with "the provision of free appropriate public education." 20 U.S.C. §§ 1415(b)(1), 1415(b)(3)(A), and 1215(b)(6)(B). For an examination of evaluation, which is the closest component to identification, see, e.g., Perry A. Zirkel, *The Law of Evaluations under the IDEA*, 297 Ed.Law Rep. 637 (2013). See, e.g., Clover Sch. Dist., 114 LRP 29307 (OCR 2014) (reasoning as follows: "Optimally, as little time as possible should pass between the time when the student's possible eligibility is recognized and the district's conducting the evaluation. However, an unreasonable delay results in discrimination against students with disabilities because it has the effect of denying them meaningful access to educational services provided to students without disabilities.").

[3] See, e.g., Perry A. Zirkel, *"Child Find": The Lore v. the Law*, 307 Ed.Law Rep. 574 (2014).

[4] 20 U.S.C. § 1412(a)(3)(A) (2012) (requiring states to identify, locate, and evaluate children with disabilities, including those who are homeless or wards of the state); *id*. § 1412(a)(10)(A) (providing specificity for child find of parentally placed private school children).

[5] 34 C.F.R. § 300.111 (2013) (adding migrant children and "[c]hildren who are suspected of being a child [eligible], even though they are advancing from grade to grade"; *id*. §§ 300.131–300.134 (paralleling statutory specifics for parentally placed private school children) and 300.140 (providing exception from non-jurisdiction of hearing officer process).

[6] See Zirkel, *supra* note 3, at 575.

[7] The basic elements are 1) meeting the criteria of one of more of the recognized classifications under the IDEA, and 2) by reason thereof, needing special education. 34 C.F.R. § 300.8(a) (2013). The courts have developed more complicated and at least partly inconsistent analyses and applications at a more micro level. See,

child within a *reasonable period*.[8] Although a recent article provides a systematic analysis of the reasonable suspicion component,[9] the literature lacks such an analysis of the reasonable period case law. The purpose of this brief article is to provide a practical synthesis of this relatively limited case law, with a focus on determining the general length of this reasonable period.

A comprehensive search and systematic assessment revealed five necessary and appropriate threshold caveats. These delimitations clarify the appropriate scope and overall nature of this still developing case law.

Serving as the first caveat, the Third Circuit announced in one of the earliest pertinent cases that the duration of this period is an ad hoc matter. More specifically, the court provided this warning: "We are not unmindful of the budgetary and staffing pressures facing school officials, and we fix no bright-line rule as to what constitutes a reasonable time in light of the information and resources possessed by a given official at a given point in time."[10] Thus, in the context of child find the appropriate specification of this period is the form of an approximate range rather than a definitive duration.

Second, the selection of the pertinent case law revealed a similarly un-bright line for the boundaries of the applicable court decisions.[11] For example, various cases that concerned child find and reasonable time warranted exclusion, because 1) they provided insufficient

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e.g., Robert A. Garda, *Untangling Eligibility Requirements under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441 (2004); Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147 (2007); Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 125 n. 193 (2009).

[8] See Zirkel, *supra* note 3, at 577–78.

[9] Perry A. Zirkel, *The "Red Flags" for Child Find under the IDEA: Separating the Law from the Lore*, __ EXCEPTIONALITY (forthcoming).

[10] *W.B. v. Matula*, 67 F.3d 484, 501, 104 Ed.Law Rep. 28 (3d Cir. 1995).

[11] The courts have been less than less than careful in differentiating the reasonable-period from the reasonable-suspicion rulings. For example, more than one court has cited *Department of Education v. Cari Rae I.*, 158 F. Supp. 2d 1190, 156 Ed.Law Rep. 924 (D. Haw. 2001) for a reasonable-period violation. See, e.g., *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 950–51, 236 Ed.Law Rep. 679 (W.D. Tex. 2008); *Reg'l Sch. Dist. No. 9 v. Mr. M.*, 53 IDELR ¶ 8 (D. Conn. 2009). Yet, the court in *Cari Rae I.* exclusively ruled on the reasonable-suspicion component.

information[12]; 2) they specifically addressed, instead, alleged violations in completing the evaluation[13]; or 3) they otherwise avoided deciding this issue by focusing on other matters.[14]

Third, although the start of this period is the triggering date of reasonable suspicion, the courts have not been entirely clear and consistent as to whether the specific ending point is the date of obtaining consent or some other step in the initiation of the evaluation process.[15] The differences appear to be attributable in part to the level of judicial scrutiny and the nature of state policies or local policies for evaluation.[16]

Fourth, even if the district exceeds the reasonable period standard, it is a per se, i.e., automatic substantive violation of the IDEA the courts consider the violation to be procedural,

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[12] See, e.g., *Johnson v. Upland Sch. Dist.*, 26 F. App'x 689, 161Ed.Law Rep. 798 (9th Cir. 2002); *D.A. v. Meridian Joint Sch. Dist. No. 2*, 62 IDELR ¶ 205 (D. Idaho 2014); *W.H. v. Schuykill Valley Sch. Dist.*, 954 F. Supp. 2d 315, 300 Ed.Law Rep. 192 (E.D. Pa. 2013) (not clearly differentiating reasonable suspicion from reasonable period); *J.S. v. Shoreline Sch. Dist.*, 220 F. Supp. 2d 1175, 170 Ed.Law Rep. 264 (W.D. Wash. 2002) (extending the issue to timely implementation of the IEP); *Hawkins v. Dist. of Columbia*, 539 F. Supp. 2d 108 (D.D.C. 2008) (focusing instead on the district's insufficient excuse for failing to comply with a previous hearing officer decision).

[13] See, e.g., *M.B. v. Hamilton Se. Sch. Dist.*, 668 F.3d 851, 277 Ed.Law Rep. 60 (7th Cir. 2011); *C.G. v. Dist. of Columbia*, 924 F. Supp. 2d 273, 295 Ed.Law Rep. 580 (D.D.C. 2013); *J.P. v Anchorage Sch. Dist.*, 260 P.3d 285, 271 Ed.Law Rep. 1077 (Alaska 2011); *cf. Hupp v. Switzerland Sch. Dist.*, 912 F. Supp. 2d 572, 293 Ed.Law Rep. 352 (S.D. Ohio 2012) (conflating regulatory deadlines for evaluation and IEP).

[14] See, e.g., *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 F. App'x 887, 286 Ed.Law Rep. 131 (5th Cir. 2012) (ruling that in any event the child was not entitled to any relief in the absence of an affirmative determination of eligibility); *Ridley Sch. Dist. v. M.R.,* 680 F.3d 260, 280 Ed.Law Rep. 37 (3d Cir. 2012) (focusing on the reasonable time after a previous evaluation that determined non-eligibility before reasonable suspicion again arises); *P.P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 250 Ed.Law Rep. 517 (3d Cir. 2009) (finding a 72-day delay in obtaining consent but focusing instead on the district's compliance with institutional, or collective, child find and harmless procedural error).

[15] *E.g., compare W.B. v. Matula*, 67 F.3d 484, 140 Ed.Law Rep. 28 (3d Cir. 1995) (referral for evaluation), *with Lazerson v. Capistrano Unified Sch. Dist.,* 56 IDELR ¶ 213 (C.D. Cal. 2012) (formal plan for the evaluation and the completion date of the evaluation). The difference between these varying end points would only be significant in close cases, i.e., those close to the applicable range. Conversely, the following incidental conclusion would appear to be limited to clear violations:

> The six month delay referenced by the Third Circuit in *Matula* was measured between the notice of behavior indicating a qualifying disability and referral for an evaluation. In this case, delay of almost twelve months separates such behavior from the *completion* of the evaluation. The Court sees no legally significant difference between the two.

O.F. v. Chester Upland Sch. Dist., 246 F. Supp. 2d 409, 418 n.3, 175 Ed.Law Rep. 445 (E.D. Pa. 2002).

[16] See, e.g., *Lazerson v. Capistrano Unified Sch. Dist.*, 56 IDELR ¶ 213 (C.D. Cal. 2012) (finding violation based on the length of time between the triggering date and providing the parents with a formal assessment plan, which California law required within 15 days).

thus in some cases—depending on the circumstances—amounting to harmless error.[17]

Finally, the courts largely have provided only cursory attention to this issue.[18] Thus, the case law is not yet fully crystallized in either depth of analysis or quantity of cases.

Yet, within this context, courts have provided a sufficient initial framework for guidance in future cases.[19] Figure 1 provides a graphic representation of the applicable case law to date.

[INSERT FIGURE 1 APPROXIMATELY HERE]

This figure suggests that, pending further case law developments, the boundary between non-violations and violations is the initial area of 1–7 weeks, depending on the particular circumstances and jurisdiction of the case.[20] Moreover, although the courts have not made it clear,[21] the date of parental consent would appear to be the appropriate ending point of this period in the absence of specification in state law, because this date is used as the starting date for the specified period for completion of the next stage, which is the eligibility evaluation.[22]

In conclusion, the proactive or preventive approach would be to err on the cautious, or clearly No Violation, side for the reasonable period; however, viewed objectively in terms of overall contours of this case law doctrine, reasonable period, like reasonable suspicion,[23] is an "it

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[17] See, e.g., *P.P. v. W. Chester Area Sch. Dist*., 585 F.3d 727, 250 Ed.Law Rep. 517 (3d Cir. 2009) (student would have remained in private school); *Horen v. Bd. of Educ*., 63 IDELR ¶ 290 (N.D. Ohio 2013) (parents refused to participate in the entire process); *Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 270 Ed.Law Rep. 664 (D.D.C. 2011) (parents refused consent); *E.M. v. Pajaro Valley Unified Sch. Dist*., 53 IDELR ¶ 41 (N.D. Cal. 2008) (court upheld district's resulting determination that student was not eligible).

[18] See, e.g., *D.A. v. Houston Indep. Sch. Dist*., 716 F. Supp. 2d 603, 615 (N.D. Tex. 2009); *New Paltz Cent. Sch. Dist. v. St. Pierre*, 307 F. Supp. 2d 394, 401, 186 Ed.Law Rep. 753 (N.D.N.Y. 2003) (deferring to the hearing officer without citation or discussion of applicable case law standards).

[19] See, e.g., *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 950–51, 236 Ed.Law Rep. 679 (W.D. Tex. 2008) (canvassing applicable court decisions as the framework to determine whether the period at issue was reasonable, with due differentiation of the reasonable-suspicion step).

[20] Adding further support to this framework was a federal district court ruling, which was vacated on other grounds on appeal, that the requisite period was not a bright line but within "a few months" after the triggering date of reasonable suspicion. *D.G. v. Flour Bluff Indep. Sch. Dist*., 832 F. Supp. 2d 755, 765, 280 Ed.Law Rep. 132 (S.D. Tex. 2011), *vacated*, 481 F. App'x 887, 286 Ed.Law Rep. 131 (5th Cir. 2012).

[21] See *supra* note 14 and accompanying text.

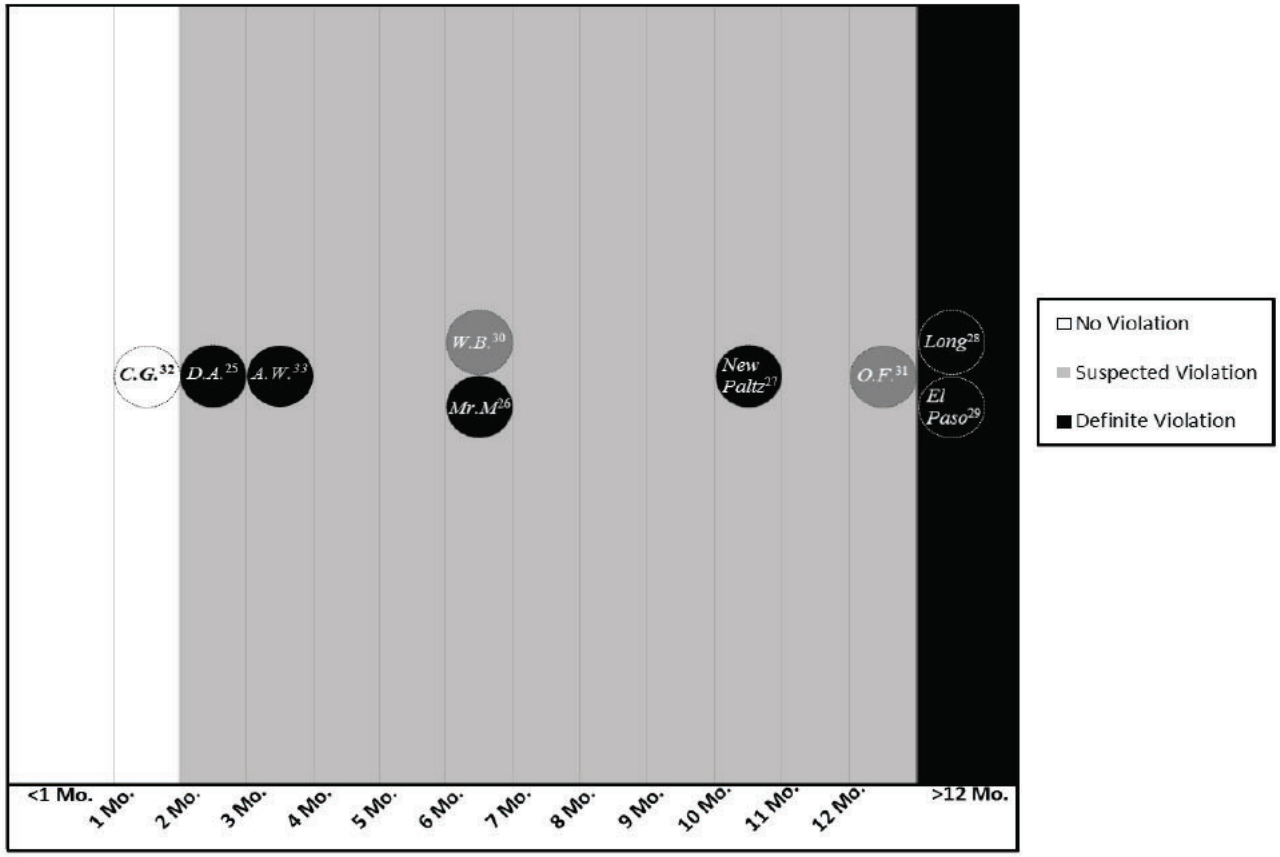
[22] 34 C.F.R. § 300.301(c) (2013). Conversely, one of the factors in determining the length of the reasonable period in each case would be parental cooperation or delay in responding to the request for consent.

[23] See Zirkel, *supra* note 9.

depends" issue that generally provides more latitude in length and consequences[24] than most practitioners may consider to be best practice. The choice, including the gray area beyond two months, depends not only on the particular circumstances that would signal a violation but also the risk-management posture of the district. Certainly, "the sooner, the better" is the proverbial wisdom, but the case law to date reveals that reasonable does not equate to optimal.

[24] See *supra* note 16 and accompanying text. As the case law specific to the foundational reasonable suspicion component, the mitigation or nullification of the consequence is particularly pronounced in the absence of a determination that the child is eligible under the IDEA. See, e.g., *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 F. App'x 887, 286 Ed.Law Rep. 131 (5th Cir. 2012); *M.A. v. Torrington Bd. of Educ.*, 980 F. Supp. 2d 245, 304 Ed.Law Rep. 384 (D. Conn. 2014).

Figure 1: Acceptable Range of Duration of a Reasonable Period



[25] *D.A. v. Houston Indep. Sch. Dist.*, 716 F. Supp. 2d 603 (N.D. Tex. 2009).

[26] *Reg'l Sch. Dist. No. 9 v. Mr. M.*, 53 IDELR ¶ 8 (D. Conn. 2009).

[27] *New Paltz Cent. Sch. Dist. v. St. Pierre*, 307 F. Supp. 2d 394, 186 Ed.Law Rep. 753 (N.D.N.Y. 2003).

[28] *Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 270 Ed.Law Rep. 664 (D.D.C. 2011).

[29] *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 237 Ed.Law Rep. 679 (W.D. Tex. 2008).

[30] *W.B. v. Matula*, 67 F.2d 484, 104 Ed.Law Rep. 28 (3d Cir. 1995) (denying district's motion for summary judgment, thereby being a triable issue).

[31] *O.F. v. Chester Upland Sch. Dist.*, 246 F. Supp. 2d 409, 175 Ed.Law Rep. 145 (E.D. Pa. 2002) (denying district's motion for summary judgment, thereby being a triable issue).

[32] *C.G. v. Five Town Cmty. Sch. Dist.*, 47 IDELR ¶ 132 (D. Me. 2007), *aff'd on other grounds*, 513 F.3d 279, 229 Ed.Law Rep. 18 (1st Cir. 2008).

[33] *A.W. v. Middleton Area Sch. Dist.*, 65 IDELR ¶ 16 (M.D. Pa. 2015).

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

Perry A. Zirkel

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

[5] The focus here is on the method for calculating compensatory education, not on overlapping issues, such as whether the IDEA allows the hearing officer to delegate the calculation or its adjustment to the IEP team. For the delegation issue, see, e.g., *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 318, 216 Ed.Law Rep. 354 (6th Cir. 2007); *Reid v. District of Columbia*, 401 F.3d 516, 526, 196 Ed.Law Rep. 402 (D.C. Cir. 2005); ***Meza v. Bd. of Educ.*, 56 IDELR ¶ 167 (D.N.M. 2011). *But see Mr. I. v. Me. Sch. Admin. Unit No. 55*, 480 F.3d 1, 217 Ed.Law Rep. 60 (1st Cir. 2007); *Struble v. Fallbrook Union Sch. Dist.*, 56 IDELR ¶ 4 (S.D. Cal. 2011); *cf. Sch. Dist. of Phila. v. Williams*, 66 IDELR ¶ 214 (E.D. Pa. 2015); *T.G. v. Midland Sch. Dist.*, 848 F. Supp. 2d 902, 282 Ed.Law Rep. 425 (C.D. Ill. 2012); *A.L. v. Chicago Pub. Sch. Dist.*, 57 IDELR ¶ 215 (N.D. Ill. 2011); *State of Haw., Dept. of Educ. v. Zachary B.*, 52 IDELR ¶ 213 (D. Haw. 2009).**

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

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

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

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

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

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

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

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

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

[13] E.g., *Dep't of Educ., State of Haw. v. R.H*., 61 IDELR ¶ 127 (D. Haw. 2013); *Mt. Vernon Sch. Corp. v. A.M.*, 59 IDELR ¶ 100 (S.D. Ind. 2012); *B.T. v. Dep't of Educ*., 676 F. Supp. 2d 982, 254 Ed.Law Rep. 212 (D. Haw. 2010); *R.M. v. Miami-Dade Cty. Sch. Bd*., 55 IDELR ¶ 261 (S.D. Fla. 2010); *cf. T.G. v. Midland Sch. Dist.*, 848 F. Supp. 2d 902, 282 Ed.Law Rep. 425 (C.D. Ill. 2012) (qualitative approach but with flexible deference for IHO). For advocacy of such a flexible hybrid approach, see Terry J. Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?* 45 URB. LAW. 281 (2013).

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

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

[14] E.g., *Woods v. Northport Sch. Dist*., 487 F. App'x 968, 287 Ed.Law Rep. 746 (6th Cir. 2012); *Pangerl v. Peoria Unified Sch. Dist.,* 69 IDELR ¶ 133 (D. Ariz. 2016); ***Maple Heights City Sch. Bd. of Educ*., 68 IDELR ¶ 5 (N.D. Ohio 2016); *Oskowis v. Sedona-Oak Creek Unified Sch. Dist*., 67 IDELR ¶ 150 (D. Ariz. 2016);** *B.H. v. W. Clermont Bd. of Educ*., 788 F. Supp. 2d 682, 272 Ed.Law Rep. 445 (S.D. Ohio 2011); *D.G. v. Flour Bluff Indep. Sch. Dist*., 832 F. Supp. 2d 755, 280 Ed.Law Rep. 132 (S.D. Tex. 2011) (qualitative approach yielding result that approximates quantitative approach), *vacated*, 481 F. App'x 887, 286 Ed.Law Rep. 131 (5th Cir. 2012); *Hollister Sch. Dist.*, 60 IDELR ¶ 172 (Cal. SEA 2013); *Sch. Dist. of Phila.*, 57 IDELR ¶ 86 (Pa. SEA 2011); *cf. Dracut Sch. Comm. v. Bureau of Special Educ. Appeals*, 737 F. Supp. 2d 35, 263 Ed.Law Rep. 625 (D. Mass. 2010) (citing *Puffer v. Raynolds*, 761 F. Supp. 838, 853, 67 Ed.Law Rep. 536 (D. Mass. 1988) for FAPE "equal in time and scope" with what a student would have received while eligible).

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

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

II. THE CALCULUS FOR THE TWO APPROACHES

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

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

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

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

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

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

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

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

III. CASE LAW FOR THE QUALITATIVE APPROACH

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Matanuska-Susitna Borough Sch. Dist. v. D.Y., 54 IDELR ¶ 52 (D. Alaska 2010)
- upheld, after supplemental briefing, $50k compensatory education fund equivalent to approximately 300 hours of speech therapist services plus roughly 208 hours of aide services, at the respective rates of $125 and $60 per hour, or 2.7 hours of speech services and 1.9 hours of aide services per week for 3 school years
- equitably calculated to put the child "in the place he would have been in absent the [34 months of] District's LRE and Dynavox violations."

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

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

B.H. v. W. Clermont Bd. of Educ., **788** F. Supp. 2d **682**, 272 Ed.Law Rep. 445 (S.D. Ohio 2011)

- upheld two years of PT and OT and two of three years of private placement as compensatory education, which was close to quantitative approach, as permissible in qualitative jurisdiction

***Woods v. Northport Pub. Sch.*, 487 F. App'x 968, 287 Ed.Law Rep. 746 (6th Cir. 2012)**

- **upheld, in a relaxed application of the qualitative approach, a 758-hour compensatory education award for two-year denial of FAPE (12 hours for each of 64 weeks of denial) for the child to "reasonably recover" in light of potentially closing window of opportunity, plus upheld requirement that the delivery be via a teacher with autism certification due to this provision in the IEP**

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

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

Phillips v. District of Columbia, 736 F. Supp. 2d 240, 263 Ed.Law Rep. 614 (D.D.C. 2010), ***after remand*, 932 F. Supp. 2d 42, 296 Ed.Law Rep. 366 (D.D.C. 2013)**

- vacated IHO's award of 255 hours of compensatory education due to parent's failure (via her expert) to provide information as to how these additional hours of tutoring would provided the educational benefits that likely would have accrued had the district provided FAPE in the first place
- remanded to the IHO "to allow plaintiff to supplement the record in order to establish a reasonably calculated and individually-tailored compensatory education award that demonstrates a causal relationship between [the child's] current educational deficits and his earlier denial of a [FAPE]"
- **upheld IHO's "inherent" authority" to order an evaluation (at district expense) that would help determine the amount of compensatory education under the *Reid* standard**
- **upheld IHO's denial of compensatory education, after expert witnesses and additional IHO-arranged expert report, based on conclusion that the child's "current difficulties do not stem from the original denial of a FAPE"**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COVID-19 and Students with Disabilities: Persistent Questions and Potential Answers

Perry A. Zirkel
perryzirkel.com

Virginia Hearing Officer Program – September 2020

1

Overriding Caveat

This brief presentation offers a legal analysis of COVID-19 threshold factors, baseline facts, and issues/answers from the lens of an **impartial and outside** IDEA and Section 504 specialist. The brevity of the presentation, its timing in relation to the course of the pandemic, and the remote perspective of the presenter serve as limits to the applicability to particular SEAs and LEAs. Careful consultation with state and local education agency leadership and applicable **legal counsel** is both necessary and appropriate in considering this information in relation to your specific and changing situation.

2

2

Perplexing Problem/Opportunity

- increased needs and expectations (e.g., recovery and/or compensatory services)
- decreased resources (e.g., significantly decreased tax revenue)
- unpredictable and fluid ending (e.g., new surges? re-opening?)
- literal lack of "precedent"

3

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Legal Framework

4

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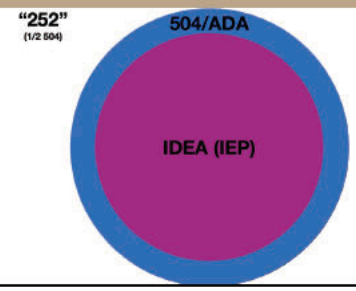
Legal Framework



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5

Legal Framework (cont.)

IDEA and Section 504/ADA

- scope of eligibility (individual with a disability)
  - double-covered v. 504-only
- standards for entitlement (FAPE)
  - § 504/ADA: reasonable accommodation + discrimination proxy (e.g., bad faith)?
- corollary state law (IDEA):
  - e.g., VA. CODE ANN. §§ 22.1-213 – 22.1-221
  - e.g., 8 VA. CODE ADMIN. §§ 20-81-10 – 20-81-230

6

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Legal Framework (cont.)

1. Adjudicative Mechanisms:
   - **due process hearings**
   - courts
2. Compliance Mechanisms:
   - SEA IDEA complaint procedures
   - **other SEA compliance activities under IDEA**
   - **OCR complaint procedure**

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Threshold Factors

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Threshold Factors

1. **CARES Legislation**
   - USDE recommendations: negligible flexibility
   - Congressional action?
   - USDE waiver authority re any IDEA or § 504 regs deemed necessary and appropriate due to the COVID-19 emergency
   - USDE June 25 interim final rule re equitable services funding to private school students

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Threshold Factors (cont.)

2. **OSEP/OCR Guidance**
   - March (n=3): including situational examples:
     - complete closure – no obligation
     - distance learning – "to the greatest extent possible" w. flexibility/differences where unsafe or infeasible
     - resumption – "every effort" plus IEP/504 team's indiv. determination as to "whether [and to what extent] compensatory services are needed under applicable standards and requirements"
   - June/July (n=6+): e.g., dispute resolution
   - legal force? – adjudicative v. compliance avenues

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Threshold Factors (cont.)

3. **SEA Guidance**
   - Virginia:

     - special education -
       http://www.doe.virginia.gov/special_ed/index.shtml
     - general education -
       http://www.doe.virginia.gov/support/health_medical/office/covid-19.shtml

   - legal force? – adjudicative v. compliance avenues

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Baseline Facts

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Baseline Facts

1. During the Pandemic
   - Extent of services and procedural compliance
     - e.g., IA and IL: remote learning plans (RLPs)
     - e.g., NJ: precondition of liability waiver
     - e.g., CASE poll: parental refusals of services
2. Upon Adjusted Resumption – But "Roller Coaster"
   - Extent of services and procedural catch-up
   - Extent, if any, of SEA or LEA "COVID-19 impact services and supports (CISS)" (aka "unfinished learning services" or "recovery services")

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Pending Issues

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Pending Issues

1. Immediate:
   - ESY: entitlement and implementation
2. Ongoing:
   - child find and eligibility
   - other, procedural requirements
     - e.g., evaluations and reevaluations - observations
     - e.g., IEP meetings, including parental participation
     - e.g., IEP revisions

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Pending Issues (cont.)

3. Central - **FAPE**

- procedural: two-step adjudicative test
- substantive: *Endrew F.* "reasonably calculated … progress appropriate under the child's circumstances" standard (via snapshot approach)
- **failure to implement**: *Van Duyn* materiality test
- capability to implement: emerging

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Pending Issues (cont.)

4. Latent – **stay-put**

- "then-current placement" (§ 1415(j)) – last IEP or operative at the time of filing?
- if last IEP, fundamental (i.e., substantially and materially, changed?
- if so, what activated the change—IEP team, parent, or other?

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Pending Issues (cont.)

5. Remedial Consequences

- purely prospective relief (e.g., procedural step 1)
- reimbursement (e.g., related services)
- **compensatory education – the big question**
  - compare CISS (or recovery services) on slide 10 along with analogies: HI / PR / TX / CT & RI / et al.
  - calculation procedure (e.g., delegation)
  - calculation approach (criteria/formula)
  - implementation

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Pending Issues (cont.)

5. Remedial Consequences (cont.) – compensatory education – possible Hawaii analogy for initial remote
   - *N.D. v. Haw.* (9th Cir. 2010) – systemwide furlough Fridays not a change in educational placement (triggering stay-put) under the IDEA - fact based (e.g., no complete cut-off) - dicta that "[the] claim is more properly characterized as a 'material failure to implement [FTI] the IEP'" (citing *Van Duyn*)
   - series of FTI cases with varying outcomes, including *Alex U. v. Dep't of Educ.* (D. Haw. 2013) (sufficient mitigation via "adjustment program")

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Pending Issues (cont.)

6. Other Thorny Issues
   - if change in placement, prior written notice or amendment procedure?
   - overlapping issue of LRE?
   - related services?
   - resumption to in-person (completely or hybrid)
     - mandatory: opt out v. exceptions? mask (incl. ADA)?
     - for spec. ed students only – ad hoc v. prioritization?
   - change back to mandatory virtual upon new cases?

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Activity to Date

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Activity to Date

1. Complaint Procedures – filings as of June 30
   - e.g., VA: RLPs as "bastardized" inequality (n=1)
   - e.g., LA: FTI (n=1) and lack of PWN (n=1)
   - e.g., CT: private school closure (n=1 group letter)
   - e.g., WA: FTI and/or substantive FAPE (n=16)
   - e.g., MA: FTI (n=3), IEP mtg. delays (n=3), notices for virtual IEP mtgs. that included broad waiver (n=16)→expedited corrective action

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Activity to Date

1. Complaint Procedures (cont.) – decisions as of August 30
   - e.g., KS: 5/29/20 decision on records request – 45 days and 7/27/20 decision on FTI + lack of PWN
   - e.g., IA: 6/8/20 FTI decision (equal opp'ty std.) – on appeal
   - e.g., GA: 6/12&26/20 decisions (3) – no violations for FTI and AT devices – relaxed, implicit stds.
   - e.g., SD: 8/7/20 decision – not placement change and not FTI except first day of ESY –> 1-day comp. ed.
   - e.g., TX: 8/12/20 decision – not FTI denial of FAPE – largely available, and students (3) made progress

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Activity to Date

1. Complaint Procedures (cont.) – decisions as of August 30
   - e.g., WA: 19 decisions in August – all FTI – limited violations – progress monitoring – IEP mtg. order

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Activity to Date (cont.)

2. Due Process Hearings – filings as of June 30
   - e.g., MA (n=3): hearing/technology issues
   - e.g., CT, LA, MO, and TN (n=1 each): FTI/comp. ed.
   - e.g., NJ (n=12): comp. ed., elig., nursing serv., grad.
   - e.g., WA (n=13-->33): ESY, failure to implement (FTI), and procedural variety (IEP meetings, DLPs w/o PWN, predetermination), tech accommodations

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Activity to Date (cont.)

2. Due Process Hearings (cont.) – decisions as of Sept. 4
   - MA 7/6/20: *Blue Hills Reg'l H.S. Dist.* – denied district's motion for dismissal (per state procedures) based on material factual issues re appropriateness of most recent IEP and extent of district's provision of its services remotely
   - CA 8/24/20: ***L.A. Unified Sch. Dist.*** – ruled that DLP amounted to material FTI per *Van Duyn* – comp. ed. award of 40 hrs. of transition counseling – fed. and state guidance (no waiver and comp. ed.)

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Activity to Date (cont.)

3. Court Cases – pending lawsuits as of Sept. 4
   - *W.G. v. Kishimoto* (D. Haw. Apr, 13): development of systemic criteria and procedures for **compensatory education** (for IDEA FTI and § 504/EP discrimination) – via § 1983
   - [*Simper v. Wash.* (Wash. Super. Ct. May 5): request for preliminary injunction against governor's order closing schools – based on state constitution's education clause]
   - *James v. Wolf* (E.D. Pa. May15): nonverbal and partially verbal students with autism – "life sustaining" exc. for full FAPE (or compensatory education) – via IDEA and § 504/ADA

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Activity to Date (cont.)

3. OCR Cases – as of Sept. 4
   - 6/21/20 pair of letters of resolution for CO district and IU that allegedly failed to provide full spec. ed. services to students in separate behavioral program for 2019–20, including pandemic period – voluntary agreement (before data request and w/o admission of liability) to convene teams to determine possible comp. services and to provide training to all program personnel

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Activity to Date (cont.)

4. Court Cases – pending lawsuits as of Sept. 4 (cont.)
   - [*NAACP v. DeVos* (D.D.C. July 22) & *COPAA v. DeVos* (D. Md. Aug. 10): challenge to USDE interim rule for calculation of apportionment of CARES Act funding to private schools – via APA]
   - ***J.T. v. de Blasio*** (S.D.N.Y. July 28): nationwide IDEA/ § 504/§ 1983 challenge to closure and remote programs of school districts – stay-put change in placement theory (Sept. 2 show cause order for Sept. 11)
   - *Brach v. Newsom* (C.D. Cal. July 29): multi-pronged § 1983 (e.g., SDP/Title VI/IDEA) challenge to governor's order for remote instruction

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Activity to Date (cont.)

4. Court Cases – pending lawsuits as of Sept. 4 (cont.)
   - [*Wilkes v. Wash. State Bd. of Educ.* (Wash Super. Ct. Aug. 11): challenge to governor's order providing for "continuous learning plans" for full funding, thus waiving full instruction for all, including sp. ed., students]
   - *C.M. v. Jara* (D. Nev. Aug. 21): class action FAPE (especially FTI) claim against Clark Cty. Sch. Dist. - spaghetti strategy – including requested funding reallocation to parents

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Activity to Date (cont.)

4. Court Cases (cont.) – decisions as of Sept. 4

- [*Chi. Teachers Union v. DeVos* (N.D. Ill. June 19) - denied motion for preliminary injunction against order for each IEP team conduct annual review before end of school year – via APA]
- *J.C. v. Fernandez* (D. Guam July 15) – denied preliminary injunction for summer stay-put order w/o prejudice based on probable applicability of *N.D. v. Haw.* (9th Cir. 2010)

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Activity to Date (cont.)

4. Court Cases – decisions as of Sept. 4 (cont.)

- *L.V. v. N.Y.C. Dep't of Educ.* (S.D.N.Y. July 17) – granted preliminary injunction to enforce IHO Sept. 19 stay-put order for ABA + OT/PT/SLT – in-person within safety guidance (not satisfactory for this child remotely) but not requested funding account
- *M.G. v. N.Y.C. Dep't of Educ.* (S.D.N.Y. Aug. 20) – granted parent's motion to amend its pre-pandemic FAPE suit for alleged violation of IHO's order for 2019-20 school year and for delay in appointing IHO for 2020-21 DPH complaint

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Activity to Date (cont.)

4. Court Cases – decisions as of Sept 4 (cont.)

- [*Wash. v. DeVos* (W.D. Wash. Aug. 21); *Mich. v. DeVos* (N.D. Cal. Aug. 26) – granted preliminary injunction, based on ADA, against interim rule for apportionment of CARES funding for private schools]
- [*Fla. Educ. Ass'n v. DeSantis* (Fla. Cir. Ct. Aug. 24) – granted preliminary injunction, based on state constitutional provision for safe schools, striking arbitrary and capricious provisions of governor's funding-based order for full in-person instruction] – stay upon expedited appeal (Fla. Dist. Ct. App. Aug. 27)

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Activity to Date (cont.)

4. Court Cases – decisions as of Sept 4 (cont.)
   - *L.A. v. N.Y.C. Dep't of Educ.* (S.D.N.Y. Sept. 1): granted stay-put order for continued placement at private school (which closed during pandemic)

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AN ADJUDICATIVE CHECKLIST OF CRITERIA FOR THE FOUR DIMENSIONS OF FAPE UNDER THE IDEA*

Perry A. Zirkel

The Individuals with Disabilities Education Act (IDEA)[1] accounts for a significant and expanding segment of P–12 education litigation.[2] The bulk of the litigation[3] is specific to the IDEA's core obligation,[4] "free appropriate public education" (FAPE).[5] Although the landmark case of *Board of Education of Hendrick Hudson Central School District v. Rowley*[6] demarcated procedural and substantive dimensions of FAPE, subsequent litigation not only crystallized the contours of these two dimensions but also started the development of standards for two additional dimensions—failure to implement the IEP[7] and capacity to implement the IEP.[8]

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* This article appeared in *West's Education Law Reporter* (Ed.Law Rep.) v. 346, pp. 18–20 (2017). The limited updated information is highlighted in yellow. **Illustrative cases in your jurisdiction are in bold font**. For copies of most of the cited publications and additional special education law information, see **perryzirkel.com**.

[1] 20 U.S.C. §§ 1400 *et seq*. (2017).

[2] *E.g*., Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 Ed.Law Rep. 1 (2011) (showing the increasing segment within the P–12 context); *see also* Zorka Karanxha & Perry A. Zirkel, *Longitudinal Trends in Special Education Case Law: Frequencies and Outcomes of Published Court Decisions*, 27 J. SPECIAL EDUC. LEADERSHIP 55 (2014) (showing the continuing increase specific to the IDEA context).

[3] *E.g*., Perry A. Zirkel, *Case Law under the IDEA: 1998 to the Present*, *in* IDEA: A HANDY DESKBOOK REFERENCE TO THE LAW, REGULATIONS, AND INDICATORS 709 (2014) (showing predominance of FAPE cases, including those in the compensatory education and tuition reimbursement categories, in annotated compilation of published court decisions under the IDEA).

[4] *E.g*., *Sytsema v. Acad. Sch. Dist*., 538 F.3d 1306, 1312, 236 Ed.Law Rep. 94 (10th Cir. 2008) (characterizing FAPE as the "central pillar of the IDEA"). The vehicle for FAPE under the IDEA is the individualized education program (IEP). *E.g*., *Murray v. Montrose Cty. Sch. Dist. RE-1J*, 51 F.3d 921, 923 n.3, 99 Ed.Law Rep. 126 (10th Cir. 1995) (referring to the IEP as the "cornerstone" of this central pillar).

[5] 20 U.S.C. §§ 1402(9) and 1412(a)(1).

[6] 458 U.S. 176 (1982).

[7] See *infra* note 17 and accompanying text.

[8] See *infra* note 18 and accompanying text.

Intended as a handy outline, this checklist provides a snapshot of the current adjudicative standards and applicable authority for each of these four dimensions. Depending on the dimension(s) at issue, each of the four respective items consists of a cluster of questions for an IDEA hearing officer or, upon judicial review, a court to answer in terms of denial of FAPE and the resulting remedies.[9] Thus, potential or actual parties may use these items as the basic criteria.[10] For the most established dimension, which is procedural FAPE, the cluster is in a flowchart-type sequence. For the remaining three dimensions, the adjudicative test is successively less specifically established, resulting in only tentative sub-questions for substantive FAPE, a choice of questions for failure to implement, and thus far only a single broad question for capacity to implement.[11]

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[9] For the two most frequent remedies, see, e.g., Perry A. Zirkel, *Compensatory Education Services: The Next Annotated Update of the Law*, 336 Ed.Law Rep. 654 (2016) (canvassing the case law concerning compensatory education); Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 Ed.Law Rep. 785 (2012) (outlining the multi-step test, with illustrative case law support); Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 214 (2013) (canvassing frequency and outcomes of compensatory education and tuition reimbursement cases). These two retrospective remedies, however, are far from exclusive in terms of the applicable remedial authority; which extends, for example, to purely prospective orders for revisions in the IEP and/or changes in the child's placement. For the various equitable remedies available to IDEA adjudicators, see, e.g., Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act*, 37 J. NAT'L ASS'N ADMIN. L. JUDICIARY 505 (2018).

[10] However, for the criteria for denials of FAPE, the alternate decisional avenue of the IDEA, which is the state complaints procedures system, generally uses a more rigorous application of the second and third dimensions of FAPE. *E.g.*, Perry A. Zirkel, *The Two Dispute Decisional Processes under the Individuals with Disabilities Education Act: An Empirical Comparison,* 16 CONN. PUB. INT. L.J. 1 (2017).

[11] The final item, or theory for denial of FAPE, is the least well developed, thus amounting to a single question at this point. It may be viewed as a branch of the third item, but also may encompass the second, substantive item.

1. Procedural FAPE[12]

a) Did the district violate IDEA (and corollary state law) procedural requirements?[13]

i) Is there an applicable procedural requirement?

ii) If so, is the proof preponderant that the district violated it?

b) If so, did the violation(s) result in the requisite loss?[14]

i) Was there a deprivation of educational benefits to the student? OR

ii) Did the violation significantly impede the parents' opportunity for participation in the IEP process?

[12] For an empirical analysis of judicial application of this multi-part test, see Perry A. Zirkel & Allyse Hetrick, *Which Procedural Parts of the IEP Process Are the Most Judicially Vulnerable?* 83 EXCEPTIONAL CHILD. 219 (2016).

[13] *E.g.*, *Bd. of Educ. v. Rowley*, 458 U.S. at 206.

[14] 20 U.S.C. § 1415(f)(3)(E)(ii). In the absence of such loss, the hearing officer still has authority to order prospective procedural relief. *E.g.*, *Dawn G. v. Mabank Indep. Sch. Dist.*, 63 IDELR ¶ 63 (N.D. Tex. 2014) (citing 20 U.S.C. § 1415(f)(3)(E)(iii)); *see generally* Perry A. Zirkel, *Safeguarding Procedures under the IDEA: Restoring the Balance in the Adjudication of FAPE*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2020). For recent Fourth Circuit decisions illustrating the effect of the second part of the test, see **R.S. v. Bd. of Directors of Woods Charter Sch. Co., 808 F. App'x 229 (4th Cir. 2020); R.F. v. Cecil Cty. Pub. Sch., 919 F.3d 237 (4th Cir. 2019).**

2. Substantive FAPE[15]

a) Is the IEP reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances?[16]

i) If the child is in a fully integrated setting, is the IEP reasonably calculated at least to enable the child to achieve passing marks and advance from grade to grade?

ii) If the child is not in a fully integrated setting and not able to achieve on grade level, is the IEP appropriately ambitious, including challenging objectives, even if the same advancement through the general education curriculum is not a reasonable prospect?

[15] For applying this standard, most of the circuits have adopted the "snapshot approach," which the Supreme Court seemed to reinforce in its recent decision. *E.g.*, Perry A. Zirkel, *The "Snapshot" Standard under the IDEA: An Update*, 358 Ed.Law Rep. 767 (2018).

[16] *Endrew F. v. Douglas Cty. Sch. Dist. RE*-1, 137 S. Ct. 988 (2017). For a legal analyses of this decision and an empirical analysis of its aftermath, see Perry A. Zirkel, *The Supreme Court's Decision in* Endrew F. v. Douglas County School District RE-1*: A Meaningful Raising of the Bar?* 341 Ed.Law Rep. 545 (2017) and Perry A. Zirkel, *The Aftermath of* Endrew F.*: An Outcomes Analysis Two Years Later*, 363 Ed. Law Rep. 1 (2019); *see also* William Moran, Note, *The IDEA Demands More: : A Review of FAPE Litigation after* Endrew F., 22 N.Y.U. J. LEGAL & PUB. POL'Y 495 (2020). For a critique of the characterization of the decision in the literature in school psychology and special education, see Perry A. Zirkel, *Professional Misconceptions of the Supreme Court's Decision in* Endrew F., 47 COMMUNIQUÉ 12 (June 2019**). For application of *Endrew F.* in your jurisdiction, see R.F. v. Cecil Cty. Pub. Sch., 919 F.3d 237 (4th Cir. 2019).**

3. Failure to Implement: Three Competing Approaches, with the Second Increasingly Predominant[17]

a) Per se: Is the failure more than de minimis? OR

b) Materiality: Is the failure more than minor—i.e., the opposite of significant or substantial implementation? OR

c) Materiality/Benefit: Is the failure not only more than minor but also resulting in deprivation of benefit?

4. Capacity to Implement[18]

a) Is the school capable (in terms of staffing and facilities, for example) of implementing the proposed IEP?

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[17] *E.g.*, Perry A. Zirkel & Edward T. Bauer, *The Third Dimension of FAPE under the IDEA: IDEA Implementation*, 36 J. NAT'L ASS'N ADMIN. L. JUDICIARY 409 (2016). Only a minority of the federal circuit courts of appeal has adopted one of these approaches. For the materiality approach, see, e.g., *L.J. v. Sch. Bd. of Broward Cty*., 927 F.3d 1203, 367 Ed.Law Rep. 103 (11th Cir. 2019); ***Sumter Cty. Sch. Dist. v. Heffernan*, 642 F.3d 478 (4th Cir. 2011);** *Van Duyn ex rel. Van Duyn v. Baker School District 5J*, 502 F.3d 811, 225 Ed.Law Rep. 136 (9th Cir. 2007). For the materiality/benefit approach, see *Spring Branch Indep. Sch. Dist. v. O.W*., 938 F.3d 695, 369 Ed.Law Rep. 639 (5th Cir. 2019); *Houston Indep. Sch. Dist. v. Bobby R*., 200 F.3d 341, 141 Ed.Law Rep. 62 (5th Cir. 2000). For the per se approach, which no circuit has yet adopted but which prevails in the IDEA's complaint procedures process, see *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d at 827 (Ferguson, J., dissenting).

[18] *E.g., N.B. v. N.Y.C. Dep't of Educ*., 711 F. 29, 351 Ed.Law Rep. 798 (2d Cir. 2017); *Y.F. v. N.Y.C. Dep't of Educ*., 659 F. App'x 3, 338 Ed.Law Rep. 52 (2d Cir. 2016); *B.P. v. N.Y.C. Dep't of Educ*., 634 F. App'x 845, 330 Ed.Law Rep. 23 (2d Cir. 2015); ***S.T. v. Howard Cty. Pub. Sch. Sys.*, 627 F. App'x 255 (4th Cir. 2015);** *M.O. v. N.Y.C. Dep't of Educ.*, 793 F.3d 236, 320 Ed.Law Rep. 77 (2d Cir. 2015); *S.K. v. City Sch. Dist. of N.Y.C*., 76 IDELR ¶ 64 (S.D.N.Y. 2020); *Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S*., 357 F. Supp. 3d 311 (S.D.N.Y. 2019); *G.L. v. Saucon Valley Sch. Dist*., 267 F. Supp. 3d 586, 350 Ed.Law Rep. 184 (E.D. Pa. 2017); *McNeil v D.C.*, 217 F. Supp. 3d 107, 342 Ed.Law Rep. 529 (D.D.C. 2016). For the Second Circuit, which is the predominant source of this dimension of FAPE thus far, the intersecting and problematic evidentiary issue is the qualified four-corners approach adopted in *R.E. v. New York City Department of Education*, 694 F.3d 167, 186, 284 Ed.Law Rep. 629 (2d Cir. 2012).

EDUCATION LAW INTO PRACTICE

THE FIFTH CIRCUIT'S LATEST CHILD FIND RULING: FUSION AND CONFUSION*

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

"Child find" is one of the ongoing obligations of school districts under the Individuals with Disabilities Education Act (IDEA).[1] Although the Act and its regulations identify this obligation on a broad basis,[2] the courts have developed its operational meaning. More specifically, in a long line of cases[3] the courts have demarcated and applied two overlapping but separable components of child find: (1) reasonable suspicion, which triggers this obligation to initiate an eligibility evaluation of the child,[4] and (2) reasonable time,[5] which marks the outer limit for initiating this evaluation.[6] The case law

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1. 20 U.S.C. §§ 1400–19 (2017).

2. 20 U.S.C. § 1412(a)(3) (2017) (referring to the functions of "identif[ying], locat[ing], and evaluat[ing]"); 34 C.F.R. § 300.111 (2018) (repeating these functions and clarifying their applicability to students advancing from grade to grade and highly mobile children "who are suspected of [meeting the eligibility criteria of the Act]").

3. *See, e.g.*, Perry A. Zirkel, *Child Find under the IDEA: An Updated Analysis of the Judicial Case Law*, 48 COMMUNIQUÉ 14 (June 2020) (finding 31 pertinent court decisions from 2017 through 2019); Perry A. Zirkel, *Child Find under the IDEA: An Empirical Analysis of the Judicial Case Law*, 45 COMMUNIQUÉ 4 (May 2017) (finding 91 pertinent court decisions from 1994 through 2016). Some of these court decisions included rulings on both components of child find, thus leading to a total of 146 rulings for the 122 decisions. For more recent rulings, see *Indep. Sch. Dist. No. 283 v. E.M.D.H.,* 960 F.3d 1073 (8th Cir. 2020); *Northfield City Bd. of Educ. v. K.S.*, 76 IDELR ¶ ___ (D.N.J. 2020); *D.C. v. Klein Indep. Sch. Dist*., 76 IDELR ¶ 208 (S.D. Tex. 2020); *Dougall v. Copley–Fairlawn Sch. Dist*., 74 IDELR ¶ (N.D. Ohio 2020).

4. *See, e.g.*, Perry A. Zirkel, *The "Red Flags" of Child Find under the IDEA: Separating the Law from the Lore*, 23 EXCEPTIONALITY 192 (2015) (identifying the various signs that may indicate or mitigate the reasonable suspicion determination). For a leading standard of the reasonable suspicion component, see *Bd. of Educ. of Fayette v. L.M*., 478 F.3d 307, 313, 216 Ed.Law 354 (6th Cir. 2007) (citing *Clay T. v. Walton Cty. Sch. Dist.,* 952 F. Supp. 817, 823 (M.D. Ga. 1997)) for preponderant proof that "the school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate").

5. On occasion, "reasonable period" is used herein, as it is in the case law, as a synonym for "reasonable time," referring to the amount of time demarcated at each end by the date of the district's reasonably suspecting the child's eligibility and the date of its initiating the evaluation via parental consent. *E.g.*, *M.P. v. Campus Cmty. Sch*., 73 IDELR ¶ 38, at *7 (D. Del. 2018); *Panama-Buena Vista Union Sch. Dist. v. A.V*., 71 IDELR ¶ 57, at *6 (E.D. Cal. 2017); *Cent. Sch. Dist. v. K.C*., 96 IDELR ¶ 125, at *8 (E.D. Pa. 2013). Other variations, as seen *infra*, are reasonable "delay" or "interval."

concerning the second component has been less extensive and well-established,[7] warranting more clear and consistent judicial guidance.[8]

The purpose of this short case note is to analyze the Fifth Circuit's recent child find ruling to show that it provides confusion rather than clarification for the reasonable-time component. The successive parts of this analysis are (1) a summary of the court's child find ruling in its initial and superseding decisions, and (2) an assessment that explains the asserted errors in the court's reasonable-time interpretation.

Two prefatory points are necessary and appropriate. First, reasonable suspicion and reasonable time are, like height and weight or, more specific to the IDEA, child find and eligibility, overlapping but separable concepts.[9] Second, Texas is a fitting context for the Fifth Circuit's decision because (1) it accounts for a disproportionally high segment of the child find case law to date,[10] and (2) it is also the scene of a statewide corrective action plan that has child find as a major feature as the result of a federal agency order.[11]

6. *See, e.g.,* Perry A. Zirkel, *Child Find: The "Reasonable Period" Requirement*, 311 Ed. Law Rep. 576 (2015) (canvassing the pertinent court rulings to date to identify an approximate range for the outer limit of this reasonable amount of time, starting seven weeks after reasonable suspicion and ending dependent on the specific circumstances of the case). In contrast the next stage, which is the evaluation, is a fixed period of time starting with notification to and consent from the parent. 34 C.F.R. § 300.301(c)(10) (2018) (60 days from receipt of parental consent unless state law specifies a different time frame).

7. *See* Zirkel 2020, *supra* note 3, at 51 (finding 15 rulings for reasonable time compared with 26 for reasonable suspicion); Zirkel 2017 *supra* note 3, at 6 (finding 35 rulings for reasonable time compared with 70 for reasonable suspicion).

8. As the courts established at the outset, this component, like its reasonable suspicion counterpart, is understandably ad hoc. *E.g.*, *W.B. v. Matula*, 67 F.3d 484, 501, 104 Ed. Law Rep. 28 (3d Cir. 1995) ("We are not unmindful of the budgetary and staffing pressures facing school officials, and we fix no bright-line rule as to what constitutes a reasonable time in light of the information and resources possessed by a given official at a given point in time"). However, the subsequent rulings have not been clear as to what the relevant indicators or circumstances are for establishing the length of the reasonable period, and they have not been consistent as to whether the measuring point for the end of this period is the date that the district requested parental consent or the date the district obtained this requisite consent for the evaluation. *See* Zirkel, *supra* note 5, at 577 (identifying the limitations in subsequent case law).

9. The typical first step in a medical examination, height and weight, correlate but are obviously not at all identical, requiring separate measurement. Similarly, child find ultimately targets eligibility because it starts with the date that the district reasonably suspected that the child may be eligible. However, as a lengthening line of case law makes clear, child find is an ongoing procedural obligation, and if the child is not—as a result of the requisite evaluation or in the absence thereof—proven to be eligible, the violation may be adjudicated as harmless. *E.g.*, *Burnett v. San Mateo Foster Cty. Sch. Dist*., 739 Fed.Appx. 870, 872, 359 Ed.Law Rep. 69 (9th Cir. 2018); *T.B. v. Prince George's Cty. Bd. of Educ*., 897 F.3d 566, 578, 356 Ed.Law Rep. 977 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1307 (2019); *Durbrow v. Cobb Cty. Sch. Dist.*, 887 F.3d 1182, 1196, 353 Ed.Law Rep. 33 (11th Cir. 2018); *D.G. v. Flour Bluff Indep. Sch. Dist*., 481 Fed. Appx. 887, 893–94, 286 Ed.Law Rep. 131 (5th Cir. 2012). *But cf*. Perry A. Zirkel, *Safeguarding Procedures under the IDEA: Restoring the Balance of Adjudication under the IDEA*, 39 J. NAT'L ADMIN. L. JUDICIARY 1, 13 (2019) (advocating Congressionally authorized and equitably tailored prospective injunctive relief in such cases); *J.P. v. Anchorage Sch. Dist.,* 260 P.3d 285, 293–95, 271 Ed.Law Rep. 1077 (Alaska 2011) (ordering reimbursement for the private evaluation, although not for the private tutoring).

10. *E.g.*, *Krawietz v. Galveston Indep. Sch. Dist*., 900 F.3d 673, 357 Ed.Law Rep. 875 (5th Cir. 2018); *Dallas Indep. Sch. Dist. v.*

The Fifth Circuit's Ruling

For its latest ruling specific to the reasonable time find context, the Fifth Circuit issued an initial decision and, almost nine months later after a panel rehearing, a substituted decision in *Spring Branch Independent School District v. O.W.*[12] The case addresses several IDEA issues, but the scope here is limited to the child find ruling.

The pertinent facts of this ruling do not require detailed recounting because the parties did not dispute the date of reasonable suspicion, which was October 8, 2014, and the date for the end of the reasonable-period inquiry, which was January 15, 2015, when the child was in fifth grade.[13] For the limited interval between the child's recent enrollment in the district, which was the start of fifth grade and October 8, relevant facts within the district's attributable knowledge were that (a) the child was transitioning from a therapeutic school, (b) his diagnoses included attention deficit hyperactivity disorder and oppositional defiant disorder, (c) he exhibited continuing disruptive behaviors from his first day at school despite school personnel's informal affirmative efforts, and (d) his parents provided consent and the requested background information, along with a private educational evaluation, for a Section 504 eligibility evaluation.[14] On October 8, the school's Section 504 team, including the parents, met and determined that he was eligible for Section 504 accommodations, which included a behavior intervention plan (BIP), and noted that he was at Tier 2 of the district's

Woody, 865 F.3d 303, 345 Ed.Law Rep. 666 (5th Cir. 2017); *D.G. v. Flour Bluff Indep. Sch. Dist.,* 481 Fed.Appx. 887, 286 Ed.Law Rep. 131 (5th Cir. 2012); *D.C. v. Klein Indep. Sch. Dist.,* 76 IDELR ¶ 208 (S.D. Tex. 2020); *D.H.H. v. Kirbyville Indep. Sch. Dist.,* 75 IDELR ¶ 4 (E.D. Tex. 2019); *T.W. v. Leander Indep. Sch. Dist*., 74 IDELR ¶ 12 (W.D. Tex. 2019); *A.L. v. Alamo Heights Indep. Sch. Dist.*, 73 IDELR ¶ 71 (W.D. Tex. 2018); *T.C. v. Lewisville Indep. Sch. Dist*., 67 IDELR ¶ 215 (E.D. Tex. 2016); *D.L. v. Clear Creek Indep. Sch. Dist*., 68 IDELR ¶ 166 (S.D. Tex. 2016), *aff'd on other grounds*, 695 Fed.Appx. 733, 347 Ed.Law Rep. 751 (5th Cir. 2017); *C.C. v. Beaumont Indep. Sch. Dist*., 65 IDELR ¶ 109 (S.D. Tex. 2015); *D.A. v. Houston Indep. Sch. Dist*., 716 F. Supp. 2d 603 (N.D. Tex. 2009), *aff'd on other grounds*, 629 F.3d 450, 264 Ed.Law Rep. 50 (5th Cir. 2010); *El Paso Indep. Sch. Dist. v. Richard R*., 567 F. Supp. 2d 918, 236 Ed.Law Rep. 679 (W.D. Tex. 2008).

11. *E.g*., Texas Educ. Agency, Special Education Strategic Plan (2018), https://tea.texas.gov/academics/special-student-populations/special-education (latest version of the corrective action plan); Letter to Morath (USDE Mar. 26, 2018), https://www2.ed.gov/admins/lead/account/stateplan17/txapprovalstateplanltr318.html (approving corrective action plan); Letter to Morath (USDE Jan. 11, 2018), www2.ed.gov/fund/data/report/idea/partbdmsrpts/dms-tx-b–2017–letter.pdf (ordering corrective action plan); Letter to Morath, 68 IDELR ¶ 231 (OSERS Oct. 3, 2016) (providing initial findings and ordering a written response). For a discussion of the controversy, see Raj Salhotra, *Lessons Learned from Texas' Special Education Cap*, 20 MARQUETTE BENEFITS & SOC. WELFARE REV. 70 (2018).

12. *Spring Branch Indep. Sch. Dist. v. O.W*., 938 F.3d 695, 369 Ed.Law Rep. 639 (5th Cir. 2019), *withdrawn and superseded*, 961 F.3d 781 (5th Cir. 2020).

13. *Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.3d at 793.

14. *Id*. at 785–86. The child had been enrolled in the district for kindergarten before attending private schools during the intervening four years. *Id*. at 785.

response to intervention (RTI) system and "may need to go to Tier 3."[15] During the interval starting on October 8, the BIP had a limited positive effect for the first few weeks, when the child's discipline problems and academic decline resumed, and on January 15 the district initiated an IDEA eligibility evaluation.[16]

The Initial Decision

The Fifth Circuit's initial decision quite correctly set forth the applicable focus for its child find ruling, which was the reasonable-time issue after the undisputed reasonable-suspicion date.[17] Specifically, the court defined this issue as "whether the delay between October 8, 2014, and January 15, 2015 (99 days, or 3 months and 7 days), was reasonable."[18] As guideposts, the Fifth Circuit identified its two previous reasonable-time decisions: (1) its ruling in *Dallas Independent School District v. Woody* that a three-month period, which included more than a month wait for requested parental information, was reasonable;[19] and (2) its ruling in *Krawietz v. Galveston Independent School District* that a four-month period, in which the district failed to take proactive steps, was not reasonable.[20]

Combining these two previous guideposts, the *O.W.* court formulated the following reasonable-time standard:

> The reasonableness of a delay is not defined by its length but by the steps taken by the district during the relevant period. A delay is reasonable when, throughout the period between notice and referral, a

15. *Id*. RTI is usually a three-tier arrangement, with the second tier being after the universal interventions are not sufficiently successful. *See, e.g*., Texas Education Agency, Brief Overview of 3–Tier Model, https://buildingrti.utexas.org/videos/brief-overview-of–3–tier-model.

16. *Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.3d at 787.

17. The court characterized October 8 as "the date the child find requirement triggered due to notice of a likely disability" (*id*. at 793), having already explained that it refers to "[when] the district is on notice of facts or behavior likely to indicate [eligibility]" (*id*. at 791).

18. *Spring Branch Indep. Sch. Dist. v. O.W*., 938 F.3d at 706.

19. *Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 319, 345 Ed.Law Rep. 666 (5th Cir. 2017). After explaining that "reasonable time" in this context refers to the period between the triggering notice date and the initiation of the eligibility evaluation (*id*. at 319), the *Woody* court characterized the relevant conduct as follows:

> [D]uring this period, the District was requesting and gathering information on [the child] in an effort to classify her and determine its obligations. For example, . . . [on] October 4, [the District] request[ed] further information. It took [the parents] until November 5 to respond. . . . Finally, the District referred [the child] for an evaluation and sought parental consent to evaluate her at that meeting. These facts suggest reasonableness, with neither the District nor the parent reacting with urgency or with unreasonable delay.

Id. at 320.

20. *Krawietz v. Galveston Indep. Sch. Dist*., 900 F.3d 673, 677, 357 Ed.Law Rep. 875 (5th Cir. 2018). The *Krawietz* court characterized the relevant conduct as follows:

> During those four months, [the District] failed to take any appreciable steps toward complying with its Child Find obligation. Indeed, it was only after [the] family requested a due process hearing that [the district] sought consent to conduct the evaluation. [The District] alleges that [the child's] family failed to "act with any urgency" until [that request], but the IDEA imposes the Child Find obligation upon school districts, not the parents of disabled students.

Id.

> district takes proactive steps to comply with its child find duty to identify, locate, and evaluate students with disabilities. Conversely, a time period is unreasonable when the district fails to take proactive steps throughout the period or ceases to take such steps.[21]

Applying this new standard, the initial *O.W.* decision rejected the district's claim that its aforementioned[22] RTI efforts fulfilled this proactive steps standard, concluding that the proscription against using RTI to delay an evaluation limited the state law prescription to consider general education interventions prior to evaluation.[23] More specifically, the court concluded that by the October 8 Section 504 meeting, it was obvious that the attempts at behavioral interventions had "utterly failed," thus not qualifying as the requisite proactive steps and resulting in a child find violation.[24]

The Superseding Decision

Apparently apprehending a problem with the child find analysis in its initial decision, the Fifth Circuit issued a superseding decision that had limited revisions.[25] First, removing the above-mentioned references,[26] the court extended the scope of its analysis of the district's "intermediate accommodations" to include Section 504, not just RTI.[27] More specifically, while confirming its rejection of the district's Section 504 and RTI efforts as qualifying as the requisite proactive steps, the court clarified that "[w]e in no way suggest that a school district necessarily commits a child-find violation if it pursues RTI or § 504 accommodations before pursuing a special education evaluation."[28]

Second, in explaining this clarified distinction that "there may be cases where intermediate measures are reasonably implemented before resorting to evaluation," the superseding version addressed a Third Circuit child find ruling in 2012 that had accepted such intermediate measures as " 'militat[ing] against a Child Find violation.' "[29] Distinguishing the facts of the Third Circuit decision, the revised *O.W.* opinion concluded that in the instant case the severity of the child's behaviors and the ineffectiveness of the district's

21. *Spring Branch Indep. Sch. Dist. v. O.W.*, 938 F.3d at 707.

22. *Supra* note 15 and accompanying text.

23. *Spring Branch Indep. Sch. Dist. v. O.W.*, 938 F.3d at 707 (citing *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 209 n.4, 365 Ed.Law Rep. 769 (5th Cir. 2019) and 19 TEX. ADMIN. CODE § 89.1011(a) (2018)).

24. *Id.* In a footnote, the initial decision similarly rejected the district's attempt to identify the parents as a contributing factor to the delay. *Id.* at 707 n.12 ("While a proactive step may include waiting for a reasonable time for a parent to respond to a request for information or approval [citing *Woody*], the IDEA imposes the Child Find obligation upon school districts, not parents [citing *Krawietz*].").

25. The scope of this critique is limited to the Fifth Circuit's child find ruling, which appeared to be the primary and perhaps exclusive focus of the superseding decision. In a relatively minor additional child find revision, the court added a final footnote confirming—in line with prior authority (*supra* note 9)—that child find violations are subject to the IDEA's codified two-part test for procedural FAPE. *Id.* at 11 n.19.

26. *Supra* note 23.

27. *Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.3d at 794.

28. *Id.* In a new footnote, the court added that its concern in this case was with district's use of the 504 plan as "*preliminary* rather than *concurrent* step pursuing an evaluation." *Id.* at 794 n.12.

29. *Id.* at 794 (citing *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 252, 285 Ed.Law Rep. 730 (3d Cir. 2012)).

intermediate efforts caused the district to have been "more than reasonably" on notice that extending these efforts would constitute a delay or denial of the duty to initiate an evaluation.[30]

The Errors in the *O.W.* Child Find Ruling

The interrelated errors in the court's analysis cumulatively amounted to conflating, or fusing, the reasonable-suspicion and reasonable-time components of child find, thus causing confusion as to the meaning and application of the second component, which is whether the time between reasonable suspicion and evaluation initiation is reasonable.

The first error in the court's analysis was the initial and unchanged reasonable-time standard that relies exclusively on steps, thus eliminating length as a relevant factor.[31] How can an interval, or in the court's inadvertently slanted language, "delay,"[32] whether it is three days, three weeks, or three months be evaluated for "reasonable time" without any consideration of its length? The compounding error is that by concluding that on the October 8 date of reasonable suspicion the district had not only notice of facts or behavior likely to indicate a disability,[33] but also reason to know that its intermediate steps were ineffective,[34] the proactive steps measure became moot. Somehow upon the relatively short-term exhaustion of the informal steps, the move to more intensive interventions, whether in the form of RTI or Section 504, was automatically a nullity. Thus, the second component merged into reasonable suspicion, meaning that at least in this case that on October 8 nothing was left for reasonable time.

In its attempt to clarify the effect of its reasonable-time standard upon other cases, the superseding decision did nothing to correct the effective elimination of the reasonable-time component, instead adding that in some cases more intensive intermediary measures may not be fatal in the child find context.[35] In this attempted clarification, the Fifth Circuit singled out a Third Circuit decision in 2012[36] from the well more than 100 judicial rulings specific to child find.[37] However, a careful reading of the Third Circuit's ruling, which is echoed in various other child find rulings,[38] is that the courts consider proactive intermediary steps as part of reasonable-suspicion, not generally the reasonable-time, analysis. More specifically, although in the Third Circuit case the parents separately alleged a reasonable-time claim the events before

30. *Id*.

31. *Supra* note 21.

32. *Supra* text accompanying note 18.

33. *Supra* note 17.

34. *Supra* text accompanying note 24.

35. *Supra* notes 25–28 and accompanying text.

36. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 285 Ed.Law Rep. 730 (3d Cir. 2012).

37. *Supra* note 3.

38. *E.g.*, *Durbrow v. Cobb Cty. Sch. Dist.,* 887 F.3d 1182, 1196, 353 Ed.Law Rep. 33 (11th Cir. 2018); *M.G. v. Williamson Cty. Sch.*, 720 Fed.Appx. 280, 285, 353 Ed.Law Rep. 673 (6th Cir. 2018); *Bd. of Educ. of Fayette Cty. v L.M.*, 478 F.3d 307, 313, 216 Ed.Law 354 (6th Cir. 2007); *Doe v. Cape Elizabeth Sch. Dep't*, 382 F.Supp.3d 83, 102–03, 367 Ed. Law Rep. 767 (D. Me. 2019); *R.E. v. Brewster Cent. Sch. Dist.*, 180 F. Supp 3d 262, 269–70, 337 Ed.Law Rep. 62 (S.D.N.Y. 2016); *Hupp v. Switzerland of Oh. Sch. Dist.,* 912 F. Supp. 2d 572, 591, 293 Ed.Law Rep. 352 (S.D. Ohio 2012).

the first evaluation and a reasonable-suspicion claim for the events thereafter,[39] the court addressed both the pre-April 2006 situation[40] and the post-April 2006 situation,[41] including the consideration of the district's continuing proactive steps,[42] as part of reasonable-suspicion analysis.[43]

In contrast, as the Fifth Circuit's preceding decision in *Krawietz* made relatively clear, the proactive steps to be considered as part of reasonable-time analysis are those appreciable measures to arrange for the initiation of the evaluation,[44] which are distinguishable from the remediating measures in general education that obviate the need for special education.[45] Due to confusion in its formulation and application of its solely "proactive steps" standard, the Fifth Circuit's effective fusion of reasonable-time into reasonable-suspicion in its original and revised *O.W.* decisions appears to at least arguably apply more generally to other child find cases. Regardless of whether the school took effective, much less any, intermediary measures before the triggering date of reasonable suspicion,[46] any such "proactive steps" do not count for the reasonable time of effectuating the evaluation.[47] Similarly, the additions of "utterly"[48] and "more than reasonably"[49] amount to mere hyperbole, not meaningful differentiation, to the analysis.

39. *D.K. v. Abington Sch. Dist.*, 696 F.3d at 249–50 ("Plaintiffs claim that the School District violated the Child Find duties . . . by failing to evaluate [the child] within a reasonable time after it should reasonably have suspected a disability [before the April 2006 evaluation] . . . and . . . by failing to suspect disability when [the child's] struggles continued after April 2006").

40. *Id*. at 251 (concluding that this young child's behavioral, social, and academic indicators did not signal likely IDEA eligibility, citing reasonable-suspicion rulings in *Bd. of Educ. of Fayette Cty. v. L.M*., 478 F.3d 307, 314, 216 Ed.Law 354 (6th Cir. 2007) and *J.S. v. Scarsdale Union Free Sch. Dist*., 826 F. Supp. 2d 635, 662–63, 279 Ed.Law Rep. 229 (S.D.N.Y. 2011)).

41. *Id*. at 251 ("We are also unpersuaded that the School District violated its Child Find obligations by failing to suspect [the child] of a disability after the April 2006 evaluation based on further misconduct and additional opinions by his parents and private therapist").

42. *Id*. at 252.

43. The only exception is limited to the special and distinguishable situation of the second of the two separate child find claims, which was for the period between initial evaluation, which found that the child was not eligible under the IDEA, and the re-evaluation. For this period, the Third Circuit cited its previous ruling that "when a school district has conducted a comprehensive evaluation and concluded that a student does not qualify as disabled under the IDEA, the school district must be afforded a reasonable time to monitor the student's progress before exploring whether further evaluation is required." *Id*. at 251–52 (citing *Ridley Sch. Dist. v. M.R*., 680 F.3d 260, 273, 280 Ed.Law 37 (3d Cir. 2012)). This special use of "reasonable time," which effectively encompasses both components for the limited situation between the initial evaluation and a reevaluation, can contribute to imprecision or inconsistency in the case law when not carefully distinguished.

44. *Supra* notes 19 and 20.

45. The line between general and special education for the overlapping purposes of child find and eligibility is far from a bright one. *See, e.g.,* Perry A. Zirkel, *Through a Glass Darkly: Eligibility under the IDEA—The Blurry Boundary of the Special Education Need Prong,* 49 J.L. & EDUC. 149 (2020). Similarly, whether RTI and other such intermediary measures are proactive is an ad hoc determination that includes their effectiveness and efficiency. *See, e.g.,* Perry A. Zirkel, *Response to Intervention and Child Find: A Legally Problematic Intersection*, 84 EXCEPTIONAL CHILD. 368 (2018).

46. *Supra* note 17.

47. *Supra* text accompanying notes 38–45.

48. *Supra* text accompanying note 24.

49. *Supra* text accompanying note 30.

Conclusion

Given the comprehensive and congested nature of its docket, the Fifth Circuit understandably may have found these specialized nuances difficult to demarcate, especially in light of the imprecise and ad hoc nature of the cryptic codification[50] and the extensive[51] but not entirely clear and consistent jurisprudence[52] for the IDEA's child find obligation. For example, in responding to the parents' request for a determination of the triggering date for reasonable suspicion, a federal judge in Maine asserted:

> The "trigger" concept is not unheard of in this area of law and searching that term will yield a collection of cases that contemplate what set of circumstances, in a given case, "trigger" educational referrals. However, suggesting that the child-find factors provide a calculus for calendaring one specific trigger date to the exclusion of all others is unwarranted. School staff considering a student's need for either an accommodation or special education services are not charting planetary motion with astronomical instruments, but are instead deciding how best to facilitate educational objectives for a unique child with particular issues in a particular school setting. In this sense, the child-find factors, in my view, should not be regarded as a clockwork armillary sphere.[53]

Nevertheless, in my relatively impartial view,[54] the Fifth Circuit and other courts should establish in child find cases that (1) the multiple factors for the reasonable-suspicion component include proactive intermediary interventions, and (2) the corresponding considerations for reasonable-time include the length of the intervening period and the diligence of the district's steps to initiate the evaluation.[55] Under this proposed analysis, the judicial outcome for the *O.W.* case may or may not be the same. Of much greater concern, the various stakeholders in the Fifth and other circuits merit a more predictable and logical framework to promote judicious decision making in both schools and courts.

50. *Supra* note 2.

51. *Supra* note 3.

52. *Supra* notes 8 and 43. For other examples of imprecision, see *supra* 18 ("likely to indicate disability") and the inherently individualized interpretive nature of the IDEA child find terminology of "reasonable," "suspicion," and "time."

53. *Doe v. Cape Elizabeth Sch. Dep't*, 382 F.Supp.3d 83, 99, 367 Ed.Law Rep. 767 (D. Me. 2019). Nevertheless, the court concluded that the district did not have the requisite reasonable suspicion upon referring the child for a Section 504 plan, "especially as general education interventions had enabled [the child] to successfully overcome her educational struggles in the previous schoolyear." *Id*. at 102–03.

54. As my website (perryzirkel.com) shows, my long career has not included legal representation of parents and districts, with my role in IDEA proceedings limited to serving as a review officer.

55. Although the meaning of "proactive steps" differs between these two overlapping components, efficacy and efficiency are key considerations for these steps throughout the child find analysis. Moreover, although the obligation applies solely to the district, the parents' conduct serves as an equitable adjudicative consideration, as it does for the remedial stage. *See, e.g.,* Perry A. Zirkel, *Compensatory Education under the IDEA: The Latest Annotated Update of the Law*, 376 Ed.Law Rep. 850, 858 (2020); Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist,* 282 Ed.Law Rep. 785, 787, 792 (2012).

Greenhill v. Loudoun Cty. Sch. Bd.

United States District Court for the Eastern District of Virginia, Alexandria Division

February 20, 2020, Decided; February 20, 2020, Filed

Civil Action No. 1:19-cv-868

Reporter
2020 U.S. Dist. LEXIS 29992 *; 2020 WL 855962

KEWIN GREENHILL, as parent and next friend of P.G., et al, Plaintiffs, v. LOUDOUN COUNTY SCHOOL BOARD, Defendant.

Counsel: [*1] For Kewin Greenhill, as parents and next friend of P.G., Elizabeth Greenhill, as parents and next friend of P.G., Plaintiffs: Quentin Reckie Corrie, Banks & Associates (FFX), Fairfax, VA.

For Loudoun County Public School Board, Defendant: Jason Henry Ballum, LEAD ATTORNEY, Alan Douglas Bart, Reed Smith LLP, Richmond, VA.

Judges: T. S. Ellis, III, United States District Judge.

Opinion by: T. S. Ellis, III

Opinion

MEMORANDUM OPINION

Plaintiffs Kewin and Elizabeth Greenhill brought this action as parents and next friends of P.G., their minor (nine-year old) son, [1] under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.*, (the "IDEA") seeking to overturn an April 2019 decision by a Hearing Officer in favor of Defendant Loudoun County School Board (the "School Board"). The Hearing Officer, after a two-day hearing, found that the School Board had, for the period at issue, provided P.G. with a free appropriate public education ("FAPE").

This matter involves a review of a state administrative decision under the IDEA.[2] Plaintiffs seek to overturn the Hearing Officer's decision on the basis that the School Board failed to provide P.G. with a FAPE and acted in bad

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[1] Although plaintiffs were originally proceeding *pro* se in this matter, counsel entered an appearance on behalf of plaintiffs on February 3, 2020. Counsel did not enter an appearance on behalf of P.G.

faith and that the Hearing Officer failed to consider properly **[*2]** all of the evidence. The School Board argues that the Hearing Officer's decision was regularly made and that there is no basis on which that decision should be reversed.

Months after briefing in this matter was completed and a hearing was held, plaintiffs filed a motion to present additional evidence. Plaintiffs seek to introduce further evaluations of P.G. as well as testimony by Plaintiff Elizabeth Greenhill and by Dr. Ronald S. Federici.

Because plaintiffs have failed to state a claim for relief under the IDEA or Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"), the School Board's motion must be granted and judgment must be entered in favor of the School Board.

I.

The following facts are derived from the administrative record and the uncontroverted allegations in the parties' pleadings.

P.G. is a nine-year old African-American student attending Ashburn Elementary School, a school within the Loudoun County Public School system. Plaintiffs, concerned with P.G.'s focus and attention, referred P.G. for an evaluation. Plaintiffs requested an individualized education plan ("IEP") for P.G.

In May 2018, the School Board developed a "Child Study Team Intervention Plan," which identified four areas of **[*3]** focus for P.G.: (i) increased work completion/on-task behavior; (ii) decreased impulsivity/increased self-regulation; (iii) increased time on-task; and (iv) increased reading achievement. The School Board proposed providing P.G. with movement breaks, small group instruction, and preferential seating.

On July 17, 2018, the eligibility committee met to determine whether P.G. met the criteria for an IEP under the IDEA (the "Eligibility Meeting"). As a result of that meeting, the School Board denied P.G. an IEP, based on his identified "other health impairments." As part of the Eligibility Meeting, plaintiffs offered a report that they had obtained from Dr. Federici, a neuropsychologist and psychopharmacologist who diagnosed P.G. with the following: (i) unspecified attention deficit/hyperactivity disorder ("ADHD"); (ii) specific learning disorder, with mild impairment in reading comprehension and written expression; (iii) persistent depressive disorder with anxious distress; (iv) asthma and allergies; and (v) mild/moderate nonverbal learning disorder/visual-perceptual processing disorder. Following the Eligibility Meeting, the School Board determined that P.G. did not require special education. **[*4]** Instead, the School Board offered P.G. a Section 504 plan.[3] Plaintiffs objected, based on their belief that a Section 504 plan does not meet P.G.'s academic needs.

On January 14, 2019, plaintiffs and their advocate, Kandise Lucas,[4] requested a due process hearing. The request was granted, and a public due process hearing occurred over a two-day period on March 8 and March 11, 2019.

At the due process hearing, plaintiffs appeared in person and were represented by their advocate, Ms. Lucas. The parties were both permitted to make opening statements, call witnesses, cross-examine witnesses, submit exhibits, lodge objections, and file post-hearing briefs. *See* Transcript of March 8 and 11, 2019 hearing (Dkts. 14-1 to 14-5) ("Transcript" or "Tr."). Plaintiffs and the School Board made opening statements, called seven witnesses, examined

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[2] The School Board filed its motion as a motion to dismiss. Here, however, the administrative record and transcripts of the administrative due process hearing have been submitted and the parties pleadings both relied on those documents. Accordingly, the Court construes the School Board's motion as a motion for judgment on the administrative record.

[3] A Section 504 Plan is a plan developed to provide students with disabilities certain accommodations that would enable them to participate in educations services and programs provided by a school in compliance with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

[4] Ms. Lucas does not appear to be an attorney and it does not appear that she has assisted plaintiffs in this appeal.

witnesses on direct examination and cross examination, asserted objections, and filed written closing statements. *See* Hearing Officer Decision, dated April 1, 2019, at 2 ("Decision").

Six of the seven witnesses called during the hearing were school employees and the School Board qualified two of those witness as experts: (i) Barbara Fromal, an eligibility coordinator and a special **[*5]** education teacher; and (ii) Kim Petz a special education teacher and educational diagnostician. *See* Decision at 21. Plaintiffs also called P.G.'s mother, Plaintiff Elizabeth Greenhill, as a witness. Mrs. Greenhill has never been a teacher and does not have a degree or license in education. *See id.* Although plaintiffs had the opportunity to do so, plaintiffs did not call any independent expert witness and instead, relied on the School Board's witnesses. *Id.* at 18 & n.2.[5] The School Board also submitted exhibits for the Hearing Officer's review. Again, despite being reminded by the Hearing Officer that plaintiffs had not introduced exhibits into the record, plaintiffs failed to seek to offer Dr. Federici's report *or any other exhibit* as evidence at the due process hearing. *See id.* at 18 and n.2.

On April 1, 2019, the Hearing Officer[6] ruled in favor of the School Board in a 24-page Decision. *See* Decision at 23. At the outset, based on the due process hearing complaint submitted by plaintiffs, the Hearing Officer identified four issues raised at the hearing:

> (i) whether the School Board correctly determined on July 17, 2018 that P.G. did not require an independent educational plan;
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> (ii) whether the Section 504 Plan enacted by the School Board **[*6]** on July 17, 2018 was appropriate;
> (iii) whether the eligibility committee considered the neuropsychological evaluation prepared by Dr. Federici; and
> (iv) whether plaintiffs were given an opportunity to participate in the meeting and have their input considered.

See Hearing Officer Decision ("Decision") at 2.

In her Decision, the Hearing Officer first found that the School Board correctly determined that P.G. was not eligible to receive special education services under the **IDEA.** In this regard, the Hearing Officer found:

> (i) that P.G. was meeting academic standards;
> (ii) that P.G. demonstrated the capacity to comprehend course material;
> (iii) that P.G. did not exhibit unusual or alarming conduct; and
> (iv) that P.G.'s teachers did not recommend special education for him.

See id. at 19. Indeed, the Hearing Officer noted that, during the 2017-2018 school year, P.G. showed significant growth in academic performance and in attention to tasks in the classroom setting. Petz, who was designated as an expert, testified that she performed an educational evaluation of P.G. and that P.G.'s achievements all fell within the normal range. Tr. at 519-22. Similarly, one of P.G.'s teachers testified that P.G. had shown **[*7]** growth in all subject areas. Tr. at 81-82.

Next, the Hearing Officer found that the School Board reviewed Dr. Federici's evaluation during the Eligibility Meeting and that Mrs. Greenhill had conceded as much in her testimony. Decision at 17, 21. The Hearing Officer noted that Fromal testified that the School Board's eligibility determination form specifically referred to "the medical findings from Dr. Federici" and that Dr. Federici's report was discussed during the Eligibility Meeting. *Id.* at 14(citing Tr. at 270-71). Petz also testified that Dr. Federici's report was considered. *Id.* at 17 (citing Tr. at 537). The Hearing Officer also found it important that Mrs. Greenhill acknowledged in the due process hearing that the eligibility team

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[5] Importantly, over the objection of the School Board, the Hearing Officer permitted Dr. Federici to testify electronically, rather than in person. Plaintiffs, however, chose not to have Dr. Federici as a witness either electronically or in person. *See* Decision at 17. Accordingly, the only expert witnesses to offer testimony at the due process hearing were the two School Board employees.

[6] A hearing officer is chosen from a list of hearing officers maintained by the Office of the Executive Secretary of the Supreme Court of Virginia. A hearing officer must be a member in good standing of the Virginia Bar, must have been in practice for at least five years, and must have completed a training course approved by the Executive Secretary of the Supreme Court. *See* Va. Code §2.2-4024.

had read the report and "took [Dr. Federici's report] into consideration." *Id.* The Hearing Officer also found that plaintiffs were provided the opportunity to participate in the Eligibility Meeting and did participate in that meeting. Decision at 23. Specifically, the Hearing Officer found that plaintiffs were asked to participate during the Eligibility Meeting by school employees and that school employees attempted to solicit questions and concerns from plaintiffs during that meeting. *Id.* at 4. The Hearing **[*8]** Officer noted that plaintiffs declined to express their concerns to the eligibility team and did not speak much during the meeting. *Id.* at 4-5. Importantly, the Hearing Officer relied on testimony from the School Board's employees that the parents' views on various topics were sought during the Eligibility Meeting and that the parents did not express disagreement with some of the eligibility team decisions regarding appropriate areas of focus. *Id.* at 6. The Hearing Officer also noted that, at the Eligibility Meeting, plaintiffs were accompanied by Joyce Visnick, a private speech therapist, apparently for the purpose of assisting plaintiffs. *Id.* at 3.

With respect to the Section 504 Plan, the hearing officer found that plan was "consistent with the data presented and considered by the eligibility committee" and was appropriate. Decision at 22. The Hearing Officer noted that the eligibility team concluded that P.G. did not qualify as a student with a disability under the "Other Health Impairment" classification, the only potentially applicable classification discussed at the hearing or proposed by plaintiffs. *Id.* at 5. Again, the Hearing Officer relied on testimony regarding P.G.'s significant growth over the 2017-18 school year, without special **[*9]** education services. *Id.* at 6. The Hearing Officer also noted testimony from school employees that the Section 504 Plan had been working for P.G. and that P.G. was viewed as a success story at the school. *Id.* at 9, 11.

On June 28, 2019, plaintiffs filed this appeal from the Decision of the Hearing Officer to the district court as permitted pursuant to the IDEA. On September 20, 2019, oral argument was heard in the district court. In the course of oral argument, the parties made several references to the due process hearing transcript. Accordingly, the School Board was ordered to submit a copy of the hearing transcript for the record and it did so. That hearing transcript has been reviewed in this appeal.

On February 3, 2020, current counsel entered an appearance on behalf of plaintiffs. Counsel did not enter an appearance on behalf of P.G. On February 11, 2020, plaintiffs moved to produce additional evidence, including further evaluations of P.G. as well as testimony by Mrs. Greenhill and Dr. Federici. The School Board has not yet filed a response to plaintiffs' motion, although the time to do so has not yet expired.

II.

It is first necessary to address whether plaintiffs, P.G.'s parents, are permitted to pursue claims **[*10]** on behalf of their son P.G. Settled authority makes clear that they may not do so. The Fourth Circuit has held that "non-attorney parents may not litigate the claims of their minor children in federal court." *Myers v. Loudoun Cnty. Pub. Schs.*, 418 F.3d 395, 401 (4th Cir. 2005). Although the Supreme Court has held that "[p]arents enjoy rights under IDEA; and they are, as a result, entitled to prosecute IDEA claims on their own behalf," *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 531, 127 S. Ct. 1994, 167 L. Ed. 2d 904 (2007), courts within the Fourth Circuit and elsewhere have consistently required parents in post- *Winkleman* IDEA cases to secure counsel to litigate claims asserted solely on behalf of a minor child.[7] While this action is clearly instituted on behalf of P.G., plaintiffs also

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[7] *See, e.g., Catharine W. v. Sch. Bd of Va. Beach*, No. 2:17-cv-645, 2018 U.S. Dist. LEXIS 160446, 2018 WL 4474688, at *5 (E.D. Va. Sept. 4, 2018) (holding *"Winkelman* does not authorize non-attorney parents to file claims*on behalf of their minor*children") (emphasis in original); *B.D. ex rel. Dragomir v. Griggs*, No. 1:09-cv-439, 2010 U.S. Dist. LEXIS 70926, 2010 WL 2775841, at *5 (W.D.N.C. July 13, 2010) **[*11]** *aff'd* 419 F.App'x 406 (4th Cir. 2011); *see also Foster v. Bd. of Educ. of City of Chicago*, 611 F. App'x 874, 877 (7th Cir. 2015) ("[Me have repeatedly held that the rule prohibiting a nonlawyer from representing another person extends to a parent attempting to represent her minor child pro se."); *I.K. ex rel. B.K. v. Haverford Sch. Dist.*, 567 F. App'x 135, 136 n.1 (3d Cir. 2014) (holding that parent could not represent child *pro se* on appeal); *FuQua v. Massey*, 615 F. App'x 611, 612 (11th Cir. 2015) (holding that "the district court properly granted the motion to dismiss because Fuqua sought to represent her minor daughter, but, as a non-attorney, she was not permitted to do so").

seek relief on their own behalf. *See* Compl. at 1 ("seeks a ruling in favor of the Parent and Student"); *id.* at 34 ("Reverse and vacate the Hearing Officer's April 1, 2019 Decision to the extent it was adverse to the Parent . . ."). Moreover, plaintiffs are *pro se* and therefore the complaint should be construed liberally as asserting claims not only on behalf of P.G. but also on behalf of plaintiffs. *See King v. Rubenstein*, 825 F.3d 206, 212-14 (4th Cir. 2016).[8] Accordingly, the analysis properly proceeds to the merits of the appeal.

III.

Before reaching the merits of this appeal from the Hearing Officer's Decision, it is necessary to consider plaintiffs' attempt to supplement the record with additional evidence. Specifically, plaintiffs seek to introduce, pursuant to 20 U.S.C. § 1415(i)(2)(C)(ii), the following evidence: (i) P.G.'s measure of academic progress ("MAP") for the Spring, Fall, and Winter 2019; (ii) testimony from Mrs. Greenhill regarding payments to a special education tutor in 2018; and (iii) testimony by Dr. Federici. At this time, the School Board has not yet had the opportunity to file a response to plaintiffs' motion. Because the supplemental evidence proposed is untimely and promotes hindsight-based review, the motion for additional evidence must be denied.

To be sure, the IDEA provides that district courts "shall hear additional evidence at a party's request" when reviewing a hearing officer's decision. 20 U.S.C. § 1415(i)(2)(C). Nonetheless, the Fourth Circuit has sensibly recognized that there are limited to this requirement; specifically, the Fourth Circuit has held that district courts have the authority to tailor IDEA proceedings. *See Springer v. Fairfax Cnty. Sch. Bd.*, 134 F.3d 659, 666-67 (4th Cir. 1998); *Schaffer ex rel. Schaffer v. Weast*, 554 F.3d 470, 477 (4th Cir. 2009). In *Springer*, the Fourth Circuit held that such authority **[*12]** was necessary to protect the role of due process hearings as the primary forum in which to resolve disputes and to avoid turning due process hearings into "mere dress rehearsal." *Id.* at 667. Following the First Circuit's decision in *Town of Burlington v. Dept. of Educ.*, 736 F.2d 773, 790 (1st Cir. 1984), the Fourth Circuit held that exclusion of "testimony from all who did, or could have, testified before the due process hearing would be an appropriate limit in many cases." *Springer*, 134 F.3d at 667.[9] The Fourth Circuit has also cautioned that district courts to be wary of evidence that arises only after an due process hearing, because it undercuts the review process. *Schaffer ex rel. Schaffer v. Weast*, 554 F.3d 470, 477 (4th Cir. 2009). [10]

An analysis of each of the proposed pieces of evidence makes clear that plaintiffs' motion to supplement the record must be denied. To begin with, plaintiff suggests that P.G.'s Spring, Fall, and Winter 2019 MAP scores should be admitted. Plaintiff asserts that these scores were not available in March 2019 during the administrative due process hearing. Yet, this is precisely the kind of post-hearing evidence that the Fourth Circuit in *Schaffer* cautioned against including. Here, the MAP scores were not available at the time of the due process hearing. As the Fourth Circuit noted in *Schaffer*,

> Assigning dispositive **[*13]** weight to evidence that arises only after the administrative hearing presents one additional and important danger: turning district court review of IEPs into a second-guessing game that will only harm the interests of the disabled children the statute was intended to serve.

554 F.3d at 477. This is exactly the kind of hindsight evidence that must be excluded. Moreover, admitting such evidence would defeat the purpose of the administrative process, because both parties would need to introduce

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[8] *See Sturgis v. Hayes*, 283 F. App'x 309, 312 (6th Cir. 2008) (permitting parents to proceed where, although the parents "did sue on behalf of their children, they also brought all of their claims on their own behalf').

[9] *See Avijan v. Weast*, 242 F. App'x 77, 81 (4th Cir. 2007) (applying "strict" *Springer* standard and affirming decision to exclude additional evidence that was available but not presented at due process hearing).

[10] The Fourth Circuit has held: "Judicial review of IEPs under the IDEA is mean to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was reasonably calculated to enable the child to receive educational benefits. But this prospective review would be undercut if significant weight were always given to evidence that arose only after an IEP was created." *Schaffer*, 554 F.3d at 477 (internal citations omitted).

witnesses and other evidence to explain the results and assign meaning to them. Accordingly, the 2019 MAP scores will not be admitted.

Next, plaintiffs seeks to introduce testimony from Mrs. Greenhill regarding retention of and payments to a tutor and testimony from Dr. Federici regarding P.G.'s need for special instruction. The motion with respect to these two witnesses must also be denied, because plaintiffs did not introduce this testimony at the due process hearing. To begin with, Mrs. Greenhill was available to testify and did testify at the due process hearing. While other witnesses referenced a tutor, Mrs. Greenhill did not. Moreover, Mrs. Greenhill's proposed testimony appears to be nothing more than an **[*14]** attempt to embellish her prior due process hearing testimony. In *Springer*, the Fourth Circuit held that this kind of embellishing testimony should not be permitted, because it reduces "the proceedings before the state agency to a mere dress rehearsal." *Springer*, 134 F.3d at 667.

The request to supplement with respect to Dr. Federici's testimony meets the same fate. Dr. Federici was not called as a witness, despite substantial testimony regarding his report. *See* Decision at 18 n.2. According to plaintiffs' motion, Dr. Federici would testify to both information available prior to the due process hearing, his diagnosis of P.G., as well as the new MAP scores, which became available after the due process hearing and will not be admitted. Plaintiffs made a strategic decision not to call Dr. Federici,[11] or present expert evidence, at the due process hearing and cannot "escape the consequences of a litigation strategy gone awry" by seeking to introduce his opinions now. *Springer*, 134 F.3d at 667. The *Springer* standard is a "strict approach," but it prevents parties from undermining the administrative process by deciding not to introduce relevant evidence at the due process hearing. *See Avjian*, 242 F. App'x at 81.

In sum, plaintiffs cannot undermine the Hearing Officer's Decision by pointing **[*15]** to evidence not available at the due process hearing or which plaintiffs chose not to introduce at that hearing. Both the additional testimony from Mrs. Greenhill and the new testimony from Dr. Federici must be excluded under *Springer*, which held that "exclusion of testimony from all who did, or could have, testified before the due process hearing would be an appropriate limit in many cases." *Springer*, 134 F.3d at 667. And it is so here. Accordingly, the motion for additional evidence must be denied.

IV.

A district court reviewing a state administrative decision under the IDEA applies a "modified *de novo* review, giving 'due weight' to the underlying administrative proceedings." *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015). The party seeking to overturn a hearing officer's decision bears the burden of proof in showing that the decision was erroneous. *See Barnett v. Fairfax Cnty. Sch. Bd.*, 927 F.2d 146, 152 (4th Cir. 1991). In particular, the district court should consider the factual findings in an IDEA state agency decision to be *prima facie* correct. *See Kirkpatrick v. Lenior Cnty. Bd. of Educ.*, 216 F.3d 380, 385 (4th Cir. 2000). When factual findings are "regularly made," a reviewing court must explain any disagreements it has with or deviations it takes from those findings. *Cnty. Sch. Bd. of Henrico v. Z.P.*, 399 F.3d 298, 304 (4th Cir. 2005). A district court must also give due regard to a hearing officer's judgments as to the credibility of witnesses. *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 104-05 (4th Cir. 1991).

A [*16] .

In determining whether a hearing officer's findings were regularly made, the Fourth Circuit has appropriately focused on the *process* by which those findings were reached. In *J.P. ex rel. Peterson v. Cnty. Sch. Bd. of Hanover Cnty., Va.*, 516 F.3d 254 (4th Cir. 2008), the Fourth Circuit recognized that the process is "regular" where, as here,

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[11] Importantly, although plaintiffs made the strategic decision not to call Dr. Federici as a witness, there was significant testimony regarding Dr. Federici's report from other witnesses at the due process hearing and the consideration it received during the Eligibility Meeting.

> the hearing officer conducted a proper hearing, allowing the parents and the School Board to present evidence and make arguments, and the hearing officer by all indications resolved factual questions in the normal way, without flipping a coin, throwing a dart, or otherwise abdicating his responsibility to decide the case.

Id. at 259. In this case, the Hearing Officer: (i) conducted a multi-day hearing; (ii) permitted opening statements by the parties; (iii) permitted witness testimony, including direct and cross-examination; (iv) permitted the admission of exhibits; (v) permitted the parties to object to testimony and exhibits; and (vi) permitted the filing of post-hearing briefs containing proposed findings of fact and conclusions of law. *See* Decision at 2. Moreover, the Decision is thorough, reciting the Hearing Officer's factual findings, how the Hearing Officer evaluated credibility decisions, and how the Hearing Officer reached her ultimate decision. *See* ***[*17]*** Decision. Thus, the Decision is entitled to deference and is *prima facie* correct.

In attacking the Decision, plaintiffs argue: (i) that the School Board failed to consider Dr. Federici's report; (ii) that the Hearing Officer's credibility determinations were incorrect; (iii) that plaintiffs were denied meaningful participation in the Eligibility Meeting, in part because the School Board failed to provide counseling and training; and (iv) the School Board failed to provide P.G. with FAPE. Plaintiffs' disagreement with the result of the due process hearing does not reveal error. *See Tice ex rel. Tice v. Botetourt Cnty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990) ("Neither the district court nor this court should disturb an IEP simply because we disagree with its content."). Moreover, each of plaintiffs' arguments fails to demonstrate that the Hearing Officer erred. Accordingly, the School Board's motion must be granted.

Plaintiffs first argue that the eligibility team did not consider Dr. Federici's report and that the Hearing Officer's Decision to the contrary is incorrect. In making this argument, plaintiffs focus on Mrs. Greenhill's testimony that she did not have the opportunity to review the report *at* the Eligibility Meeting. *See* Opp'n at 10-11. Plaintiffs are **[*18]** incorrect, as the testimony before the Hearing Officer was that the hearing recessed to provide members time to review the report. *See* Decision at 4 (citing Transcript). Moreover, as the Hearing Officer's Decision and the Transcript both disclose, there was testimony from multiple witnesses, and exhibit evidence, indicating that Dr. Federici's report was considered by those present at the Eligibility Meeting. *See* Decision at 12-13, 17 (recounting the testimony of various School Board witnesses stating that they had read Dr. Federici's report); Tr. at 248-49, 267-68, 270-71, 398-99, 441, 537-38, 573.[12] In her testimony, Mrs. Greenhill conceded as much when she testified that she "thought that they had read [Dr. Federici's report] and everybody took it into consideration." Tr. at 472.[13] Accordingly, plaintiffs first procedural challenge to the administrative proceedings fails.

Next, plaintiffs contend that the Hearing Officer incorrectly weighed the credibility of various witnesses. In this regard, the Hearing Officer found that the "professional judgments and opinions" of the School Board's witnesses were "highly credible," "appropriate," and "supported by the testimony and evidence presented." Decision at 22. On the other hand, **[*19]** the Hearing Officer found Mrs. Greenhill "to be less credible" because "she is not a teacher or conversant with special education law or its procedures." *Id* at. 23. Plaintiffs cite no persuasive reason or record evidence that undermines these conclusions. Plaintiffs argue that "the hearing officer's credibility determinations as it relates to the School Board's claims were inconsistent and unsupported by the evidence." Opp'n at 12. None of the testimony identified in plaintiffs' opposition brief undermines the Hearing Officer's credibility determinations. Instead, plaintiffs' arguments focus on their contention that Dr. Federici's report was not considered and that P.G.

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[12] Plaintiffs complain that Dr. Federici's report was not read aloud at the Eligibility Meeting, without explaining why this was necessary. *See* Opp'n at 8. The testimony at the due process hearing establishes that Dr. Federici's report was considered and reading the report aloud would have been unnecessary and an inefficient use of time.

[13] Although plaintiffs place great weight on Dr. Federici's report in this appeal, they neither made Dr. Federici available to testify at the due process hearing nor introduced his report as evidence. *See* Decision at 17-18. In so doing, plaintiffs made a calculated decision and ran the risk that the Hearing Officer — or a reviewing court — would not be able to accurately review whether defendant gave appropriate weight to Dr. Federici's report. *See Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004) ("For regardless of which side has the burden of proof in an administrative hearing, parents will have to offer expert testimony to show that the proposed IEP is inadequate."). In any event, the evidence at the due process hearing was that defendant did consider Dr. Federici's report at the Eligibility Meeting.

requires specialized instruction. *See* id. at 12-13. As the School Board correctly points out that "[t]he mere fact that the hearing officer accepted the evidence of [one party] over [the other] is not a reason to reject the hearing officer's findings." *Z.P.*, 399 F.3d at 305. In sum, the Hearing Officer's credibility determinations are entitled to deference and plaintiffs fail to allege plausible facts demonstrating that those determinations were incorrect. Thus, plaintiffs procedural challenge also fails in this respect.

Plaintiffs next argue that they were **[*20]** not permitted to participate meaningfully in the Eligibility Meeting. In this regard, plaintiffs argue that, because they did not understand Dr. Federici's report or the entirety of the IDEA process, they were not permitted to participate. The IDEA contains procedural safeguards that provide parents "an opportunity for meaningful input into all decisions affecting their child's education." *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). Courts have sensibly rejected, however, an interpretation of the IDEA that would "guarantee that parents must fully comprehend and appreciate to their satisfaction all of the pedagogical purposes in the IEP." *Colonial Sch. Dist. v. G.K. by and through A.K.*, 763 F. App'x 192, 198 (3d Cir. 2018). Thus, courts have not required "perfect comprehension by parents" and construe the IDEA to require "serious deprivation," before parents' participation rights are impacted. *Id.* [14] Moreover, at both the Eligibility Meeting and the due process hearing, plaintiffs were assisted by an advocate,[15] who was presumably there to clarify and explain matters for plaintiffs. *See* Tr. at 491. Additionally, plaintiffs had access to Dr. Federici, because he was plaintiffs' expert, and presumably plaintiffs could, at any time, have asked Dr. Federici to explain any **[*21]** portion of the report that they did not understand. Therefore, although plaintiffs had resources available to them to explain processes or diagnoses that they did not understand, it appears that plaintiffs did not utilize those resources and instead place the burden on the School Board to educate plaintiffs to plaintiffs' satisfaction. Such a burden goes far beyond the requirement of meaningful participation. Accordingly, the Hearing Officer's finding that plaintiffs participated in a meaningful way at the Eligibility Meeting is not error.

Plaintiffs also argue that their participation at the Eligibility Meeting was not meaningful because their concerns were overlooked. *See* Opp'n at 12-13. That plaintiffs' views did not carry the day does not mean that they did not participate in a meaningful way. *See Paolella ex rel. Paolella v. D.C.*, 210 F. App'x 1 (D.C. Cir. 2006) (rejecting parents' argument that they did not participate meaningfully where "the parents disagreed with the DCPS placement decision"). [16] Here, plaintiffs attended the Eligibility Meeting with an advocate and provided input, including consideration of Dr. Federici's report. *See* Decision at 23. Moreover, although plaintiffs complain that the Eligibility **[*22]** Meeting failed to address their concerns, Mrs. Greenhill testified that she did not express her concerns to the team or speak much at all at the Eligibility Meeting. *See* Decision at 4-5; Tr. at 491-92. Thus, when given the opportunity to participate meaningfully in the Eligibility Meeting, plaintiffs declined to do so. Nonetheless, the School Board's employees testified that they considered Dr. Federici's report and plaintiffs were given opportunities to have input. That plaintiffs did not get their desired result does not undermine their participation, as the "IDEA does not mandate that parental preferences guide educational decisions." *M.M. v. Dist. 00001 Lancaster*

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[14] Plaintiffs cite 34 C.F.R. § 300.34(c)(8) to support their argument that defendant was required to educate them regarding Dr. Federici's report and the IDEA/IEP process. Section 300.34(c) defines "related services," which *may* include: (i) assisting parents in understanding the special needs of their child; (ii) providing parents with information about child development, and (iii) helping parents acquire the necessary skills that will allow them to support the implementation of the IEP. *See* 34 C.F.R. § 300.34(c)(8). This section does not require the type of education and training that plaintiffs suggest here, namely assistance with the interpretation of a specific report provided by the parents and assistance with understanding the IDEA more generally. Moreover, this section "does not mandate the provision of parent counseling." *K.L. ex rel. M L. v. N.Y. City Dept. of Educ.*, No. 11-cv-3733, 2012 U.S. Dist. LEXIS 124460, 2012 WL 4017822, at 13, n.5 (S.D.N.Y. Aug. 23, 2012).

[15] At the Eligibility Meeting, plaintiffs were apparently assisted by Ms. Visnick and, at the due process hearing, plaintiffs were apparently assisted by Ms. Lucas.

[16] *See also T.R. v. Sch. Dist. of Phila.*, No. 15-cv-4782, 2019 U.S. Dist. LEXIS 66002, 2019 WL 1745737 (E.D. Pa. Apr. 18, 2019) (holding that "meaningful participation" does not "proscribe a certain course of conduct by a school district"); *B.P. v. N Y.C. Dept. of Educ.*, 841 F. Supp.2d. 605, 613 (E.D.N.Y. Jan. 6, 2012) (noting that the parents "real objection is not that they lacked the opportunity to participate in the development of the IEP, but rather that the IEP ultimately did not incorporate their concerns").

Cnty. Sch., 702 F.3d 479, 488 (8th Cir. 2012). Accordingly, the Hearing Officer did not err when she determined that plaintiffs participated in the Eligibility Meeting, and plaintiffs final procedural challenge must therefore fail.

Finally, plaintiffs argue that they have adequately pled a substantive denial of FAPE for P.G. Plaintiffs argue that the testimony at the due process hearing establishes that P.G. requires specialized instruction and that the Section 504 Plan fails to provide required interventions. *See* Opp'n at 13. In the complaint and their other pleadings, plaintiffs' **[*23]** allegations regarding a substantive FAPE violation are limited and conclusory.[17]

In evaluating a substantive FAPE allegation, a court must determine "whether, taking account of what the school knew or reasonably should have known of the student's needs at the time, the [plan] it offered was reasonably calculated to enable the specific student's progress." *Z.B. v. D.C.*, 888 F.3d 515, 524, 435 U.S. App. D.C. 194 (D.C. Cir. 2015); *R.F. v. Cecil Cnty. Pub. Schs.*, 919 F.3d 237, 246 (4th Cir. 2019) (holding "to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"). The Hearing Officer found that P.G.: (i) "has continued to make progress in the general education setting"; (ii) "is meeting grade-level benchmarks in math and reading and has received all satisfactory and outstanding marks" on all by one of his report cards; and (iii) has been behaving appropriately and commensurate with his third-grade peers. Decision at 16. These findings are supported by the testimony from the due process hearing. *See* Tr. at 25, 8183, 86-87, 92, 151, 155, 159-161, 217, 221. Indeed, Fromal, who was accepted without objection as an expert witness, testified that P.G. "was making progress," "was responding well to teacher redirection," **[*24]** and "was not in need of specially designed instruction." Decision at 13. Plaintiffs did not introduce any other expert opinions to contradict this testimony. *See id.*18, n.2. Accordingly, the Hearing Officer found that the School Board provided a FAPE to P.G. The Hearing Officer's finding in this regard is entitled to deference and plaintiffs' conclusory allegations are insufficient to establish error in the administrative process or a substantive violation of the IDEA.[18]

In sum, the Hearing Officer's Decision was regularly made and is entitled to deference. The documents relied upon by plaintiffs, namely the Decision and the Transcript, show that plaintiff cannot plausibly allege that the Hearing Officer erred in her decision because: (i) the School Board considered Dr. Federici's report; (ii) the Hearing Officer's credibility determinations were not error and are entitled to deference; (iii) plaintiffs were able to participate meaningfully in the Eligibility Meeting; and (iv) the School Board provided P.G. with a FAPE. Accordingly, the School Board's motion must be granted and judgment must be entered in favor of the School Board.[19]

B.

Plaintiffs' complaint also alleges, for the first time, that P.G. has a visual **[*25]** impairment and requests, also for the first time, that compensatory services from 2017 to present be awarded and that mandatory professional development regarding parental participation be ordered. These issues were not raised in plaintiffs' due process complaint or during the due process hearing. the School Board thus argues that these claims must be dismissed for

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[17] Most of plaintiffs' allegations in the complaint, as well as arguments in their opposition brief, assert that P.G. has been denied FAPE by virtue of the lack of meaningful participation by plaintiffs in the Eligibility Meeting and the failure of defendant to consider Dr. Federici's report. In this regard, plaintiffs argue that defendant has engaged in procedural violations of the IDEA. As discussed *supra*, those arguments are meritless.

[18] In their complaint, plaintiffs also request that declaratory judgment be awarded, including a finding that defendant "intentionally abandoned its federal responsibility to meet the requirements of FAPE." Compl. ¶ 106. Because the Hearing Officer did not err in determining that defendant provided a FAPE, the declaratory judgment sought by plaintiffs is inappropriate.

[19] Because defendant has provided P.G. with a FAPE, plaintiffs are not entitled to "advocacy fees" either as attorney's fees or as a related service. Opp'n at 14-15. Plaintiffs have not alleged any facts regarding the services provided by their advocates at the Eligibility Meeting or at the due process hearing or provided any legal authority establishing that plaintiffs are entitled to such fees. Here, it is unnecessary to decide whether advocacy services would qualify as a related service, because defendant provided a FAPE without additional related services.

failure to exhaust. In their opposition brief, plaintiffs do not appear to dispute that these issues were not presented during the due process hearing.

Under the IDEA, parents asserting a violation must first request a due process hearing. *See* 20 U.S.C. § 1415(f). The Fourth Circuit has held that the failure of parents to exhaust administrative remedies, as plaintiffs have plainly done here, "deprives us of subject matter jurisdiction over those claims" and those "claims . . . must fail." *M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 536 (4th Cir. 2002). Accordingly, plaintiffs claims based on issues not presented to the Hearing Officer have not been administratively exhausted and judgment on these claims must be entered in favor of the School Board.

V.

Although it is not clear that plaintiffs state any claims under Section 504, the complaint is construed as an attempt to allege that the Section 504 Plan is deficient. Plaintiffs **[*26]** allege that the School Board engaged in bad faith by failing to consider Dr. Federici's report, refusing to collect data on the effectiveness of the Section 504 Plan, and failing to monitor the Section 504 Plan.

Although plaintiffs may bring both a Section 504 claim and an IDEA claim, the Fourth Circuit has held that where the relief sought is for denial of an appropriate education plaintiffs may not avoid the IDEA's exhaustion requirements. *See Z.G. v. Pamlico Cty. Pub. Sch. Bd. of Educ.*, 744 F.App'x 769, 778-79 (4th Cir. 2018) (holding Section 504 claims subject to IDEA's administrative exhaustion requirements because "the crux of the claims was to alter Z.G.'s educational placement [and] secure educational services").[20] Here, plaintiffs Section 504 claims focus on their argument that the Section 504 Plan is ineffective and does not provide P.G. with what he needs to succeed in school. These claims are inextricably bound up with and mirror plaintiffs' IDEA claims. Accordingly, plaintiffs were required to exhaust their Section 504 claims. They did not do so; therefore, judgment must be entered in favor of the School Board on plaintiffs' Section 504 claims.

In the context of the education of a child with a disability, a finding of discrimination based on disability **[*27]** requires a showing of bad faith or gross misjudgment on the part of the School Board. *See Sellers by Sellers v. Sch. Bd. of City of Manassas, Va.*, 141 F.3d 524, 529 (4th Cir. 1998). This is because Section 504 "does not create any general tort of educational malpractice." *Barnett v. Fairfax Cnty. Sch. Bd.*, 721 F. Supp. 755, 757 (E.D. Va. 1989). To prove discrimination in the education context, "something more than a mere failure to provide [FAPE] required by [the IDEA] must be shown." *Sellers*, 141 F.3d at 529. Accordingly, the 'bad faith or gross misjudgment' standard is extremely difficult to meet, especially given the great deference to which local school officials' educational judgments are entitled." *Doe v. Arlington Cty. Sch. Bd.*, 41 F. Supp. 2d 599, 608-09 (E.D. Va. 1999).

Plaintiffs' allegations do not meet this standard. To begin with, most of plaintiffs' allegations of bad faith, namely those concerning Dr. Federici's report and plaintiffs' ability to participate meaningfully in the Eligibility Meeting, have already been rejected *supra*. Plaintiffs also argue that the School Board demonstrated bad faith when it refused to collect data regarding the effectiveness of the Section 504 Plan. *See* Compl. ¶ 101; Opp'n at 17. Plaintiffs' allegations in this regard are entirely conclusory and do not identify any facts regarding what data could or should have been collected; thus, they are not sufficient to state a claim. *See Charlotte—Mecklenburg Bd. of Educ. v. B.H. ex rel. C.H. & W.H.*, No. 3:07cv189, 2008 U.S. Dist. LEXIS 83347, 2008 WL 4394191, at *7 (W.D.N.C. Sept. 24, 2008) **[*28]** (citing *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir.2008)).

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[20] *See also Tawes v. Bd. of Educ. of Somerset Cty.*, No. RDB-17-2375, 2017 U.S. Dist. LEXIS 202966, 2017 WL 6313945, at *5 (D. Md. Dec. 11, 2017) (finding that because the gravamen of Plaintiff's claims of negligence, negligence per se, violation of Title VII, and education malpractice was the denial of a FAPE, the IDEA's exhaustion requirement applied); *Vlasaty v. Wake Cty. Pub. Sch. Sys. Bd of Educ.*, No. 5:17-CV-578-D, 2018 U.S. Dist. LEXIS 160808, 2018 WL 4515877, at *6 (E.D.N.C. Sept. 20, 2018) (finding that the IDEA exhaustion requirement applied to ADA, § 504, and § 1983 claims because "Plaintiffs' claims are uniquely tied to the school environment and to [Plaintiff child's] status as a student within the school. Plaintiffs could not bring substantially the same claims against other public facilities.").

In the end, plaintiffs' allegations are nothing more than a disagreement with the Section 504 Plan and its administration. This, too, is insufficient to establish a Section 504 Claim. *See Sellers*, 141 F.3d at 529 (holding that there must be "more than an incorrect evaluation, or a substantively faulty individualized education plan, in order for liability to exist"); *B.M. ex rel. Miller v. S. Callaway R—II Sch. Dist.*, 732 F.3d 882, 888 (8th Cir.2013) ("[S]tatutory noncompliance alone does not constitute bad faith or gross misjudgment."). Even where Section 504 Plans have proven ineffective for several years, courts have held that there is no bad faith or gross misjudgment. *See Petty v. Hite*, No. DKC-13-1654, 2013 U.S. Dist. LEXIS 180349, 2013 WL 6843576, at *1, *3 (D.Md. Dec. 26, 2013). The allegations contained in plaintiffs' complaint do not meet this high bar; accordingly, judgment must be entered in favor of the School Board.

VI.

For the reasons set forth above, the School Board's motion must be granted, and judgment must be entered in favor of the School Board. An appropriate order will issue separately.

The Clerk is directed to provide a copy of this Opinion to all counsel of record.

Alexandria, Virginia

February 20, 2020

/s/ T. S. Ellis III

T. S. Ellis, III

United States District Judge

INDEPENDENT EDUCATIONAL EVALUATION REIMBURSEMENT UNDER THE IDEA: THE LATEST UPDATE*

PERRY A. ZIRKEL

The purpose of this article is to provide a practical legal checklist that updates a predecessor ELIP versions in WEST'S EDUCATION LAW REPORTER concerning independent educational evaluations (IEEs) at public expense.[1] For ease of differentiation, **the updated parts, which are largely in the footnoted supporting authority, are highlighted in underlined bold font.**

The 2004 Individuals with Disabilities Education Act (IDEA) legislation[2] and the 2006 IDEA regulations[3] left largely unchanged the parent's conditional right to obtain an independent educational evaluation (IEE) at public expense.[4] The specified conditions[5] form what amounts to a flowchart-like framework akin to the multi-step test for tuition reimbursement under the IDEA.[6] The extensive and continuing amount of hearing and review officer decisions concerning IEEs at public expense evidence not only the frequency of the issue but also the need for a careful legal analysis.[7] The primary bases for such a legal analysis are the relevant IDEA regulations, court decisions, and policy letters issued by the U.S. Office of Special Education Programs (OSEP).

The IEE reimbursement[8] checklist is arranged in the same sequence as the relevant regulation, starting with the successive pair of procedural steps and culminating in the respective pair of the substantive steps.[9] For each step, the relevant questions

* This article was published in *West's Education Law Reporter*, v. 341, pp. 555–564.

based on the regulations are in bold italics, whereas those based on OSEP letters are in italics alone.[10] The corresponding answers are in regular font. Finally, the checklist items for the two substantive steps are worded as neutral questions to avoid the unsettled issue of burden of proof.[11]

IEE REIMBURSEMENT CHECKLIST

PROCEDURAL STEPS:[12]

1. Did the parent disagree with the district evaluation[13]?

• *via notification to the district within a reasonable period of time?*[14]

If not, in various but far from all jurisdictions and circumstances,[15] it may be an equitable consideration but it is not an absolute prerequisite; thus, move on to the subsequent steps in this analysis.[16]

2. ***Did the district file for a due process hearing (or provide the requested IEE) …***

• at all?

If not, this will **sometimes** end the analysis in favor of reimbursement[17] unless there are multiple issues[18] or special circumstances,[19] including the parent's failure at step 1.[20]

• without unnecessary delay?

A delay of more than 2-3 months is likely fatal to the district's case,[21] although the exact length will depend on the circumstances rather than being a bright-line test.[22] **The district may not delay to seek additional assessments**.[23]

SUBSTANTIVE STEPS

3. ***Was the district's evaluation*** *(or reevaluation or necessary FBA)*[24] ***appropriate?***[25]

In light of the relatively skeletal substantive criteria for district evaluations and the restricted role of the procedural standards, the court outcomes have varied widely depending on the specific facts of the case and the degree of judicial deference to district actions.[26]

4. ***Was the parent's IEE appropriate***[27] ***…***

• according to the district criteria that are no more and, if necessary, less restrictive than applicable to the district's evaluation[28] **or are in** ***"substantial compliance" with the full district criteria***[29]

- As for procedures, the district may require the parents to submit the IEE report by a date certain within any state imposed deadlines,[30] but authority is split as to whether the district may require advance clearance.[31]

- As for timing, the parent's IEE:

  (a) need not be before the district's filing[32];

  (b) is not subject to a district-imposed deadline[33]

- As for IEE location and evaluator qualifications, the district may:

  (a) limit the parents to a comprehensive list if there is allowance for individual exceptions[34];

  (b) include the criteria established by the producer of evaluation instruments[35];

  (c) impose a mileage limit on the IEE as long as this does not prevent the parent from getting an appropriate evaluation[36];

  (d) restrict IEEs to evaluators within the state if there is a sufficient number of qualified evaluators within those boundaries and the parents have the opportunity for an exception based on unique circumstances[37]; and

  (e) require the IEE examiner to hold, or be eligible to hold, a particular license when the district does the same for personnel who conduct corresponding evaluation for the district unless only the district personnel may obtain said license.[38]

  (f) conversely, the district may not require (i) specified experience or non-affiliation,[39] or (ii) criteria for qualifications different from those required for the district's own evaluations.[40]

- As for methodology, the IEE need not be the same as the district's evaluation.[41]

- As for contents, the district may not prohibit the IEE evaluator from including age and grade level standards.[42]

- As for costs, a district may:

  (a) establish maximum allowable charges for specific tests if said maximum (i) allows a choice among qualified professionals, (ii) is not limited to the average fee customarily charged in that area, (iii) allows for exceptions for justified unique circumstances,[43] and (iv) applies as well to the district when it initiates an evaluation[44]; and

(b) establish "reasonable cost containment criteria applicable to [both district and parent evaluators]" but only with a provision for an exception when the parents show unique circumstances justifying a higher fee.[45]

(c) conversely, if an IEE is necessary outside the district boundaries, the district may be required—if the parent meets the "unique circumstances" exception—to pay for the expenses incurred by the parent for travel or other related costs,[46] and the district may not require parents to submit the charges first to their health care insurer.[47]

(d) finally, according to limited case law authority to date, if the parents are entitled to reimbursement, it extends to the costs of the private evaluator's presentation at the IEP meeting[48] **and is the pre-, not post-insurance amount.**[49]

[1] For the two earlier versions, see Perry A. Zirkel, *Independent Educational Evaluation Reimbursement: An Update*, 306 Ed.Law Rep. 32 (2014); Perry A. Zirkel, *Independent Educational Evaluation Reimbursement: A Checklist*, 231 Ed.Law Rep. 21 (2008). For a corresponding detailed treatment, see Perry A. Zirkel, *Independent Educational Evaluations at* ***District Expense under the Individuals with Disabilities Education Act*****, 38 J.L. & EDUC. 223 (2009).**

[2] 20 U.S.C. § 1415(B)(1) (2005); *see also id*. § 1415(d)(2)(A) (2012).

[3] 34 C.F.R. § 300.502 (2012). The only change was to limit the parent to only one IEE at public expense each time the school district conducts an evaluation with which the parent disagreed. *Id*. § 300.502(b)(5) (2012). This change represents reinstitution of a previous limitation. *See, e.g.*, Hudson v. Wilson, 828 F.2d 1059, 41 Ed.Law Rep. 830 (4th Cir. 1987); Letter to Fields, EHLR 213:260 (OSERS 1989). In a recent decision, a federal appellate court upheld the validity of this IDEA regulation in relation to the statute's purpose. Phillip C. v. Jefferson Cty. Bd. of Educ., 701 F.3d 691, 287 Ed.Law 50 (11th Cir. 2012).

[4] The scope of this checklist does not extend to IEE case law concerning issues other than reimbursement. See, e.g., K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 270 Ed.Law Rep. 479 (8th Cir. 2011); T.S. v. Bd. of Educ., 10 F.3d 87, 87 Ed.Law Rep. 386 (2d Cir. 1993); **G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 67 Ed.Law Rep. 103 (1st Cir. 1991); S.W. v. N.Y.C. Dep't of Educ., 92 F. Supp. 3d 143, 322 Ed.Law Rep. 154 (S.D.N.Y. 2015); P.G. v. N.Y.C. Dep't of Educ., 65 IDELR ¶ 43 (S.D.N.Y. 2015); James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 250 Ed.Law Rep. 194 (N.D. Ill. 2009) (concluding that district met its obligation to "consider" parent's IEE);** L.M. v. Capistrano Unified Sch. Dist., 556 F.3d 900, 242 Ed.Law Rep. 23 (9th Cir. 2009) (ruling that failure to provide equivalent opportunity for IEE observation, as required by state law, did not amount to denial of FAPE); Bd. of Educ., v. H.A., 56 IDELR ¶ 156 (S.D. W.Va. 2011), *aff'd mem*., 445 F. App'x 660 (4th Cir. 2011) (ruling that district's insistence on its choice of psychologist to conduct IHO-ordered IEE violated parents' opportunity for meaningful participation); **Dallas Indep. Sch. Dist. v. Woody, 178 F. Supp. 3d 443, 336 Ed.Law Rep. 786 (N.D. Tex. 2016); Marc M. v. Dep't of Educ. 56 IDELR ¶ 9 (D. Haw. 2011) (failure to consider IEE contributed to denial of FAPE); Staton v. District of Columbia, 63 IDELR ¶ 159 (D.D.C. 2014) (ruling that, for purpose of attorneys' fees, order of IEE to determine student's eligibility was more favorable than timely settlement offer); Mangum v. Renton Sch. Dist., 57 IDELR ¶ 252 (W.D. Wash. 2011), *aff'd mem*., 584 F. App'x 618 (9th Cir. 2014) (ruling that district opted for the reimbursement alternative and complied with the applicable IDEA and state regulations, including the requirement to consider the IEE)**; Northport Pub. Sch. v. Woods, 63 IDELR ¶ 134 (W.D. Mich. 2014) (denying dismissal of district's claim for attorneys' fees from parent's attorney); **Meridian Joint Sch. Dist. No. 2 v. D.A., 792 F.3d 1054, 320 Ed.Law Rep. 8 (9th Cir. 2015); T.B. v. Bryan Indep. Sch. Dist., 628 F.3d 240, 263 Ed.Law Rep. 490 (5th Cir. 2010); D.S. v. Neptune Twp. Bd. of Educ., 264 F. App'x 186, 232 Ed.Law Rep. 107 (3d Cir. 2008) (denying attorneys' fees where hearing officer ordered IEE at public expense but the ultimate determination was that the child was not eligible); E.P. v. Howard Cty. Pub. Sch. Sys., 68 IDELR ¶ 249 (Md. SEA 2016) (refusing to allow IEE as additional evidence upon judicial review);** T.J. v. Winton Woods City Sch. Dist., 60 IDELR ¶ 244 (S.D. Ohio 2013) (ruling that IEE was inadmissible to determine whether the IEP was appropriate when the IEP team had not had the opportunity to consider it); Plainville Bd. of Educ. v. R.N., 58 IDELR ¶ 257 (D. Conn. 2012) (ruling that district violated IEE consideration requirement but did not reach whether this violation did not result in a substantive denial of FAPE); Sch. Bd. of Manatee Cty. v. L.H., 53 IDELR ¶ 149 (M.D. Fla. 2009) (upholding ALJ's order to provide equivalent opportunity for IEE observation); **M.M. v. Lafayette Sch. Dist., 66 IDELR ¶ 217 (N.D. Cal. 2015) (preserving for further proceedings possible § 504**

retaliation claim for district's proposing additional evaluations in response to request for IEE); Letter to Savit, 64 IDELR ¶ 250 (OSEP 2014) (opining that district must provide the same opportunity for IEE observation as it does for its own personnel). It also does not include OSEP policy interpretations concerning IEEs more broadly. See, e.g., **Letter to Carroll, 68 IDELR ¶ 279 (OSEP 2016) (extending the district's IEE obligation to an additional requested area);** Letter to Fisher, 23 IDELR 565 (OSEP 1995) (interpreting the right to an IEE to extent to assistive technology assessments). **Similarly, it does not extend to rulings via the IDEA's state complaint resolution process. See, e.g., Farmington Pub. Sch. Dist., 115 LRP 31117 (Mich. SEA 2015).** Finally, the coverage does not extend to otherwise relevant cases decided on technical adjudicative grounds. See, e.g., **T.P. v. Bryan Cty. Sch. Dist., 794 F.3d 1284, 320 Ed.Law Rep. 25 (11th Cir. 2015) (mootness based on triennial period for reevaluation);** David P. v. Lower Merion Sch. Dist., 29 IDELR 23 (E.D. Pa. 1998) (statute of limitations); Hyde Park Cent. Sch. Dist. v. Peter C., 21 IDELR 354 (S.D.N.Y. 1994) (jurisdiction of review officer).

[5] 34 C.F.R. § 300.502(b) (2012):

> (1) A parent has the right to an [IEE] at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the [following] conditions.
> (2) If a parent requests an [IEE] at public expense, the public agency must, without unnecessary delay, either--
> (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
> (ii) Ensure that an [IEE] is provided at public expense, unless the agency demonstrates in [an impartial hearing under the IDEA] … that the evaluation obtained by the parent did not meet agency criteria

For the additional regulatory language concerning agency criteria at the last step, see *id*. § 300.502(e) (2012):

> (1) If an [IEE] is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an [IEE].
> (2) Except for the criteria described in [the previous] paragraph …, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

[6] *See, e.g., id*. § 300.148(b)-(e) (2012). For an analysis of the case law, see, e.g., Thomas Mayes & Perry Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350 (2001). For an analogous flowchart-like synthesis, see Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 Ed.Law Rep. 785 (2012).

[7] In general these administrative decisions do not have precedential value in either strict or broader sense of this doctrine. For a synthesis showing the frequency of IDELR-published hearing/review officer decisions specific to one step of the applicable test—the appropriateness of school district evaluations—and the relative neglect of these three stronger legal sources at the federal level (i.e., the regulations, court decisions, and OSEP policy letters), see Susan Etscheidt, *Ascertaining the Adequacy, Scope, and Utility of District Evaluations*, 69 EXCEPTIONAL CHILD. 227 (2003).

[8] The term IEE reimbursement is used generically herein because most of the pertinent cases arise from a request for reimbursement, although a few are limited to the threshold right, where the IEE is yet to happen and thus its appropriateness and payment are prospective only.

See, e.g., M.Z. v. Bethlehem Area Sch. Dist., 521 F. App'x 74, 296 Ed.Law Rep. 92 (3d Cir. 2013) (reversed hearing officer's order for district to expand its inappropriate evaluation, instead ruling that in wake of failing to provide an appropriate evaluation the district must provide publicly funded IEE).

[9] *See supra* note **5**.

[10] For the legal effect of such policy interpretations, see, e.g., Raymond S. v. Ramirez, 918 F. Supp. 1280, 108 Ed.Law Rep. 196 (N.D. Iowa 1996); *see also* Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?* 171 Ed.Law Rep. 391 (2003).

[11] The language in the regulation puts the burden on the district, but the intervening effects of the Supreme Court's decision in *Schaffer v. Weast*, 546 U.S. 49 (2005) and any opposing state law leaves this matter an open question. **For the interrelationship with the regulatory provision for district filing, see Damarcus S. v. District of Columbia, 190 F. Supp. 3d 35, 338 Ed.Law Rep. 823 (D.D.C. 2016).**

[12] In a case that does not fit one of the procedural steps the regulatory framework specifically but imported the overall two-step test for procedural FAPE due to the parent's requested remedy, the D.C. district court ruled that even if the school district's delay in authorizing an IEE was a procedural violation, the child was not entitled to compensatory education in the absence of resulting substantive loss to the student. Fullmore v. District of Columbia, 67 IDELR ¶ 144 (D.D.C. 2016).

[13] For the meaning of evaluation or reevaluation within this context and the preemptive effect of federal regulations, see Haddon Twp. Sch. Dist. v. N.J. Dep't of Educ., 67 IDELR ¶ 44 (N.J. Super. Ct. App. Div. 2016); *cf*. F.C. v. Montgomery Cty. Pub. Sch., 68 IDELR ¶ 6 (D. Md. 2016) (absence of reevaluation under federal or state law, thereby defeating parent's claim of disagreement). For a recent OSEP interpretation regarding another scope issue, see Letter to Baus, 65 IDELR ¶ 81 (OSEP 2015) (observing that if disagreeing with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that the child needs, whereupon the district may file for a hearing to show that its evaluation is appropriate without that addition).

[14] *See, e.g.*, Letter to Fields, EHLR 213:260 (OSERS 1989). However, the parent's failure to provide notification does not nullify the parent's otherwise justified right to reimbursement. *See, e.g.*, Letter to Anonymous, 55 IDELR ¶ 106 (OSEP 2010); Letter to Imber, 19 IDELR 352 (OSEP 1992); Letter to Kerry, 18 IDELR 527 (OSEP 1991); Letter to Thorne, 16 IDELR 606 (OSEP 1990). Without addressing the OSEP interpretations, courts have split on whether a notification requirement applies. *Compare* Phillip C. v. Jefferson Cty. Bd. of Educ., 57 IDELR ¶ 97 (N.D. Ala. 2011), *aff'd on other grounds*, 701 F.3d 691, 287 Ed.Law 50 (11th Cir. 2012), *with* R.A. v. Amador Cty. Unified Sch. Dist., 58 IDELR ¶ 152 (E.D. Cal. 2012); *cf*. T.G. v. Midland Sch. Dist., 848 F. Supp. 2d 902, 282 Ed.Law Rep. 425 (C.D. Ill. 2012) (lack of notification in combination with same lack in hearing complaint was fatal). Moreover, OSEP has taken the position that a district may not require a specified period to correct the perceived deficiency. Letter to Gray, EHLR 213:183 (OSEP 1988). **Finally, the threshold issue of the parent's standing to proceed in court pro se in such matters is not entirely clear. See, e.g., Foster v. City of Chicago, 611 F. App'x 874, 321 Ed.Law Rep. 146 (7th Cir. 2015).**

[15] *Compare* P.R. v. Woodmore Local Sch. Dist., 49 IDELR ¶ 31 (6th Cir. 2007); Warren G. v. Cumberland Cmty. Sch. Dist., 190 F.3d 80, 138 Ed.Law Rep. 91 (3d Cir. 1999); Bd. of Educ. of Murphysboro Cmty. Unit Sch. Dist. v. Illinois St. Bd. of Educ., 41 F.3d 1162, 96 Ed.Law Rep. 90 (7th Cir. 1994); Hudson v. Wilson, 828 F.2d 1059, 41 Ed.Law Rep. 830 (4th Cir. 1987); Raymond S. v. Ramirez, 918 F. Supp. 1280 (N.D. Iowa 1996); Mullen v. District of Columbia, 16 EHLR 792 (D.D.C. 1990; Hiller v. Bd. of Educ. of Brunswick Cent. Sch. Dist., 687

F. Supp. 735, 47 Ed.Law Rep. 91 (N.D.N.Y. 1988); *cf.* I.T. v. Dep't of Educ., 59 IDELR ¶ 219 (D. Hawaii 2012); Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 233 Ed.Law Rep. 177 (C.D. Cal. 2008) (not per se fatal), *with* P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 250 Ed.Law Rep. 517 (3d Cir. 2009); **E.F. v. Newport Mesa Unified Sch. Dist., 65 IDELR ¶ 265 (E.D. Cal. 2015), *aff'd mem.*, F. App'x , Ed.Law Rep. (9th Cir. 2017);** M.V. v. Shenendehowa Cent. Sch. Dist., 60 IDELR ¶ 213 (N.D.N.Y. 2013); M.S. v. Mullica Twp. Bd. of Educ., 485 F. Supp. 2d 555, 220 Ed.Law Rep. 231(D.N.J. 2007), *aff'd,* 263 F. App'x 264, 232 Ed.Law Rep. 92 (3d Cir. 2008); R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d 222 (D. Conn. 2005); D.H. v. Manheim Twp. Sch. Dist., 45 IDELR ¶ 38 (E.D. Pa. 2005); Krista P. v. Manhattan Sch. Dist. 225 F. Supp. 2d 873 (N.D. Ill. 2003); Penn Trafford Sch. Dist. v. C.F., 45 IDELR ¶ 156 (E.D. Pa. 2002); P.T.P. v. Bd. of Educ. of Cty. of Jefferson, 488 S.E.2d 61 (W. Va. 1997); *cf.* **Jeffries v. City of Chicago Sch. Dist. No. 299, 63 IDELR ¶ 280 (N.D. Ill. 2014) (lack of request);** K.B. v. Pearl River Union Sch. Dist., 58 IDELR ¶ 108 (S.D.N.Y. 2012); Sch. Bd. of Lee Cty. v. E.S., 49 IDELR ¶ 251 (M.D. Fla. 2008) (vague request); K.R. v. Jefferson Twp. Bd. of Educ., 37 IDELR ¶ 92 (D.N.J. 2002); Norris v. Mass. Dep't of Educ., 529 F. Supp. 759 (D. Mass. 1981) (state law). **In a recent case, the court awarded reimbursement where the hearing officer denied it based on the incorrect finding that the parent had failed to express the requisite disagreement. Genn v. New Haven Bd. of Educ., F. Supp. 3d , Ed.Law Rep. (D. Conn. 2016).**

[16] However, if the parents request an IEE at public expense before completion of the district's evaluation, they may have equitably eliminated any entitlement to reimbursement. *See, e.g.*, G.J. v. Muscogee Cty. Sch. Dist., 668 F.3d 1258, 277 Ed.Law Rep. 90 (11th Cir. 2012); C.S. v. Governing Bd. of Riverside Unified Sch. Dist., 321 F. App'x 630 (9th Cir. 2009); **Genn v. New Haven Bd. of Educ., F. Supp. 3d , Ed.Law Rep. (D. Conn. 2016); E.F. v. Newport Mesa Unified Sch. Dist., 65 IDELR ¶ 265 (E.D. Cal. 2015); L.M. v. Downingtown Area Sch. Dist., 65 IDELR ¶ 124 (E.D. Pa. 2015);** D.K. v. Abington Sch. Dist., 54 IDELR ¶ 119 (E.D. Pa. 2010); **R.H. v. Fayette Cty. Sch. Dist., 53 IDELR ¶ 86 (N.D. Ga. 2009**); Kirby v. Cabell Cty. Bd. of Educ., 46 IDELR ¶ 146 (S.D. W.Va. 2006); D.Z. v. Bethlehem Area Sch. Dist., 2 A.3d 712, 259 Ed.Law Rep. 740 (Pa. Commw. Ct. 2010); Letter to Zirkel, 52 IDELR ¶ 77 (OSEP 2008); *cf.* P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 250 Ed.Law Rep. 517 (3d Cir. 2009); R.H. v. Fayette Cty. Sch. Dist., 53 IDELR ¶ 86 (N.D. Ga. 2009) (prior to the initial evaluation altogether). *But cf.* J.P. v. Anchorage Sch. Dist., 260 P.3d 285, 271 Ed.Law Rep. 1077 (Alaska 2011) (child find).

[17] *See, e.g.*, Bd. of Educ. of Murphysboro Cmty. Unit Sch. Dist. v. Illinois St. Bd. of Educ., 41 F.3d 1162, 96 Ed.Law Rep. 90 (7th Cir. 1994); Evans v. Dist. No. 17 of Douglas Cty. 841 F.2d 824 (8th Cir. 1988); Jefferson Cty. Bd. of Educ. v. Lolita S., **581** F. App'x **760**, **310** Ed.Law Rep. **686** (11th Cir. 2014); K.B. v. Haledon Bd. of Educ., 54 IDELR ¶ 230 (D.N.J. 2010); *cf.* Harris v. District of Columbia, 561 F. Supp. 2d 63, 235 Ed.Law Rep. 278 (D.D.C. 2008) (ruling that IEEs include parentally requested independent functional behavioral assessments and district's failure to either fund one or file for a hearing after the parent provided the requisite disagreement and request was a denial of FAPE after the child "languished" for two years). *But see* **Seth B. v. Orleans Parish Sch. Dist., 810 F.3d 961, 326 Ed.Law Rep. 620 (5th Cir. 2016);** Phillip C. v. Jefferson Cty. Bd. of Educ., 57 IDELR ¶ 97 (N.D. Ala. 2011), *aff'd on other grounds*, 701 F.3d 691, 287 Ed.Law 50 (11th Cir. 2012).

[18] *See, e.g.*, Dudley v. Lower Merion Sch. Dist., 58 IDELR ¶ 12 (E.D. Pa. 2011); Myles v. Montgomery Cty. Bd. of Educ., 824 F. Supp. 1549, 84 Ed.Law Rep. 264 (M.D. Ala. 1994).

[19] *See, e.g.*, **A.L. v. Jackson Cty. Sch. Bd., 635 F. App'x 774, 330 Ed.Law Rep. 60 (11th Cir. 2015)**; P.R. v. Woodmore Local Sch. Dist., 49 IDELR ¶ 31 (6th Cir. 2007); A.L. v. Chicago Pub. Sch. Dist. 299, 57 IDELR ¶ 276 (N.D. Ill. 2011); ***cf.* F.C. v. Montgomery Cty. Pub. Sch., 68 IDELR ¶ 6 (D. Md. 2016) (absence of reevaluation)**.

[20] *See, e.g.*, R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d 222, 197 Ed.Law Rep. 181 (D. Conn. 2005).

[21] *Compare* D.H. v. Manheim Twp. Sch. Dist., 45 IDELR ¶ 38 (E.D. Pa. 2005) (8 months); **Hill v. District of Columbia, 68 IDELR ¶ 133 (D.D.C. 2016); Horne v. Potomac Preparatory P.C.S., F. Supp. 3d , Ed.Law Rep. (D.D.C. 2016);** Pajaro Valley Unified Sch. Dist. v. J.S., 47 IDELR ¶ 12 (N.D. Cal. 2006) (3 months), *with* J.P. v. Ripon Unified Sch. Dist., 52 IDELR ¶ 125 (E.D. Cal. 2009) (3 months, but 3 weeks from impasse); L.S. v. Abington Sch. Dist., 48 IDELR ¶ 244 (E.D. Pa. 2007), *reconsideration denied*, 50 IDELR ¶ 37 (E.D. Pa. 2008) (1.5 months not fatal); Ms. H. v. Montgomery Cty. Bd. of Educ., 56 IDELR ¶ 73 (M.D. Ala. 2011) (1.7 months but intervening justifiable events); C.W. v. Capistrano Unified Sch. Dist., 59 IDELR ¶ 163 (C.D. Cal. 2012) (41 days not fatal where parent's disagreement was vague).

[22] *See, e.g.*, Letter to Anonymous, 56 IDELR ¶ 175 (OSEP 2010); Letter to Anonymous, 23 IDELR 721 (OSEP 1994); Letter to Anonymous, 21 IDELR 1185 (OSEP 1994); Letter to Saperstone, 21 IDELR 1127 (OSEP 1994); *cf.* Letter to Smith, 16 IDELR 1080 (OSERS 1990) (45-day deadline starts after filing and, thus, is not applicable).

[23] Letter to Carroll, 68 IDELR ¶ 279 (OSEP 2016).

[24] See, e.g., Questions and Answers on Discipline Procedures, 52 IDELR ¶ 231 (OSERS 2009); Letter to Scheinz, 34 IDELR ¶ 34 (OSEP 2000).

[25] For a synthesis of the various requirements for appropriateness of an initial evaluation and reevaluation, see, e.g., Letter to Baus, 65 IDELR ¶ 81 (OSEP 2015).

[26] *Compare* **Meridian Joint Sch. Dist. No. 2 v. D.A., 792 F.3d 1054, 320 Ed.Law Rep. 8 (9th Cir. 2015); S. Kingstown Sch. Comm. v. Joanna S., 773 F.3d 344, 312 Ed.Law Rep. 507 (1st Cir. 2014);** Jefferson Cty. Bd. of Educ. v. Lolita S., **581** F. App'x **760, 310** Ed.Law Rep. **686** (11th Cir. 2014); M.Z. v. Bethlehem Area Sch. Dist., 521 F. App'x 74, 296 Ed.Law Rep. 92 (3d Cir. 2013); Warren G. v. Cumberland Cmty. Sch. Dist., 190 F.3d 80, 138 Ed.Law Rep. 91 (3d Cir. 1999); Seattle Sch. Dist. No. 1 v. B.S., 82 F.3d 1493, 109 Ed.Law Rep. 55 (9th Cir. 1994); **W. Chester Area Sch. Dist. v. G.D., 69 IDELR ¶ 91 (E.D. Pa. 2017); Horne v. Potomac Preparatory P.C.S., F. Supp. 3d , Ed.Law Rep. (D.D.C. 2016); Sch. Dist. of Philadelphia v. Drummond, 67 IDELR ¶ 170 (E.D. Pa. 2016); E.L. Haynes Pub Charter Sch. v. Frost, 66 IDELR ¶ 287 (D.D.C. 2015); Cobb Cty. Sch. Dist. v. D.B., 66 IDELR ¶ 134 (N.D. Ga. 2015);** S.F. v. McKinney Indep. Sch. Dist., 58 IDELR ¶ 157 (E.D. Tex. 2012), *adopted magistrate's report*, 59 IDELR ¶ 271 (E.D. Tex. 2012); Indep. Sch. Dist. No. 701 v. J.T., 45 IDELR ¶ 92 (D. Minn. 2006); A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 161 Ed.Law Rep. 827 (D. Conn. 2002); Pajaro Valley Unified Sch. Dist. v. L.S., 47 IDELR ¶ 12 (N.D. Cal. 2006 (parents won), *with* Avila v. Spokane Sch. Dist., __ F. App'x __ (9th Cir. 2017); Council Rock Sch. Dist. v. Bolick, 462 F. App'x 212, 279 Ed.Law Rep. 91 (3d Cir. 2012); C.S. v. Governing Bd. of Riverside Unified Sch. Dist., 321 F. App'x 630 (9th Cir. 2009); Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583 (3d Cir. 2000); **B.G. v. City of Chicago Sch. Dist. 299, 69 IDELR ¶ 177 (N.D. Ill. 2017); Shafi A. v. Lewisville Indep. Sch. Dist., 69 IDELR ¶ 66 (E.D. Tex. 2016); E.E. v. Tuscaloosa City Bd. of Educ., 68 IDELR ¶ 45 (N.D. Ala. 2016); Student v. Sch. Dist. of Philadelphia, 115 LRP 33496 (E.D. Pa. Apr. 3, 2015); Perrin v. Warrior Run Sch. Dist., 66 IDELR ¶ 225 (M.D. Pa. 2015); H.G. v. Upper Dublin Sch. Dist., 65 IDELR ¶ 123 (E.D. Pa. 2015); Stepp v. Midd-West Sch. Dist., 65 IDELR ¶ 46 (M.D. Pa. 2015); Doe v. Cape Elizabeth Sch. Dep't, 64 IDELR ¶ 272 (D. Me. 2014);** H.D. Cent. Bucks Sch. Dist., 902 F. Supp. 2d 614, 291 Ed.Law Rep. 733 (E.D. Pa. 2012); M.C. v. Katonah/ Lewisboro Union Free Sch. Dist., 58 IDELR ¶ 196 (S.D.N.Y. 2012); T.G. v. Midland Sch. Dist., 848 F. Supp. 2d 902, 282 Ed.Law Rep. 425 (C.D. Ill. 2012); Dudley v. Lower Merion Sch. Dist., 58 IDELR ¶ 12 (E.D. Pa. 2011); Ms. H. v. Montgomery Cty. Bd. of Educ., 56 IDELR ¶ 73 (M.D. Ala. 2011); Ka.D. v. Solana Beach Sch. Dist., 54 IDELR ¶ 310 (E.D. Cal. 2010); J.P. v. Ripon

Unified Sch. Dist., 52 IDELR ¶ 125 (E.D. Cal. 2009); Blake B. v. Council Rock Sch. Dist., 51 IDELR ¶ 100 (E.D. Pa. 2008); L.S. v. Abington Sch. Dist., 48 IDELR ¶ 244 (E.D. Pa. 2007), *reconsideration denied*, 50 IDELR ¶ 37 (E.D. Pa. 2008); DeMerchant v. Springfield Sch. Dist., 48 IDELR ¶ 181 (D. Vt. 2007); Wachlarowicz v. Sch. Bd. of Indep. Sch. Dist. No. 832, 42 IDELR ¶ 7 (D. Minn. 2004); Judith S. v. Bd. of Educ. of Cmty. Unit Sch. Dist. No. 200, 28 IDELR 728 (N.D. Ill. 1998); *cf.* B.H. v. Joliet Sch. Dist., 54 IDELR ¶ 121 (N.D. Ill. 2010) (district won). For a comprehensive overview, see Perry A. Zirkel, *The Law of Evaluations under the IDEA: An Annotated Update*, 297 Ed.Law Rep. 637 (2013). **For a case where the trial court awarded the reimbursement as a matter of equity despite not fitting the statutory framework but the appellate court determined there was no obligation for the reevaluation, see M.S. v. Lake Elsinore Unified Sch. Dist., 66 IDELR ¶ 17 (C.D. Cal. 2015), *rev'd on other grounds*, F. App'x , Ed. Law Rep. (9th Cir. 2017).**

[27] The results at this step have also varied, although the courts have not shown the same deference to districts as they have for the previous step. See, e.g., Breanne C. v. S. York Cty. Sch. Dist., 732 F. Supp. 2d 474, 263 Ed.Law Rep. 122 (M.D. Pa. 2010); Indep. Sch. Dist. No. 701 v. J.T., 45 IDELR ¶ 92 (D. Minn. 2006); *cf.* Jefferson Cty. Bd. of Educ. v. Lolita S., **977** F. Supp. 2d **1091**, **1127**, **304** Ed.Law Rep. **280** (N.D. Ala. 2013), *aff'd*, **581** F. App'x **760**, **310** Ed.Law Rep. **686** (11th Cir. 2014) (rejecting district's argument that the report was expert testimony, not an IEE). For a recent decision where a court upheld reimbursement in a "child find" case where the district delayed its evaluation and used the parents' IEE despite an ultimate determination that the child was not eligible, see J.P. v. Anchorage Sch. Dist., 260 P.3d 285 (Alaska 2011).

[28] 34 C.F.R. § 300.502(e) ("must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an [IEE]").

[29] Seth B. v. Orleans Parish Sch. Dist., 810 F.3d 961, 326 Ed.Law Rep. 620 (5th Cir. 2016).

[30] Letter to Anonymous, 58 IDELR ¶ 19 (OSEP 2011).

[31] *Compare* P.L. v. Charlotte-Mecklenburg Bd. of Educ., 55 IDELR ¶ 46 (W.D.N.C. 2010) (denying reimbursement for IEE where parents did not obtain written approval per district's handbook), *with* Letter to Bluhm, EHLR 211:206 (OSEP 1980) (opining that the district may not require advance consultation or clearance).

[32] A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 161 Ed.Law Rep. 827 (D. Conn. 2002); *cf.* Letter to Reedy, 16 EHLR 1364 (OSEP 1990) (after the district's evaluation).

[33] 34 C.F.R. 300.502(e) (2012).

[34] *See, e.g.,* Letter to Anonymous, 56 IDELR ¶ 175 (OSEP 2010); Letter to Parker, 41 IDELR ¶ 155 (OSEP 2004); Letter to Young, 39 IDELR ¶ 98 (OSEP 2003).

[35] Letter to Anonymous, 22 IDELR 636 (OSEP 1994).

[36] Letter to Bluhm, EHLR 211:227 (OSEP 1980); ***cf.* A.L. v. Jackson Cty. Sch. Bd., 635 F. App'x 774, 330 Ed.Law Rep. 60 (11th Cir. 2015) (upheld refusal for distant evaluator when qualified ones were available locally).**

[37] Letter to Anonymous, 20 IDELR 1219 (OSEP 1993).

[38] *Id*. at 46,689 (Aug. 14, 2006); *see also* Letter to Anonymous, 56 IDELR ¶ 175 (OSEP 2010).

[39] Letter to Petska, 35 IDELR ¶ 191 (OSEP 2001) (may not prohibit affiliation with private schools and advocacy organizations or expert witnesses who consistently testified on the parents' side, and may not require recent and extensive experience in public schools).

[40] 34 C.F.R. § 300.502(e)(1) (2012).

[41] A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 161 Ed.Law Rep. 827 (D. Conn. 2002).

[42] Letter to LoDolce, 50 IDELR ¶ 106 (OSEP 2008).

[43] *See, e.g.*, Letter to Anonymous, 22 IDELR 637 (OSEP 1995); *see also* Letter to Aldine, 16 EHLR 606 (OSEP1990); Letter to Fields, EHLR 213:259 (OSERS 1989). **For a cases concerning whether the cost cap was unreasonable under the "unique circumstances," *compare* M.S. v. Utah Sch. for the Deaf and Blind, 64 IDELR ¶ 11 (D. Utah 2014), *vacated on other grounds*, 822 F.3d 1128, 331 Ed.Law Rep. 696 (10th Cir. 2016) (yes), with A.A. v. Goleta Union Sch. Dist., 69 IDELR ¶ 156 (C.D. Cal. 2017) (no).**

[44] 34 C.F.R. § 300.502(e) (2012). **For a recent decision where the court upheld a reasonable cap without reaching the issue of an exception, see Seth B. v. Orleans Parish Sch. Bd., 810 F.3d 961, 326 Ed.Law Rep. 620 (5th Cir. 2016).**

[45] 71 Fed. Reg. at 46,689-46,690 (Aug. 14, 2006). For recent decisions where the court upheld a locally reasonable cap with a possible exception, see **Shafi A. v. Lewisville Indep. Sch. Dist., 69 IDELR ¶ 66 (E.D. Tex. 2016);** M.V. v. Shenendehowa Cent. Sch. Dist., 60 IDELR ¶ 213 (N.D.N.Y. 2013). **For the district's default upon failing to file to challenge the IEE's allegedly high cost, see Damarcus S. v. District of Columbia, 190 F. Supp. 3d 35, 338 Ed.Law Rep. 823 (D.D.C. 2016).**

[46] Letter to Petska, 35 IDELR ¶ 191 (OSEP 2001); Letter to Heldman, 20 IDELR 621 (OSEP 1993).

[47] Letter to Thompson, 34 IDELR ¶ 8 (OSEP 2000).

[48] M.M. v. Lafayette Sch. Dist., 58 IDELR ¶ 132 (N.D. Cal. 2012); Meridian Joint Sch. Dist. No. 2 v. D.A., 62 IDELR ¶ 144 (D. Idaho 2013, ***aff'd on other grounds*, 792 F.3d 1054, 320 Ed.Law Rep. 8 (9th Cir. 2015).**

[49] Jason O. v. Manhattan Sch. Dist. No. 4, 173 F. Supp. 3d 744, 335 Ed.Law Rep. 868 (N.D. Ill. 2016).

Longitudinal Trends in Impartial Hearings under the IDEA*

Perry A. Zirkel

Starting in the 1980s, litigation in the context of K–12 education has remained relatively level, while the segment concerning special education has been rather steadily on the rise.[1] The other distinguishing characteristic of this growth segment is that the driving force, the Individuals with Disabilities Education Act (IDEA),[2] provides an underlying system of administrative adjudication,[3] which is subject to exhaustion.[4] The centerpiece of this underlying system is the impartial hearing, alternatively called the due process hearing (DPH).[5]

Tracking the frequency of these impartial hearings is important not only as a wider

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[1] See, e.g., Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1 (2011). For analyses specific to special education, see Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731 (2002) (finding an upward trend from 1977 to 1997 but, using three-year increments, a slight decline in 1998-2000) (finding a steady, rather dramatic increase on a decade-by-decade basis from the 1970s through 2009–10); Perry A. Zirkel & James Newcomer, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469 (1999) (finding a marked increase from 1975 and 1995).

[2] 20 U.S.C. §§ 1400-1482 (2012). The corresponding regulations are at 34 C.F.R. Parts 300 and 303 (2012).

[3] 20 U.S.C. § 1415(f) (2012); 34 C.F.R. § 300.511 (2012).

[4] E.g., Lewis Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction under the Individuals with Disabilities Education Act*, 29 J. NAT'L ADMIN. L. JUDICIARY 349 (2009).

[5] The IDEA also provides states with the option of a second administrative tier, or review officer level. 20 U.S.C. § 1415(g) (2012); 34 C.F.R. § 300.514(b) (2012). However, the number of states with two-tier systems dropped from twenty-four in 1991 to ten in 2011. Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3, 5 (2010). Although the overall trend has been in the direction of one tier, some jurisdictions have fluctuated in both directions. See, e.g., Eileen Ahearn, *Due Process Hearings: 2001 Update*, NASDSE Project Forum (April 2002), http://www.nasdse.org/DesktopModules/DNNspot-Store/ProductFiles/131_ffb7747b-2f2e-4887-97a7-137cc145dd1b.pdf

indication of litigation activity under the IDEA but also as a likely predictor of the judicial level.[6] For the longitudinal trend, the leading source was Zirkel and Gischlar's analysis of adjudicated hearings under the IDEA from 1991 to 2005.[7] Based on data reported by state education agencies and excluding the District of Columbia,[8] they found a steady increase in the volume of decisions during the period 1991 to 1996, followed by a "relatively high, albeit uneven, plateau"[9] from 1997 to 2005. They determined that the top five states in overall frequency during that time period, accounting for more than 80% of the total, were as follows: 1. New York (43%); 2. New Jersey (13%); 3. Pennsylvania (7%); 4. California (5%); and 5. Maryland (4%).[10]

The purpose of this short article is to extend the previous analysis—based on the availability of governmental data—to 1) the next six years, i.e., from 2006–07 through 2011–12, and 2) the other jurisdictions that the IDEA covers, such as the District of Columbia. The specific source of the data is the U.S. Department of Education's Office of Special Education

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[6] Although the rate of appeal may vary, in general the pyramid-like structure of the adjudicative levels under the IDEA would suggest a significant, even less than complete correlation, between the number of adjudicated impartial hearings and the number of court decisions.

[7] Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis,* 21 J. SPECIAL EDUC. LEADERSHIP 21, 28 (2008). An earlier analysis was limited to the sampling of hearing officer decisions published in the Individuals with Disabilities Law Report (IDELR) database from 1977 to 2000, revealing a generally but not uniformly upward trend. Zirkel & D'Angelo, *supra* note 1, at 738–40. The relationship between IDELR-published hearing officer decisions and the population of hearing officer decisions appears to be moderate at best. Anastasia D'Angelo, J. Gary Lutz, J. & Perry A. Zirkel, *Are Published IDEA Hearing Officer Decisions representative?* 14 J. DISABILITY POL'Y STUD. 241 (2004).

[8] They relied on the published data from the National Association of State Directors of Special Education for the earlier period, adding their own survey for the years 2001–05. However, D.C. was the only jurisdiction that failed to respond to the survey. *Id*. at 24.

[9] *Id*. at 25. From 1997-2005 the volume of decisions slightly fluctuated from year to year; however, the overall volume for this period remained higher than for the period 1991–1996. *Id*. at 26.

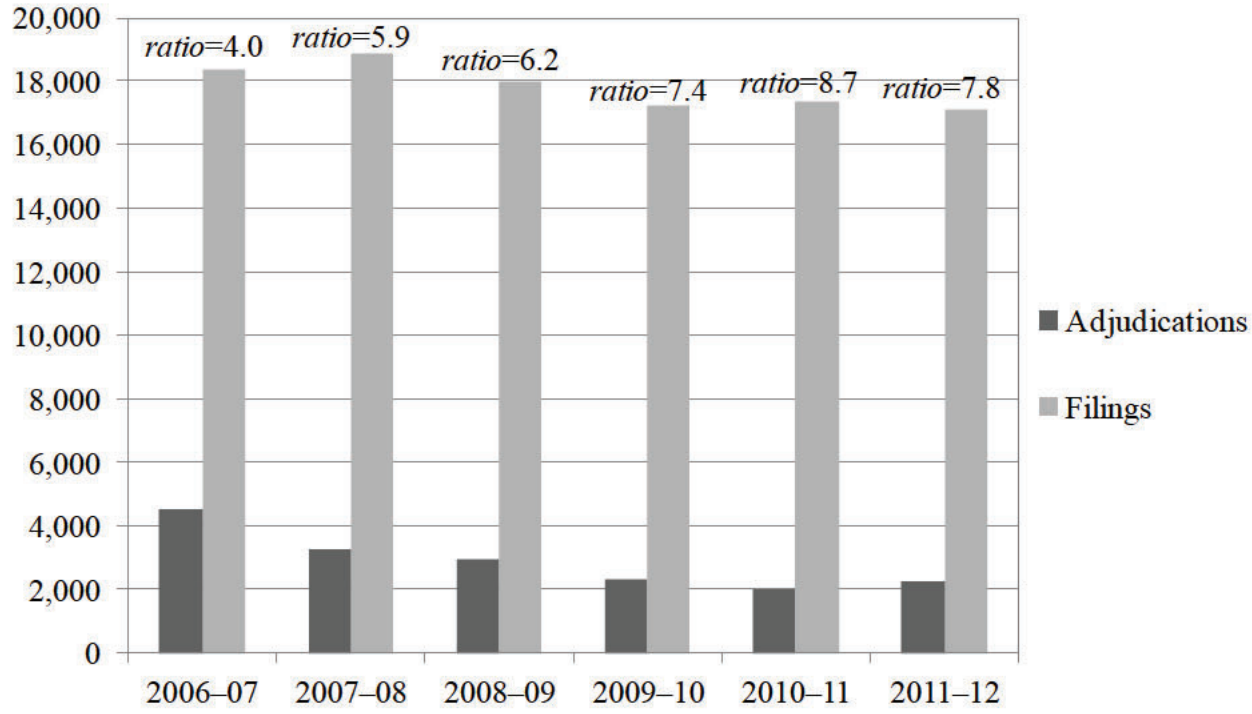
[10] *Id*. at 27. The next four, with the rest of the states each accounting for 1% or less, were: 6. Illinois (3.3%%); 7. Connecticut (3.2%); 8. Texas (2.4%); and 9. Massachusetts (2%). *Id*. Zirkel-Gischlar also separately calculated rankings based on a per capita basis in relation to special education enrollments, with those above a ratio of 100 per 10,000 students being: 1. New York, 2; New Jersey; 3. Hawaii; 4. Connecticut; 5. Rhode Island; 6. Maryland; 7. Pennsylvania; and 8. New Hampshire. *Id*.

(OSEP) compilation of the annual reports from each IDEA jurisdiction.[11]

RESULTS

Figure 1 shows the six-year trend for the total number of due process hearing (DPH) complaints filed and the number of hearings complaints adjudicated, i.e., resulting in a written decision, respectively. The ratio above each pair of bars is the ratio between filings and adjudications for the year.

Figure 1. Longitudinal Trend of DPH Filings and Adjudications

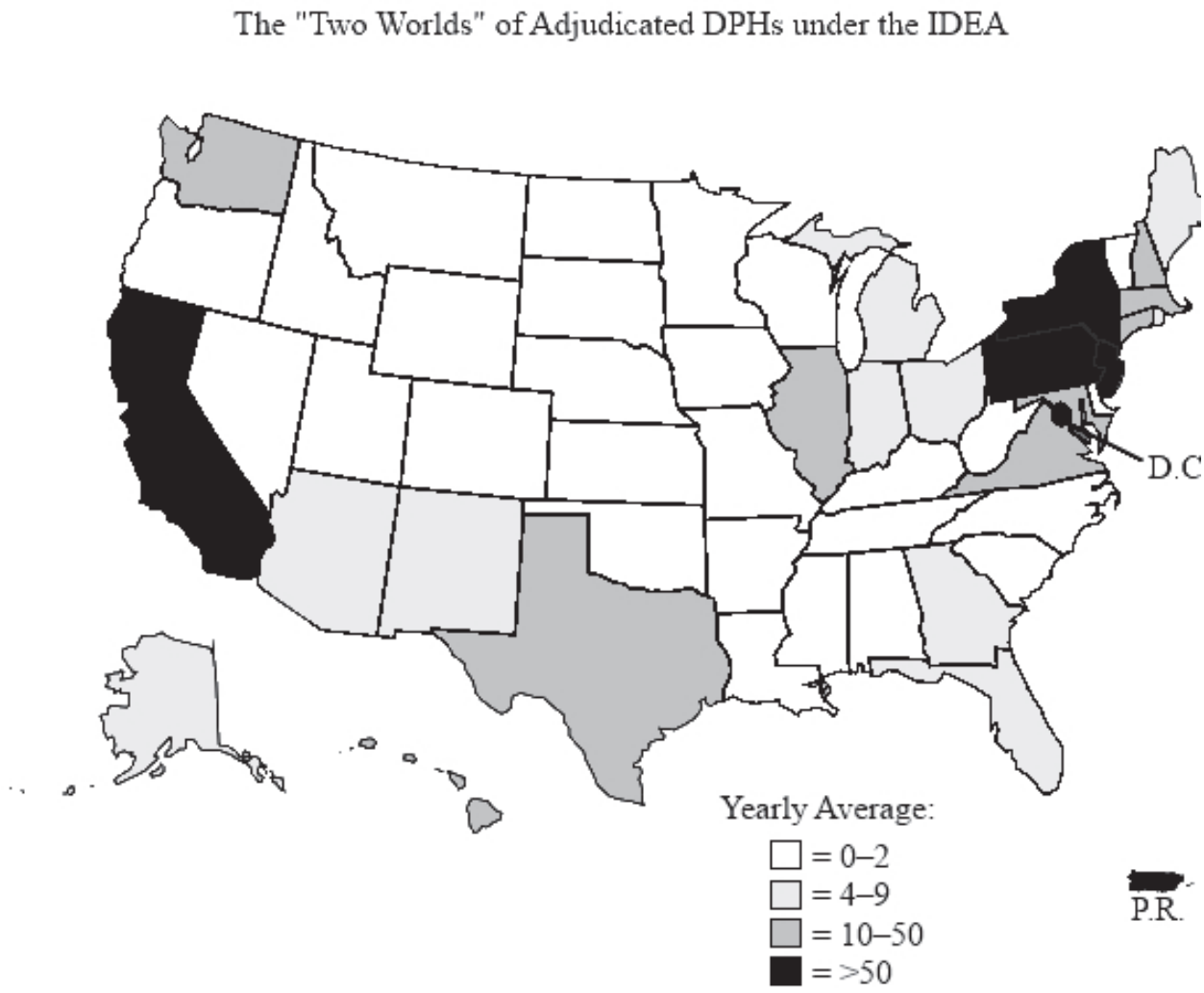


Examination of Figure 1 reveals that for the second half of the six-year period both the filings and adjudications stabilized at a moderately lower level, while the ratio of filings to adjudications moved to a moderately higher level. Thus, the decline was much less pronounced

[11] Technical Assistance and Dissemination Network, Historical State-Level IDEA Data Files - Dispute Resolution, http://tadnet.public.tadnet.org/pages/712 (for the school years 2006–07 through 2010–11); 2011–2012 Part B IDEA Dispute Resolution, https://explore.data.gov/Education/2011-2012-IDEA-Part-B-Dispute-Resolution/deib-aj7g (for the school year 2011–12).

for filings than for adjudications.

Illustrating, by way of transition, the variation among states, Figure 2 provides a map of the 50 states, along with the District of Columbia and Puerto Rico, shaded in terms of the average frequency of adjudications for each jurisdiction.



As this map shows, a relatively few jurisdictions—here shaded in black or dark gray—account for most of the adjudicated hearings, with most of the states—here shaded in light gray and white—being at a negligible level of activity.

However, as documented in the Appendix, a closer examination included not only adjudications, which are the end of the first-tier process, but also filings, which mark the initiation of this impartial hearing process. Addressing both filings and adjudications, along with the ratio between filings and adjudications, Table 1 identifies the top six jurisdictions, [12] which accounted for 80% of the filings[13] and 90% of the adjudicated DPHs for the six-year period.[14] The figures for the two "Total" columns are annualized averages for the sake of relative accuracy and user-friendliness.[15]

[12] "Jurisdictions" in this context refers to the 51 states plus the other separate geographic entities identified in the OSEP data compilations, *supra* note 11.

[13] The next group, which brought the cumulative proportion to 90% of the total for the period, was as follows: 7. Massachusetts (n=582); 8. Illinois (n=340); 9. Texas (n=318); 10. Maryland (n=278); 11. Connecticut (n=211). The rest of the states, starting with Florida (n=167) each had less than 1,000 filings for the six-year period.

[14] The next cluster for the period was as follows: 7. Hawaii (n=29); 8. Texas (n=27); 9(tie). Illinois (n=21); 9(tie). Maryland (n=21); and 9(tie). Massachusetts (n=21). The rest of the states, starting with Connecticut (n=14) each had less than 100 adjudicated DPHs for the six-year period.

[15] The primary reason is that policymakers and practitioners are accustomed to collecting and viewing such data on an annual basis.

Table 1. The Top Jurisdictions in Terms of Adjudicated DPHs

	Adjudications		Filings		Filings/ Adjudications
	Rank	Av'g. Total	Rank	Av'g. Total	Ratio[16]
Puerto Rico	1	1,009	4	1,860	1.84
District of Columbia	2	817	3	2,007	2.46
New York	3	569	1	6,078	10.69
California	4	93	2	2,694	28.92
Pennsylvania	5	67	6	776	11.60
New Jersey	6	55	5	854	15.57

Table 1 shows that the same six jurisdictions lead the rest of the nation in both DPH filings and adjudications, but the ratio of filings to adjudications varies so much[17] that the rank order within this group is different for each of these measures. Puerto Rico and the District of Columbia are the leaders for adjudications, but New York and California are the leaders for filings.

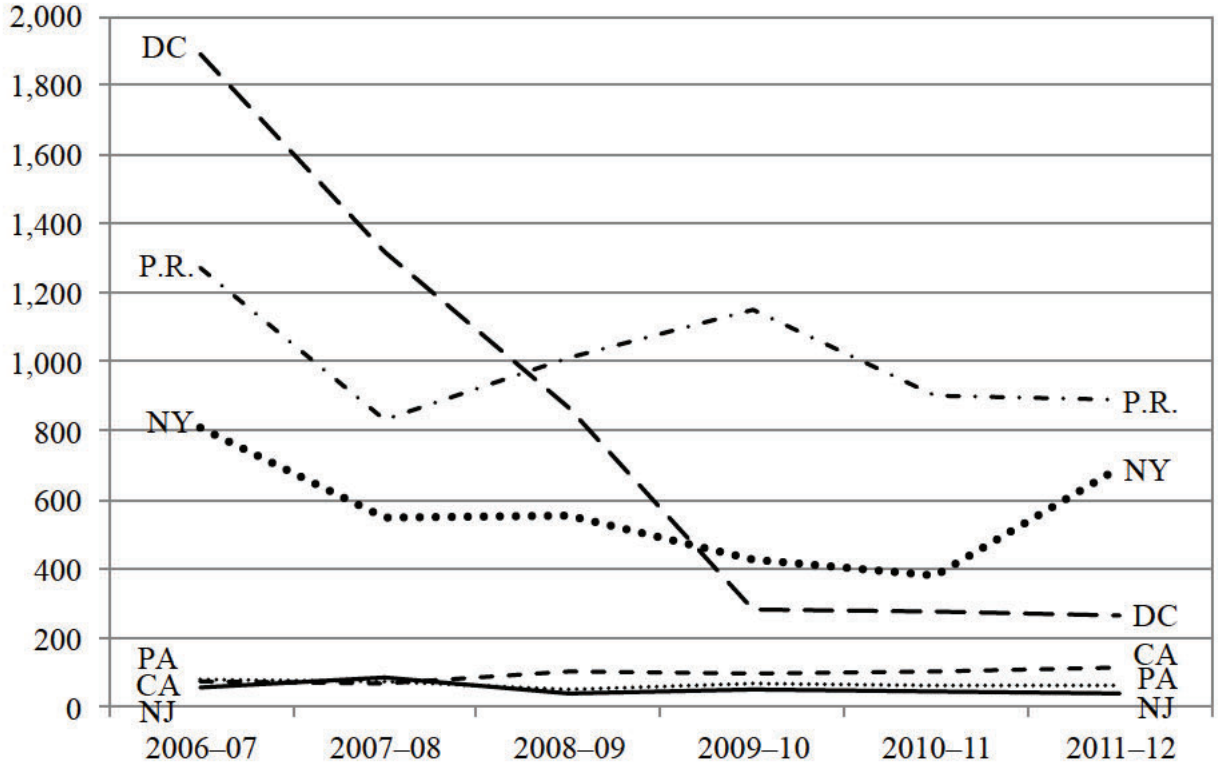
Finally, Figure 2 presents the longitudinal trend in the number of adjudicated DPHs for the top six states, as identified in Table 1 for adjudications, but here presented as six-year totals

[16] A limitation in these ratios is that the filings and adjudications are not necessarily directly connected as the same cases. Although the IDEA regulations provide a 75-deadlines, subject to hearing officer extensions (34 C.F.R. § 300.515), a case may extend from one year to another, especially if the filing is later in the year.

[17] The ratios for the second cluster of states (*supra* note 14) were as follows: Hawaii - 4.40; Texas - 11.78; Illinois - 16.32; Maryland - 13.44; and Massachusetts - 28.15. The overall filings-to-adjudications ratio for all of the jurisdictions together was 6.20.

rather than their annual averages.

Figure 3. Longitudinal Trend of Adjudicated DPHs for Top Six Jurisdictions



Review of Figure 3 reveals three subgroupings among the top six jurisdictions. First, standing relatively along, the District of Columbia experienced a precipitous drop in the first half of the period, followed during the second half with stability at the much lower level. Second, Puerto Rico and New York fluctuated in a net downward direction to levels that ended with respectively more limited reductions. In contrast, the third subgroup—California, New Jersey, and Pennsylvania—remained relatively steady at lower levels for the entire period.[18]

[18] However, although relatively modest in relation to the scale of Figure 2, the changes in these three states were not negligible during the six-year period:

	2006–07	2007–08	2008–09	2009–10	2010–11	2011–12
California	74	67	104	95	105	114
New Jersey	55	88	42	54	48	52
Pennsylvania	81	75	54	66	61	64

DISCUSSION

The primary overall finding of this analysis was—as the next step after the dramatic rise and then leveling off during 1991–2005[19] the clearly downward longitudinal trend for adjudicated DPHs during this most recent available six-year period, ending at a seemingly relatively stable level less than half that of the start of the period. On first impression, especially when also considering the generally increased ratio between filings and adjudications in Figure 1, the reduction would seem to be attributable to the nationally systemic emphases 1) initiated in the 2004 amendments and 2006 regulations of the IDEA, including extending the option of mediation to the period before filing for a DPH[20] and—more notably—adding the innovation of a resolution session as a prerequisite to the DPH[21]; and 2) supplemented by the continuing alternative dispute resolution (ADR) activities of the OSEP-funded National Center on Dispute Resolution in Special Education,[22] such as IEP facilitation.[23]

However, this conclusion would not appear to be the explanation, at least in terms of primary attribution, for two reasons. First, the number of filings has declined to a much less considerable extent. Accounting for the difference in trend lines is the higher ratio for filings to cases for the second half of the period, showing that a smaller proportion of the case are ending short of adjudication, including via alternate forms of dispute resolution.[24]

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[19] See *supra* notes 7–9 and accompanying text.

[20] 20 U.S.C. § 1415(e)(1) (2012); 34 C.F.R. § 300.506(a) (2012).

[21] 20 U.S.C. § 1415(f)(1)(B) (2012); 34 C.F.R. § 300.510 (2012). Other changes that may have had a dampening effect were the addition of more specific prehearing notice-pleading, , including sufficiency provision, for DPHs (20 U.S.C. § 1415(c)(2); 34 C.F.R. § 300.508) and a two-year statute of limitations (20 U.S.C. § 1415(a)(6)(B); 34 C.F.R. § 300.511(e)).

[22] http://www.directionservice.org/cadre/index.cfm

[23] Facilitated IEP Meetings: An Emerging Practice, http://www.directionservice.org/cadre/pdf/Facilitated%20IEP%20for%20CADRE%20English.pdf

[24] Alternatively, the filings that do not result in adjudications may be attributable to withdrawals, dismissals that are not counted as adjudications, or settlements independent of alternative dispute

Second, upon examining Figure 3's corresponding trend during the same period for the leading jurisdictions, which account for 90% of the adjudications[25] and 80% of the filings,[26] the reduction appears to be largely attributable to relatively few jurisdictions, particularly the District of Columbia. More specifically, the District of Columbia (71%)[27] and Puerto Rico (17%)[28] together accounted for almost 90% of the overall reduction of 2,273 adjudications.[29] Thus, it may be that other factors, such as organizational changes in the District of Columbia,[30] may additionally or alternatively account for the overall decline. The relatively steady level in the third tier of the leading states—California, New Jersey, and Pennsylvania[31]—would seem to suggest that the aforementioned[32] systemic changes in the IDEA did not have a major dramatic national effect. Nevertheless, although accounting for much smaller segments of the overall DPH trend, other states experienced notable reductions based on the systemic and/or state-specific factors.[33]

The second major finding was the continuation of the previous picture revealing two

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resolution mechanisms. The respective proportions for each of these dispositions warrants follow-up research.

[25] See *supra* text accompanying note 14.

[26] See *supra* note 12.

[27] The number of adjudications in the District of Columbia dropped 1,625 from 1,893 in 2006–07 to 268 in 2011–12.

[28] The number of adjudications in the Puerto Rico dropped 384 from 1,271 in 2006–07 to 887 in 2011–12. New York accounted for an additional 5% of the overall reduction, declining 117 adjudications from 810 in 2006–07 to 693 in 2011–12.

[29] The total number of adjudications declined from 4,534 in 2006–07 to in 2,261 in 2011–12.

[30] For example, possible contributing factors, in addition to increased use of resolution sessions, were improvements in the District of Columbia's 1) DPH system, such as the selection, evaluation, and training of its hearing officers; 2) state education agency, such as its mediation and complaint resolution processes, and 3) predominant local education agency, such as DPH decision implementation. E-mail from D.C. former chief hearing officers Deusdedi Merced, Feb. 4, 2014, 10:20 EST (on file with author) and Lynwood Beekman, Feb. 3, 2014, 21:55 EST (on file with the author). The jurisdictionally specific policies and practices concerning attorneys' fees may also have played a contributing role. *Id*.

[31] See *supra* note 18 and accompanying text.

[32] See *supra* note 20–21.

[33] For the next cluster of states (*supra* note 14), the starting and ending levels during this six-year period were as follows: Hawaii - 28 → 19; Texas - 45 → 13; Illinois - 29 → 14; Maryland - 22 → 14; and Massachusetts - 26 → 18.

worlds of DPHs—a relatively small number of jurisdictions accounting for most of them[34] and the remaining jurisdictions each having a relatively negligible level of DPHs. The differences in the leading group from the findings for the previous longer period of 1991 to 2005[35] were 1) the addition—in positions #1 and #2—of Puerto Rico and the District of Columbia, and 2) the lowered position of California.[36] The high position of the District of Columbia is not surprising in light of its high level of court decisions under the IDEA.[37] However, the DPH data for Puerto Rico are unexpected in light of its correspondingly negligible level of IDEA court decisions,[38] but the Puerto Rico Department of Education's representative has confirmed that these DPH figures are accurate.[39] Although OSEP's data collection procedures have mitigated the previous problem of lack of uniformity in terminology and time periods,[40] the open question for Puerto Rico serves a reminder that the quality of the data ultimately depend on the reporting personnel, who vary in their stability, expertise, and motivation.

A third major finding is the wide variance among the filings-to-adjudications ratios. For example, among the eleven leading jurisdictions, the ratios varied from Puerto Rico (1.84) and

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[34] The concentration is more acute for the adjudications, but it is still pronounced for the filings. Compare *supra* text accompanying note 15, with note 12.

[35] See *supra* text accompanying note 10.

[36] See *supra* Table 1.

[37] E.g., Perry A. Zirkel, *Case Law under the IDEA*, in IDEA: A HANDY DESK REFERENCE TO THE LAW, REGULATIONS AND INDICATORS 669 (2012) (revealing more than 60 pubished decisions from the District of Columbia during the six years of data).

[38] *Id*. (revealing only one published court decision from Puerto Rico during the six years of these data). Other reasons for skepticism include comparing Puerto Rico with the District of Columbia in terms of 1) the availability of legal counsel specialized in the IDEA, and 2) the propensity of litigiousness.

[39] E-mail from Daiber N. Carrión Muñoz, Feb. 21, 2014, 16:21 EST (on file with author). As one contributing factor, she identified the Rosa Lydia Velez class action suit as increasing "parent interest and willingness to file due process requests and . . . contribut[ing] to developing a body of attorneys and advocates who assist parents with such filings." *Id*. For information about this class action settlement agreement and related system-wide issues, see Pleito de Clase, http://pleitodeclase.com/; OSEP letter to Puerto Rico Department of Education (2005), www2.ed.gov/fund/data/report/idea/partbapr/baprltr05-pr.pdf; Puerto Rico Civil Rights Commission, Access to Education of Minors with Learning Conditions (2008), http://observatorioeducacionespecial.org/wp-content/uploads/2013/08/Vigencia-de-los-Hallazgos-en-ingles-2008.pdf www2.ed.gov/fund/data/report/idea/partbapr/baprltr05-pr.pdf

[40] Zirkel & Gischlar, *supra* note 7, at 23, 25.

District of Columbia (2.46) to Massachusetts (28.52) and California (28.92).[41] This wide disparity suggests differences in not only the prevailing party practices but also ADR effectiveness among the jurisdictions.[42] Moreover, on an overall basis, the ratio of filings to adjudications was more than six to one,[43] which is more than double the ratio for the 1990s.[44] Consequently, in light of not only the wide variance but also the overall average, more in-depth analyses of the OSEP data, including the number of pending DPHs, withdrawals, dismissals, resolution sessions, and mediations,[45] are warranted.

Thus, this brief analysis is a continuation of, and springboard for, further research concerning DPH trends of interest to both policymakers and practitioners. In addition to further mining of the OSEP data regarding frequency trends,[46] other empirical research should extend to outcomes of DPHs[47] and the perceptions of the parties.[48]

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[41] See *supra* note 13 and Table 1.

[42] For example, the high ratio in Massachusetts may reflect its reportedly effective mediation practices (http://archives.lib.state.ma.us/bitstream/handle/2452/113469/ocn752506007.pdf?sequence=1) and its ADR innovations of advisory opinions (http://www.mass.gov/anf/hearings-and-appeals/bureau-of-special-education-appeals-bsea/advisory-opinion-process.html) and, to a lesser extent due to its relative recency, SpedEx (http://spedexresolution.com/)

[43] See *supra* note 17 (reporting overall ratio of 6.20).

[44] Specifically, for the period 1991–2000, the overall ratio between filings and adjudications was 2.83. Ahearn, *supra* note 5 (reporting filings that totaled 73,433 and adjudications that totaled 25,916).

[45] See *supra* note 11. For an initial analysis of the various interrelated variables during the eight-year period ending with 2011–12, see CADRE's State and National Dispute Resolution Data Summaries: Part B (Feb. 2014), http://www.directionservice.org/cadre/aprsppb.cfm. CADRE's summary reported, for example, that during this eight-year period, filings have decreased by 15%, adjudicated hearings have decreased by 58%, and mediations have increased approximately 4%. Trends in Dispute Resolution under the Individuals with Disabilities Education Act (Dec. 2013), http://www.directionservice.org/cadre/pdf/Trends_DR_IDEA_DEC2013.pdf. In a February 2014 CADRE webinar concerning these analyses, presenters Dick Zeller and Amy Whitehorn observed that little is known about the specific within the relatively large numbers for "pending hearings" and the "complaints resolved without a hearing." Dispute Resolution National Trends: 8 Years of APR/Section 618 Data, http://www.directionservice.org/cadre/DRtrendswebinar.cfm

[46] For a corresponding springboard study of Office for Civil Rights data concerning students designated with 504 plans (and those with IEPs), see Perry A. Zirkel & John M. Weathers, Section 504-Only Students: Updated Data (2014) (manuscript under review).

[47] For a relatively limited example, see Kristen Rickey, *Special Education Due Process Hearings: Students Characteristics, Issues, and Decisions*, 14 J. DISABILITY POL'Y STUD. 46 (2003) (tabulating the outcomes of the 50 adjudicated DPHs from 1989 to 2001 in Iowa).

Appendix: Annual Filings and Adjudications for 2006–11, with Their Ratios for 53 Jurisdictions

State	Adjudications Average Rank	Adjudications Average Total	Filings Rate Rank	Filings Rate Total	Ratio of Filings to Adjudications
Alabama	24	4	16	107	29.14
Alaska	22	4	43	15	3.63
Arizona	21	4	24	58	13.31
Arkansas	37	2	40	19	8.69
California	4	93	2	2694	28.92
Colorado	34	2	38	22	9.29
Connecticut	12	14	11	211	14.92
Delaware	36	2	41	16	7.38
District of Columbia	2	817	3	2007	2.46
Florida	17	7	12	167	22.70
Georgia	25	4	17	101	27.55
Hawaii	7	29	14	127	4.40
Idaho	40	2	46	10	5.90
Illinois	9	21	8	340	16.32
Indiana	16	7	20	73	9.95
Iowa	48	1	47	10	14.25
Kansas	43	1	39	21	15.63
Kentucky	47	1	37	22	26.20
Louisiana	29	3	34	24	7.83
Maine	23	4	27	36	9.91
Maryland	10	21	10	278	13.44
Massachusetts	11	21	7	582	28.37
Michigan	20	5	18	74	14.87
Minnesota	38	2	30	30	13.69
Mississippi	28	3	35	23	7.32
Missouri	35	2	19	74	31.57
Montana	52	0	49	5	NA*
Nebraska	51	0	50	3	NA*
Nevada	42	1	23	59	44.38
New Hampshire	13	13	22	59	4.51
New Jersey	6	55	5	854	15.57
New Mexico	26	4	29	32	9.05
New York	3	569	1	6078	10.69
North Carolina	27	3	25	58	17.30
North Dakota	53	0	53	0	NA*
Ohio	18	7	13	157	23.00
Oklahoma	46	1	33	26	25.50
Oregon	44	1	32	27	23.43
Pennsylvania	5	67	6	776	11.60

[48] For an early example, see Steven S. Goldberg & Peter J. Kuriloff, *Evaluating the Fairness of Special Education Due Process Hearings*, 57 EXCEPTIONAL CHILD. 546 (1991) (analyzing perceptions of parties participating in Pennsylvania DPHs from 1980 to 1984).

Puerto Rico	1	1009	4	1860	1.84
Rhode Island	19	6	28	32	5.68
South Carolina	31	3	44	14	5.31
South Dakota	50	1	52	3	5.00
Tennessee	41	2	26	57	34.00
Texas	8	27	9	318	11.78
Utah	49	1	48	6	11.67
Vermont	39	2	36	22	13.10
Virgin Islands	32	2	45	11	4.64
Virginia	14	10	21	71	6.87
Washington	15	10	15	112	11.60
West Virginia	33	2	42	16	6.71
Wisconsin	30	3	31	30	10.41
Wyoming	45	1	51	3	2.83

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* Due to zero adjudications, the ratio was not applicable (NA) for each of these three states.

M. S. v. Fairfax County Sch. Bd.

United States Court of Appeals for the Fourth Circuit

September 23, 2008, Argued; January 14, 2009, Decided

No. 07-1555

Reporter
553 F.3d 315 *; 2009 U.S. App. LEXIS 565 **

M. S., a minor, by and through his parents and next friends, Carl and Jacqueline Simchick; JACQUELINE SIMCHICK, Plaintiffs-Appellants, v. FAIRFAX COUNTY SCHOOL BOARD, Defendant-Appellee, and FAIRFAX COUNTY PUBLIC SCHOOLS; JACK DALE, individually and in his official capacity as Superintendent of Fairfax County Public Schools; JOYCE SUYDAM, individually and in her official capacity as Director of Secondary Special Education Services, Fairfax County Public Schools; ELEANOR BARNES, individually and in her official capacity as the former Coordinator of Special Education Monitoring and Compliance, and currently as Director of Student Services, Fairfax County Public Schools; and in his official capacity as Coordinator of Special Education Monitoring and Compliance, Fairfax County Public Schools; MARTIN HUMBERTSON, individually and in his official capacity as Coordinator of Special Education Monitoring and Compliance, Fairfax County Public Schools; VIRGINIA DEPARTMENT OF EDUCATION; VIRGINIA BOARD OF EDUCATION; JO LYNNE DEMARY, individually and in her official capacity as State Superintendent of Public Instruction for the State of Virginia; JUDITH DOUGLAS, individually and in her official capacity as Director of Dispute Resolution and Administrative Services, Virginia Department of Education, Defendants. CHILDREN'S LAW CENTER; VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY, Amici Supporting Appellants.

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Senior District Judge. (1:05-cv-01476-JCC).

M.S. v. Fairfax County Sch. Bd., 2007 U.S. Dist. LEXIS 33735 (E.D. Va., May 8, 2007)

Disposition: AFFIRMED IN PART AND VACATED AND REMANDED WITH INSTRUCTIONS IN PART.

Case Summary

Procedural Posture
Plaintiffs, a student with multiple disabilities and his parents, appealed from an order of the U.S. District Court for the Eastern District of Virginia, at Alexandria, which found that the 2005-2006 Individualized Education Program (IEP) developed by defendant school board was adequate under the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C.S. § 1400 et seq., and denied reimbursement for his parental placement from 2002-2005.

Overview

Considering that the IDEA did not require a perfect education, and that the IEP merely had to be calculated to confer some educational benefit on the disabled child, the court could not say that the district court clearly erred in determining the 2005-2006 IEP was adequate. However, because the district court failed to evaluate the parental placement on a year-by-year basis, and failed to consider whether partial reimbursement might have been appropriate, the court vacated the district court's denial of reimbursement for the parental placement and remanded for further proceedings. Because the district court had found that the school district's IEPs violated the IDEA, it could award reimbursement if it found any year of instruction at private school to be "reasonably calculated" to confer some educational benefit on the student. Moreover, given the equitable nature of the IDEA, the district court erred in failing to determine whether some partial reimbursement for plaintiff student's private school was appropriate, in light of defendant school district's failure to provide educational benefit to the student.

Outcome

The court affirmed the district court's finding that the 2005-2006 IEP was adequate under the IDEA; the court vacated the district court's denial of reimbursement for the parental placement and remanded with instructions for the district court to consider the private school placement on a year-by-year basis and to determine whether any partial reimbursement was appropriate, consistent with the opinion.

Counsel: ARGUED: William Henry Hurd, TROUTMAN & SANDERS, L.L.P., Richmond, Virginia, for Appellants.

John Francis Cafferky, BLANKINGSHIP & KEITH, P.C., Fairfax, Virginia, for Appellee.

ON BRIEF: Siran S. Faulders, Stephen C. Piepgrass, TROUTMAN & SANDERS, L.L.P., Richmond, Virginia, for Appellants.

Thomas J. Cawley, Jill Marie Dennis, HUNTON & WILLIAMS, McLean, Virginia, for Appellee.

Adrienne E. Volenik, Director, Disability Law Clinic, Alisa Ferguson, Third Year Law Student, Children's Law Center, RICHMOND SCHOOL OF LAW, University of Richmond, Virginia; Jonathan Martinis, Managing Attorney, VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY, Richmond, Virginia, for Amici Supporting Appellants.

Judges: Before WILLIAMS, Chief Judge, WILKINSON, Circuit Judge, and Richard L. VOORHEES, United States District Judge for the Western District of North Carolina, sitting by designation. Chief Judge Williams wrote the opinion, in which Judge Wilkinson and Judge Voorhees joined.

Opinion by: WILLIAMS

Opinion

[*318] WILLIAMS, **[**2]** Chief Judge:

M.S., a student with multiple disabilities in the Fairfax County, Virginia schools, appeals from a district court order in this action involving the application of the Individuals with Disabilities in Education Act ("IDEA"), codified at 20 U.S.C.A. § 1400 *et seq*. (West 2000 & Supp. 2008). In particular, M.S.'s parents appeal the district court's denial of reimbursement for his parental placement from 2002-2005, and its finding that the Fairfax County School Board's 2005-2006 Individualized Education Program ("IEP") for M.S. was adequate under the IDEA. Because the district court failed to evaluate the parental placement on a year-by-year basis and to consider whether partial reimbursement **[*319]** might be appropriate, we vacate the district court's denial of reimbursement for the parental placement and remand for further proceedings. We affirm the district court's finding that the 2005-2006 IEP developed by Fairfax County was adequate under the IDEA.

I.

A.

An overview of the IDEA and its relevant procedures will help place the following discussion in context. Congress passed the IDEA to provide disabled children with programs "that emphasize[ ] special education and related services **[**3]** designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C.A. § 1400(d)(1)(A). The IDEA requires all states receiving federal education funds to provide disabled school-children with a "free appropriate public education" ("FAPE"). 20 U.S.C.A. § 1412(a)(1)(A). A FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188-89, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982) (internal quotation marks omitted).

IEPs are the primary vehicle through which schools provide a particular student with a FAPE. To that end, IEPs "must contain statements concerning a disabled child's level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." *MM ex rel. DM v. Sch. Dist*., 303 F.3d 523, 527 (4th Cir. 2002); *see* 20 U.S.C.A. § 1414(d)(1)(A). Further, an IEP must ultimately be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207

The IDEA **[**4]** prescribes procedures for developing and challenging IEPs. 20 U.S.C.A. § 1415. Parents may participate in the IEP development process and may challenge IEPs they believe are inadequate. § 1415(b)-(h). To challenge an IEP, parents must present complaints to the school and request a due process hearing. § 1415(b)(6), (f)(1)(A). These procedural safeguards are "designed to ensure that the parents or guardian of a child with a disability are each notified of decisions affecting their child and given an opportunity to object to these decisions." *MM ex rel. DM*, 303 F.3d at 527 (internal quotation marks omitted).

B.

M.S. was born in 1988 and currently resides in Fairfax County, Virginia, where he was enrolled in public school from 1996-2002. [1] M.S. has been diagnosed with mental retardation, mild to moderate autism, and a significant communication disorder. [2] This communication disorder contains **[*320]** two components: severe verbal and oral

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[1] M.S. began attending Fairfax County schools in the first grade. M.S. was moved to the fifth grade after his second grade year, due to his age, and thus did not have a third or fourth grade year. He remained in Fairfax County schools from fifth grade through eighth grade.

[2] Under the Individuals with Disabilities in Education Act ("IDEA"), codified at 20 U.S.C.A. § 1400 *et seq*. (West 2000 & Supp. 2008), M.S. suffers from "[m]ultiple disabilities," meaning that he has "concomitant impairments . . . the combination of which

motor dyspraxia, which affects the mechanical abilities of speech, and auditory processing delays. [3] M.S. has a very limited ability to speak and must frequently use sign language to communicate. M.S. also suffers from severe deficits in his short-term memory. [4] **[**5]** M.S.'s IQ is generally measured at between 37 and 41, the approximate mental functioning of a four-year old.

Although Fairfax County prepared annual **[**6]** IEPs for M.S. in each of the six years he was enrolled in Fairfax County schools, he made little progress while enrolled there. In fact, during these six years, M.S. only mastered the academic objectives specified in his IEPs once. Moreover, by 2002, the end of M.S.'s eighth grade year, he could only make approximately fifteen signs for sign language and produce roughly twelve to fifteen words intelligibly. His ability to identify words was significantly limited: on one test, administered three times during the eighth grade, he was able to identify only three words: "a," "I," and "no." [5] (J.A. at 1027.) He was unable to count higher than six and became discouraged in his efforts to communicate.

C.

On December 21, 2001, M.S.'s parents initiated a due process hearing, suggesting placement at the Lindamood-Bell Center, a facility focusing on the "building blocks" of communication -- phonemic awareness, symbol imagery, and concept imagery. On March 5, 2002, Fairfax County proposed to pay for twelve weeks of attendance **[**7]** at Lindamood-Bell on the condition that M.S. return to Fairfax County schools at completion of the twelve weeks. The parents declined this offer.

On May 28, 2002, following a formal hearing finding that M.S. suffers from several disabilities, including autism, Fairfax County finally acknowledged that M.S. should be classified as having "[m]ultiple [d]isabilities." [6] (J.A. at 1122.) Thereafter, Fairfax County and M.S.'s parents met to discuss an IEP for 2002-2003, M.S.'s freshman year in high school. Fairfax County rejected the parents' request to place M.S. at Lindamood-Bell, and recommended an IEP similar to those of the preceding six years. Specifically, Fairfax County's IEP contained no assurances that M.S. would receive the one-on-one instruction that his parents requested. The IEP provided two hours per week of speech and language therapy, one-anda-half hours per week of physical education, and one-half hour per week of written language, in addition to other courses, including reading, independence and community skills, communication, articulation, and oral motor and math skills. In total, twenty-three-and-one-half hours per week of special education in both small-group special **[**8]** education classes and general education **[*321]** classes with special education support were to be provided.

On June 24, 2002, the parents rejected the proposed 2002-2003 IEP and informed Fairfax County that they intended to enroll M.S. privately at Lindamood-Bell. At the parents' request, Fairfax County prepared additional IEPs for the 2002-2005 school years, all of which provided a life skills program to address work behavior, social skills, and peer interaction, in addition to academics. None, however, guaranteed any one-on-one instruction.

D.

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causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments." 34 C.F.R. § 300.8(c)(7) (2008).

[3] Dyspraxia "is a speech disorder that interferes with [M.S.]'s ability to initiate and sequence motor movements for speech. . . . [It] is characterized by the loss of ability to consistently position the articulators for speech. Unintelligible speech is the result in children . . . ." (J.A. at 1514.)

[4] Specifically, M.S.'s working memory is that of a two-year old.

[5] His reports also show, however, that at various times he was able to identify other words, such as "map," "mom," "big bug," and "A Big Dog A little cat." (J.A. at 502-508.)

[6] It appears that M.S.'s parents had unsuccessfully attempted to have his autism recognized for years, but that Fairfax County resisted this diagnosis despite at least three physician reports from as early as 1996 that suggested an atypical autism diagnosis would have been appropriate.

After deciding to remove M.S. from Fairfax County public schools, but before deciding on Lindamood-Bell, his parents contacted at least three private schools in the area. M.S. was denied admission to two, and the third school had no openings at the time. Accordingly, M.S.'s parents crafted the following education program for M.S., which focused primarily on one-on-one academic **[**9]** education as opposed to group classroom settings:

> *Lindamood-Bell Center*: one-on-one instruction for five days per week (six hours per day during the school year and four hours per day during the summer);
>
> *Sign Language*: one-on-one instruction from a licensed Virginia teacher (one hour per week);
>
> *Speech and Language Therapy*: one-on-one speech and language therapy from Building Blocks Therapy, LLC and Kids Communication Center (three hours per week);
>
> *Physical Therapy*: participation in group activities such as the Broad Run Riding School, the therapeutic program at Dance Abilities, and the Special Olympics equestrian program (two to three hours per week);
>
> *Vocational Training*: cutting grass in the neighborhood for $ 20/hour.

The parents maintained this program from 2002-2006, all four of M.S.'s high-school years, and paid all associated costs. The main component of the parents' program was Lindamood-Bell.

Lindamood-Bell is a learning center focused on the "building blocks" of communication -- phonemic awareness, symbol imagery, and concept imagery. It is neither a school nor a special education facility, and it does not require teachers to be certified in special education. Lindamood-Bell is "not **[**10]** designed to provide curriculum," but rather to develop "underlying skills . . . necessary in order for the students to be able to access the curriculum within their traditional school settings." (J.A. at 1973.)

Lindamood-Bell is on the approved-list of Virginia Supplemental Education Services Providers for Virginia and Fairfax County, and its services have been used as a remedy in other circumstances where a school district has violated the IDEA by failing to provide a disabled child with a FAPE. [7]

Fairfax County and Lindamood-Bell both tracked M.S.'s progress at Lindamood-Bell from 2002-2005. In M.S.'s 2003-2004 IEP, Fairfax County noted that M.S. could "read, **[**11]** without prompts, homemade books," (J.A. at 1108), had "115 sight **[*322]** and decodable words," (J.A. at 1108), and could "identify numbers 1-10 . . . [and] count out money for taxi ride[s]," (J.A. at 1113.) In the 2004-2005 IEP, Fairfax County noted that M.S. could now "recognize and/or decode 156 words," (J.A. at 1629), and that M.S. was "able to greet, protest, provide information, show interest, inquire, comment and remind," (J.A. at 1624). By 2005, the IEP recognized that M.S. could count "numbers 1-12 accurately and with varying accuracy to 15." (J.A. at 343.) Finally, in the 2006-2007 IEP, Fairfax County recognized that M.S. had "a vocabulary of about 500 words and phrases, that he [was] learning and reviewing," (S.J.A. at 344), and that he could "count things in his environment . . . [and] count [numbers] 11-15 fairly consistently," (S.J.A. at 347).

Lindamood-Bell also recorded M.S.'s progress, noting that a review of "daily clinical records, observations, program checklists, [and] just interacting with [M.S.]," revealed progress at Lindamood-Bell. (J.A. at 2013-14.) This progress included M.S.'s increased ability to sign, understand, and verbalize simple sentences, as well as his ability **[**12]** to produce written notes. Although these notes were exceedingly simple in their content ("Dear Dad I hope you feel better. Love [M.S.]" (J.A. at 1601)), M.S., by contrast, had shown almost no writing ability when he left the Fairfax County public schools.

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[7] *See, e.g., Draper v. Atlanta Indep. Sch. Sys.*, 480 F. Supp. 2d 1331, 1351 n.8 (N.D. Ga. 2007) (noting that the ALJ offered a prospective remedy that included 5 hours per week of intensive multisensory reading services at Lindamood-Bell Center); *C.C. ex rel. Mrs. D. v. Granby Bd. of Educ.*, 453 F. Supp. 2d 569, 571-72 (D. Conn. 2006) (noting that school board did not appeal either the Hearing Officer's decision to place student in Lindamood-Bell reading program for twelve weeks or its order that the school provide transportation).

Although M.S. made minimal progress on standardized testing across a broad range of subjects from 2002-2005, none of Fairfax County's witnesses could testify that M.S. made no progress while at Lindamood-Bell. In fact, Dr. Ticknor, the school psychologist, wrote in her 2004 report that M.S., who was initially reserved, became increasingly comfortable and appeared to enjoy social interactions with adults and noted that she was "struck by [M.S's] desire for social connection . . . and the lack of . . . overly self-focused behaviors typical of many young people with Pervasive Developmental Disorder." (J.A. at 817.)

E.

From 2002-2005, M.S. remained at Lindamood-Bell. M.S.'s parents continued to negotiate with Fairfax County during this time, sending numerous emails and letters in the eighteen months following the June 24, 2002 IEP meeting. Finally, in June 2004, M.S.'s parents filed a request for a due process hearing challenging the IEPs **[**13]** for 2002-2003, 2003-2004, and 2004-2005. M.S.'s parents, in addition to challenging these three IEPs, also requested reimbursement for the costs of sending M.S. to Lindamood-Bell and of acquiring the other service providers for M.S.

The hearing officer ("HO") held a due process hearing over several days in October and November 2004. Both sides presented testimony from numerous witnesses. Fairfax County's witnesses generally testified that M.S. made little progress at Lindamood-Bell, as shown in standardized testing, and that he needed far more peer interaction than provided at Lindamood-Bell. M.S.'s witnesses, on the other hand, testified that M.S. had never advanced at Fairfax County schools and that intensive one-on-one instruction was necessary to keep M.S. on task and give him a chance to develop underlying communication skills.

Faced with conflicting testimony from interested parties, the HO ruled that the three IEPS from 2002-2005 were invalid under the IDEA, and that Lindamood-Bell was an inappropriate placement. Therefore, he awarded no reimbursement for **[*323]** M.S.'s time at Lindamood-Bell. [8] Driving the HO's decision was his conclusion that "[M.S.] need[ed] both the experience of **[**14]** group teaching and the interaction with peers as well as an intensive one-on-one academic program." (J.A. at 2351.) To that end, the HO concluded that the IEPs were invalid because they focused too much on group interaction and too little on one-on-one instruction. Likewise, the HO concluded that Lindamood-Bell was not an appropriate placement because it focused too much on one-on-one instruction and had little group interaction. The HO also determined that Lindamood-Bell was inappropriate because it was not an accredited school and it failed to offer vocational training. The HO also directed Fairfax County to provide an appropriate IEP for the 2005-2006 school year.

Both parties sought review of the HO's decision in the United States District Court for the Eastern District of Virginia. The district court, as permitted by the IDEA, *see* 20 U.S.C.A. § 1415(i)(2)(C)(ii) (requiring district court to hear additional evidence "at the request of a party"), held an evidentiary hearing to take additional evidence before rendering a decision. On May 8, **[**15]** 2007, the district court affirmed the HO's decision. The district court also upheld the 2005-2006 IEP as providing a FAPE.

M.S.'s parents noted a timely appeal, and we possess jurisdiction under 28 U.S.C.A. § 1291 (West 2006).

II.

On appeal, M.S.'s parents contend: (1) the district court erred by not awarding any reimbursement for Lindamood-Bell; and (2) the district court erred by concluding that the 2005-2006 IEP was valid. [9] We address each claim in turn.

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[8] The HO did, however, award reimbursement for sign language and speech/language therapy services that M.S. received under his parents' program.

[9] The parents also challenge the district court's failure to grant reimbursement for various speech/language and sign language placement expenses. Because these arguments were not presented to the district court, they have been forfeited. *See Holland v. Big River Minerals Corp*., 181 F.3d 597, 605 (4th Cir. 1999) ("Generally, issues that were not raised in the district court will not be addressed on appeal.").

A.

In a proceeding under the IDEA, we conduct a modified de novo review, giving "due weight" to the underlying administrative proceedings. *Rowley*, 458 U.S. at 206; *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 103 (4th Cir. 1991) ("Generally, in reviewing state administrative decisions in IDEA cases, courts are required to make **[**16]** an independent decision based on a preponderance of the evidence, while giving due weight to state administrative proceedings."). We do not, however, "substitute [our] own notions of sound educational policy for those of local school authorities." *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 999 (4th Cir. 1997). When a district court has heard and considered additional evidence, we review its findings of fact for clear error. *MM ex rel. DM*, 303 F.3d at 531.

B.

We first turn to the parents' contention that the district court erred in not awarding any reimbursement for M.S.'s education at Lindamood-Bell. The IDEA provides for parental reimbursement for private placements if (1) the school district fails to provide a FAPE and (2) the parental placement is appropriate. *Sch. Comm.* **[*324]** *of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985). Because Fairfax County does not dispute that the 2002-2005 IEPs failed to provide M.S. with a FAPE, the only issue before us is whether the Lindamood-Bell placement was appropriate. Like an IEP, a parental placement is appropriate if it is "reasonably calculated to enable the child to receive educational benefits." *Carter v. Florence County Sch. Dist. Four*, 950 F.2d 156, 163 (4th Cir. 1991) **[**17]** (internal quotation marks omitted).

In challenging the district court's decision denying reimbursement, the parents focus on three alleged errors: (1) the failure to consider the appropriateness of Lindamood-Bell placement on a year-by-year basis, as well as the appropriateness of partial reimbursement, (2) the inappropriate consideration of M.S.'s lack of progress, and (3) the application of the least-restrictive environment test to a parental placement. We now consider each argument.

1. Year-by-Year Analysis and Partial Reimbursement

The parents contend that the district court erred by failing to evaluate each year of the Lindamood-Bell placement on an independent basis. We agree.

As noted, when evaluating whether reimbursement is appropriate for a parental placement, we determine (1) whether the IEP provided by the school district failed to provide a FAPE, and, if so, (2) whether the parental placement was appropriate. *Burlington*, 471 U.S. at 369. By statute, IEPs are evaluated "periodically, but not less frequently than annually." 20 U.S.C.A. § 1414(d)(4)(A)(i); *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). Of course, because the finding of an invalid IEP for a particular school year is **[**18]** a necessary precursor to reimbursement for a parental placement, we necessarily must also consider the appropriateness of a particular placement on the same year-by-year basis. Evaluating both IEPs and parental placements on a yearly basis simply acknowledges that what is "reasonably calculated" to confer some educational benefit on the child may change over time. [10]

Here, the district court considered M.S.'s time at Lindamood-Bell in its entirety instead of separating out each year. We believe this was error, and, accordingly, we vacate the district court's decision that Lindamood-Bell was an inappropriate placement and remand the case for year-by-year analysis of whether Lindamood-Bell was an appropriate placement. Because the district court has found that Fairfax County's IEPs violated the IDEA, it may

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[10] For example, at the time M.S. was initially placed at Lindamood-Bell, his parents had unsuccessfully tried to place him in three other schools. Lindamood-Bell was willing to accept M.S. and believed he would benefit from its services. Furthermore, audiologist Dr. Lucker recommended Lindamood-Bell to the parents after careful consideration based upon the individualized program offered to M.S. At the moment of initial enrollment, M.S.'s parents, like all parents beginning an educational program they hope will benefit their special needs child, could not have known if their son would ultimately fail to make progress. Where a child does fail to make progress, full reimbursement for subsequent school years in the same program is likely inappropriate. *See infra* Section II.B.2 (discussing district court's consideration of lack **[**19]** of progress).

award reimbursement if it finds *any* year of instruction at Lindamood-Bell to be "reasonably calculated" to confer some educational benefit on M.S.

Moreover, the district court must also consider whether, given the equitable nature of the IDEA, *see Burlington*, 471 **[*325]** U.S. at 374 (noting that "equitable considerations are relevant in fashioning relief"), some partial reimbursement is appropriate for any given year. [11] A district court has the power to "grant such relief as [it] determines is appropriate," 20 U.S.C.A. § 1415(i)(2)(C)(iii), in light of a school system's failure to provide educational benefit to a disabled student. This language confers "broad discretion" on the court in fashioning an appropriate remedy. *Burlington*, 471 U.S. at 369; **[**20]** *see also Draper v. Atl. Indep. Sch. Sys.*, 518 F.3d 1275, 1283-90 (11th Cir. 2008) (upholding an award of six years of prospective compensatory education at a private placement); *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 394 (3d Cir. 2006) (upholding an award of partial reimbursement for the difference between the amount of time actually offered by the school board's IEP and the amount of time that should have been offered to a disabled student for speech therapy); *Adams v. Oregon*, 195 F.3d 1141, 1151 (9th Cir. 1999) (remanding to determine whether partial reimbursement is appropriate where parents supplemented the school program).

And, the Supreme Court has instructed that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including *the appropriate and reasonable level* of reimbursement that should be required." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 16, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993) (emphasis added). In determining whether partial reimbursement is appropriate, "the district court may consider the following factors, among others: the existence of other, perhaps more appropriate, substitute placements, the effort expended by [the] parents in securing alternative placements[,] and the general cooperative or uncooperative position of [the school board]." *Adams*, 195 F.3d at 1151. [12]

The equitable nature of the IDEA statute does not mean, of course, that courts are at liberty to award reimbursement out of the blue. Rather, as noted above, it is clear that the IDEA provides for reimbursement only if (1) the school district fails to provide a FAPE and (2) the parental placement is "reasonably calculated to enable the child to receive educational benefits." *Carter*, 950 F.2d at 163 (internal quotation marks omitted); *see also Burlington*, 471 U.S. at 369. These two findings lie at the heart of the statute.

In this regard, we note that the hearing officer and district court made findings that Lindamood-Bell had fallen short in **[*326]** several significant respects, namely in the failure to provide the life skills and vocational training and the group interaction needed by M.S. for his instruction. We accord great deference to such findings under our precedent. *See MM ex rel. DM*, 303 F.3d at 531 (holding that "findings of fact made in administrative proceedings are **[**23]** considered to be prima facie correct," and that "where a district court has heard and considered additional evidence, . . . we review its findings of fact for clear error"). Whether the identified shortcomings of Lindamood-Bell were of such a nature as to preclude the realization of an educational benefit for M.S. is, of course, for the trier of fact to determine on remand. However, they do not preclude as a matter of law the possibility that the one-on-one instruction provided by Lindamood-Bell warranted some reimbursement. Therefore, if the district court, on remand, again determines that full reimbursement for Lindamood-Bell is inappropriate for one or more school years, it must nonetheless consider whether partial reimbursement is appropriate in any year for the one-on-one

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[11] Throughout its brief, Fairfax County argues that any equitable considerations weighing in favor of the parents' request for reimbursement are outweighed by the parents' delay in filing this suit until 2004, after M.S. had already spent two years at Lindamood-Bell. We decline the opportunity to impose filing deadlines not issued by Congress when authorizing these equitable remedies. First, the parents have presented evidence that the delay was due to their unsuccessful efforts to negotiate with Fairfax County to resolve their concerns out of court. Second, **[**21]** the Supreme Court has recognized that "the review process is ponderous," and held reimbursement to be an appropriate remedy for precisely that reason. *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 370, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985). Even if the administrative review process had been completed within Virginia's 45-day statutory window, "[a] final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed." *Id.*

[12] For example, **[**22]** M.S.'s parents unsuccessfully attempted to negotiate with Fairfax County for more one-on-one instruction in the public school setting and were unable, despite several attempts, to place M.S. in other private schools.

services that Lindamood-Bell provided to M.S. Here, the HO and the district court concluded that M.S. needed significant one-on-one instruction that Fairfax County failed to provide for 2002-2005. *M.S. v. Fairfax County Sch. Bd.*, No. 1:05cv1476, 2007 U.S. Dist. LEXIS 33735, at *32-*33 (E.D. Va. 2007). Lindamood-Bell provided thirty hours per week of one-on-one instruction in the "building blocks" of communication. **[**24]** If the district court determines that any time spent at Lindamood-Bell during any or all of the 2002-2005 school years was "reasonably calculated to enable [M.S.] to receive educational benefits," M.S.'s parents may be reimbursed for such period as the district court deems appropriate. *Carter*, 950 F.2d at 163 (internal quotation marks omitted); *see also Burlington*, 471 U.S. at 369.

2. Actual Progress and the Least Restrictive Environment

Having remanded the case for further proceedings, we now address two other legal arguments made by M.S.'s parents that are relevant on remand: the district court erred by (1) considering M.S.'s lack of progress and (2) applying the least restrictive environment requirement to their private placement. [13]

The district court found, as a factual matter, that M.S. made minimal actual progress at Lindamood-Bell. *M.S.*, No. 1:05cv1476, 2007 U.S. Dist. LEXIS 33735, at *44-*45. The parents contend that, because the IDEA speaks of programs "reasonably calculated" to provide an educational **[**25]** benefit, M.S.'s actual progress while at Lindamood-Bell is irrelevant as to whether his initial placement there was appropriate. [14]

We begin by noting that the parents' argument lacks support in our caselaw. Although other circuits have held that an IEP's "appropriateness is judged prospectively so that any *lack of progress* under a particular IEP . . . does not render that IEP inappropriate," *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 530 (3d Cir. 1995) (emphasis added); *see also Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990) ("An IEP is a snapshot, not a retrospective. In striving for **[*327]** 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated."), we have concluded that, in some situations, evidence of *actual progress* may be relevant to a determination of whether a challenged IEP was reasonably calculated to confer some educational benefit, *see MM ex rel. DM*, 303 F.3d at 532 (finding error where the district court concluded **[**26]** that the 1995-96 IEP was inadequate because it "failed to consider the actual educational progress" made by the student during the 1995-96 school year). To be sure, however, progress, or the lack thereof, while important, is not dispositive. *See Rowley*, 458 U.S. at 207 n.28 ("[T]he achievement of passing marks and advancement from grade to grade will be *one* important factor in determining educational benefit." (emphasis added)).

Here, the district court's decision correctly followed precedent. The court looked at M.S.'s actual progress on standardized tests, but only as one factor. Rather, the court also joined with the HO in finding that M.S. required both one-on-one and group instruction, as well as vocational and social education. Accordingly, the district court's decision to consider M.S.'s actual progress as a factor in determining whether the Lindamood-Bell placement was proper.

We also believe the district court did not err in handling the least restrictive environment requirement in the IDEA. Under the IDEA, schools must place disabled students in the least restrictive environment to achieve a FAPE. Thus, a disabled child should participate in the same activities as nondisabled **[**27]** children to the "maximum extent appropriate." 20 U.S.C.A. § 1412(a)(5)(A). As we have explained, "[m]ainstreaming of handicapped children into regular school programs . . . is not only a laudable goal but is also a requirement of the Act." *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989).

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[13] "[O]ur court regularly issues opinions to provide guidance on remand in the interest of judicial efficiency." *Goodman v. Praxair, Inc.*, 494 F.3d 458, 466 n.2 (4th Cir. 2007).

[14] As discussed above, the parents dispute whether M.S. made any actual progress. For the purposes of this section, we assume he did not.

The district court agreed with the HO that the Lindamood-Bell placement was "highly restrictive" by IDEA standards. *M.S.*, No. 1:05cv1476, 2007 U.S. Dist. LEXIS 33735, at *49. Although we have never held that parental placements must meet the least restrictive environment requirement, *see Carter*, 950 F.2d at 160 (noting that "the [IDEA]'s preference for mainstreaming was aimed at preventing *schools* from segregating handicapped students from the general student body" and that "the school district ha[d] presented no evidence that the [IDEA's preference for mainstreaming] was meant to restrict *parental* options when the public schools fail to comply with the requirements of the [IDEA] (emphasis in original)), the district court's consideration of Lindamood-Bell's restrictive nature was proper because it considered the restrictive nature only as a factor in determining whether the placement **[**28]** was appropriate under the IDEA, not as a dispositive requirement. *M.S.*, No. 1:05cv1476, 2007 U.S. Dist. LEXIS 33735, at *49; *see also M.S ex rel. S.S. v. Bd. of Educ.*, 231 F.3d 96, 105 (2d Cir. 2000) (recognizing that "parents seeking an alternative placement may not be subject to the same mainstreaming requirements as a school board," but concluding that the IDEA's mainstreaming requirement "remains a consideration that bears upon a parent's choice of an alternative placement and may be considered by the hearing officer in determining whether the placement was appropriate").

C. Validity of 2005-2006 IEP

Finally, we consider whether the 2005-2006 IEP was adequate to provide **[*328]** M.S. with a FAPE. Pursuant to the HO's order, Fairfax County prepared an IEP for 2005-2006 that provided 12.75 hours per week of individual instruction, in addition to 17.25 hours of the group and vocational instruction that the HO determined were important to M.S.'s education. The IEP also provided for additional one-on-one assistance as the educators deemed necessary. The district court found the IEP adequate to provide M.S. with a FAPE because it complied with the HO's order to provide "reliable and intensive" **[**29]** one-on-one education. *M.S.*, No. 1:05cv1476, 2007 U.S. Dist. LEXIS 33735, at *50.

The parents contend that the 12.75 hours per week of one-on-one instruction is insufficient to provide M.S. with a FAPE. Although trivial academic advancement will not produce a FAPE, *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985), the IDEA does not require a perfect education, *MM ex rel. DM*, 303 F.3d at 526 ("The IDEA does not . . . require a school district to provide a disabled child with the best possible education."). The IEP must be "calculated to confer *some* educational benefit on a disabled child." *A.B. ex rel D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004) (internal quotation marks omitted) (emphasis in original). Under this standard, we cannot say the district court clearly erred in determining the 2005-2006 IEP adequate.

III.

For the foregoing reasons, the judgment of the district court is affirmed in part and vacated and remanded in part with instructions for the district court to consider the Lindamood-Bell placement on a year-by-year basis and to determine whether any partial reimbursement is appropriate, consistent with this opinion.

*AFFIRMED IN PART AND **[**30]** VACATED AND REMANDED WITH INSTRUCTIONS IN PART*

NATIONAL UPDATE OF CASE LAW UNDER THE IDEA AND § 504/A.D.A.[1]

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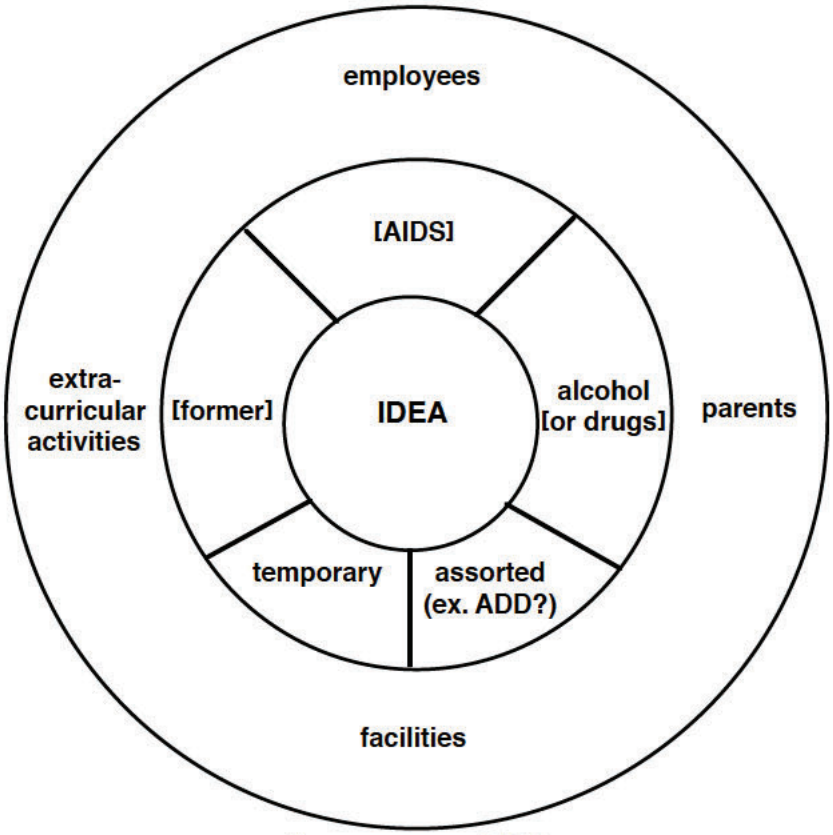

SEPTEMBER 2020

Notes:

- ***P*** = Parent won; ***S*** = School district won; **( )** = Inconclusive
- supra = cross reference to earlier full citation; infra = cross reference to subsequent citation
- Cases from the Fourth Circuit Virignia are in **bold font**.
- Court decisions or component concepts for initial discussion are highlighted in yellow.
- Decisions for particular attention are in shaded in blue-green.
- The acronyms are listed in a glossary on the last page of this document

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[1]A long version of the Zirkel National Update, which extends back to 1998, is available as a free download at perryzirkel.com. The coverage of both this document and the long-term version is limited to officially published decisions (and those in the Federal Appendix).

I. IDENTIFICATION (INCLUDING CHILD FIND)

(*P*) William V. v. Copperas Cove Indep. Sch. Dist., 774 F. App'x 253, 74 IDELR ¶ 277 (5th Cir. 2019)
- while recognizing the murky difference between general and special education (citing Lisa M.), vacated and remanded lower court's determination that student with dyslexia was, per se, eligible as SLD, ruling that its failure to address the need prong and to make findings as to the extent of the student's progress with accommodations was fatal error

***S*/(*P*)** J.N. v. Jefferson Cty. Sch. Dist., 421 F. Supp. 3d 1288, 75 IDELR ¶ 153 (N.D. Ala. 2019)
- ruled that district violated child find for middle-school child with ADHD but was not entitled to compensatory education (or, as a result, attorneys' fees) because the parent did not meet her burden of proof of a resulting denial of FAPE, including lack of proof that the general education interventions that the teachers provided were substantively different from what she subsequently received under an IEP

P Indep. Sch. Dist. No. 283 v. E.M.D.H., 960 F.3d 1073, 76 IDELR ¶ 203 (8th Cir. 2020)
- ruled that district (a) violated child find for gifted h.s. student with various mental health diagnoses and increasing attendance problems (statute of limitations info - continuing violation), and (b) had erroneously determined that she was ineligible as ED and OHI [IEE reimbursement, tutoring reimbursement, and compensatory education case]

P Spring Branch Indep. Sch. Dist. v. O.W., 961 F.3d 781, 76 IDELR ¶ 234 (5th Cir. 2020)
- upheld child find violation based on reasonable period dimension, concluding that proactive steps rather than only length was the key consideration—here, the district had reason to know at the time of the 504 eligibility determination meeting that the general education behavioral interventions was not working (revised to clarify that intermediate measures, i.e., RTI or 504, may be warranted in other circumstances)

II. APPROPRIATE EDUCATION (INCLUDING ESY)[2]

S C.D. v. Natick Pub. Sch. Dist., 924 F.3d 621, 74 IDELR ¶ 121 (1st Cir. 2019), cert. denied,140 S. Ct. 1264 (2020)
- upheld appropriateness of three successive proposed IEPs for student with ID, including transition assessment and services in the third one, based on district-deferential approach that rejected ambitious goals/challenging objectives as second, separate Endrew F. standard [tuition reimbursement case]

(P) H.P. v. Bd. of Educ. of Chi., 385 F. Supp. 3d 623, 74 IDELR ¶ 128 (N.D. Ill. 2019)
- denied dismissal of claim that district's failure to translate vital IEP process documents and to provide competent and impartial interpreters to EL parents amounted to a denial of FAPE (and a violation of Title VI)

S L.J. v. Sch. Bd. of Broward Cty., 927 F.3d 1203, 74 IDELR ¶ 185 (11th Cir. 2019)
- adopted the Van Duyn materiality standard for failure-to-implement claims and applied it in favor of the district for the stay-put IEP of child with autism, distinguishing Endrew F. as applying to "content" FAPE claims

S Albright v. Mountain Home Sch. Dist., 926 F.3d 942, 74 IDELR ¶ 187 (8th Cir. 2019)
- upheld substantive appropriateness of IEP for student with autism per Endrew F., including appropriateness of the BIP in relation to PRR, and rejected parental participation challenge in a case of "a profoundly toxic lack of trust"

S J.G. v. Dep't of Educ., Haw., 772 F. App'x 567, 74 IDELR ¶ 190 (9th Cir. 2019)
- ruled, in brief decision, that district's proposed change in placement of middle schooler with autism from private school to its autism center, including use of LRE checklist, was not predetermination and met Endrew F. standard

S M.G. v. N. Hunterdon-Voorhees Reg'l High Sch. Dist., 778 F. App'x 107, 74 IDELR ¶ 191 (3d Cir. 2019)
- brief decision upholding, with deference to IHO's credibility determination, his decision that the IEP provided "significant learning and meaningful educational benefits in light of [the child with autism's] individual needs and potential"

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[2] 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2):

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies--

(i) Impeded the child's right to a FAPE;

(ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or

(iii) Caused a deprivation of educational benefit.

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

S Pangerl v. Peoria Unified Sch. Dist., 780 F. App'x 505, 74 IDELR ¶ 246 (9th Cir. 2019)
- upheld rejection of parents' claims of denial of FAPE based on parent participation (left early and unreasonably), denial of ESY (exception rather than rule), vague transition plan (Endrew F. snapshot), and SLT services (qualified providers) for student with SLD and SLI

S Candi M. v. Riesel Indep. Sch. Dist., 379 F. Supp. 3d 570 (W.D. Tex. 2019)
- upheld FAPE implementation as well as procedural and substantive FAPE of IEP of h.s. student with OHI (ADD) and SLD (dyslexia), including transition assessment

S Perkiomen Valley Sch. Dist. v. S.D., 405 F. Supp. 3d 620, 75 IDELR ¶ 67 (E.D. Pa. 2019)
- reversing IHO, ruled that grade 6 IEP for student with dyslexia contained reading fluency PELs, thus not "seriously" depriving parental participation and meeting Endrew F. substantive standard "although the fact that [she] apparently did not meet her IEP reading fluency goals in a timely manner is troubling" [tuition reimbursement case]

(*S*) Jefferson Cty. Bd. of Educ. v. Amanda S., 418 F. Supp. 911, 75 IDELR ¶ 95 (N.D. Ala. 2019)
- granted preliminary injunction to board, ruling that IHO likely erred by using progress rather than reasonable calculation of progress under Endrew F. in ruling that IEP for fourth grader with SLD did not provide FAPE after limited progress in reading

S Bruno v. Northside Indep. Sch. Dist., 788 F. App'x 287, 75 IDELR ¶ 243 (5th Cir. 2019), cert. denied, __ S. Ct. __ (2020)
- brief affirmance of lower court decision upholding comparable services upon moving into district from out-of-state and substantive and procedural appropriateness of subsequent IEP for preschooler with autism

P D.L. v. St. Louis City Sch. Dist., 950 F.3d 1057, 75 IDELR ¶ 31 (8th Cir. 2020)
- ruled that district's proposed placement for fourth grader with autism at its special school for students with educational and behavior difficulties did not meet the Endrew F. standard for FAPE, because it was limited to correcting "poor choices," i.e., purely voluntary behavior, and lacked sensory supports [tuition reimbursement case]

S R.S. v. Highland Park Indep. Sch. Dist., 951 F.3d 319, 75 IDELR ¶ 32 (5th Cir. 2020)
- upheld ruling that the district's IEPs for nonverbal and non-ambulatory student with multiple disabilities amounted to substantive FAPE in the LRE (including Endrew F.), despite his five falls and partial regression – specialized team, expert input, and repeated revisions in protocol and IEP [tuition reimbursement case]

S A.B. v. Abington Sch. Dist., 440 F. Supp. 3d 428, 76 IDELR ¶ 41 (E.D. Pa. 2020)
- ruled that that a district's obligation to offer a FAPE for a privately enrolled student with a disability is not triggered unless the parent requests it specifically, as objectively understood [tuition reimbursement case]

S A.A. v. Northside Indep. Sch. Dist., 951 F.3d 678, 76 IDELR ¶ 61 (5th Cir. 2020)
- ruled that district did not violate IDEA procedural requirements in conducting reevaluation of fourth grader with ED two months after parent's request and in changing the child's classrooms that were substantially similar in function w/o an IEP meeting and that his IEP met the Endrew F. standard based on his meaningful progress despite hospitalizations

S N.G. v. Placentia Yorba Linda Unified Sch. Dist., 807 F. App'x 648, 76 IDELR ¶ 117 (9th Cir. 2020)
- ruled that the proposed placement for student with autism met the Endrew F. standard and the unilateral residential placement was not necessary for FAPE [tuition reimbursement case]

P A.N. v. Bd. of Educ. of Iroquois Cent. Sch. Dist., 801 F. App'x 35, 76 IDELR ¶ 148 (2d Cir. 2020)
- brief affirmance of lower court's decision that the proposed segregated placement for student with SLD (dyslexia) was substantively appropriate but the IEP was not, in light of repeated deficient literacy and math instruction, counseling, and assistive technology [tuition reimbursement case]

P Preciado v. Bd. of Educ. of Clovis Mun. Sch., 443 F. Supp. 3d 1289, 76 IDELR ¶ 67 (D.N.M. 2020)
- upheld rulings that district denied FAPE in grades 4 and 5 for student with SLD (dyslexia) by (a) effectively excluding parental participation by relying on but not sufficiently explaining Istation reading progress scores, (b) not meeting Endrew F.'s substantive standard based on grade-level frame of reference and repeated insufficient methods (despite excessive attendance problems), (c) failing to implement sufficiently the specialized instruction in the final IEP, and (d) failing to provide AT evaluation for reading materials [compensatory education case]

S Sanchez v. D.C., 815 F. App'x 559, 76 IDELR ¶ 175 (D.C. Cir. 2020)
- brief ruling that district's proposed transfer of student with autism from one private school to another did not significantly impede the parent's opportunity for participation in the circumstances of this case [tuition reimbursement case]

S Butte Sch. Dist. No. 1 v. C.S., ___ F. App'x __ , 76 IDELR ¶ 204 (9th Cir. 2020)
- rejected claims on behalf of 12th grader with autism and ED based on lack of an FBA-BIP (not entitled and behaviorally appropriate IEP – Endrew F. reasonable>ideal) and transition assessment (harmless procedural violation – variety of services that were beneficial)

P/S Spring Branch Indep. Sch. Dist. v. O.W. (supra)
- ruled that (1) the use of in-class time-outs was substantial or significant departure that resulted in loss of benefit, (2) as was the halving of the school day w/o a written document; but (3) the use of repeated restraints in the wake of violent behavior were permissible under state law and did not have to be in the child's IEP, and (4) summoning the police upon the child's assault on his teacher did not violate his IEP

S McKnight v. Lyon Cty. Sch. Dist., 812 F. App'x 455, 76 IDELR ¶ 274 (9th Cir. 2020)
- brief affirmance that district's IEP for child with autism complied with procedural requirements for progress reporting and also met the Endrew F. substantive standard without the provision of a 1:1 aide—also ruled that autism specialist's classroom observation constituted screening, thus not requiring parental consent

S A.W. v. Tehachapi Unified Sch. Dist., 810 F. App'x 588, 76 IDELR ¶ 275 (9th Cir. 2020)
- brief affirmance of ruling that parent of nine-year old with autism and ADHD did not meet burden of proof that the district's failure to provide the requested BCBA supervision (2 hrs./wk.) for the ABA-trained aide amounted to a denial of FAPE under Endrew F.

S Alvarez v. Swanton Local Sch. Dist., ___ F. Supp. 3d __, 77 IDELR ¶ ___ (N.D. Ohio 2020)
- rejected procedural and substantive FAPE claims on behalf of high school student with multiple disabilities, attributing blame to the parents' unreasonable insistence on home instruction (citing judge's previous decision in Horen)

S Wong v. Bd. of Educ., ___ F. Supp. 3d __, 77 IDELR ¶ 43 (D. Conn. 2020)
- ruled that district provided parents with opportunity to attend IEP meetings, even if they did not attend all of them, and that the four successive IEPs for the twice-exceptional secondary school student met the Endrew F. substantive standard for FAPE [tuition reimbursement case]

III. MAINSTREAMING/LRE

S C.D. v. Natick Pub. Sch. Dist. (supra)
- ruled that district's three successive proposed IEPs that provided mix of general and special education classes for student with ID were the LRE, reaffirming the First Circuit's balancing test rather than the more nuanced multi-factor test in various other circuits

P A.B. v. Clear Creek Indep. Sch. Dist., 787 F. App'x 217, 75 IDELR ¶ 90 (5th Cir. 2019)
- ruled that district's proposed change of third grader with autism and ADHD from inclusionary placement to special education class for all academic subjects did not meet Daniel R. multi-factor test

IV. RELATED SERVICES

S Osseo Area Sch. v. M.N.B., __ F.3d __, 77 IDELR ¶ 1 (8th Cir. 2020)
- ruled that IDEA does not require neighboring district that accepted application for student with ED under state open enrollment law was obligated to provide to-and-from school transportation in her IEP beyond district boundaries

V. DISCIPLINE ISSUES

P Jay F. v. William S. Hart Union High Sch. Dist., 772 F. App'x 578, 74 IDELR ¶ 188 (9th Cir. 2019)
- brief ruling reversing, based on his history of threatening behavior, district's manifestation determination that student's ED was not causally connected to his threatened retaliation against other students—also upholding remedies of expungement and dialectical behavior therapy (and attorneys' fees)

(*P*) Olu-Cole v. E.L. Haynes Pub. Charter Sch., 930 F.3d 519, 74 IDELR ¶ 215 (D.C. Cir. 2019)
- ruled that school did not overcome heavy presumption to return student with ED to his regular placement after 45-day IAES (for serious bodily injury to another student) expired, remanding for determination of compensatory education

VI. ATTORNEYS' FEES

P/S P.J. v. Conn. State Bd. of Educ., 931 F.3d 156, 74 IDELR ¶ 245 (2d Cir. 2019)
- ruled that Supreme Court's Buckhannon decision did not abrogate, by silence, its Delaware Valley decision that reasonable attorney's fees are available for useful and necessary work in monitoring class action consent decree, further reducing district's court's award of $470k, rather than parent attorneys' request of $1.1 million, to approximately $200k

P/S Rayna P. v. Campus Cmty. Sch., 390 F. Supp. 3d 556, 74 IDELR ¶ 222 (D. Del. 2019)
- modestly reduced parents' attorneys' fees from request $376k to $310k for largely successful comp ed case on behalf of two brothers, rejected charter school's request for further reduction based on parents' contingent fee agreement and charter school's ability to pay

S Wofford v. N. Little Rock Sch. Dist., 788 F. App'x 415, 75 IDELR ¶ 242 (8th Cir. 2019)
- brief ruling that parent did not qualify as a prevailing party for attorneys' fees where, upon the hearing officer's order for the district to develop a BIP with the assistance of a parent-approved behavior consultant, the parent moved the family out of the district so to preclude implementation of the relief

S J.M. v. Oakland Unified Sch. Dist., 804 F. App'x 501, 76 IDELR ¶ 34 (9th Cir. 2020)
- ruled that parents were not entitled to attorneys' fees where the hearing officer ordered placement that they opposed – order for IAES was relatively ephemeral and order for certain records was too limited degree of success

VII. REMEDIES

A. TUITION REIMBURSEMENT

P Steven R.F. v. Harrison Cent. Sch. Dist. No. 2, 924 F.3d 1309, 74 IDELR ¶ 122 (10th Cir. 2019); see also Nathan M. v. Harrison Cent. Sch. Dist., 942 F.3d 1034, 75 IDELR ¶ 179 (10th Cir. 2019)
- ruled that district's appeal of lower court's tuition reimbursement order, which was based on district's placement process violations depriving parents of requisite participation opportunity, was moot in light of district's payment of tuition per stay-put

S W.A. v. Hendrick Hudson Cent. Sch. Dist., 927 F.3d 126, 74 IDELR ¶ 186 (2d Cir. 2019), cert. denied, 140 S. Ct. 934 (2020)
- rejected appropriateness of small boarding school for gr. 9 and 10 for student with OHI based on migraines and related psychological issues (deference to expertise of SRO)

P Edmonds Sch. Dist. v. A.T., 780 F. App'x 491, 74 IDELR ¶ 218 (9th Cir. 2019)
- upheld tuition reimbursement award for residential placement of student with severe mental health problems, concluding that he needed this placement for educational benefit and that it qualified as an educational placement

S R.H. v. Bd. of Educ. Saugerties Cent. Sch. Dist., 776 F. App'x 719, 74 IDELR ¶ 221 (2d Cir. 2019)
- rejected appropriateness of private school for grade 7 student with autism and anxiety disorder due to its failure to offer services designed to meet his unique needs despite limited evidence of social, emotional, and attendance improvement

P D.L. v. St. Louis City Sch. Dist. (supra)
- ruled that unilateral placement that provided sensory and speech support, weekly OT, autism-focused services and staff to fourth grader with autism and resulted in his academic progress was appropriate and the district's correction of the substantive defects in its proposed placement did not end the reimbursement relief w/o notice to the parents via an IEP meeting

P A.N. v. Bd. of Educ. of Iroquois Cent. Sch. Dist. (supra)
- affirmed award of tuition reimbursement for sixth grader with dyslexia, upholding rulings that the unilateral placement was appropriate and the equities were in favor of the parents

S J.F. v. Byram Twp. Bd. of Educ., 812 F. App'x 79, 76 IDELR ¶ 176 (3d Cir. 2020)
- denied tuition reimbursement for student with dyslexia and ADHD based on the equities, specifically parents' lack of timely written notice and their unreasonable conduct

S Spring Branch Indep. Sch. Dist. v. O.W. (supra)
- ruled that tuition reimbursement may not extend to period that did not amount to denial of FAPE

B. COMPENSATORY EDUCATION[3]

P Preciado v. Bd. of Educ. of Clovis Mun. Sch. (supra)
- upheld IHO award of one year of compensatory education for two-year denial of FAPE, concluding that the detailed analysis of the denial of FAPE sufficed as the requisite explanation for this award

[3] For the latest treatment, see Perry A. Zirkel, "Compensatory Education under the IDEA: The Latest Annotated Update of the Law," West's Education Law Reporter, 2020, v. 376, pp. 850–863. For the difference between the quantitative and qualitative approaches, see, e.g., Perry A. Zirkel, "The Two Competing Approaching for Calculating Compensatory Education under the IDEA: An Update," West's Education Law Reporter, 2017, v. 339, pp. 10–22.

P **R.S. v. Bd. of Directors of Woods Charter Sch. Co., 806 F. App'x 229, 76 IDELR ¶ 205 (4th Cir. 2020)**
- brief decision affirming "direct funding" compensatory education award with parents' choice of licensed providers at reasonable rates

P Indep. Sch. Dist. No. 283 v. E.M.D.H. (supra)
- ruling that high school student, as a result of child find and eligibility violations, was entitled to not only IEE and tutoring reimbursement, but also private tutoring as compensatory education "so long as the Student suffers from a credit deficiency caused from the years she spent without a FAPE"

P/S Doe v. E. Lyme Bd. of Educ., 962 F.3d 649, 76 IDELR ¶ 233 (2d Cir. 2020) (Doe III)[4]
- with the limited exceptions of the escrow agent's delegated authority (Reid) and parents' portion of the maintenance fee ("free" in FAPE), rejected the parents' various challenges to provisions for the requested escrow account, the calculation of prejudgment interest, and the previous substantive rulings (including the unchanged effect of the Supreme Court's intervening decision in Endrew F.)

C. Other Remedies (including IEE Reimbursement)[5]

S A.H. v. Colonial Sch. Dist., 779 F. App'x 90, 74 IDELR ¶ 219 (3d Cir. 2019)
- ruled that district's evaluation was appropriate and, thus, that parents were not entitled to IEE at public expense—upholding superior familiarity of district personnel with the child than that of parent's expert, who authored the IEE

(P) L.C. v. Alta Loma Sch. Dist., 389 F. Supp. 3d 845, 74 IDELR ¶ 261 (C.D. Cal. 2019)
- ruled that district engaged in unnecessary delay in relation to parents' request for IEE reimbursement not based on 3-week period from belated impasse until requesting impartial hearing, but based on failure to timely provide critical cost-cap info to parents, remanding to IHO to determine whether his procedural violation affected student's or parent's substantive rights

S M.S. v. Hillsborough Twp. Pub. Sch. Dist., 793 F. App'x 91, 75 IDELR ¶ 212 (3d Cir. 2019)
- denied IEE at public expense to parents because they had not expressed disagreement with the district's reevaluation (distinguishing Third Circuit's Warren G. decision as focusing on when, not whether)

[4] In an intervening decision, the Second Circuit issued a summary order dismissing the parents' earlier appeal as premature, pending the district court's final decision, including calculation of prejudgment interest. Doe v. E. Lyme Bd. of Educ., 747 F. App'x 30 (2d Cir. 2019) (Doe II).

[5] For a useful checklist of IHO analysis of IEEs at public expense, see Perry A. Zirkel, "Independent Educational Evaluation Reimbursement: The Next Update," West's Education Law Reporter, 2017, v. 341, pp. 555–563.

VIII. OTHER IDEA ISSUES

P Wimbish v. D.C., 381 F. Supp. 3d 22, 74 IDELR ¶ 65 (D.D.C. 2019) (Wimbish III)
- replaced IHO's restrictive remedy with order for full evaluation in wake of uncontested ruling that district exited student from eligibility w/o such an evaluation

S V.D. v. N.Y., 403 F. Supp. 3d 76, 74 IDELR ¶ 279 (E.D.N.Y. 2019)
- held that the IDEA's stay-put provision did not preclude the state from enforcing the revised vaccination requirement—removal of religious exemption did not amount to a change in placement

(*P*) del Rosario v. Nashoba Reg'l Sch. Dist., 419 F. Supp. 3d 210, 75 IDELR ¶ 222 (D. Mass. 2019)
- granted parents' requested preliminary injunction for their choice of entity to conduct transitional evaluation in cooking and baking that the IHO ordered for 22-year-old with autism, without addressing the parents' appeal of the IHO's decision that upheld the district's provision of FAPE and, thus, denied compensatory education

S Duncan v. Eugene Sch. Dist. 4J, 431 F. Supp. 3d 1193, 75 IDELR ¶ 248 (D. Or. 2020)
- rejected minority tolling and student's (rather than parent's) KOSHK date for IDEA's statute of limitations

(*P*)/(*S*) R.S. v. Highland Park Indep. Sch. Dist. (supra)
- although finding it unnecessary to determine in this case, concluded that the KOSHK date in a substantive FAPE challenge to an IEP generally accrues immediately after the district's action resulting in the alleged deficiency but is a fact-intensive inquiry as to its sufficient apparentness upon such a challenge to a series of IEPs

S Doe v. Westport Bd. of Educ., __ F. Supp. 3d __, 76 IDELR ¶ 42 (D. Conn. 2020)
- ruled that transfer of rights at age 18 extinguishes parents' standing to pursue tuition reimbursement

S Chi. Teachers Union v. DeVos, __ F. Supp. 3d __, 76 IDELR ¶ 237 (N.D. Ill. 2020)
- denied teacher union's motion for preliminary injunction against alleged order to review all IEP's before the end of the school year – lack of standing under APA against USDE for lack of waiver recommendation and unlikelihood of success under APA against both USDE and school district

IX. SECTION 504/ADA ISSUES

S Doe v. Pleasant Valley Sch. Dist., 745 F. App'x 658, 73 IDELR ¶ 171 (8th Cir. 2018)
- rejected parents' § 504/ADA challenge to IEP based on IEP not incorporating all of the IEE recommendations – parents must show bad faith or gross misjudgment, not just denial of FAPE

(P)/(S) Marshall v. N.Y.S. Athletic Ass'n, 374 F. Supp. 3d 276, 74 IDELR ¶ 45 (W.D.N.Y. 2019), further proceedings, 374 F. Supp. 3d 276, 74 IDELR ¶ 45 (W.D.N.Y. 2019)
- denied dismissal and motion for preliminary injunction for student with POTS who sought exception to eight-semester eligibility rule for interscholastic basketball under Section 504, and subsequently reached mixed results for requested relief against state commissioner of education

P K.N. v. Gloucester City Bd. of Educ., 379 F. Supp. 3d 334, 74 IDELR ¶ 73 (D.N.J.. 2019)
- ruled that third grader with autism was entitled to not only an aide but also a special education teacher for after-school program, which the child had in her school program, to provide meaningful access under § 504/ADA—reasonable, necessary, and not undue burden or fundamental alternation

(P) E.M. v. San Benito Indep. Sch. Dist., 374 F. Supp. 3d 616, 74 IDELR ¶ 106 (S.D. Tex. 2019)
- denied dismissal of FAPE (here, alleged unjustified removal of special education services and refusal to provide justifiable accommodations) and peer harassment claims of middle-school student with multiple disabilities—sufficient showing of possible deliberate indifference

S M.L. v. Williamson Cty. Sch. Dist., 772 F. App'x 287, 74 IDELR ¶ 152 (6th Cir. 2019); cf. McKnight v. Lyon Cty. Sch. Dist. (supra) (failure to show proffered reasons were pretext for retaliation for filing for a due process hearing)
- ruled that parents of hypersexual student with IEP failed to show sufficient evidence of the final pretext step for retaliation, i.e., that district's motive for reporting them for suspected child abuse was retaliation for their advocacy on behalf of their child

S L.G. v. Bd. of Educ. of Fayette Cty., 775 F. App'x 227, 74 IDELR ¶ 193 (6th Cir. 2019)
- upheld dismissal of § 504/ADA retaliation claim of parent of middle school student with e-coli infection for lack of evidence of causal connection between parent's advocacy and truancy (and neglect) proceedings

S Camfield v. Bd. of Tr. of Redondo Beach Unified Sch. Dist., 800 F. App'x 491 (9th Cir. 2020)
- upheld rejection of ADA retaliation claim of parent of student with disability who received 24-hour notice letter for visits to her child's elementary school in the wake of her profanity-laced, disruptive on-campus communications with school staff – no evidence of pretext

(*P*) Duncan v. Eugene Sch. Dist. 4J (supra)
- ruled that minority tolling and student's KOSHK applied to the § 504/ADA hostile environment claims (unlike the IDEA claims), as does the continuing violations exception, thus preserving these claims for further proceedings

(*P*) I.M. v. City of N.Y., 111 N.Y.S.3d 273, 75 IDELR ¶ 161 (App. Div. 2019)
- rejected dismissal of § 504/ADA failure-to-accommodate claim on behalf of nonverbal student with autism that six-week transportation on full-size bus rather than IEP's provision for minibus, which was attributable to computer error and which resulted in the child's repeated behavioral incidents, met the required elements including gross misjudgment, bad faith, or deliberate indifference due to district's bureaucratic inaction in response to parents' complaints

S Powers v. Northside Indep. Sch. Dist., 951 F.3d 298, 76 IDELR ¶ 33 (5th Cir. 2020)
- upheld rejection of plaintiff-administrators' First Amendment and, after jury trial, state Whistleblower Law claims after the district fired them for over-identifying students under § 504 (for accommodations in state ESSA testing

(*P*) Ga. Advocacy Office v. Ga., 447 F. Supp. 3d 1311, 76 IDELR ¶ 131 (N.D. Ga. 2020); see also U.S. v. Ga., __ F. Supp. 3d __, 76 IDELR ¶ 298 (N.D. Ga. 2020)
- denied dismissal of ADA Title II claims of integration violation and unequal education against state's administration of GNETS

S Richardson v. Omaha Sch. Dist., 957 F.3d 869, 76 IDELR ¶ 145 (8th Cir. 2020)
- upheld summary rejection of parents' bullying-based § 504 FAPE claim for failure to show requisite bad faith or gross misjudgment

S K.H. v. Antioch Unified Sch. Dist., 424 F. Supp. 3d 699, 76 IDELR ¶ 150 (N.D. Cal. 2020)
- rejected respondeat superior liability of school district under § 504 absent notice of private school's alleged inappropriate restraint of child with disability

S Wong v. Bd. of Educ. (supra)
- rejected retaliation claim of students based on legitimate nondiscriminatory reason for removal from National Honor Society

S G.P. v. Claypool, __ F. Supp. 3d __, 76 IDELR ¶ 239 (N.D. Ill. 2020)
- ruled that district's transfer offer for student with severe mobility problems to another Montessori magnet school was not a violation of ADA Title II "program accessibility"

Glossary of Acronyms and Abbreviations

ADA	Americans with Disabilities Act
ADHD	attention deficit hyperactivity disorder
ALJ	administrative law judge
APA	Administrative Procedures Act
AT	assistive technology
BIP	behavior intervention plan
C.F.R.	Code of Federal Regulations
DCL	Dear Colleague Letter
DD	developmental delay
ED	emotional disturbance
EL	English learner
ESY	extended school year
FAPE	free appropriate public education
FBA	functional behavior analysis
GEI	general education interventions
ID	intellectual disabilities
IDEA	Individuals with Disabilities Education Act
IEE	independent educational evaluation
IEP	individualized education program
IHO	impartial hearing officer
infra	cross reference to subsequent citation
LRE	least restrictive environment
OHI	other health impairment
OT	occupational therapy
Part C	IDEA provisions specific to infants and toddlers (i.e., ages 0–3)
PRR	peer-reviewed research
PT	physical therapy
§ 504	Section 504 of the Rehabilitation Act
SEA	state education agency
SL	speech and language
SLD	specific learning disability
SLI	speech and language impairment
SLT	speech and language therapist
supra	cross reference to earlier, full citation
U.S.C.	United States Code (i.e., federal legislation)

R.F. v. Cecil Cty. Pub. Sch.

United States Court of Appeals for the Fourth Circuit

January 29, 2019, Argued; March 25, 2019, Decided

No. 18-1780

Reporter
919 F.3d 237 *; 2019 U.S. App. LEXIS 8837 **

R.F., a minor child, by and through her PARENTS and next friends, E.F. and H.F.; E.F.; H.F., on their own behalves, Plaintiffs — Appellants, v. CECIL COUNTY PUBLIC SCHOOLS, Defendant — Appellee, and D'ETTE W. DEVINE, Superintendent (officially); SARAH FARR, Director of Special Education (officially), Defendants.COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.; DISABILITY RIGHTS MARYLAND; NATIONAL DISABILITY RIGHTS NETWORK; THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, Amici Supporting Appellant.

Subsequent History: US Supreme Court certiorari denied by R. F. v. Cecil Cty. Pub. Sch., 2019 U.S. LEXIS 5108 (U.S., Oct. 7, 2019)

Prior History: **[**1]** Appeal from the United States District Court for the District of Maryland, at Baltimore. (1:17-cv-02203-ADC). Albert David Copperthite, Magistrate Judge.

R.F. v. Cecil Cty. Pub. Sch., 2018 U.S. Dist. LEXIS 104936 (D. Md., June 21, 2018)

Disposition: AFFIRM.

Case Summary

Overview
HOLDINGS: [1]-The district court properly affirmed an ALJ's determination that the school district provided a disabled student with a FAPE under the IDEA, 20 U.S.C.S. § 1400 et seq., because, although the district violated certain procedural requirements by changing the student's placement without notifying her parents or modifying her IEP, the violations did not deny the student a FAPE. Her placement in the intensive communication support classroom, where she was the only student, was reasonably calculated to enable her to make progress appropriate in light of her circumstances, she still received multiple daily opportunities to interact with her nondisabled peers to the maximum extent appropriate under 20 U.S.C.S. § 1412(a)(5), and the violations did not significantly impede the parents' opportunity to participate in the decisionmaking process under 20 U.S.C.S. § 1415(f)(3)(E)(ii)(II).

Outcome
Judgment affirmed.

Counsel: ARGUED: Wayne Darryl Steedman, STEEDMAN LAW GROUP, Lutherville, Maryland, for Appellants.

David Andrew Burkhouse, PESSIN KATZ LAW, P.A., Columbia, Maryland, for Appellee.

Peter J. Anthony, DENTONS US LLP, Washington, D.C., for Amici Curiae.

ON BRIEF: Cheryl A. Steele Steedman, STEEDMAN LAW GROUP, Lutherville, Maryland; Kevin Golembiewski, BERNEY & SANG, Philadelphia, Pennsylvania, for Appellants.

Adam E. Konstas, Towson, Maryland, Rochelle S. Eisenberg, PESSIN KATZ LAW, P.A., Columbia, Maryland, for Appellee.

Ira A. Burnim, Lewis Bossing, THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, Washington, D.C.; Richard D. Salgado, Dallas, Texas, A. David Mayhall, DENTONS US LLP, Washington, D.C., for Amicus The Judge David L. Bazelon Center for Mental Health Law.

Selene Almazan-Altobelli, COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC., Towson, Maryland, for Amicus Council of Parent Attorneys and Advocates, Inc., National Disability Rights Network, and Disability Rights of Maryland.

Judges: Before AGEE and HARRIS, Circuit Judges, and DUNCAN, **[**2]** Senior Circuit Judge. Senior Judge Duncan wrote the opinion, in which Judge Agee and Judge Harris joined.

Opinion by: DUNCAN

Opinion

[*240] DUNCAN, Senior Circuit Judge:

R.F., an elementary school student with a disability, and her parents (collectively "Appellants") challenge the district court's decision to affirm the determination of a Maryland Administrative Law Judge (an "ALJ") that Cecil County Public Schools ("CCPS") provided R.F. with a free appropriate public education (a "FAPE") under the Individuals with Disabilities Education Act (the "IDEA"), 20 U.S.C. § 1400 *et seq.* Appellants contend that CCPS violated the IDEA by (1) failing to educate R.F. in the least restrictive environment (the "LRE"), (2) failing to implement R.F.'s Individualized Education Program (her "IEP"), (3) denying R.F.'s parents the opportunity to participate in her educational decisionmaking, and (4) providing an IEP that was inappropriate for R.F.'s needs. The ALJ found, and

the district court agreed, that while CCPS violated certain procedural requirements of the IDEA, those violations did not substantively deny R.F. a FAPE in violation of the IDEA. For the reasons that follow, we affirm.

I.

R.F., who was seven years old when these proceedings began, is **[**3]** a CCPS student with a disability who is entitled to special education and related services under the IDEA.[1] R.F. and her parents contend that CCPS failed to comply with the IDEA in several respects and that, in so doing, CCPS denied R.F. a FAPE in violation of the IDEA. Before addressing these arguments, we first provide a brief overview of the applicable regulatory framework and the facts and procedural history of this case.

[*241] A.

The IDEA provides funds for states to educate children with disabilities, subject to conditions imposing substantive requirements on the education that is provided. 20 U.S.C. § 1412. The statute was enacted to ensure that children with disabilities have access to an education that meets their unique needs, to protect the rights of these children and their parents, and to prevent the unnecessary exclusion of these children "from the public school system and from being educated with their peers."[2] *Id.* § 1400.

To that end, the IDEA requires that participating states provide a FAPE to children with disabilities. *Id.* § 1412(a)(1). The mechanism by which a state provides a FAPE is an IEP--a document that describes the child's unique needs and the state's plan for meeting those needs. *See Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) ("The IEP **[**4]** is the centerpiece of the [IDEA's] education delivery system for disabled children.") (citation and internal quotation marks omitted). The IDEA requires participating states to "develop[], review[], and revise[]" an IEP for each child with a disability. 20 U.S.C. § 1412(a)(4). An IEP must contain an assessment of the child's "present levels of academic achievement and functional performance," measurable annual goals that are designed to "meet the child's needs that result from the child's disability" along with a statement of how progress toward those goals will be measured, a description of "the special education and related services and supplementary aids and services" that the school will provide for the child, and an "explanation of the extent[] . . . to which the child will not participate with nondisabled children in the regular class." *Id.* § 1414(d)(1)(A)(i). The IEP team--a group comprised mainly of school staff and a child's parents--should revise the IEP "as appropriate" to address various circumstances, including a "lack of expected progress towards the annual goals"; "the results of any reevaluation"; "information about the child provided to, or by, the parents"; "the child's anticipated needs"; or "other matters." **[**5]** *Id.* § 1414(d)(4)(A). The IDEA requires that a child's parents be included in the IEP decisionmaking process as members of the IEP team. *Id.* § 1414(d)(1)(B).

B.

R.F. has been diagnosed with severe autism spectrum disorder and a rare genetic disorder.[3] She generally communicates without using words, and she "exhibits complex, challenging, disruptive behaviors" such as hyperactivity and aggression. J.A. 24. Her aggressive behaviors, which include "grabbing people, pulling hair, biting, and placing her mouth on others," often manifest during transitions in the school day. *Id.* R.F. also exhibits physical limitations--for instance, she has significant neuromuscular deficits, so she sometimes needs assistance

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[1] All facts are taken from the ALJ's findings of fact, J.A. 23-51, except where otherwise indicated. The parties agree that there are no genuine issues of material fact with these findings aside from the finding that R.F.'s behavior intervention plan (the "BIP") is "appropriate to address [her] problem behaviors." J.A. 28. We address the appropriateness of the BIP *infra*.

[2] The IDEA is an updated version of the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (current version at 20 U.S.C. § 1400 *et seq.*), under which some of the caselaw setting out IDEA requirements was initially developed.

[3] R.F. was one of only two people in the world diagnosed with this disorder when she received that diagnosis. The long-term consequences of this disorder, including its impact on R.F.'s educational potential, are unknown.

sitting up straight and being aware of her body's position when navigating steps and curbs. R.F. "requires adult supervision and assistance at all times." *Id.* She also has a short attention **[*242]** span and has difficulty processing information quickly.

CCPS first identified R.F. as a student qualifying for special education and related services when she was two years old. It developed IEPs for R.F. for half-day kindergarten in the 2014-2015 school year and for full-day kindergarten in the 2015-2016 school year.

Before R.F. entered **[**6]** first grade, CCPS took steps to address R.F.'s behavioral issues. CCPS hired a consultant from the Kennedy Krieger Institute to instruct its staff on conducting functional behavior assessments ("FBAs") for students with significant disabilities and autism. CCPS staff conducted an FBA for R.F. in April 2016 and created a behavior intervention plan (a "BIP") for her that focused on biting as her primary interfering behavior.

The BIP set out actions for CCPS staff to take to reduce R.F.'s unwanted biting and to intervene when she began to bite. Steps to reduce R.F.'s biting included ensuring that R.F.'s NovaChat (a device that allows R.F. to press pictures on a screen to communicate) was accessible to her at all times, maintaining a "clear and consistent daily routine" and a visual schedule to ease transitions during the day, reminding R.F. of appropriate behaviors by presenting social stories to her throughout the day, providing R.F. with "short verbal instructions with visual supports," and using a token reinforcement system. J.A. 29. Steps to intervene when R.F. began to bite included redirecting R.F. to her NovaChat, to appropriate oral stimulation items, or to vibration tools meant **[**7]** to calm R.F., followed by reviewing social stories to remind R.F. why biting is inappropriate.

As relevant to the dispute on appeal, R.F.'s IEP team--comprised primarily of CCPS staff and R.F.'s parents--met in May 2016 to revise her IEP for the 2016-2017 first grade school year (the "May 2016 IEP"). The May 2016 IEP incorporated R.F.'s BIP. It also included thirteen goals to address R.F.'s academic, behavioral, physical, and speech and language needs. The IEP team determined that to make progress on these goals, R.F. would require sixteen hours and fifty-five minutes outside the general education setting and fourteen hours and thirty-five minutes inside the general education setting each week.

R.F.'s mother attended this meeting and objected to the May 2016 IEP. She did not think that R.F. should be included in classes with nondisabled peers and requested that CCPS pay for R.F.'s tuition at the Benedictine School, a private school. The other members of R.F.'s IEP team disagreed and noted that CCPS was developing an intensive communication support classroom (an "ICSC") for children with communicative difficulties. The IEP team again met in June 2016 to evaluate R.F.'s progress on her **[**8]** IEP goals before the start of the 2016-2017 school year. Appellants' arguments on appeal focus solely on the 2016-2017 school year.[4]

At the start of the 2016-2017 school year, CCPS provided most of R.F.'s special education services in the ICSC. Although CCPS anticipated the participation of other students in the ICSC, those students did not attend in the fall of 2016 due to unexpected circumstances. Consequently, R.F. was the only student in the ICSC. R.F. joined the general education classroom for "specials" (e.g. gym, art, music), **[*243]** recess, field trips, and occasional reading and math classes.

Mr. K., a special education teacher, provided R.F. with special education services in the ICSC. CCPS also assigned a paraprofessional to support R.F. throughout the day. In the ICSC and throughout R.F.'s day, CCPS offered R.F. a number of specialized services, including individualized supervision and instruction, and supports. These supports included objects meant to help R.F. transition to new activities and locations, a visual schedule with verbal cues, and low lighting and reduced noise. CCPS "implemented the BIP regularly, but not perfectly." J.A. 44. For instance, while Mr. K. used the behavior **[**9]** reduction and intervention steps in the BIP, he did not always follow them in order. To monitor R.F.'s progress toward her IEP goals, Mr. K. collected data on R.F.'s behavior and performance every other week and incorporated that data into quarterly progress reports. He destroyed his raw data after writing the quarterly reports, even though CCPS requires teachers to maintain data for two years.

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[4] Appellants initially asserted claims arising from the 2014-2015 and 2015-2016 school years, but these claims were disposed of by the ALJ below, and Appellants do not pursue them on appeal.

In August 2016, approximately three weeks after the start of school, Mr. K. began to notice that R.F. struggled when she joined her nondisabled peers in the general education setting. She had difficulty walking between classrooms and staying seated and quiet in the general education classroom. She also often failed to finish her lunch in the school lunchroom because she became distracted.

In response to these difficulties, Mr. K. gradually began providing more instruction to R.F. in the ICSC instead of the general education classroom. For instance, while R.F.'s schedule placed her in the general education classroom for reading comprehension, Mr. K. would sometimes remove her from that class and take her back to the ICSC. This decision varied daily and, according to Mr. K., was "responsive to her **[**10]** needs depending on her success in the class." S.A. 3.[5] On some days, Mr. K. was unable to take R.F. to the general education classroom "if she was exhibiting really aggressive behaviors or if she was having a really difficult time walking or with mobility." S.A. 4. As a result of these adjustments, R.F.'s hours in the ICSC exceeded the number specified in the May 2016 IEP.

In December 2016, R.F.'s IEP team met again to revise her IEP (the "December 2016 IEP"). The team decided to reduce the number of hours that R.F. spent in the general education setting so that she would only attend specials with nondisabled peers. Accordingly, the December 2016 IEP increased R.F.'s weekly time outside the general education setting from sixteen hours and fifty-five minutes to twenty-nine hours.

R.F.'s parents attended the meeting and opposed CCPS's approach. R.F.'s mother again expressed opposition to placing R.F. in a general education setting "at all during the school day." J.A. 45. R.F.'s parents also presented a report by Lisa Frank, an education consultant, who recommended placement in a "full-day evidence-based program for children with autism" like the Benedictine School. *Id.* The other members **[**11]** of the IEP team disagreed with this proposed placement and determined that the ICSC was the best placement for R.F.

C.

Shortly after R.F.'s IEP team compiled the December 2016 IEP, R.F.'s parents initiated this action, alleging that CCPS violated the IDEA and seeking to have R.F. placed at the Benedictine School or **[*244]** another private school at CCPS's expense. As required under the IDEA, they first filed a due process complaint with Maryland's Office of Administrative Hearings, resulting in a hearing before an ALJ. *See* 20 U.S.C. § 1415(f). The hearing before the ALJ addressed whether CCPS denied R.F. a FAPE or failed to offer her an IEP that would provide her with a FAPE during the 2016-2017 school year.

Mr. K testified at the hearing. As relevant to one of Appellants' principal claims concerning CCPS's procedural violations of the statute, Mr. K. stated that he was unaware that CCPS required teachers to maintain raw data for two years. The ALJ concluded that he had violated CCPS's retention policy but "did not do so for any nefarious purpose," and she declined to draw any negative inferences from his testimony. J.A. 71.

The ALJ also heard evidence regarding how CCPS calculates special education hours for the **[**12]** purposes of preparing IEPs and recording services provided. She found that, while Maryland requires schools to define special education hours in terms of the number of hours a child spends outside the general education classroom, CCPS defines them in terms of the number of hours of instruction focused on a child's IEP goals. Therefore, the ALJ concluded that experts who testified that R.F.'s IEP contained an inadequate number of special education hours did so based on a misunderstanding of how CCPS calculates those hours.

Based on the testimony and data presented at the hearing, the ALJ evaluated R.F.'s progress on her IEP goals. She found that R.F. had made progress toward some of her physical goals as well as some of her speech and language goals. She also found that R.F. did not make progress toward her behavioral or academic goals. She concluded that, overall, R.F. had "made incremental progress on some, but not all of her goals" and that this was appropriate for R.F. "given her unique circumstances." J.A. 86.

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[5] Citations to the "S.A." refer to the Supplemental Appendix filed by CCPS in this appeal.

The ALJ issued a decision holding that CCPS procedurally violated the IDEA by changing R.F.'s placement in August 2016 by gradually increasing her hours in the ICSC without **[**13]** notifying her parents or revising her IEP. She also concluded, however, that this violation did not deny R.F. a FAPE, crediting Mr. K.'s testimony that R.F. was having difficulty in the general education setting and benefitted from additional time in the ICSC. Overall, the ALJ concluded that "CCPS offered [R.F.] 'an IEP reasonably calculated to [enable her to] make progress appropriate in light of the child's circumstances.'" J.A. 87 (quoting *Endrew F.*, 137 S. Ct. at 999).

Appellants challenged the ALJ's decision in federal district court, naming as defendants CCPS, its superintendent, and its director of special education, in their official capacities.[6] The district court granted CCPS's motion for summary judgment for reasons similar to those stated in the ALJ's decision.[7] This appeal followed.

II.

In IDEA cases, we conduct a modified de novo review, "giving 'due weight' to the underlying administrative proceedings." *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 323 **[*245]** (4th Cir. 2009) (citation omitted). Under our precedent, whether an educational program offered by the state is appropriate for purposes of the FAPE analysis is a question of fact.[8] We consider an ALJ's factual findings to be "*prima facie* correct." *Doyle v. Arlington Cty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). However, the "ultimate decision as to whether the state has complied **[**14]** with the IDEA" is an independent decision made by the district court. *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 484 (4th Cir. 2011). In making this independent decision, courts should not "substitute their own notions of sound educational policy for those of the school authorities which they review." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

III.

Appellants contend that CCPS violated the IDEA in several respects. Whether a state has violated the IDEA has procedural and substantive components. Procedurally, the state must comply with the stated requirements of the IDEA. *Id.* at 206-07. Substantively, the state must offer the child a FAPE, which requires a targeted educational program setting reasonably calculated goals for a child's progress in light of the child's particular circumstances. *Endrew F.*, 137 S. Ct. at 999.

We first reexamine our precedent in light of the Supreme Court's recent decision in *Endrew F.*, 137 S. Ct. 988, 197 L. Ed. 2d 335, clarifying the FAPE standard. We then address Appellants' specific contentions regarding CCPS's compliance with the IDEA.

A.

To meet the substantive requirements of the IDEA, a school must provide a child with a FAPE. *M.L. ex rel. Leiman v. Smith*, 867 F.3d 487, 499 (4th Cir. 2017). The Supreme Court recently held in *Endrew F.* that to satisfy the FAPE requirement, "a school must **[*246]** offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's **[**15]** circumstances." 137 S. Ct. at 999.

In establishing this standard, the Court rejected the Tenth Circuit's approach, which held that the education and services provided to children with disabilities "must be calculated to confer *some* educational benefit" to meet the FAPE requirement and that a child's IEP "is adequate as long as it is calculated to confer an educational benefit that is merely more than *de minimis*" (the "*de minimis* standard"). *Id.* at 997 (alterations, citation, and internal

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[6] Throughout this opinion, we refer to these defendants collectively as "CCPS."

[7] The district judge referred the case to a federal magistrate judge for all proceedings and the entry of judgment by consent of the parties, in accordance with 28 U.S.C. § 636(c).

[8] We note, however, that several other circuits treat the issue of whether the school district has provided a FAPE as a mixed question of fact and law. *See, e.g., K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 804 (8th Cir. 2011) ("Whether a child has received a FAPE is a mixed question of law and fact.").

quotation marks omitted). Before *Endrew F.*, we required schools to provide "some educational benefit" to a child to meet their substantive obligation to provide the child with a FAPE. *See O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 358 (4th Cir. 2015) (quoting *Rowley*, 458 U.S. at 200) (collecting cases). This prior standard is similar to the Tenth Circuit's *de minimis* standard, and we clarify again that it is no longer good law. *See M.L.*, 867 F.3d at 496 (acknowledging that "[o]ur prior FAPE standard is similar to that of the Tenth Circuit, which was overturned by *Endrew F.*").

Instead, we follow the Court's standard as articulated in *Endrew F.* and hold that "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's **[*247]** circumstances." **[**16]** [9] *Endrew F.*, 137 S. Ct. at 999. This standard is framed in terms of each child's unique circumstances because "[a] focus on the particular child is at the core of the IDEA." *Id.* Consequently, "the benefits obtainable by children at one end of the spectrum [of disability] will differ dramatically from those obtainable by children at the other end, with infinite variations in between." *Id.* (quoting *Rowley*, 458 U.S. at 202). Our analysis is therefore grounded in each particular child's circumstances.

B.

Having established the relevant standard for the FAPE requirement, we turn to the issues on appeal in this case. In sum, we hold that CCPS did violate certain procedural requirements of the IDEA, most notably by changing R.F.'s placement without notifying her parents or modifying her IEP. However, any procedural violations did not deny R.F. a FAPE.

Appellants contend that CCPS violated the IDEA in four respects: (1) by failing to educate R.F. in the LRE, (2) by failing to implement the classroom placement in R.F.'s IEP when Mr. K. increased her hours in the ICSC, (3) by denying R.F.'s parents the right to participate in her education, and (4) by failing to provide an IEP appropriate for R.F.'s needs. We address each issue in **[**17]** turn.

1.

Appellants contend that CCPS failed to educate R.F. in the LRE because it provided her most of her instruction in the ICSC, where R.F. was the only student. They seek an order placing R.F. at a private school where she would be educated among peers with disabilities. We reject this contention.

The IDEA requires participating states to educate children with disabilities in the LRE--that is, alongside children who are not disabled "[t]o the maximum extent appropriate." 20 U.S.C. § 1412(a)(5). It permits states to remove a child with disabilities from the "regular educational environment . . . only when the nature or severity of the disability of a child is such that education in regular classes [with appropriate supports] cannot be achieved satisfactorily." *Id.* We have acknowledged that this statutory language "obviously indicates a strong congressional preference for mainstreaming" students into the general education classroom but that "[m]ainstreaming . . . is not appropriate for every [child with a disability]." *DeVries ex rel. DeBlaay v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). Instead, "[t]he proper inquiry is whether a proposed placement is appropriate under the [IDEA]"--in other words, whether a child's placement--the setting where the child learns--provides **[**18]** the child with a FAPE. *Id.* (citation omitted).

Here, placement in the ICSC was "reasonably calculated to enable [R.F.] to make progress appropriate in light of [her] circumstances." *Endrew F.*, 137 S. Ct. at 999. The ALJ's analysis here is instructive; she noted that "CCPS was not hiding [R.F.] from her peers; [R.F.] was afforded opportunities to interact with other first graders, albeit not to the degree CCPS would have preferred." J.A. 73-74. Indeed, while R.F. received most of her instruction in the

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[9] Indeed, we implicitly did so in *T.B., Jr. ex rel. T.B., Sr. v. Prince George's County Board of Education*, 897 F.3d 566 (4th Cir. 2018). In that case, we held that a school board procedurally violated the IDEA by failing to promptly evaluate a child for special education. *Id.* at 573. We concluded, however, that the school did not substantively violate the IDEA because its failure did not deny the child a FAPE. *Id.* at (Continued) 575. In doing so, we quoted *Endrew F.*'s standard to explain the substantive requirement of the IDEA, but it was not central to our holding because the case did not turn on whether the child's IEP was reasonably calculated to provide the child with a FAPE. *See id.* at 571.

ICSC, CCPS gave her multiple daily opportunities to interact with her nondisabled peers. For instance, she attended specials with the general education population and walked around the school each day to practice greeting other students. These opportunities, combined with R.F.'s instructional time in the ICSC, did not deny R.F. a FAPE, particularly where Mr. K. noted that R.F. had trouble concentrating and accessing material in the general education population. R.F. had opportunities to interact with her peers "[t]o the maximum extent appropriate," given R.F.'s unique circumstances and academic and behavioral needs. 20 U.S.C. § 1412(a)(5).

Appellants argue that the conclusions of the ALJ and the district court regarding R.F.'s placement **[**19]** improperly conflate the LRE and FAPE requirements. However, as they themselves recognize, the statutory obligation requires placement in the least restrictive environment *appropriate for the child's education. See Devries*, 882 F.2d at 880. As in *DeVries*, that required an environment where R.F. could benefit from "a structured program" and the opportunity for "one-to-one instruction." *Id.* at 879.

Appellants argue that they are not urging CCPS to increase the number of hours that R.F. spends with her peers who are not disabled; instead, they contend that the LRE for R.F. would include more time among peers with disabilities, and they seek placement in a private school to achieve that outcome. This argument miscomprehends the LRE requirement, which is defined in terms of the extent to which children with disabilities "are educated with children who are *not* disabled." *Id.* at 878 (emphasis added). But

However, as we have noted, not all procedural violations of the IDEA result in the denial of a FAPE. *T.B., Jr.*, **[*248]** 897 F.3d at 573. Indeed, Mr. K.'s decision to provide R.F. with more instruction in the ICSC than her IEP specified was "reasonably calculated to enable [R.F.] to make progress appropriate in light of [her] circumstances." *Endrew F.*, 137 S. Ct. at 999. Mr. K. recognized that R.F. **[**20]** was struggling in the general education classroom, and he determined that she would make more progress with more one-on-one instruction in the ICSC. He did so on a gradual and individualized basis, based on close attention to R.F.'s performance in a general education setting and in the ICSC. We conclude that R.F. received a FAPE when CCPS changed her placement, even though it failed to follow the IDEA's procedural requirements.

3.

Appellants also contend that CCPS violated the IDEA by taking certain actions that impeded her parents from participating in decisions about her education. The IDEA and its regulations grant the parents of a child with a disability certain procedural rights, including the right to "examine all records" relating to that child and to "participate in meetings with respect to the identification, evaluation, and educational placement" of the child. 20 U.S.C. § 1415(b); *see* 34 C.F.R. § 300.322 (setting out parent participation regulations for IEP development). The IDEA also "grants parents independent, enforceable rights" that are not limited to procedural matters, including "the entitlement to a [FAPE] for the parents' child." *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 533, 127 S. Ct. 1994, 167 L. Ed. 2d 904 (2007). We first clarify the grounds on which an ALJ may determine that a violation **[**21]** of parents' rights under the IDEA resulted in the denial of a FAPE to a child before turning to Appellants' contentions here.

a.

Parents who seek to enforce their rights or the rights of their child under the IDEA first seek review through a due process hearing before an ALJ. 20 U.S.C. § 1415(f). In general, the ALJ must determine whether a school violated the IDEA by deciding "on substantive grounds . . . whether the child received a [FAPE]." *Id.* § 1415(f)(3)(E)(i). However, "[i]n matters alleging a procedural violation, an ALJ "may find that a child did not receive a [FAPE]" if the ALJ determines that a procedural right was violated and that the violation "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child." *Id.* § 1415(f)(3)(E)(ii)(II).

Under § 1415(f)(3)(E)(ii)(II), an ALJ must answer each of the following in the affirmative to find that a procedural violation of the parental rights provisions of the IDEA constitutes a violation of the IDEA: (1) whether the plaintiffs "alleg[ed] a procedural violation," (2) whether that violation "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' **[**22]** child," and (3)

whether the child "did not receive a [FAPE]" as a result. *Id.* § 1415(f)(3)(E). Unless an ALJ determines that a given procedural violation denied the child a FAPE, she may only order compliance with the IDEA's procedural requirements and cannot grant other forms of relief, such as private placement or compensatory education. *See Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 754 n.6, 197 L. Ed. 2d 46 (2017) ("Without finding the denial of a FAPE, a hearing officer may do nothing more than order a school district to comply with the [IDEA's] various procedural requirements.").

[*249] b.

Our analysis here starts and ends with the second prong of this standard: whether a violation of parents' procedural rights under the IDEA "significantly impeded" their opportunity to participate in decisionmaking regarding their child's education. Appellants contend that CCPS violated their parental participation rights under the IDEA by changing R.F.'s placement without involving them in an IEP meeting and by destroying data relating to R.F.'s progress on her IEP goals. We hold that neither constitutes a significant impediment to parental participation on these facts.

With respect to changing R.F.'s placement, the parties agree that "Mr. K.'s unilateral determination to alter the environment **[**23]** in which some of R.F.'s IEP services were offered . . . constituted a procedural violation of [the parental rights provisions of] the IDEA." Appellees' Br. at 17; *see* 20 U.S.C. § 1415(b)(3).

However, R.F.'s parents' opportunity to participate in decisionmaking regarding R.F.'s education was not "significantly impeded" when CCPS changed R.F.'s placement for four months without involving her parents. 20 U.S.C. § 1415(f)(3)(E)(ii)(II). As discussed above, in changing R.F.'s placement, CCPS provided her more special education services, not fewer, in the ICSC, consistent with her parents' objection that her IEP contained too many hours in the general education classroom. CCPS did not significantly impede R.F.'s parents' participation rights when it failed to inform them that it was gradually changing R.F.'s placement in line with their expressed wishes.

Additionally, R.F.'s parents did eventually have an opportunity to participate in decisions about R.F.'s placement when her mother attended the December 2016 IEP meeting. *See D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3d Cir. 2010) (holding that a school district did not violate the IDEA when it ignored parents' letters for months but included the parents in their child's IEP meeting because "they ultimately had an opportunity to participate meaningfully **[**24]** in the creation of an IEP" for their child). Therefore, the only form of relief that Appellants seek--private placement for R.F.-- "cannot reasonably be traced" to CCPS's failure to include R.F.'s parents in decisions regarding her placement in August 2016. *Id.* at 566. We cannot agree with Appellants that CCPS's procedural violation of R.F.'s parents' right to participate in decisions about her placement rises to the level of a substantive IDEA violation that could be cured by private placement.

Appellants also contend that CCPS violated their parental rights under the IDEA when Mr. K. destroyed the raw data that he collected on R.F.'s progress before her parents could review it. However, as the ALJ noted, "the IDEA does not specify how often a school system should collect data or how long it should be maintained." J.A. 72. Instead, it only requires that the IEP describe how the child's progress toward her goals will be measured. 20 U.S.C. § 1414(d)(1)(A)(i)(III). The ALJ found that while Mr. K. violated *CCPS*'s records retention policy, which required him to preserve the data for two years, he did not violate the IDEA when he destroyed R.F.'s raw data after making his quarterly reports. We agree that this was not a procedural **[**25]** violation of the IDEA.

Regardless of whether the data destruction was a procedural violation of the IDEA, R.F.'s parents could still view summaries of the data in Mr. K.'s quarterly reports. Therefore, their ability to "participate in the decisionmaking process" regarding R.F.'s education was not "significantly **[*250]** impeded." 20 U.S.C. § 1415(f)(3)(E)(ii)(II).

We in no way minimize the necessity of compliance with the procedural requirements of the IDEA, including those pertaining to parental participation. *See DiBuo ex rel. DiBuo v. Bd. of Educ.*, 309 F.3d 184, 191 (4th Cir. 2002) (explaining, in a case before § 1415(f)(3)(E)(ii)(II) was enacted, that "[w]e have no doubt that a procedural violation of the IDEA . . . that causes interference with the parents' ability to participate in the development of their child's IEP

will often actually interfere with the provision of a FAPE to that child"). But here, we cannot find that CCPS significantly impeded R.F.'s parents' participation rights when it changed R.F.'s placement and destroyed raw data on R.F.'s progress. Accordingly, we affirm that CCPS did not violate R.F.'s parents' rights under the IDEA.

4.

Finally, Appellants contend that CCPS violated the IDEA because it failed to provide R.F. with an IEP that was sufficient to meet her needs, thus denying her a FAPE. **[**26]** Specifically, they contend that R.F.'s BIP was insufficient because it primarily focused on biting while ignoring R.F.'s other behaviors, that R.F.'s IEP was inadequate because it lacked a social skills goal, and that R.F.'s IEP contained an insufficient number of hours of special education instruction to meet her needs. We disagree.

As we have discussed, "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 999. Courts conduct this analysis with an understanding that "crafting an appropriate program of education requires a prospective judgment by school officials." *Id.*

First, with respect to the BIP, Appellants contend that it rendered R.F.'s IEP inadequate because it should have addressed behaviors other than biting.[10] However, the ALJ found that, at the time the May 2016 IEP was created, biting was R.F.'s primary problem behavior. She also deferred to testimony by Sarah Farr, CCPS's director of special education, that "[t]he skills set forth in the BIP for the primary behavior [here, biting] can be generalized to other behaviors." J.A. 68-69. Therefore, **[**27]** the behavior strategies in the May 2016 IEP were "reasonably calculated" in light of R.F.'s circumstances at the time that IEP was created, and CCPS did not deny her a FAPE. *Endrew F.*, 137 S. Ct. at 999.

Appellants contend that the December 2016 IEP was inadequate because it incorporated the BIP without revising it to include interventions for R.F.'s other interfering behaviors. However, Appellants present no evidence that by the time the IEP team met to revise R.F.'s IEP in December, CCPS was aware that biting was not R.F.'s only interfering behavior. While it is true that Mr. K. testified in March 2017 that if he were to develop a new BIP for R.F., it would include biting, hair pulling, grabbing, hitting, kicking, and scratching, this says nothing about what CCPS knew in December 2016. Without other evidence indicating that CCPS knew in December 2016 that R.F. needed interventions for behaviors other than biting, we cannot say that CCPS procedurally **[*251]** violated the IDEA by failing to account for those behaviors in her IEP.

Regardless, any error in failing to update the BIP did not deny R.F. a FAPE because CCPS took steps that were "reasonably calculated" to address R.F.'s behavioral needs "in light of [her] circumstances." **[**28]** *Id.* For instance, Farr testified that R.F.'s existing BIP was sufficient to address R.F.'s behaviors. Farr explained that R.F.'s other interfering behaviors did not need to be included in a new BIP because "they're being addressed in a very appropriate way. [CCPS is] altering the environment to change those behaviors." S.A. 24. Farr emphasized that R.F.'s interfering behaviors, including biting, have decreased because CCPS is taking steps to reduce those behaviors. Therefore, CCPS did not violate the IDEA and deny R.F. a FAPE by failing to address behaviors other than biting in the BIP that was incorporated in her May 2016 and December 2016 IEPs.

Second, with respect to whether R.F.'s IEP was inadequate because it lacked a social skills goal, the ALJ found that "[R.F.] could benefit if her IEP contained a measurable socialization goal" but noted that "an IEP is not required to contain every goal from which a student might benefit." J.A. 70. She concluded that "[t]aking the IEP as a whole," R.F. "was not denied a FAPE due to the lack of a social skills goal in her IEP." *Id.* We agree and note that the IEP did build in opportunities for R.F. to practice her social skills. For instance, **[**29]** R.F.'s BIP included the use of social stories to remind R.F. of appropriate social interactions, and her schedule included regular walks around the building to greet students.

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[10] Although the BIP itself is defined by Maryland regulations, *see* Md. Code Regs. § 13a.08.04.02(B)(1), its incorporation by reference into R.F.'s IEP gives rise to review under the IDEA framework governing the adequacy of IEPs.

Finally, with respect to whether R.F.'s IEP contained inadequate hours of special education, the ALJ correctly noted that, because IEPs are prospective, Appellants cannot rely on the fact that R.F.'s hours of special education were increased in the December 2016 IEP as evidence that the May 2016 IEP was defective when created. *See* J.A. 74 ("The appropriateness of the May 2016 IEP must be judged as of the time it was adopted, not in December 2016."). The ALJ also found that Appellants' experts who testified that the May 2016 IEP contained an inadequate number of special education hours did so under an incorrect understanding of the way CCPS calculates and records special education hours. Appellants offered no other evidence that the May 2016 IEP contained an inadequate number of special education hours to enable R.F. to "make progress appropriate in light of the [her] circumstances." *Endrew F.*, 137 S. Ct. at 999. Therefore, we affirm and conclude that the content of R.F.'s IEP was sufficient to provide her with a FAPE.

5.

In sum, although CCPS **[**30]** violated the IDEA in some procedural respects, we affirm because it did not deny R.F. a FAPE. The education that R.F. actually received during the 2016-2017 school year reinforces our decision that CCPS provided her with a FAPE. The May 2016 IEP set out thirteen goals addressing "all of R.[F.]'s identified special needs." J.A. 35. These goals "focus[ed] on the particular child." *Endrew F.*, 137 S. Ct. at 999. The IEP's use of the ICSC, with its specialized supports to target R.F.'s issues with focus and stress, "aim[ed] to enable [her] to make progress," while its efforts to include R.F. in a general educational setting for specials aimed to avoid unduly isolating her from her peers at school. *Id.*

Under this IEP, as the ALJ found, R.F. did make "progress toward achieving some of the goals on her IEP during the 2016/2017 school year," although not all of **[*252]** them. J.A. 46. To facilitate her progress, Mr. K. and a paraprofessional worked closely and constructively with R.F. throughout the year to determine how to best enable her to make progress towards these goals. Such efforts include an ongoing assessment of whether R.F. was able to make progress in general educational settings.

The IEP did not aim for grade-level **[**31]** advancement through the general curriculum or for standard letter grades because these were not considered "a reasonable prospect" for R.F. *Endrew F.*, 137 S. Ct. at 1000. But this does not indicate a failure to set "challenging objectives" for R.F. *Id.* The IEP team also revised the IEP in December 2016 to account for the progress that R.F. had made to date.

This combination of reasonably ambitious goals that were focused on R.F.'s particular circumstances and that were pursued through the careful and attentive instruction of specialized professionals provided the education that R.F. is entitled to under the statute. We therefore conclude that CCPS provided R.F. with a FAPE despite its procedural violations of the IDEA.

IV.

Although CCPS procedurally violated the IDEA in certain technical respects, it did not substantively violate the IDEA because it did not deny R.F. a FAPE. We therefore

AFFIRM.

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R.S. v. Bd. of Dirs.

United States Court of Appeals for the Fourth Circuit

June 23, 2020, Filed

No. 19-1349

Reporter
2020 U.S. App. LEXIS 19535 *

R.S., By and through his father Ronald E. Soltes, Plaintiff - Appellant v. BOARD OF DIRECTORS OF WOODS CHARTER SCHOOL COMPANY; WOODS CHARTER SCHOOL; DOES 1 to 10, Inclusive, Defendants - Appellees

Prior History: [*1] (1:16-cv-00119-TDS-LPA).

R.S. v. Bd. of Dirs., 2020 U.S. App. LEXIS 16828 (4th Cir. N.C., May 27, 2020)

Counsel: R.S., By and through his father Ronald E. Soltes, Plaintiff - Appellant, Pro se, Apex, NC.

For Board of Directors of Woods Charter School Company, Woods Charter School, Defendants - Appellees: Donna Rhea Rascoe, Katie E. Terry, Cranfill, Sumner & Hartzog, Llp, Raleigh, NC.

Opinion

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Wynn, and Judge Floyd.

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

By Perry A. Zirkel*

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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of limitations under the IDEA via the borrowing analogy).

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

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

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

[29] For sources that do explore these issues, see Mayes & Zirkel, *supra* note 14; Zirkel, *supra* note 15. For the similarly separable issue of the clarity and workability of H/RO remedial orders, *see, e.g.*, Sch. Bd. of Osceola Cty. v. M.L, 30 IDELR ¶ 655 (M.D. Fla. 1999), *aff'd mem*., 281 F.3d 1285 (11th Cir. 2001); E.C. v. Lewisville Indep. Sch. Dist., 58 IDELR ¶ 219 (E.D. Tex. 2011).

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

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

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

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

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

II. H/RO AUTHORITY TO ISSUE DECLARATORY RELIEF

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

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

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

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

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

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

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

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

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

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

[37] *Id.* at 1211.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. H/RO Authority to Issue Injunctive Relief

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

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

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

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

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

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

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

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

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

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

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

evaluations to attorneys' fees.

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

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

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

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

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

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

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

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

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

A. Ordering Evaluations

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

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

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

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

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

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

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

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

B. Overriding Refusal of Parental Consent for Services

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

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

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

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

[73] *Id*.

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

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

C. Ordering IEP Revisions

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

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

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

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

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

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

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

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relief. *Id.* at 1074–75.

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

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

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

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

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

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

D. Ordering a Particular Student Placement

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

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

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

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

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

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

E. Awarding Tuition Reimbursement

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

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

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

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

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

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

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

tuition reimbursement extends to H/ROs.[94]

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

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

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

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

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

[97] *Id*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Awarding Compensatory Education

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

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

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

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

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

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

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

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

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

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

[120] Zirkel, notes 15 and 29; Terry J. Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?* 45 URB. LAW. 281 (2013); Perry A. Zirkel & M. Kay Hennessey, *Compensatory Educational Services in Special Education Cases: An Update*, 150 EDUC. L. REP. 311 (2001); Perry A. Zirkel, *Compensatory Education: An Annotated Update of the Law*, 291 EDUC. L. REP. 1 (2013); Perry A. Zirkel, *Compensatory Education: An Annotated Update of the Law*, 251 EDUC. L. REP. 101 (2010); Perry A. Zirkel, *Compensatory Education Services under the IDEA: An Annotated Update*, EDUC. L. REP. Rep. [45 (2004); Perry A. Zirkel, *The Remedy of Compensatory Education under the IDEA,* 95 EDUC. L. REP 483 (1995); Perry A. Zirkel, *Compensatory Educational Services in Special Education Cases*, 67 EDUC. L. REP. 881 (1991); *see also* James Schwellenbach**,** *Mixed Messages: An Analysis of the Conflicting Standards Used by the United States Circuit Courts of Appeals when Awarding Compensatory Education for a Violation of the Individuals with Disabilities Education Act*, 53 ME. L. REV. 245 (2001).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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944 (2d Cir. 1996); State of Conn. Unified Dist. No. 1 v. State Dep't of Educ., 699 A.2d 1077 (Conn. Super. Ct. 1997); *cf.* T.G. v. Midland Sch. Dist., 848 F. Supp. 2d 902 (C.D. Ill. 2012); A.L. v. Chicago Pub. Sch. Dist. No. 299, 57 IDELR ¶ 276 (N.D. Ill. 2011); State of Haw. Dep't of Educ. v. Zachary B., 52 IDELR ¶ 213 (D. Haw. 2009) (distinguishing *Reid* and *L.M.*); Struble v. Fallbrook Union High Sch., 56 IDELR ¶ 4 (S.D. Cal. 2011) (upholding remand to IEP team to devise, not reduce or discontinue, the award). A related question is whether the H/RO must or may order such implementation via an escrow fund. Zirkel 2010, *supra* note 15, at 509 n.62; Zirkel, *supra* note 29, at 756 n.77. For recent examples, see *Streck v. Bd. of Educ.*, 642 F. Supp. 2d 105 (N.D.N.Y. 2009), *modified*, 408 F. App'x 411 (2d Cir. 2010) (ordering escrow account for $37,778 for prescribed compensatory reading services for student now at postsecondary institution); Matanuska-Susitna Borough Sch. Dist. v. D.Y., 54 IDELR ¶ 52 (D. Alaska 2010) (upholding, after supplemental briefing under qualitative approach, $50,000 compensatory education fund equivalent to approximately 300 hours of speech therapist services plus roughly 208 hours of aide services, at the respective rates of $125 and $60 per hour, or 2.7 hours of speech services and 1.9 hours of aide services per week for three school years)*; cf.* Millay v. Surry Sch. Dep't, 56 IDELR ¶ 162 (D. Me. 2011) (rejecting trust fund under the circumstances).

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

G. Changing Student Grades or Records

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

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

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

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

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

[138] 20 U.S.C. § 1232g (2016).

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

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

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

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

H. Ordering a Student's Promotion or Graduation

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

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[141] *Id*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. Ordering Training of District Personnel

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

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

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

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

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

[156] *Id*.

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

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

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

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

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

J. Ordering Districts to Hire Consultants

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

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

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

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

focused on other issues.[163]

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

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

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

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

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

[166] *Id.*

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

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

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

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

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

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

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

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

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

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

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

K. Issuing Enforcement Orders

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

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

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

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

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

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

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

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

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

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

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

[181] 109 F.3d at 898.

[182] *Id.* at 900.

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

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

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

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

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

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

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

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

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

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

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

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

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

L. Issuing Disciplinary Sanctions

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

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

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

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

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

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

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

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

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

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

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[198] *Id.*

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

[200] *Id.* at 1086.

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

[202] *Id.* at 284.

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

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

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

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

M. Issuing Other Injunctive Relief

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

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

[206] *Id.* at 1070.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

N. Overall Limitation

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

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

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

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

IV. OTHER RELIEF

A. Awarding Attorneys' Fees

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

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

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

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

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

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

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

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

B. Awarding Money Damages

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

C. Making Strong Recommendations for District Action

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

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

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

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

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

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

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

V. CONCLUSION

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

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

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

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

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

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Safeguarding Procedures Under the IDEA: Restoring the Balance in the Adjudication of FAPE

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Safeguarding Procedures Under the IDEA: Restoring the Balance in the Adjudication of FAPE

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Initiated as funding legislation in 1975 and amended periodical reauthorizations,[1] the Individuals with Disabilities Education Act (IDEA)[2] provides a detailed framework of procedural requirements focused on the obligation of providing a "free appropriate public education" (FAPE)[3] to each student with a disability.[4] These procedural requirements include, for example, the FAPE delivery vehicle of an individualized education program (IEP),[5] the administrative adjudicatory dispute resolution mechanism of an impartial due process hearing,[6] and specialized notices for various stages of this process.[7]

In the landmark case *Board of Education v. Rowley* in 1982,[8] the Supreme Court concluded that FAPE has two prongs—procedural compliance and a less specific substantive standard.[9] In the succeeding decades, the courts have gradually eroded the procedural dimension to the point of near distinction by giving preemptive effect to the substantive dimension.[10]

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[1] The successive reauthorizations included the 1986 amendments, Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99 § 457, 100 Stat. 1145 (1986) (amended 1990), which included attorneys' fees for prevailing parents; the 1990 amendments, Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101 § 476, 104 Stat. 1103 (1990) (amended 1991), which provided, *inter alia*, the IDEA as the new name for the original Education of the Handicapped Act; the 1997 amendments, Individuals with Disabilities Act Amendments of 1997, Pub. L. No. 105 § 17, 111 Stat. 37 (1997) (amended 2004), which included major provisions for discipline of students with disabilities; and the most recent 2004 amendments, Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108, § 446, 118 Stat. 2647 (2004), which included fine-tuning several provisions of the Act. For historical perspectives, see Edward W. Martin, Reed Martin, & Donna L. Terman, *The Legislative and Litigation History of Special Education*, 6 FUTURE OF CHILD. 25 (1996); Mitchell Yell, David Rogers, & Elisabeth Lodge Rogers, *The Legal History of Special Education*, 19 REMEDIAL & SPECIAL EDUC. 219 (1998).

[2] 20 U.S.C. §§ 1400–19 (2017).

[3] 20 U.S.C. § 1401(9) (2017). *E.g.*, Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1312 (10th Cir. 2008) (characterized FAPE as "the central pillar of the IDEA statutory structure").

[4] 20 U.S.C. §§ 1401(3), 1412(a)(1)(A) (2017).

[5] 20 U.S.C. §§ 1401(14), 1414(d) (2017). *E.g.*, Honig v. Doe, 484 U.S. 305, 311 (1988) (characterizing the IEP as "the primary vehicle" of the IDEA).

[6] 20 U.S.C. § 1415(f)–(i) (2017).

[7] 20 U.S.C. § 1415(c)–(d) (2017).

[8] Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley (*Rowley*), 458 U.S. 176 (1982).

[9] *Id.* at 182, 187–91.

[10] *See* M.M. *ex rel.* D.M. v. Sch. Dist. of Greenville Cty, 303 F.3d 523, 533 (4th Cir. 2002) ("When such a procedural defect exists, we are obliged to assess whether it resulted in the loss of an educational opportunity for the disabled

The article's purpose is to stimulate IDEA adjudicators, starting with the specialized and significant level of impartial hearing officers,[11] and to restore the enforceable meaning of the procedural requirements of the IDEA. Doing so will provide a more coherent balance with not only the substantive dimension, but also the other decisional dispute resolution mechanisms of the Act.[12] Part I provides an overview of the procedural structure of the IDEA and the Supreme Court's framework interpretation.[13] Part II traces the subsequent interpretation of the procedural dimension of FAPE, culminating in the codification of the two-part test in the latest IDEA amendments.[14] Part III proposes an adjudicative approach for enforcing the procedural dimension of FAPE.[15]

I. PROCEDURAL DIMENSIONS OF FAPE

The IDEA regulation's requirements supplement the IDEA legislation,[16] which consists of approximately fifty pages specific to public schools.[17] The detailed procedural provisions extend from the state to the local level.[18] In an analysis of part of the procedural

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child"); Sch. Bd. of Collier Cty. v. K.C. *ex rel*. SWC, 285 F.3d 977, 982 (11th Cir. 2002) (reciting the test for a "procedurally defective IEP" as whether it "failed to provide [the child] with any educational benefit"); T.S. v. Indep. Sch. Dist. No. 54, 265 F.3d 1090, 1093 n.2 (10th Cir. 2001) ("If there has been no substantive deprivation, procedural defects do not amount to a denial of FAPE").

[11] *E.g.*, Burilovich v. Bd. of Educ. of Lincoln Consol. Sch., 208 F.3d 560, 566–67 (6th Cir. 2000) (recognizing the specialized expertise of IDEA hearing officers as compared to the federal judiciary); Perry A. Zirkel & Cathy Skidmore, *Judicial Appeal of Due Process Hearing Rulings: The Extent and Direction of Decisional Change*, 29 J. DISABILITY POL'Y STUD. 22 (2017) (finding that in almost three quarters of the cases the final court decision upheld the hearing officer's rulings with slight or no change).

[12] *E.g.*, Perry A. Zirkel, *A Comparison of the IDEA's Dispute Resolution Processes—Complaint Procedures and Impartial Hearings: An Update*, 369 EDUC. L. REP. 550 (2019) (providing a detailed comparison of the administrative adjudicative mechanism of the IDEA, the impartial hearing, with its corresponding administrative investigative avenue, the complaint procedures mechanism under 34 C.F.R. §§ 300.151–300.15 (2018); Perry A. Zirkel, *The Two Decisional Processes under the Individuals with Disabilities Education Act: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 169 (2017) (*An Empirical Comparison*) (providing a comparative analysis of the frequency and outcomes of issue rulings under the impartial hearing and complaint procedures avenues of the IDEA).

[13] *See infra* Part I.

[14] *See infra* Part II.

[15] *See infra* Part II.

[16] 34 C.F.R. §§ 300.1(a)–(d) (2018).

[17] 20 U.S.C §§ 1400–1419 (2017). These sections are Part B, which applies to eligible children ages three to twenty-one, but the statute is even longer in its entirety, extending to 20 U.S.C. § 1482 (2017).

[18] 34 C.F.R. § 300.1(c) (2018) (stating "[t]o assist States, localities, educational agencies, and Federal agencies to provide for the education of all children with disabilities").

dimension of the IDEA at the local level,[19] Zirkel and Hetrick identified at least four major and various miscellaneous school district requirements for each of these core FAPE categories: (1) IEP components, (2) IEP team, and (3) IEP development, revision, and effectuation.[20]

The Supreme Court in its aforementioned[21] landmark *Rowley* decision recognized the separable importance of the Act's procedural framework in delineating the meaning of FAPE under the IDEA.[22] Specifically, the Court placed at least equal emphasis on procedural compliance as substantive quality in its foundational reasoning:

When the elaborate and highly specific procedural safeguards . . . are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures . . . as it did upon the measurement of the resulting IEP against a substantive standard. We . . . [infer] the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.[23]

The Court reasoned that the detailed procedural provisions would open the door to the requisite education[24] and interpreted the Act's vague FAPE definition to provide only a rather low floor once inside.[25] As a result, the Court divined a two-pronged standard, with apparent primacy and stringency on the first dimension. Specifically, to determine compliance with the standard, the Court set forth these adjudicative questions: "[f]irst, has the State complied with the procedures set forth in the Act? And second, is the individualized

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[19] This compilation did not extend to the procedural requirements at the school district level for child find (34 C.F.R. § 300.111 (2018)) and eligibility (34 C.F.R. §§ 300.306–300.311 (2018)); least restrictive environment (34 C.F.R. §§ 300.114–300.116 (2018)); parental consent (34 C.F.R. §§ 300.300 (2018)); discipline (34 C.F.R. §§ 300.530–300.536 (2018)); parentally placed private school children (34 C.F.R. §§ 300.131–300.140 (2018)); interagency cooperation (34 C.F.R. § 300.154 (2018)); the dispute resolution processes (34 C.F.R §§ 300.151–300.153; 300.506–300.515 (2018)) and remedies (34 C.F.R. § 300.148 (2018)).

[20] Perry A. Zirkel & Allyse Hetrick, *Which Procedural Parts of the IDEA Are the Most Judicially Vulnerable?* 83 EXCEPTIONAL CHILD. 219, 224 (2017).

[21] *Rowley*, 458 U.S. at 205–08.

[22] *Id.*

[23] *Id.* 205–06.

[24] *Id*. at 192. "[T]he intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.*

[25] *Id*. at 201. "[T]he 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.*

educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?"[26]

II. THE SUBSEQUENT INTERPRETATION OF THE PROCEDURAL DIMENSION

The post-*Rowley* interpretations of the procedural prong extended both vertically in chronological phases and horizontally in subject matter scope.[27] The phases were before and after the 2004 IDEA amendments[28] whereas the scope started with the core meaning of FAPE and extended to the full range of procedural issues, including child find.[29]

A. *Pre-2004 Judicial Interpretations*

Rather than strict application, the *Rowley* progeny gradually developed a harmless error approach to procedural FAPE largely culminating in the application of the relatively relaxed substantive standard.[30] Initially, a few jurisdictions stopped at the determination of whether the school district violated one or more of the procedural requirements of the IDEA, thus amounting to a per se approach.[31] Eventually, however, the prevailing approach added a second step for cases in which the court determined that there was a violation.[32] In the majority of these *Rowley* progeny cases, the question for the second step was whether the procedural violation resulted in a substantive loss to the student,[33] thus having the effect of *Rowley*'s

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[26] *Id*. at 206–07.

[27] *See generally* Perry A. Zirkel, *Is it Time for Elevating the Standard for FAPE under IDEA?*, 79 EXCEPTIONAL CHILD. 497 (2013) (*Elevating the Standard for FAPE*); Stacy Inman & Darren Bogie, *Child Find How to Find the Children Before the Parents Find You*, SCH. LEGAL SERV. 1 (2015), http://schoolslegalservice.org/wp-content/uploads/sites/15/2016/02/B-Child-Find-SLI.pdf.

[28] *See generally Elevating the Standard for FAPE*, *supra* note 27.

[29] *E.g.*, Bd. of Educ. of Fayette Cty. v. L.M., 478 F.3d 307, 313 (6th Cir. 2007); D.K. *ex rel*. Stephen K. v. Abington Sch. Dist., 696 F.3d 233, 249 (3d Cir 2012).

[30] Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 215, 237 (2013).

[31] *E.g*., Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. LEG. 415, 435–37 (2011) (canvassing the initial chaotic variety of approaches but, via a case study of the Fourth Circuit, showing the movement from the per se to the majority approach of requiring a substantive loss to the student as the second step).

[32] *See id.*

[33] *E.g.*, *MM ex rel. DM*, 303 F.3d at 533 ("When such a procedural defect exists, we are obliged to assess whether it resulted in the loss of an educational opportunity for the disabled child"); *Sch. Bd. of Collier Cty*., 285 F.3d at 982 (reciting the test for a "procedurally defective IEP" as whether it "failed to provide

second prong swallowing its first, procedural prong.[34] In a minority of the cases, the courts applied the alternative step two of a loss to the student's parents.[35]

B. *IDEA 2004 Codification*

Although the specific contours of the second step were consistent in this substantial body of post-*Rowley* procedural FAPE case law,[36] the 2004 IDEA amendments adopted the two-step harmless error approach as follows:

> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a . . . [FAPE] only if the procedural inadequacies–(I) impeded the child's right to a . . . [FAPE]; (II) significantly impeded the parent's opportunity to participate in the decision-making [*sic*] process regarding the provision of a . . . [FAPE] to the parents' child; or (III) caused a deprivation of educational benefits.[37]

[the child] with any educational benefit"); *T.S.*, 265 F.3d at 1093 n.2 ("If there has been no substantive deprivation, procedural defects do not amount to a denial of FAPE").

[34] See *Rowley*, 458 U.S. at 206–07 and accompanying text for two-pronged test.

[35] *E.g.*, Adam J. *ex rel*. Robert J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 812 (5th Cir. 2003) ("[whether the] procedural deficiency resulted in a loss of educational opportunity or infringed his parents' opportunity to participate in the IEP process"); W.G. *ex rel.* R.G. v. Bd. of Tr. of Target Range Sch. Dist., 960 F.2d 1479, 1484 (9th Cir. 1992) ("procedural inadequacies that result in the loss of educational opportunity . . . or seriously infringe the parents' opportunity to participate in the IEP formulation process). Although courts have similarly not been clear or consistent in differentiating substantive and procedural rights, it would appear that this parental right is mixed but ultimately substantive. *E.g.*, Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 533 (2007) ("We conclude IDEA grants parents independent, enforceable rights. These rights, which are not limited to certain procedural and reimbursement-related matters, encompass the entitlement to a free appropriate public education for the parents' child").

[36] *E.g.*, Romberg, *supra* note 31, at 429–30 (concluding, under the rubric of "judicial chaos," that the *Rowley* progeny "often referred to the Supreme Court's insistence on the primary importance of the IDEA's procedural protections, but were at a loss when attempting to figure out what those protections actually **meant**"); Perry A. Zirkel, *Parental Participation: The Paramount Procedural Requirement under the IDEA?*, 15 CONN. PUB. INT. L. J. 1, 5–11 (2016) (*Parental Participation*) (using the wavering line of Ninth Circuit decisions illustrates the lack of clarity and consistency).

[37] 20 U.S.C. § 1415(f)(3)(E)(ii) (2017). Because the first prong appears to serve only as a general introduction, the second and third prongs amount to the alternative requisite losses to the child or the parents.

As Romberg observed, an adjudicative interpretation of this codification as making the procedural protections of the Act superfluous would be "misguided."[38] But, what has been the prevailing adjudicative treatment and what should it be?

C. *Post-2004 Judicial Interpretation*

Illustrating the effect of this IDEA 2004 provision, a systematic analysis of a representative sample of the IEP related procedural FAPE court decisions revealed that most of these claims were unsuccessful.[39] More specifically, upon the courts' application of the two-step test, the outcome was conclusively in the plaintiffs' favor in only 18% of the claims.[40] Even though the parents asserted an average of two procedural violations per case, they fared almost as poorly upon reanalyzing the case outcomes on a best-for-plaintiff basis.[41] Similarly, a procedural claims analysis of parental participation at steps one and two from 2007 to 2015 found that the plaintiffs fared poorly and in almost half of the cases the court failed to cite the applicable statutory standard.[42]

Although special education experts regard the IEP's specialized components as proactive and substantive,[43] findings suggest that many courts consider them procedural and, thus, subject to the relaxed two-step analysis.[44] For example, an analysis of the judicial rulings specific to transition services, which the IDEA requires for bridging to post-secondary education or employment,[45] found that the outcomes were largely in favor of districts, often based on the two-

[38] Romberg, *supra* note 31, at 440–41. However, his assertion that the previous scholarly commentary adopted this interpretation seems to be an overstatement.

[39] Zirkel & Hetrick, *supra* note 20, at 225–26.

[40] *Id.* at 225.

[41] Specifically, on a case-by-case rather than claim-by-claim basis, courts ruled conclusively in favor of the plaintiff-parents in 25% of the cases, with an additional 4% being inconclusive (i.e., subject to further proceedings). *Id*. at 226.

[42] *Parental Participation*, *supra* note 36, at 19–20. If hearing officers and courts more robustly applied this alternative statutory standard for the requisite loss for denial of FAPE, the need for the proposed solution would not be so acutely broad-based.

[43] *See generally* Julie J. Weatherly, IEP Disasters: Common Procedural and Substantive Mistakes to Avoid, Nebraska/Kansas Regional Special Education Conference (Nov. 7, 2008) *in* Julie J. Weatherly, *IEP Disasters: Common Procedural and Substantive Mistakes to Avoid*, THERASHARE 1, 14, 19 (2008), http://www.therashare net/files/KSDEIEPDisasters.pdf (characterizing measurable goals and transition services as substantive).

[44] *E.g.*, M.C. *ex rel.* M.N. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1194–1201 (9th Cir. 2017*)*; *see also Elevating the Standard for FAPE*, *supra* note 27, at 500.

[45] 20 U.S.C. § 1414(d)(1)(A)(I)(VIII) (2017).

step procedural approach.[46] Under this approach, most courts applied step two globally to the IEP rather than specifically to the transition component, eviscerating the statutory compliance specifications for transition services.[47] A more dramatic example is the judiciary's treatment of the IDEA's seemingly proactive provisions and corollary state special education laws for functional behavioral assessments (FBAs) and behavior intervention plans (BIPs).[48] Successive empirical analyses revealed an increasingly pro-district skew in FBA and BIP rulings, with the two-step approach being predominant.[49] In the most recent six-year period, the judicial outcomes favored the districts 7:1, and the rulings in New York, which has the strongest FBA-BIP law, were not significantly more parent favorable.[50]

[46] Perry A. Zirkel, *An Analysis of the Judicial Rulings for Transition Services under the IDEA*, 41 CAREER DEV. & TRANSITION FOR EXCEPTIONAL INDIVIDUALS 136 (2018). The overall outcomes ratio of the rulings was 3:1 in favor of districts, with this pro-district skew particularly pronounced for the federal appellate courts and in the most recent segment of the sixteen-year period. *Id*. at 141.

[47] *Id*. at 141–42 (citing also the limited exception of Gibson v. Forest Hills Sch. Dist. Bd. of Educ., 655 F. App'x 423 (6th Cir. 2016)).

[48] 20 U.S.C. § 1414(d)(3)(B)(I) (2017) (implicit special consideration in the IEP); 20 U.S.C. § 1415(k)(1)(D)(ii); 20 U.S.C.§ 1415(k)(1)(F)(i) (explicit requirement for disciplinary changes in placement). For the corollary state laws, see Perry A. Zirkel, *State Laws for Functional Behavioral Assessments and Behavior Intervention Plans: An Update,* 45 COMMUNIQUÉ 4 (Nov. 2016); Perry Zirkel, *State Special Education Laws for Functional Behavioral Assessments and Behavior Intervention Plans*, 36 BEHAV. DISORDERS 262 (2011).

[49] Perry A. Zirkel, *An Update of Judicial Rulings Specific to FBAs or BIPs under the IDEA and Corollary State Laws*, 51 J. SPECIAL EDUC. 50 (2017) (*Judicial Rulings Specific to FBAs or BIPs*); Perry A. Zirkel, *Case Law for Functional Behavioral Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U. L. REV. 133 (2011).

[50] *Judicial Rulings Specific to FBAs or BIPs*, *supra* note 49, at 53–54.

Moreover, courts extended this largely fatal two-step approach to the fuller gamut of procedural claims,[51] even to violations of the procedural requirements for impartial hearing decisions.[52] The most glaring examples are child find[53] claims because they are at the root of the entire identification and FAPE process, being directly before a child's eligibility determination.[54] A growing line of court decisions have concluded that if a district violates its child find obligation but the record lacks an ultimate determination that the child is eligible under the Act, the parent is without any remedy, effectively including[55] attorneys' fees.[56]

This adjudicative conclusion eviscerates the child find duty in the

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[51] See *supra* note 19 for the fuller range beyond the IEP process.

[52] *E.g.*, Pangerl v. Peoria Unified Sch. Dist., 780 F. App'x 505, 507 (9th Cir. 2019); J.D. *ex rel.* J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69–70 (2d Cir. 2000); Heather S. *ex rel*. Kathy S. v. Wisconsin, 125 F.3d 1045, 1059–60 (7th Cir. 1997); Amman v. Stow Sch. Sys., 982 F.2d 644, 653 (1st Cir. 1993).

[53] Courts have interpreted the IDEA's child find provision, 20 U.S.C. § 1412(a)(3) (2017), as referring to school districts' ongoing affirmative obligation to evaluate a child after reasonably suspecting that the child may be eligible under the Act. *E.g.*, W.A. *ex rel*. W.E. v. Hendrick Hudson Cent. Sch. Dist., 927 F.3d 126 (2d Cir. 2019); Krawietz v. Galveston Indep. Sch. Dist., 900 F.3d 673 (5th Cir. 2018); Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 322 (2018); M.G. v. Williamson Cty. Sch., 720 F. App'x 280 (6th Cir. 2018); D.K. v. Abington Sch. Dist., 696 F.3d 233 (3d Cir. 2012). For illustrative overviews, see Perry A. Zirkel, *An Adjudicative Checklist for Child Find and Eligibility under the IDEA*, 357 EDUC. L. REP. 30 (2018); Perry A. Zirkel, *"Child Find": The Lore v. the Law*, 307 EDUC. L. REP. 574 (2014).

[54] Moreover, child find is not the only area of the IDEA's procedural requirements that is beyond the technical scope of the child's eligibility. Other examples include the disciplinary protections for "students not yet eligible for special education" what is commonly referred to as the "response to intervention" (RTI) provision for identification of students with learning disabilities and the requirements for evaluations more generally. 20 U.S.C. § 1415(k)(5) (2017); 20 U.S.C. § 1414(b)(6)(B) (2017); 20 U.S.C. § 1414(a)–(c) (2017).

[55] Technically, attorneys' fees are not a remedy. *Awards of Attorney's Fees by Federal Courts and Federal Agencies*, CONG. RES. SERV. 1, 1 (Oct. 22, 2009), https://www.everycrsreport.com/files/20091022_94-970_5ca462bf2eacfb4f483fcf98bd90d9e7313257af.pdf. However, the IDEA's fee shifting provisions are essential to effective litigation, especially but not at all exclusively for poor parents and for students in states with limited availability of specialized counsel. *E.g.*, Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 451–54 (2012) (pointing out the significant role and expense of attorneys in the IDEA context); NAT'L COUNCIL ON DISABILITY, BACK TO SCH. ON CIVIL RIGHTS (2000), http://www.ncd.gov/publications/2000/Jan252000 (proposing publicly funded IDEA attorneys).

[56] *E.g.*, Burnett v. San Mateo Foster City Sch. Dist., 739 F. App'x 870, 872 (9th Cir. 2018); T.B. v. Prince George's Cty. Bd. of Educ., 897 F.3d 566, 578 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1307 (2019); Durbrow v. Cobb Cty. Sch. Dist., 887 F.3d 1182, 1196 (11th Cir. 2018); D.G. v. Flour Bluff Indep. Sch. Dist., 481 F. App'x 887, 893 (5th Cir. 2012); D.S. *ex rel*. Z.S. v. Neptune Twp. Bd. of Educ., 264 F. App'x 186, 189–90 (3d Cir. 2008); T.W. *ex rel.* K.J. v. Leander Indep. Sch.

various cases where the district has reasonable suspicion of the child's eligibility and does not conduct a timely evaluation,[57] but the parents fail to prove that the child was eligible.[58] Both of these contingencies present significant problems in ultimately adjudicating eligibility. The first challenge is based on changes in the child during the interim that may affect eligibility,[59] particularly because the hearing process and judicial appeals prolong the interim period from six months to two-years.[60] The second contingency increases the possibility of eligibility changes due to the time-consuming process of IDEA adjudication.[61] It also can serve as an incentive reinforcing districts' failure to fulfill their evaluation obligation, for the following reasons in addition to the usual parental difficulties of litigating against their school district.[62] Under

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Dist., 74 IDELR ¶ 12 (W.D. Tex. 2019); D.F. *ex rel.* Evans v. Sacramento Unified Sch. Dist., 63 IDELR ¶ 164 (E.D. Cal. 2014); *cf.* J.G. v. Oakland Unified Sch. Dist., 2014 WL 12576617 at *1 (N.D. Cal. Sept. 19, 2014); E.M. *ex rel.* E.M. v. Pajaro Valley Unified Sch. Dist., 53 IDELR ¶ 41 (N.D. Cal. 2008), *rev'd in part on other grounds*, 652 F.3d 999 (9th Cir. 2011) (default rationale). Indeed, in some cases even if the child was eligible, the child find violation has resulted in no remedy. *E.g.*, J.N. v. Jefferson Cty. Sch. Dist., 75 IDELR ¶ 153 (N.D. Ala. 2019) (parent did not provide preponderant proof that the erroneous finding of ineligibility amounted to a denial of FAPE in light of the general intervention services that led to the child find violation).

[57] For the successive reasonable suspicion and reasonable period, timely evaluation, or dimensions of child find, see *supra* note 53.

[58] Although most of these cases are in the wake of an untimely evaluation, others arise after the lack of a district eligibility evaluation. *E.g.*, T.W. *ex rel.* K.J. v. Leander Indep. Sch. Dist., 74 IDELR ¶ 12 (W.D. Tex. 2019).

[59] *Cf.* D.K. *ex rel.* Stephen K. v. Abington Sch. Dist., 696 F.3d 233, 251 (3d Cir. 2012) ("The mere fact that a subsequent evaluation of [the child] yielded a different result—*i.e.*, he was found [eligible] in November 2007 but did not qualify in April 2006—does not necessarily render the earlier testing inadequate").

[60] First, the filing for the hearing may be for up to two years after the parents have reason to know of the child find violation. *E.g.*, G.L. v. Ligonier Valley Sch. Auth., 802 F.3d 601 (3d Cir. 2015) (applying the IDEA statute of limitations to a child find claim). Second, the majority of impartial hearings are not adjudicated within the seventy-five day timeline of the IDEA regulations, which allow for extensions upon the request of either party. *E.g.*, CADRE, *Dispute Resolution Summary for U.S. and Outlying Areas 2008–09 to 2017–18*, https://www.cadreworks.org/sites/default/files/resources/2017-18%20DR%20Data%20Summary%20-%20U.S.%20and%20Outlying%20Areas.pdf (last visited Feb. 19, 2020) (reporting that 27% of hearings were adjudicated within the regulatory timeline for 2017 to 2018). Third, for the hearing officer decisions that are appealed, the period until the final decision often extends to subsequent grades in the student's school career. *E.g.*, Perry A. Zirkel, *Autism Litigation under the IDEA*, 24 J. SPECIAL EDUC. LEADERSHIP 92, 94 (2011) (finding average of 2.8 years from time of filing for hearing until final court decision for a seventeen-year sample of autism cases).

[61] *See supra* notes 59–60.

[62] In general education, to litigate on behalf of their child against the child's school, parents face daunting problems that are not only economic in terms of access to and affordability of sufficiently specialized attorneys, but also emotional

the IDEA, (1) parents shoulder the burden of persuasion at due process hearings[63] with the exception of the few jurisdictions where state law provides otherwise,[64] and (2) even if they prevail, parents are not entitled to expert witness fees.[65]

Yet since the latest IDEA amendments, courts have maintained the substantive standard of FAPE, which is more generally the basis of the eviscerating effect of step two, at a district friendly level without dramatic change despite three successive developments.[66] The first two were the general purpose and peer-reviewed research (PRR) provisions of the 2004 amendments of the IDEA,[67] which made no significant difference in lower court outcomes despite notable advocacy in scholarly commentary.[68] More recently and dramatically, the Supreme Court's *Endrew F. v. Douglas County School District RE-*

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in terms of the adversarial participation in and consequences of the adjudicative process. These general problems are all the more difficult for parents of children in special education in relation to attorney specialization and student vulnerability. *See* Kristen Taketa, *Families Endure Costly Legal Fights Trying to Get the Right Special Education Services*, L.A. TIMES (Oct. 6, 2019), https://www.latimes.com/california/story/2019-10-06/legal-fights-families-special-education-services.

[63] Schaffer *ex rel.* Schaeffer v. Weast, 546 U.S. 49, 62 (2005) (ruling that the burden of persuasion in an impartial hearing under the IDEA is on the challenging party, i.e., the one seeking relief). In procedural violation cases, the challenging party is the parent. *See id.*

[64] Only a handful of state laws —Delaware, Nevada, New Jersey, New York, with Connecticut leaving the matter to the discretion of the hearing officer—place the burden of persuasion on the school district. Perry A. Zirkel, *State Laws for Due Process Hearings under the Individuals with Disabilities Education Act*, 38 J. NAT'L ASS'N ADMIN. L. JUDICIARY 3, 31 n.93 (2018). Moreover, the Supreme Court left open the question of whether its ruling preempts the aforementioned state laws that provide otherwise. *Schaffer ex rel. Schaffer*, 546 U.S. at 61–62.

[65] Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 292 (2006).

[66] *See* Endrew F. *ex rel*. Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 997 (2017); *Rowley*, 458 U.S. at 206–07.

[67] 20 U.S.C. §§ 1400(d) (2017) (emphasizing, *inter alia*, "educational results") and 1414(d)(1)(A)(III) (2017) (requiring the IEP provisions for special education and related services to be "based on peer-reviewed research to the extent practicable").

[68] *E.g*., Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed* Rowley *and Raised the Substantive Standard for "Free Appropriate Public Education"?*, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 396 (2008) (tracing commentators' proposals and the courts' interpretation of the purpose and PRR provisions of IDEA 2004). Although the relevant judicial interpretations of the purpose language ended in the first few years after the 2004 amendments, the continuing line of cases interpreting PRR have remained in the districts' favor. *E.g*., Albright v. Mountain Home Sch. Dist., 926 F.3d 942 (8th Cir. 2019); E.M. v. Lewisville Indep. Sch. Dist., 763 F. App'x 361 (5th Cir. 2019); Ridley Sch. Dist. v. M.R., 680 F.3d 260 (3d Cir. 2012); Joshua A. v. Rocklin Unified Sch. Dist., 319 F. App'x 692 (9th Cir. 2009).

I[69] revisited and refined the substantive prong in *Rowley*.[70] Yet the reformulation of "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"[71] has not significantly changed the judicial outcomes in the many subsequent lower court cases.[72]

D. *Alternate Forum Interpretation*

This two-step approach, which reduces procedural violations largely to technical and unenforced issues in the adjudicative arena, is in clear contrast with the prevailing approach in the alternative decisional dispute resolution avenue under the IDEA.[73] In most states, the complaint procedures avenue, which is an investigative rather than adjudicative process, takes a strict one-step approach.[74] Thus, in comparison to the adjudicative arena, this forum meaningfully enforces compliance with the procedural requirements of the IDEA.

III. THE REMEDIAL SOLUTION

Although hearing officers, review officers, and courts have almost entirely ignored the solution to their effective evisceration of the procedural requirements of the Act, it is explicitly in tandem with the codification of the two-step test.[75] Specifically, the same

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[69] *Endrew F. ex rel. Endrew F.*, 137 S. Ct. at 991–93.

[70] *Rowley*, 458 U.S. at 206-07.

[71] *Endrew F. ex rel. Endrew F.*, 137 S. Ct. at 999–1001.

[72] Perry A. Zirkel, *The Aftermath of Endrew F.: An Outcomes Analysis Two Years Later*, 363 EDUC. L. REP. 1, 4 (2019) (finding that only five of the seventy-five judicial applications of the new substantive standard under *Endrew F.* resulted in a change from a ruling in favor of the district to a ruling in favor of the parent).

[73] *See* Perry A. Zirkel, *The Complaint Procedures Avenue of the IDEA: Has the Road Less Traveled By Made All The Difference?*, 30 J. OF SPECIAL EDUC. & LEADERSHIP 88, 88 (2017).

[74] *E.g.*, *An Empirical Comparison*, *supra* note 12, at 183 (finding that parents' success rate was twice as high for procedural FAPE claims in the complaints procedures than the impartial hearing venue, with even more dramatic disparities in the success rate for child find, evaluation, notice, and discipline claims).

[75] Romberg proposed a much more theoretical structural approach based on the principles of contracts, collaboration, and individualization and that meshed with the three subparts of the aforementioned. Romberg, *supra* note 31, at 449–66; 20 U.S.C. § 1415(f)(3)(E)(ii) (2017). However, his approach ignored the accompanying statutory solution and the remedy of prospective procedural correction. *Infra* notes 76–77 and accompanying text. Moreover, his approach has not gained any judicial traction, with citations limited to the peripheral use of distinguishing between procedural and substantive FAPE. R.S. *ex rel*. Soltes v. Bd. of Dir. of Woods Charter Sch. Co., 73 IDELR ¶ 252 (M.D.N.C. 2019); Beckwith v. District of Columbia, 208 F. Supp. 3d 34, 45 (D.D.C. 2016); J.T. *ex rel*. A.T. v. Dumont, 58 IDELR ¶ 229 (D.N.J. 2012) (referring to the two-step approach for procedural FAPE).

aforementioned[76] codification of the two-step test ends its elucidation of step two with the following caveat: "Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section."[77]

Thus, in light of their broad equitable authority under the IDEA,[78] hearing officers could and should issue prospective injunctive relief to rectify the procedural violation or violations. Such relief may include, for example, ordering the revision of pertinent policies or procedures, training the child's violating staff members, or a corrective procedural redo.[79] The two relevant subsets of child find cases[80] serve as effective examples. Under this statutorily authorized solution, those child find cases lacking any evaluation should typically result in an order for an evaluation.[81] Those with delayed but defensible determination of ineligibility could result in an order for child find training for the violating staff members or for a revision in the district's child find procedures.[82] The general purpose, as any equitable relief, is to be justly tailored to the scope and nature of the violation.[83] The more specific purpose in these cases is to restore the procedural dimension of the Act to a more balanced and effective position aligned with the statute's overall structure[84] and specific language.[85]

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[76] 20 U.S.C. § 1415(f)(3)(E)(ii) (2017).

[77] *Id.* Recently, the administering agency for the IDEA added indirect support via this guidance: "The SEA, pursuant to its general supervisory responsibility . . . must ensure that a hearing officer's decision is implemented in a timely manner, unless either party appeals the decision. This is true even if the hearing officer's decision includes only actions to ensure procedural violations do not recur and no child-specific action is ordered." Letter to Zirkel, 74 IDELR ¶ 171 (OSEP 2019).

[78] Letter to Kohn, 17 IDELR 522 (OSEP 1991) ("based upon the facts and circumstances of each individual case, an impartial hearing officer has the authority to grant any relief he/she deems necessary"); *see generally* 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 ASS'N ADMIN. L. JUDICIARY 505 (2018). The exception is for the awarding of attorneys' fees. *Id*. at 555–56.

[79] *Id*. at 536–54. The alternatives of policy or training orders must be equitably specific to the scope of the case. *E.g.,* J.N. *ex rel*. M.N. v. Jefferson Cty. Bd. of Educ., 75 IDELR ¶ 153 (N.D. Ala. 2019) (denying requested district-wide training order in the absence of evidence of systemic child-find violations).

[80] *Supra* note 58.

[81] *E.g.*, Student with a Disability, 63 IDELR ¶ 205 (Utah SEA 2014).

[82] *E.g.*, District of Columbia Pub. Sch.*,*120 LRP 184 (D.C. SEA 2019).

[83] *E.g.*, Branham v. District of Columbia, 427 F.3d 7, 9 (D.C. Cir. 2005) (emphasizing the need for an inquiry that is "above all, tailored to the unique needs of the disabled student").

[84] *Rowley*, 458 U.S. at 205–06.

[85] *Supra* note 77 and accompanying text.

To date, the use of this corrective remedial authority has been relatively rare and largely limited to the hearing officer level.[86] The even more limited judicial authority supports this approach. For example, in *Dawn G. v. Mabank Independent School District*[87] the court rejected the school district's contention that the hearing officer's prospective procedural remedies were *ultra vires* after ruling that the district met the substantive standard for FAPE.[88] Observing that the hearing officer did not comply with some procedural requirements, the court cited the aforementioned[89] IDEA provision in upholding the hearing officer's orders.[90]

Other examples do not cite the statutory solution, but provide at least secondary support in the child find context. First, presenting a mixed example, another federal court upheld a hearing officer's order for a new evaluation as a result of a child find violation.[91] The district appealed, contending that its child find violation amounted to harmless error due to its determination that the child was not eligible.[92] The court rejected this claim for mixed reasons.[93] In part, the substantive loss to the student remained in question because, in agreeing with the hearing officer that the district's evaluation was not sufficiently comprehensive, the court reasoned that the result "may mean" that the child was eligible.[94] However, in an overlapping part, the child find

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[86] *E.g*., Phila. Sch. Dist., 118 LRP 19611 (Pa. SEA Feb. 9, 2018) (finding no substantial denial of FAPE but ordering correction of procedural defects of IEP); Boston Pub. Sch., 69 IDELR ¶ 25 (Mass. SEA 2016) (finding de minimis denial of FAPE to date but ordering specified completion of evaluation and contingent IEP team consideration of compensatory education); Red Lion Area Sch. Dist., 115 LRP 12726 (Pa. SEA Mar. 9, 2015) (finding no substantive denial of FAPE but issuing various orders to correct procedural violations); Mabank Indep. Sch. Dist., 113 LRP 2115 (Tex. SEA Sept. 12, 2012); D.C. Pub. Sch., 111 LRP 20046 (D.C. SEA Aug. 20, 2010) (finding no substantial denial of FAPE but ordering district to issue prior written notice to parent); *cf*. District of Columbia, 117 LRP 21233 (D.C. SEA 2017); Highlands Cty. Sch. Bd., 115 LRP 27365 (Fla. SEA 2015); Walker Cty. Bd. of Educ., 111 LRP 48174 (Ala. SEA 2011); Student with a Disability, 109 LRP 17648 (Va. SEA 2008a); Fulton Cty. Sch. Dist., 49 IDELR ¶ 30 (Ga. SEA 2007) (ordering a new manifestation determination as a result of procedural violations in the first manifestation determination).

[87] Dawn G. *ex rel*. D.B. v. Mabank Indep. Sch. Dist., 63 IDELR ¶ 63 (N.D. Tex. 2014).

[88] *Dawn G. ex rel. D.B*., 63 IDELR ¶ 63 (N.D. Tex. 2014).

[89] *Supra* note 77 and accompanying text.

[90] *Dawn G. ex rel. D.B.,* 63 IDELR ¶ 63 (N.D. Tex. 2014).

[91] Indep. Sch. Dist. No. 413 v. H.M.J. *ex rel.* A.J., 123 F. Supp. 3d 1100, 1108 (D. Minn. 2019).

[92] *Indep. Sch. Dist. No. 413*, 123 F. Supp. 3d at 1111.

[93] *Id.*

[94] *Id*. at 1111; *cf*. Hoover City Bd. of Educ. v. Leventry *ex rel.* K.M., 75 IDELR ¶ 32 (N.D. Ala. 2019); Wimbish v. D.C., 381 F. Supp. 3d 22, 36–38 (D.D.C. 2019) (illustrating remedy of an order for evaluation in the context of an eligibility determination was open to question in light of a defective evaluation).

violation resulted in deprivation of meaningful parental participation.[95]

In the second example, the Alaska Supreme Court addressed a child find violation in the unusual situation in which the district found the child ineligible, but the parents withdrew this issue from the appeal.[96] The court reasoned that "a school district's duty to [timely] evaluate children for eligibility under the IDEA is not dependent upon the ultimate determination that the child is 'disabled.'"[97] Based on this reasoning, the court upheld the hearing officer's order for reimbursement of the independent educational evaluation (IEE).[98] However, limiting the remedy in the absence of a substantive denial of FAPE, the court reversed the hearing officer's other reimbursement order, which was for the private tutoring expenses that the parents had incurred.[99]

A final, more peripheral example arose within the specialized context of the IDEA's requirement for a manifestation determination upon a disciplinary change in placement.[100] A federal district court in Pennsylvania upheld a hearing officer's order to conduct another manifestation determination review based on "significant procedural flaws" in its first review.[101]

This proposed approach has the added advantage of closing the gap between the hearing officer and complaint procedures avenues of decisional dispute resolution,[102] thus mitigating forum shopping and

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[95] *Indep. Sch. Dist. No. 413*, 123 F. Supp. 3d at 1112. Whether this parental prong argument applies more generally in response to child find harmless error cases depends at least in part as to whether the underlying rationale is lack of eligibility generally or lack of FAPE specifically. *Id.* In any event, the proposed solution of a prospective procedural remedy tailored to the violation remains applicable to the cases otherwise lacking any remedy at all. *Id.*

[96] J.P. *ex rel.* P.P. v. Anchorage Sch. Dist., 260 P.3d 285, 286 (Alaska 2011).

[97] *Id*. at 293.

[98] Although in comparison to most cases of IEEs at public expense, this prospective remedy is unusual, the court pointed to the "unique circumstances" of the case, specifically the district's use of the parents' IEE "and the inadequacy of alternative remedies." *Id*. at 294–95.

[99] *Id*. at 292–93.

[100] *Supra* note 48.

[101] Bristol Twp. Sch. Dist. v. Z.B. *ex rel.* K.B., 67 IDELR ¶ 9 (E.D. Pa. 2016). However, this case is only partially supportive due to the fuzzy boundary between procedural and substantive violations, as evidenced in the tandem order for compensatory education. *Id.*

[102] The reason for the disparity is the prevailing one-step approach to procedural FAPE in the complaint procedures forum. *Supra* note 74 and accompanying text. Interestingly, in the pertinent provision of the IDEA Congress noted the interconnection of the two decision dispute resolution avenues with regard to procedural issues. 20 U.S.C. § 1415(f)(F) (2017) (clarifying that the prescribed adjudicatory treatment of procedural FAPE does not affect the complaint procedures alternative). Another potential gap-closing activity is whatever extent that state education agencies implement the OSEP guidance to enforce technical, or step one only violations identified in either complaint procedures or due process hearing decisions. *E.g*., Letter to Copenhaver, 53 IDELR ¶ 165 (OSEP 2008).

deferral issues.[103] It also closes the gap between the procedural orientation of state education department compliance supervision[104] and local education professional development.[105] In doing so, it provides enforceable meaning to the "elaborate and highly specific procedural safeguards" that are the backbone of the Act and for which compliance is at least as important as the substantive dimension.[106] If indeed the legal emphasis instead should be on substantive outcomes,[107] Congress should amend the Act accordingly to intentionally degrade the procedural dimension. Unless and until Congress evinces such intent, adjudicators should follow the overall structure of the Act and fulfill their specific authority for prospective procedural remedies.

This adjudicative approach not only corrects the violation for the child, but also triggers the potential for the recovery of attorneys' fees that the parents expended in proving this violation.[108] The entitlement and the amount of attorneys' fees are not automatic, with the court having discretion within a rather carefully balanced set of criteria in the Act.[109] Thus, the relatively limited pertinent case law is divided depending on the circumstances.[110]

Finally, hearing officers, in light of their pivotal position in the IDEA's adjudicative system,[111] are potentially the leaders in moving

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[103] *E.g.*, Perry A. Zirkel, *Questionable Initiation of Both Decisional Dispute Resolution Processes under the IDEA: Proposed Regulatory Interpretations,* 49 J. L. & EDUC. 99 (2020) (discussing problems in the agency's policy interpretations of the interconnection of these two decisional avenues).

[104] *E.g.*, 20 U.S.C. §§ 1412(a), 1415(a) (2017) (specifying compliance requirements for state eligibility generally and procedural safeguards specifically).

[105] *See generally* BARBARA D. BATEMAN & MARY ANN LINDEN, BETTER IEPS: HOW TO DEVELOP LEGALLY CORRECT AND EDUCATIONALLY USEFUL PROGRAMS (2012); BARBARA D. BATEMAN & CYNTHIA M. HERR, WRITING MEASURABLE IEP GOALS AND OBJECTIVES (2006) (illustrating prevailing emphasis on adhering to the procedural specifications of the IDEA for IEP content and process).

[106] *See Rowley*, 458 U.S. at 205–06.

[107] *E.g.*, *Elevating the Standard for FAPE*, *supra* note 27 (advocating statutory raising of the substantive standard in response to the corresponding erosion of the procedural dimension).

[108] Given the significant role and expense of attorneys' fees under the IDEA (*supra* note 55), this added factor adds to the balance-restoring nature of the proposed solution by reinforcing the districts' incentive for procedural compliance and the parents' sense of vindicating utility rather than frustrating futility.

[109] 20 U.S.C. §§ 1415(i)(3) (2017).

[110] *Compare* Sykes v. D.C., 870 F. Supp. 2d 86, 91–92 (D.D.C. 2012) (awarding attorneys' fees), *with* Dawn G. *ex rel.* D.B. v. Mabank Indep. Sch. Dist., 63 IDELR ¶ 63 (N.D. Tex. 2014) (declining to award attorneys' fees). For a court that awarded partial attorneys' fees within a more comprehensive consideration of the equitable relief based on the particular circumstances, including the relief that the parents' sought, see M.A. v. Torrington Bd. of Educ., 980 F. Supp. 2d 245 (D. Conn. 2013), *further proceedings*, 980 F. Supp. 2d 279 (D. Conn. 2014).

[111] *Supra* note 11 and accompanying text.

the case law in this restorative, rebalancing direction.[112] Primarily[113] because this proposal represents a change in their modus operandi at the remedial stage,[114] they are likely to be resistant to implement it.[115] Some may indirectly blame the parent, pointing to the requirement for the filing party to specify the requested remedy in the complaint.[116] However, the counterbalancing considerations are: (1) this requirement is conditional,[117] meaning the parent likely did not know it was an available remedy;[118] (2) "the IDEA does not necessarily limit the relief a due process hearing officer can award to the relief a party proposes at a given stage of the administrative process[;]"[119] and (3) a formulaic catch-all[120] consistent with the hearing officer's remedial authority would seem to be a superfluous solution.[121] Consequently, the cost-

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[112] Interestingly, the procedural-substantive distinction may also affect the degree of deference due for hearing officer decisions. *E.g.*, Daniel W. Morton-Bentley, *The Rowley Enigma: How Much Weight Is Due to IDEA Administrative Proceedings in Federal Court?*, 36 J. NAT'L ASS'N ADMIN. L. JUDICIARY 428, 462-67 (2016) (proposing judicial deference to substantive, not procedural, findings of hearing officers).

[113] An overlapping contributing factor is the tight regulatory timeline for completion of the process via issuance of a written decision for both regular and expedited hearings. 34 C.F.R. § 300.515(c) (2018); 34 C.F.R. § 300.532(c) (2018). In my many years of experience as an IDEA review officer and as an IDEA hearing officer trainer, I have found that the remedies stage of decision writing is often given insufficient equitable care and creativity due to exhaustion in and of this prescribed process.

[114] Not only do hearing officers typically provide no remedy for procedural violations that do not survive step two, but also more generally they only rarely order purely prospective procedural relief. *Supra* note 86 and accompanying text; *e.g.*, Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 214 (2013) (*Adjudicative Remedies for Denials of FAPE*) (finding that only 5% of 224 hearing officer cases that granted remedies in FAPE cases was an order for evaluation or another action beyond the substantive content of the IEP).

[115] *Adjudicative Remedies for Denials of FAPE*, *supra* note 114.

[116] 34 C.F.R. § 300.508(b)(6) (2018) (requiring the complaint to contain "the proposed resolution of the problem to the extent known and available at the time").

[117] *Id*.

[118] The likely lack of the requisite knowledge of this remedy is not at all limited to pro se parents. Specialized legal counsel is lacking in many locations. *E.g.*, Kay Hennessey Seven & Perry A. Zirkel, *In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow?*, 9 GEORGETOWN J. POVERTY L. & POL'Y 193, 217–19 (2002) (finding notable insufficiency of parent attorneys in national survey).

[119] *E.g.*, Albuquerque Pub. Sch. v. Sledge, 74 IDELR ¶ 290 (D.N.M. 2019).

[120] *E.g.*, *Dawn G. ex rel. D.B.*, 63 IDELR ¶ 63 (N.D. Tex. 2014) (reciting parent's culminating request for "any [other] relief that the Hearing Officer . . . deem[] appropriate").

[121] *E.g.*, Letter to Kohn, 17 IDELR 522 (OSEP 1991) (stating the agency's position that "an impartial hearing officer has the authority to grant any relief he [or] she deems necessary"). This authority is derived from the reviewing court's express and broad equitable authority to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(1)(C) (2017).

benefit balance weighs in favor of hearing officers' actively fulfilling their broad remedial authority to restore the meaning of the procedural dimension of the IDEA to an equitably enforced level.

S.T. v. Howard County Pub. Sch. Sys.

United States Court of Appeals for the Fourth Circuit

December 8, 2015, Argued; January 5, 2016, Decided

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Reporter
627 Fed. Appx. 255 *; 2016 U.S. App. LEXIS 151 **

S.T.; S.J.P.T.; I.T., Plaintiffs - Appellants, v. HOWARD COUNTY PUBLIC SCHOOL SYSTEM; RENEE A. FOOSE, officially, Defendants - Appellees.COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, Amicus Supporting Appellant.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[**1]** Appeal from the United States District Court for the District of Maryland, at Baltimore. (1:14-cv-00701-JFM; 1:15-cv-00100-JFM). J. Frederick Motz, Senior District Judge.

S.T. ex rel. S.J.P.T. v. Howard County Pub. Sch. Sys., 2015 U.S. Dist. LEXIS 182 (D. Md., Jan. 5, 2015)

Disposition: AFFIRMED.

Counsel: ARGUED: Wayne D. Steedman, CALLEGARY & STEEDMAN, P.A., Baltimore, Maryland, for Appellants.

Jeffrey A. Krew, JEFFREY A. KREW, LLC, Ellicott City, Maryland, for Appellees.

ON BRIEF: James F. Silver, CALLEGARY & STEEDMAN, P.A., Baltimore, Maryland, for Appellants.

Caroline Heller, GREENBERG TRAURIG, LLP, New York, New York, for Amicus Curiae.

Judges: Before TRAXLER, Chief Judge, SHEDD, Circuit Judge, and Elizabeth K. DILLON, United States District Judge for the Western District of Virginia, sitting by designation.

Opinion

[*255] PER CURIAM:

S.T., through his parents, appeals the district court's grant of summary judgment for Howard County Public School System. We affirm.

S.T. is a nine year old boy in the Howard County Public School System. Diagnosed with autism spectrum disorder, S.T. qualifies as disabled under the Individuals with Disabilities in Education Act ("IDEA"). He receives special-education services through an Individualized Educational Program ("IEP") developed by an IEP team which includes both school system personnel and S.T.'s **[**2]** parents.

On October 21, 2013, the school system conducted an annual review of S.T.'s IEP. At this meeting, the IEP team developed a new IEP which included a new placement, transferring S.T. from The Trellis School, a private institution, to the Cornerstone Program at Cedar Lane, a school in the Howard County Public School System. S.T.'s parents filed a Due Process Complaint challenging the new placement. After a five-day hearing, the administrative law judge found that the IEP provides S.T. a free appropriate education ("FAPE") as required by the law. S.T.'s parents appealed to the district court, which granted summary judgment for the school system. The district court found **[*256]** that the ALJ used the correct methodology to reach a decision and that her factual findings indicate that administering the IEP at the Cornerstone Program will provide S.T. with a FAPE.

We review a district court's grant of summary judgment de novo. Lee Graham Shopping Ctr., LLC v. Estate of Kirsch, 777 F.3d 678, 681 (4th Cir. 2015). On a motion for summary judgment, we view "all facts and reasonable inferences in the light most favorable to the non-moving party." Dulaney v. Packaging Corp. of America, 673 F.3d 323, 330 (4th Cir. 2012). Whether an IEP is sufficient to provide a FAPE is a question of fact that we review for clear error. County School Bd. of Henrico County, Va. v. Z.P. ex rel. R.P., 399 F.3d 298, 309 (4th Cir. 2005).

On appeal, S.T.'s parents argue **[**3]** that the IEP utilizing the Cornerstone Program did not offer S.T. a FAPE at the time it was developed and that the ALJ and the district court erred in relying on "retrospective evidence" to show that the Cornerstone Program meets the IEP requirements. They argue that the Cornerstone Program was a 36-week program at the time the IEP was created, not a 46-week program as required by the IEP. Since the evidence that the program could meet the durational requirements of the IEP was offered for the first time at the ALJ hearing (rather than at the IEP meeting), they argue, it was improper retrospective evidence.

The district court held that the ALJ's determination that the Cornerstone Program can meet the requirements of S.T.'s IEP is supported by the testimony of Howard County Public School System employees, autism specialist Shannon Majoros and instructional facilitator Janet Zimmerman. Testimony before the ALJ indicated that bridge services are available to lengthen the program to 46 weeks. The court held, therefore, that the ALJ did not err when she determined that the Cornerstone Program can meet any IEP requirement for 46 weeks of services.

The district court further held that Mojoros' **[**4]** and Zimmerman's testimony about the current duration of available services at the Cornerstone Program was not improper evidence because the dispute here is not over the services required to be provided to S.T., but the ability of the school placement to provide those services. Further, the court noted that even if offering new testimony about the duration of the Cornerstone Program were a procedural violation of the IDEA, it is subject to a harmlessness analysis and there is no evidence of actual harm to S.T.'s education because he will receive all necessary services under his IEP at the Cornerstone Program. See MM ex rel. DM v. School Dist. of Greenville County, 303 F.3d 523, 534 (4th Cir. 2002)(a school district fulfills its statutory obligation where a disabled child received or was offered a FAPE, even if there was a technical violation of the IDEA).

Having reviewed the record and the applicable law, and having had the benefit of oral argument, we affirm the judgment based substantially on the reasoning of the district court.

AFFIRMED

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Sch. Bd. of the City of Norfolk v. Brown

United States District Court for the Eastern District of Virginia, Norfolk Division

December 13, 2010, Decided; December 13, 2010, Filed

Civil Action No. 2:10cv41

Reporter
769 F. Supp. 2d 928 *; 2010 U.S. Dist. LEXIS 140223 **

SCHOOL BOARD OF THE CITY OF NORFOLK, Plaintiff, v. DAPHNE BROWN, As Parent and Next Friend of RP, Defendant.

Subsequent History: Costs and fees proceeding at, Motion granted by Sch. Bd. of Norfolk v. Brown, 2011 U.S. Dist. LEXIS 159574 (E.D. Va., Feb. 23, 2011)

Case Summary

Overview
The hearing officer found that the student was entitled to counseling services to address escalating behavior which the school board had previously ignored. The order compelling the board to provide counseling services was not an abuse of discretion. The board failed to provide the student with a free appropriate public education (FAPE) by failing to adequately address the student's emerging behavioral and psychological issues after having adequate reason to suspect that the student could have a disability and that special education services could be necessary to address that disability.

Outcome
The motions for summary judgment were granted in part and denied in part. The final decision of the due process hearing officer was affirmed in part and reversed in part.

Counsel: [1]** For School Board of the City of Norfolk, Plaintiff: Derek Anthony Mungo, LEAD ATTORNEY, Office of the City Attorney, Norfolk, VA.

For Daphne Brown, As Parent and Next Friend of RP, Defendant: Raymond Andrew Hartz, Legal Aid Society of Eastern Virginia, Norfolk, VA.

Judges: Raymond A. Jackson, United States District Judge.

Opinion by: Raymond A. Jackson

Opinion

[*933] ***MEMORANDUM OPINION AND ORDER***

Before the Court are the Parties' cross Motions for Summary Judgment. Having carefully reviewed the Parties' pleadings and considered the oral arguments, the Court finds that this matter is ripe for judicial determination. For the reasons stated herein, Plaintiff School Board of the City of Norfolk's Motion for Summary Judgment is **DENIED** in part and **GRANTED** in part; Defendant Brown's Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part; and the final decision of the due process hearing officer is **AFFIRMED** in part and **REVERSED** in part.

OUTLINE OF OPINION

[*934] I. [2] FACTUAL AND PROCEDURAL HISTORY**

On January 20, 2010, Plaintiff, School Board of the City of Norfolk ("School Board"), filed a Complaint against Defendant, Daphne Brown ("Brown"), as the parent and next friend of minor RP, pursuant to certain provisions of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(i)(2), seeking to appeal the administrative findings of the special education due process hearing officer.

RP ("Student") is an eleven year old student who was enrolled in Campostella Elementary School, which is operated by the School Board, from September 2004 to February 2009. Compl. ¶ 6-a. Student resides with his aunt and legal guardian, Daphne Brown. Compl. ¶ 5. Student suffers from several impairments which qualify him as a "child with disability," pursuant to 20 U.S.C. § 1401(3)(A), including right side hemiplegia (cerebral palsy) and seizure disorder. Compl. ¶¶ 6-k, 6-1. As a result of his disabilities, Student qualifies for special education and related services under the IDEA. Compl. ¶ 6-1. In accordance with the provisions of the IDEA, Student was classified under the disability category of "other health impaired" and an initial individualized education **[**3]** program ("IEP") was developed on December 20, 2006, in accordance with 20 U.S.C. § 1414. Compl. ¶¶ 6-1, 6-m. Though Student had exhibited some behavioral problems in the past, Student's initial IEP did not address any behavioral concerns. Compl. ¶¶ 6-f, 6-m. Student's IEP was subsequently modified in April 2007, January 2008, and January 2009; however none of the modifications included any behavioral goals or objectives or a behavioral intervention plan ("BIP"). Compl. ¶¶ 6-o, 6-r, 6-z.

On February 25, 2009, Student was suspended from school long term for leaving three threatening messages on the principal's voice mail. Compl. ¶¶ 6-cc, 6-ee. Student was subsequently admitted to the Virginia Psychiatric Center, after a school psychologist determined Student's behavior, in association with his disciplinary incident, to be bizarre. Compl. ¶¶ 6-dd, 6-ee. On March 3, 2009, a Manifestation Determination Review ("MDR") was conducted concerning Student's conduct that led to the suspension, in accordance with 20 U.S.C. § 1415(k)(1)(E). Compl. ¶ 6-ff. The MDR resulted in a finding that Student's conduct was not a manifestation of his disability. *Id*. Consequently, in April 2009, Brown filed complaints **[**4]** with the Virginia Department of Education ("VDOE"), asserting, *inter alia*, violations of state and federal law relating to the MDR conducted on March 3, 2009. Compl. ¶ 6-jj. After substantial investigation, on June 15, 2009, the VDOE issued a Letter of Findings, holding the School Board in noncompliance with federal law for failing to consider whether the behavioral conduct "had a direct and substantial relationship to" Student's disability. Compl. ¶ 6-nn; see 20 U.S.C. § 1415(k)(1)(E)(i)(I). On June 18, 2009, the School Board determined that Student would be placed in the Chrysalis Program ("Chrysalis") at Granby Elementary School for the 2009-2010 academic year. Compl. ¶ 6-oo. Following this determination, and in accordance with the VDOE's Letter of Findings, a second MDR was conducted on July 9, 2009. Compl. ¶ 6-pp. Again, the MDR resulted in a finding that Student's behavioral conduct was not a manifestation of his educational disability. Compl. ¶ 6-qq. Subsequently, on July 31, 2009, Brown, as parent and next friend of RP, requested a due process hearing against the School Board for violations of the IDEA.

On September 14, 2009, a seven-day hearing commenced before special education **[**5]** due process hearing officer Sarah **[*935]** Smith Freeman ("Hearing Officer") to address the issue of whether Student's disciplinary placement in response to his threats against the principal constituted the least restrictive environment in which Student would receive a free appropriate public education ("FAPE"), pursuant to the IDEA. Compl. ¶ 8. The Hearing Officer heard evidence and oral arguments from both parties and issued a decision on the matter on October 23, 2009. Compl. ¶ 9. The Hearing Officer concluded, *inter alia*, that the School Board's disciplinary placement did not constitute the least restrictive environment for Student and that the School Board had failed to meet its requirements under the IDEA. Compl. ¶ 10.

In reaching her ultimate conclusions, the Hearing Officer found that, while the School Board's official records contained little information documenting Student's behavioral pattern, the guidance counselor's records, which were much more thorough, indicated a series of disciplinary events which placed the School Board on notice that Student was in need of a functional behavioral assessment and, ultimately a BIP, well before the disciplinary incident of February 2009. Sarah **[**6]** Smith Freeman, Va. Dep't of Educ., *In Re Brown v. School Board of the City of Norfolk* 23 (2009) [hereinafter *VDOE Decision*]. Furthermore, the Hearing Officer determined that, though the School Board had evidence to suggest that Student suffered from one or more mental infirmities either in addition to or as a result of his physical ailments, the School Board, nevertheless failed to evaluate the effect of these mental difficulties on Student's behavior. *Id*. at 25. This failure constituted a substantial violation of the School Board's obligations under the "child find" provisions of the IDEA. *Id*.

With regard to Student's placement in the Chrysalis Program following the disciplinary incident of February 2009, the Hearing Officer found that the placement did not constitute the least restrictive environment in which Student

would receive a FAPE. *Id*. at 25. The Hearing Officer determined that Student would be removed from his current general education environment and placed in an environment where he would attend school only with other children with disciplinary problems. *Id*. at 25-26. The Hearing Officer concluded that Student receives educational benefit from the inclusive setting, which **[**7]** he would not receive in the Chrysalis setting. *Id*. at 28. Further, the Hearing Officer also concluded that the School Board failed to comply with certain procedural requirements of the IDEA prior to changing Student's educational placement. *Id*. at 29-30; *see* 20 U.S.C. § 1415(k)(1)(E).

After determining that Student's placement in the Chrysalis Program was a direct result of the School Board's failure to implement the IEP, the Hearing Officer ordered the following forms of relief: (1) Brown to receive an independent educational evaluation of Student at public expense; (2) Brown and the school psychologist to complete ADHD testing of Student; (3) the IEP team to convene a meeting at the culmination of all ordered testing; (4) IEP team to implement Student's draft IEP of July 9, 2009; and (5) the School Board to provide Student with regular guidance counseling services as an IEP accommodation. *VDOE Decision*, at 33-34. Following the Hearing Officer's decision and order, the School Board filed the instant action in this Court on January 20, 2010, challenging several of the administrative findings of the Hearing Officer.

On September 13, 2010, the School Board filed its Motion for Summary **[**8]** Judgment seeking to set aside the administrative findings of the special education due process hearing officer. Brown, as parent **[*936]** and next friend of RP, filed a Response in Opposition to Plaintiff's Motion and Defendant's Motion for Summary Judgment on September 24, 2010. Oral arguments on this matter were heard before this Court on October 21, 2010. Accordingly, this matter is now ripe for judicial determination.

II. LEGAL STANDARD

The IDEA, 20 U.S.C. § 1400 *et seq*., provides any party aggrieved by a decision reached at a due process hearing of the state educational agency with a right to bring a civil action in a United States district court. 20 U.S.C. § 1415(i)(2). A district court reviewing a decision of the educational agency "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines appropriate." § 1415(i)(2)(C). Accordingly, a reviewing court may grant summary judgment based on the administrative record of the hearing. *Hogan v. Fairfax Cnty. Sch. Bd*., 645 F. Supp. 2d 554, 561 (E.D. Va. 2009).

A court **[**9]** reviewing an administrative decision under the IDEA, is "obliged to conduct a modified de novo review, giving 'due weight' to the underlying administrative proceedings." *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 530-31 (4th Cir. 2002). However, district courts may not "substitute their own notions of sound educational policy for those of the school authorities which they review." *Hartmann ex rel. Hartmann v. Loudoun Cnty. Bd. of Educ.*, 118 F.3d 996, 1000 (4th Cir. 1997) (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)). Once the reviewing court has given the administrative findings due weight, it is then "free to decide the case on the preponderance of the evidence." *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991)

In evaluating the administrative findings, findings of fact which are "regularly made" are taken to be "prima facie" correct and a reviewing court that fails to adhere to the factual findings of the agency must explain its deviation. *Id*. In determining whether such factual findings were "regularly made," a reviewing court "should examine the way in which the state administrative authorities **[**10]** have arrived at their administrative decisions and the methods employed." *Id*.; *see also Cnty. Sch. Bd. of Henrico Cray., Va. v. Z.P*., 399 F.3d 298, 305 (4th Cir. 2005) ("Factual findings are not regularly made if they are reached through a process that is far from the accepted norm of a fact-finding process."); *see, e.g., J.P. ex rel. Peterson v. Cnty. Sch. Bd. Of Hanover Cnty., Va*., 516 F.3d 254, 259 (4th Cir. 2008) ("In this case, there is nothing in the record suggesting that the hearing officer's process in resolving the case was anything other than ordinary. That is, the hearing officer conducted a proper hearing, allowing the parents and the School Board to present evidence and make arguments, and the hearing officer by all indications resolved the factual questions in the normal way, without flipping a coin, throwing a dart, or otherwise abdicating his responsibility to decide the case.").

III. DISCUSSION

In reviewing the substantive decisions of the Hearing Officer, the Court must first look to the factual findings of the hearing officer to determine whether such findings were "regularly made." *See Doyle*, 953 F.2d at 105. Thus, before turning to the Hearing Officer's ultimate **[**11]** conclusions that Student was denied FAPE, the Court will first determine whether the factual findings of the Hearing Officer **[*937]** were regularly made and thus, should be considered "prima facie" correct. *See id*.

A. Count XII: The Factual Findings of the Due Process Hearing Officer

In determining whether the factual findings of the due process hearing officer were regularly made, a district court must "examine the way in which the state administrative authorities have arrived at their administrative decision and the methods employed." *Id*. In Count XII of the Complaint, the School Board apparently argues that the Hearing Officer committed several procedural errors which would entitle this Court to afford her findings considerably less weight. *See* Compl. ¶¶ 45-47.

First, the School Board contends that the Hearing Officer allowed Brown's counsel to exceed time limits for examining witnesses, allowing Brown six days to present her case, when the hearing had originally been scheduled to last only five days total. Pl.'s Mem. Supp. at 47-48. Second, the School Board argues that the Hearing Officer failed to fairly allocate the scheduled time between the parties, providing Brown six days to present **[**12]** evidence, while limiting the School Board to only one day to present its case. *Id*. at 48. Third, the School Board asserts that the Hearing Officer failed to base her findings on a preponderance of the evidence, as the Hearing Officer neglected to acknowledge the evidence presented by the School Board. *Id*. at 48-49. Finally, the School Board argues that the Hearing Officer demonstrated a bias in favor of Brown by disregarding uncontradicted facts in the record and agreeing with misrepresentations of fact that Brown's counsel made. *Id*. at 49. The School Board's first two contentions concern the process that the Hearing Officer used, while the third and fourth contentions relate, not to the process used, but rather to the "manner in which the hearing officer expressed [her] view of the case." *See J.P.*, 516 F.3d at 260. Thus the Court will address the process the Hearing Officer used and the manner of expression separately.

1. Procedural Considerations

The factual findings of an administrative hearing officer are entitled to a presumption of correctness where such findings were "regularly made." *Doyle*, 953 F.2d at 105. "Factual findings are not 'regularly made' if they are reached through **[**13]** a process that is 'far from the accepted norm of a fact-finding process.'" *Z.P.*, 399 F.3d at 305 (quoting *Doyle*, 953 F.2d at 104). Though the Fourth Circuit has not precisely defined the necessary elements of a fact-finding process, precedent indicates that, at the very minimum, a proper hearing must allow both parties to present their case and the fact-finder must weigh the evidence presented in reaching factual determinations. *See J.P.*, 516 F.3d at 259 ("[T]here is nothing in the record suggesting that the hearing officer's process in resolving the case was anything other than ordinary. That is, the hearing officer conducted a proper hearing, allowing the parents and the School Board to present evidence and make arguments, and the hearing officer by all indications resolved the factual questions in the normal way, without flipping a coin, throwing a dart, or otherwise abdicating his responsibility to decide the case."); *see also Hogan v. Fairfax Cnty. Sch. Ed.*, 645 F. Supp. 2d 554, 569 (E.D. Va. 2009) (holding that the Hearing Officer's factual findings were "regularly made" where "[a] proper hearing was held; witnesses from both sides testified and were cross-examined; voluminous **[**14]** exhibits were submitted; and the hearing officer was fully engaged in the process").

In this case, as in *J.P.*, the Hearing Officer allowed both parties to present evidence, **[*938]** provided each side with an opportunity to cross-examine the witnesses of the other side, and considered the evidence presented in order to "resolve[] the factual questions in the normal way, without flipping a coin, throwing a dart, or otherwise abdicating [her] responsibility to decide the case." *See J.P.*, 516 F.3d at 259. The School Board does not dispute

that these basic due process tenants were available to it, but rather asserts that the process used in the due process hearing was flawed in two respects: (1) the Hearing Officer allowed Brown's counsel to exceed time limits for examining witnesses; and (2) the Hearing Officer allowed Brown six days to present her case, while restricting the School Board to only one day to present its case.

Upon close review of the administrative record, the Hearing Officer set time limitations for direct and cross examinations of witnesses, which were equally applicable to both parties. *See* Pre-Hr'g Report, at 2. The Hearing Officer described these time frames as "goals" which **[**15]** were "not meant to exclude testimony in any way." Due Process Hr'g Tr. vol. 1, 5:24-6:2, Sept. 19, 2009. Accordingly, throughout the proceedings, the Hearing Officer allowed testimony to exceed the pre-set time limitations in an attempt to allow the parties to fully present their case. However, it is not clear in the record that the Hearing Officer's decision to extend the time for witness examination was preferential towards either party. In fact, the Hearing Officer, in the interests of fairness, made an effort to allow the School Board's counsel additional time to cross-examine far beyond that set at the outset of the hearing. Due Process Hr'g Tr. vol. 6, 342:17-343:2, Oct. 12, 2009. Furthermore, even if the Hearing Officer had allowed Brown's counsel additional time to conduct direct examination, such a decision could not be considered "far from the accepted norm of a fact-finding process," as the Hearing Officer complied with all of the procedural safeguard required by the IDEA in conducting the hearing, *see* 20 U.S.C. § 1415(h), and Brown was the party bearing the burden of proof at the hearing, *see Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005) ("The burden of proof **[**16]** in an administrative hearing challenging an IEP is properly placed upon the party seeking relief"). Thus, the Court finds that the Hearing Officer's extension of time for Brown's counsel to examine its witnesses does not constitute a procedural error which would cause the Court to diminish the weight given to the factual findings of the Hearing Officer.

Additionally, the School Board asserts that the Hearing Officer's failure to fairly allocate the time evenly among the parties was a procedural error which entitles the Court to give the Hearing Officer's findings less weight. Again, the Court must disagree. In oral argument, counsel for the School Board indicated that the School Board objected to the limited time to present its case after arguing its Motion to Strike. However, the record indicates that prior to the School Board arguing its Motion to Strike, counsel for Brown objected to the School Board calling witnesses on direct that Brown had previously called during her case-in-chief. Due Process Hr'g Tr. vol. 7, 5:6-13, Oct. 16, 2009. In response, counsel for the School Board asserted that requiring the School Board to conduct direct examination of witnesses during Brown's case-in-chief **[**17]** would impermissibly shift the burden of proof from Brown to the School Board. *Id*. at 5:18-7:10. In resolving Brown's objection, the Hearing Officer indicated that she would allow the School Board to conduct a direct examination of the witness that Brown had previously called during her case-in-chief. *Id*. at 8:8-9:4. Furthermore, **[*939]** the administrative record reveals, and counsel for the School Board conceded at oral argument, that the School Board was not prohibited from calling any of the witnesses that it wished to call during its rebuttal case, even though it presented evidence for only one day. Thus the Court finds that the procedural error the School Board alleges did not affect its ability to adequately present its case and thus does not require this Court to afford the findings of the Hearing Officer less weight.

2. The Hearing Officer's Manner of Expression

In addition to the alleged procedural errors addressed above, the School Board also argues that the Hearing Officer failed to base her findings on a preponderance of the evidence by neglecting to acknowledge the evidence the School Board presented, disregarding uncontradicted facts in the record and agreeing with misrepresentations **[**18]** of fact that Brown's counsel made. Pl.'s Mem. Supp. at 48-49. As with the procedural considerations, the Court finds that none of these contentions render the Hearing Officer's findings so deficient as to be deprived of deference.

While, generally, the Court should focus the inquiry of whether factual findings were "regularly made" on the procedure used in reaching factual determinations, the Fourth Circuit has recognized that "the manner in which a hearing officer's factual findings are presented could be so deficient as to deprive the opinion of the deference to which it would otherwise be entitled." *J.P.*, 516 F.3d at 260. However, the standard set forth in Doyle "does not require the hearing officer to explain in detail its reasons for accepting the testimony of one witness over that of

another." *Z.P.*, 399 F.3d at 306; *see also J.P.*, 516 F.3d at 261 ("[Fourth Circuit] case law does not require an IDEA hearing officer to offer a detailed explanation of his credibility assessments.").

In this case, the Hearing Officer's opinion was far from deficient. The Hearing Officer issued a lengthy, 35-page opinion, including 16 pages detailing her factual findings, complete with references to **[**19]** the administrative record. Though the Hearing Officer did not explicitly state that she found Brown's witnesses to be more credible than those of the School Board or refute the School Board's evidence, such an explanation is not required by the IDEA or applicable case law. *See J.P.*, 516 F.3d at 261. Furthermore, it is implicit in the Hearing Officer's decision that she considered the evidence before her and found Brown's evidence to be more persuasive on some points and the School Board's evidence to be more persuasive on others. The School Board's characterization of the evidence Brown presented as "misrepresentations of fact" cannot shift the duty to assess the credibility of witnesses from the Hearing Officer to this Court. It is not for this Court to question or judge the credibility determinations of the Hearing Officer who actually heard and evaluated the testimony presented. *See Z.P.*, 399 F.3d at 307 ("[Credibility determinations implicit in a hearing officer's decision are as entitled to deference under *Doyle* as explicit findings.").

Furthermore, given that the due process hearing spanned over several weeks, consisting of the lengthy testimonies of dozens of witnesses, and produced **[**20]** over a thousand transcript pages, it would be impossible for the Hearing Officer to have discussed all of the factual evidence presented in the record when rendering her decision. Thus it was entirely appropriate for the Hearing Officer to focus on the facts that were most relevant in reaching her ultimate conclusions. *See J.P.*, 516 F.3d at 262 ("While it would of course be **[*940]** preferable for hearing officers to explain their analysis in as much detail as possible, a hearing officer's failure to meet this aspirational standard does not provide a basis for concluding that the factual findings contained in a statutorily compliant written opinion were not regularly made and therefore not entitled to deference."). Thus, the Court finds that the Hearing Officer's consideration of the evidence and testimony presented was sufficient to afford her findings the deference required under *Rowley* and *Doyle* and, accordingly, this Court will take the findings of the Hearing Officer as prima facie correct. Plaintiff School Board's Motion for Summary Judgment is **DENIED** and Defendant Brown's Motion for Summary Judgement is **GRANTED** as to Count XII of the School Board's Complaint.

B. Provision of a Free Appropriate [21] Public Education**

Having determined that the Hearing Officer's factual findings were "regularly made" and therefore are entitled to presumptive correctness, the Court must turn to whether the Hearing Officer properly concluded that Student was denied FAPE. The Hearing Officer found that Student was denied FAPE in two primary respects. First, the Hearing Officer found that the School Board's failure to evaluate Student for mental disease or defects that might affect his behavior constituted a violation of the School Board's obligations under the "child find" provisions of the IDEA. *VDOE Decision*, at 25. Thus Student was denied FAPE when he was not subjected to a functional behavioral assessment or provided a behavioral intervention plan ("BIP"). *Id*. Second, the Hearing Officer found that Student was denied FAPE when he was required to attend the Chrysalis Program as a result of the disciplinary incident of February 2009. *Id*. The Hearing Officer found that, not only was the Chrysalis placement more restrictive than the general education inclusion environment designated in Student's most recent Individualized Education Program ("IEP"), but also neither Manifestation Determination Review **[**22]** ("MDR") that the School Board conducted satisfied the procedural requirements of the IDEA. *Id*. at 25, 28, 29.

1. Violation of the "Child Find" Provisions of the IDEA

In Counts II and III of the School Board's Complaint, the School Board raises alleged errors the Hearing Officer made, all pertaining to the Hearing Officer's ultimate conclusion that Student was denied FAPE as a result of the School Board's violations of the "child find" provisions of the IDEA. In Count II, the School Board argues that the Hearing Officer erroneously determined that the School Board failed to fully evaluate Student's suspected disabilities which may have adversely impacted his academic performance during the 2007-2008 and 2008-2009 academic years. Pl.'s Mem. Supp. at 26-30. The School Board maintains that the Hearing Officer erred in her

interpretation of the law, as the IDEA does not require school boards to fully evaluate a student in order to identify suspected disabilities. Pl.'s Mem. Supp. at 26. Similarly, Count III asserts that the Hearing Officer erred in concluding that the School Board should have provided Student with specially designed instruction, a functional behavioral assessment and a BIP. **[**23]** Pl.'s Mem. Supp. at 30-35. Specifically, the School Board argues that the Hearing Officer disregarded the informed judgment of professional educators in crafting Student's IEP and instead substituted her own opinion. Pl.'s Mem. Supp. at 31-32. Before addressing the merits of the School Board's claims, the Court will examine the statutory text and history of the IDEA.

[*941] a. The Individuals with Disabilities Education Act

The IDEA was promulgated in order "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). In order to achieve the stated goals of the IDEA, the statute authorizes federal assistance to states that comply with the provisions of the Act. § 1412(a). Notably, the Act imposes an affirmative obligation on any state receiving federal assistance to identify and evaluate all children suffering from disabilities who may be in need of special education and related services. § 1412(a)(3). Specifically, the IDEA requires that "[a]ll children with **[**24]** disabilities residing in the State,... regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated." § 1412(a)(3)(A). This duty is known as the "child find" obligation. The "child find" duty extends even to "[c]hildren who are suspected of being a child with a disability... even though they are advancing from grade to grade." 34 C.F.R. § 300.111(c)(1).

Among the other requirements specified for state qualification, is the mandate that the state provide a "free appropriate public education" ("FAPE") to all children with disabilities, including those with disabilities who have been suspended or expelled. 20 U.S.C. § 1412(a)(1)(A). A FAPE consists of "special education and related services that have been provided at public expense, under public supervision and direction, and without charge ... and are provided in conformity with the individualized education program." § 1401(9). Furthermore, a FAPE is marked by "educational instruction specially designed to meet the unique needs of the handicapped child,... supported by such services as are necessary to permit the child to benefit from the instruction." **[**25]** *Z.P.*, 399 F.3d at 300 (quoting *Rowley*, 458 U.S. at 188-89).

In order to satisfy the FAPE requirement, the School Board must provide an "individualized education program" ("IEP") for each child with a disability. 20 U.S.C. § 1412(a)(4). The IEP is a written statement for each child with a disability that includes, *inter alia*, information about the child's current academic progress, including how the child's disability affects that progress, and a statement of the child's academic and functional goals. § 1414(d)(1)(A). The IEP is developed by an IEP team, which is comprised of the disabled child's parents, at least one regular education teacher and one special education teacher of the child, a representative of the local educational agency, and others who may have knowledge or special expertise regarding the disabled child. § 1414(d)(1)(B). In developing an appropriate IEP, the IEP team is required to consider the strengths of the child, the concerns of the parents, the results of any evaluation of the child, the academic, developmental and functional needs of the child, and, where the child's behavior impedes his learning or that of others, "the use of positive behavioral interventions **[**26]** and supports, and other strategies, to address that behavior." § 1414(d)(3)(A) - (d)(3)(B)(i). "An IEP is sufficient if it is 'reasonably calculated to enable the child to receive educational benefits.'" *Z.P.*, 399 F.3d at 300 (quoting *Rowley*, 458 U.S. at 207).

In examining whether the School Board provided Student with a FAPE, the Court must conduct a two-part assessment. First the Court must determine **[*942]** whether the State complied with the procedures as set forth in the IDEA and second, the Court must look to whether the IEP was reasonably calculated to enable the child to receive educational benefits. *Jaynes ex rel Jaynes v. Newport News Sch. Bd.*, 13 F. App'x 166, 172 (4th Cir. 2001). Accordingly, "[f]ailure to meet IDEA'S procedural requirements is an adequate ground for holding that the public school failed to provide a free appropriate public education." *Id*. The Hearing Officer found both procedural and substantive violations of the IDEA in determining first, that the School Board failed to comply with the procedural

requirements set forth in the "child find" provisions of the IDEA, and second, that Student's IEP was inadequate because it failed to address Student's behavioral problems. **[**27]** *VDOE Decision*, at 25.

b. Count II: Procedural Violation of Child Find

Though case law analyzing the "child find" provisions of the IDEA are scarce, failure to comply with the "child find" mandate may constitute a procedural violation of the IDEA. *See Forest Grove Sch Dist. v. T.A.*, 129 S. Ct. 2484, 2495, 174 L. Ed. 2d 168 (2009) ("A reading of the [IDEA] that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services."). The "child find" provision of the IDEA imposes on States a requirement that "[a]ll children with disabilities residing in the State,... regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated." 20 U.S.C. § 1412(a)(3)(A). The "child find" duty extends even to "[c]hildren who are suspected of being a child with a disability ... even though they are advancing from grade to grade." 34 C.F.R. § 300.111(c)(1). Furthermore, where a child is suspected of being a child with a disability, the local educational **[**28]** agency shall ensure that "the child is assessed in *all* areas of suspected disability." 20 U.S.C. § 1414(b)(3)(B) (emphasis added).

Though the "child find" duty does not impose a specific deadline by which time children suspected of having a qualifying disability must be identified and evaluated, evaluation should take place within a "reasonable time" after school officials are put on notice that behavior is likely to indicate a disability. *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995), *abrogated on other grounds by A. W. v. Jersey City Pub. Sch.*, 486 F.3d 791 (3d Cir. 2007). Thus, the "child find" obligation is triggered where the state has reason to suspect that the child may have a disability and that special education services may be necessary to address that disability. *Dept. of Educ, State of Haw. v. Can Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001). A local educational agency is deemed to have knowledge that the child may suffer from a disability where (1) "the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and **[**29]** related services;" (2) "the parent of the child has requested an evaluation of the child pursuant to section 1414 (a)(1)(B);" or (3) "the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency." 20 U.S.C. § 1415(k)(5)(B).

In order to establish a procedural violation of the "child find" requirement, **[*943]** the claimant "must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate." *Bd. of Educ. of Fayette Cnty., Ky. v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007) (adopting the standard set forth in *Clay T. v. Walton Cnty. Sch. Dist.*, 952 F. Supp. 817, 823 (M.D. Ga.1997)); *see also M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996) ("[A] school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a de minimis educational benefit must correct the situation."). In this case, the Hearing **[**30]** Officer found that the School Board failed to evaluate and identify Student's suspected disabilities which had been adversely affecting his behavior during the 2007-2008 and 2008-2009 academic school years. *VDOE Decision*, at 32. Specifically, the Hearing Officer found that several behavioral incidents leading up to Student's February 2009 suspension placed the School Board on notice that Student's current disability or a new developing disability warranted a functional behavioral assessment and, potentially, the development of a BIP. *Id*.

Giving due weight to the factual findings of the Hearing Officer, the Court finds that the Hearing Officer's conclusions regarding the School Board's duties under the "child find" provisions are supported by substantial evidence. As early as June 2005, the school's Eligibility Committee reported that Student's psychiatric issues, possibly related to his seizures, could be the basis for Student's behavioral issues. *Id*. at 11. The Hearing Officer also found that the school guidance counselor documented several behavioral incidents involving Student during the 2007-2008 and 2008-2009 academic school years, including making threats against, becoming physical **[**31]** with, and harassing other classmates. *Id*. at 17-19. Student was also suspended on three other occasions

prior to the disciplinary incident of February 2009. *Id*. at 18-19. Furthermore, the hearing revealed that in October 2008, Student was removed from school and referred to a behavioral program, the Alternatives to Violent Behavior Program ("AVBP"), based on his making verbal threats to other students. *Id*. at 13. AVBP provided several suggestions to school officials concerning Student's unsatisfactory behavior, including recommending that Student receive behavior consequences, appropriate support and immediate feedback in order to achieve behavioral modification, and providing Student with a Positive Behavior Support Plan to address his needs. *Id*. at 13-14. However, the school failed to implement the plan. *Id*. at 14. Considering the above factual findings of the Hearing Officer, the Court finds that there was substantial evidence to support the Hearing Officer's conclusion that the School Board "overlooked clear signs of disability" and thus failed to fully evaluate Student's suspected disabilities which adversely impacted his academic performance during the 2007-2008 and 2008-2009 **[**32]** academic years. This constituted a procedural violation of the "child find" provisions of the IDEA. Therefore, Plaintiff School Board's Motion for Summary Judgment is **DENIED** and Defendant Brown's Motion for Summary Judgement is **GRANTED** as to Count II of the Complaint.

c. Count III: Substantive Violation of Child Find

In addition to arguing that the Hearing Officer erroneously determined that the School Board failed to fully evaluate Student, in Count III of the Complaint, the School Board also asserts that the Hearing Officer erred in concluding that the School Board should have provided Student with specially designed instruction, a functional **[*944]** behavioral assessment and a BIP prior to the February 2009 suspension. Compl. ¶ 17. This allegation concerns, not the procedure the School Board followed, but rather the substance of Student's then-existing IEP and whether it was "reasonably calculated to enable the child to receive educational benefits." *Z.P*., 399 F.3d at 300 (quoting *Rowley*, 458 U.S. at 207).

"Whether an IEP is appropriate and thus sufficient to discharge a school board's obligations under the IDEA is a question of fact", entitled to deference under the *Doyle* standard. *Z.P*., 399 F.3d at 307. **[**33]** While neither the due process hearing officer nor the district court may "substitute their own notions of sound educational policy for those of the school authorities which they review," *Rowley*, 458 U.S. at 206, such restriction does not "relieve the hearing officer or the district court of the obligation to determine as a factual matter whether a given IEP is appropriate," meaning "reasonably calculated to enable the child to receive educational benefits," *Z.P*., 399 F.3d at 307. Under the IDEA, where a child's behavior impedes the child's learning or that of others, the IEP team must consider "the use of positive behavioral interventions and supports, and other strategies, to address that behavior" in developing the child's IEP. 20 U.S.C. § 1414(d)(3)(B)(I).

In this case, the Hearing Officer determined that the evidence presented indicated that the Student's behavioral pattern required that the School Board implement IEP behavioral goals or a BIP prior to the disciplinary incident of February 2009. *VDOE Decision*, at 28. The Hearing Officer's conclusion appears to stem partly from the fact that Student was removed from school and referred to the AVBP behavioral modification program **[**34]** as a result of his unsatisfactory behavior towards other students in October of 2008. *See id*. at 26. The Hearing Officer found that this removal demonstrated that Student's behavior had begun to affect his academic performance. The Court agrees with this conclusion. The Hearing Officer could have rationally concluded, based on the evidence presented, that Student's behavior was impeding his learning or the learning of other students prior to the disciplinary incident of February 2009. Supporting the Hearing Officer's conclusion was not only the fact that Student was removed from school and placed in a behavioral modification program for eight days, but also that the professional educators at AVBP provided Student with a behavioral intervention plan, complete with information concerning triggers to Student's behavior and insight into situations likely to escalate such behavior; yet the School Board failed to implement or acknowledge the plan going forward. *Id*. Based on these factual circumstances, the Court finds that there was substantial evidence to support the Hearing Officer's determination that, as a factual matter, Student's behavior impeded his learning or that of others at some **[**35]** point prior to the disciplinary incident of February 2009. Therefore, the Hearing Officer correctly concluded that the IDEA imposed a duty to implement positive behavioral interventions and supports to address Student's behavior.

Additionally, the School Board's reliance on the deference afforded professional educators is misplaced. The School Board argues that the Hearing Officer's determination was erroneous because several professional educators testified that Student's behavior did not interfere with his learning or that of others and that the nature and quantity of disciplinary incidents did not indicate that Student was in need of specially designed instruction, a functional behavioral assessment or a BIP. *See* Pl.'s **[*945]** Mem. Supp. at 33-34. The School Board maintains that the Hearing Officer should have adhered to the professional judgment of the educators rather than inserting her own, uninformed opinion. *Id*. at 32. While it is true that "absent some statutory infraction," educators alone are tasked with providing an education compliant with the IDEA, *Hartmann*, 118 F.3d at 1000, "the fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other **[**36]** professional testifies that the IEP is appropriate," *Z.P.*, 399 F.3d at 307. The requirement for deference to professional educators articulated in *Vice v. Botecourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990), and reiterated in MM, 303 F.3d at 532, applies to the *content* of a disabled student's IEP and not to the question of whether the IEP enables the child to achieve educational benefit. *See Tice*, 908 F.2d at 1207.

In this case, the Hearing Officer did not evaluate the content of Student's IEP, but rather recognized that the School Board failed to comply with the IDEA by not addressing Student's behavior in any manner within the IEP. Had the School Board included behavioral considerations within Student's IEP with which the Hearing Officer disagreed, the deference standard would be applicable. But where, as here, the IEP is not specially designed to meet Student's unique needs with regard to his behavioral issues, the IEP did not provide Student with FAPE. Thus, the Hearing Officer correctly concluded that Student's January 2009 IEP, which was in place at the time of the February 2009 disciplinary incident, did not provide any meaningful way for Student to achieve educational **[**37]** benefit in response to his behavioral difficulties. Accordingly, Plaintiffs Motion for Summary Judgment is **DENIED** and Defendant's Motion for Summary Judgement is **GRANTED** as to Count III of the Complaint.

2. The July 9 Manifestation Determination Review

In Counts IV, V, and VI of the School Board's Complaint, the School Board asserts several alleged errors that the Hearing Officer made relating to her determination that Student was denied FAPE when he was removed from his current educational placement following his suspension in February of 2009. As with the "child find" duties, the Hearing Officer found both procedural and substantive violations of the IDEA when considering whether Student was denied FAPE based on his February 2009 suspension. Procedurally, the School Board raises two related challenges. First, in Count IV, the School Board asserts that the Hearing Officer erred in determining that the School Board conducted a "flawed" second MDR on July 9, 2009. Pl.'s Mem. Supp. at 38. Similarly, in Count V, the School Board maintains that the Hearing Officer erred in ruling that the School Board failed to fully implement the VDOE's corrective action plan in order to resolve Brown's **[**38]** complaint about the flawed original MDR of March 3, 2009. Pl.'s Mem. Supp. at 35-38.

Substantively, in Count VI, the School Board challenges the Hearing Officer's finding that the July 9 MDR inquiry into whether Student's conduct was the result of the School Board's failure to implement the IEP should have been answered in the affirmative. Pl.'s Mem. Supp. at 38-41. Specifically, the School Board asserts that it was required only to implement the IEP that was in effect at the time of the disciplinary action, and that IEP did not include a BIP. *Id*. at 40. The Court will address the Hearing Officer's asserted procedural and substantive IDEA violations separately.

a. Counts IV and V: MDR Procedural Violations

Pursuant to the IDEA, school personnel may remove a disabled student who has **[*946]** violated a code of conduct from his current educational setting under limited circumstances. Where school personnel intend to place the disabled child in an alternative educational setting for a period of more than ten school days, the school must first determine that the student's behavior was not a manifestation of his disability. *See* 20 U.S.C. § 1415(k)(1)(C). In conducting this inquiry, within ten days **[**39]** of any decision to change the student's placement, the local educational agency, the parent, and relevant members of the students IEP team (collectively, the "MDR team")

shall "review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine — (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP." § 1415(k)(1)(E)(i). Where the MDR team answers either of the above inquiries in the affirmative, the student's conduct shall be determined to be a manifestation of his or her disability and the student shall be returned to the educational placement from which he or she was removed. §§ 1415(k)(1)(E)(i), 1415(k)(1)(F)(iii).

In this case, Student was subjected to two separate MDR proceedings. Student's initial MDR, which occurred on March 3, 2009 and was within ten days following the school's decision to suspend Student, was found to be procedurally faulty by the VDOE. Compl. ¶ 6-nn. The VDOE issued a "corrective **[**40]** action plan" directing the MDR team to "promptly convene a properly comprised IEP meeting to determine, using the applicable regulatory standard, whether [Student's] behavior was a manifestation of his disability." *Id*. Accordingly, a second MDR was conducted on July 9, 2009. Compl. ¶ 6-pp. The Hearing Officer found that this second MDR did not comply with the procedural requirements set forth in the IDEA. Specifically, the Hearing Officer noted that the MDR team did not conduct the MDR over again, but rather limited its inquiry to the question of whether Student's conduct "had a direct and substantial relationship to" his disability. *VDOE Decision*, at 30. The Hearing Officer found that such "fragmenting" conflicted with "the spirit of the IDEA in the conduct of a complete MDR." *Id*. Furthermore, several of the individuals present at the initial MDR were not in attendance at the second meeting and Student's parent was denied participation by being told that the purpose of the meeting was only to redo the particular question on the School Board's form. *Id*. Additionally, the MDR team conducted only a "record review" and failed to consider relevant information, including a report based **[**41]** on a psychiatric evaluation of Student which was conducted following the behavior which led to his suspension. *Id*. The Hearing Officer further found that no formal discussion of the issues ever occurred "with all of the relevant information, at the same time, in the same room with the correct legal standard in place." *Id*. Thus, the Hearing Officer found that the July 9 MDR substantially violated the procedural requirements of the IDEA.

As previously mentioned, a school board's failure to satisfy the procedural requirements of the IDEA can constitute a denial of FAPE. *See Jaynes*, 13 F. App'x at 172. However, "[w]hen such a procedural defect exists, [courts] are obliged to assess whether it resulted in the loss of an educational opportunity for the disabled child, or whether, on the other hand, it was a mere technical contravention of the IDEA." *M.M. ex rel. DM. v. Sch. Dist. of Greenville Cnty*., 303 F.3d 523, 533 (4th Cir.2002). In this case, the Hearing Officer cited five procedural errors **[*947]** which gave rise to her conclusion that the second MDR was procedurally flawed and that the MDR team failed to comply with the VDOE's corrective action plan: (1) the MDR team "fragmented" the manifestation **[**42]** determination inquiry by addressing only one question; (2) different individuals were present at the second MDR than were present at the first; (3) Student's parent was denied parental participation; (4) the MDR team conducted only a record review of the evidence; and (5) the MDR team failed to review the Student's psychiatric report which had not been available during the first MDR. *See VDOE Decision*, at 30. It was the compounding of these procedural violations that led the Hearing Officer to conclude that Student was denied FAPE. The Court finds that this determination was supported by substantial evidence.

The cornerstone of the IDEA is the notion that every disabled child shall be provided with "meaningful access" to public education, through provision of some educational benefit. *A.B. ex rel D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004). Where a procedural violation deprives a disabled child of that educational benefit, such violation may constitute a denial of FAPE. *See M.M.*, 303 F.3d at 533. In this case, the Court finds that the Hearing Officer reasonably concluded that the July 9 MDR was so procedurally faulty as to deny Student FAPE. Both the IDEA and the VDOE's "corrective **[**43]** action plan" required the MDR team to determine "whether [Student's] behavior was a manifestation of his disability." When the MDR team failed to properly conduct this inquiry at the first MDR, it was obligated to reconvene to make this determination during the second MDR. In making the manifestation determination, the MDR team was required to consider each prong of the inquiry as set forth in 20 U.S.C. § 1415(k)(1)(E)(i). Failing to do so not only deprived Student of the full and complete consideration required under the IDEA before removal, but also deprived his parents of participation in the MDR process. The denial of parental participation, as found by the Hearing Officer, is a substantial and serious violation of the IDEA. *See Schaffer*, 546

U.S. at 53 ("The core of the statute, however, is the cooperative process that it establishes between parents and schools."). Further, as the Hearing Officer noted, the most egregious procedural violation was the failure to consider the psychiatric report which was generated as a result of Student's admission to the Virginia Psychiatric Center, which was a direct consequence of the behavioral incident at issue at the MDR. The IDEA requires **[**44]** the MDR team to consider "*all* relevant information" and certainly a psychiatric evaluation based upon the subject disciplinary incident would be relevant to the determination of whether the conduct leading to that disciplinary incident was a manifestation of Student's disability. See 20 U.S.C. § 1415(k)(1)(E)(I) (emphasis added).

Furthermore, the School Board's reliance upon *Fitzgerald v. Fairfax County School Board*, 556 F. Supp. 2d 543 (E.D. Va. 2008), fails to undermine the Hearing Officer's findings. In *Fitzgerald*, a disabled student and his parents launched a procedural attack on the MDR which concluded that his behavioral conduct was not a manifestation of his disability. *See id*. at 546. The parents in *Fitzgerald* alleged several procedural violations including, *inter alia*, selecting MDR team members who were not "relevant" members of the child's IEP team, violating the parents' right to determine whether the child's conduct was a manifestation of his disability, and failing to require MDR team members to review all relevant information prior to the MDR meeting. *Id*. at 552. The Court held that "relevant members" of the IEP team need not know the child personally in order to **[*948]** participate **[**45]** in the MDR, so long as each MDR team member "serve[s] some purpose pertinent to the MDR." *Id*. at 556. Furthermore, the Court found that while the IDEA does require parental involvement and participation in the MDR process, it does not allow parents to veto a decision of the MDR team or require the decision of the MDR team to be unanimous. *Id*. at 557-58. Finally, the Court held that the IDEA does not require the MDR team to review all relevant information *before* the MDR meeting, so long as prior to reaching a manifestation determination, the MDR team does in fact review the information. *Id*. at 559. Thus the Court concluded that none of the procedural errors that the student's parents alleged gave rise to a denial of FAPE. *Id*. at 561.

The procedural errors that the Hearing Officer relied on in this case are wholly distinguishable from those addressed in *Fitzgerald*. First, in this case, the Hearing Officer did not find that Student's parent was not allowed to "veto" or overrule the finding of the MDR team, but rather determined that Student's parent was denied parental participation altogether. *See VDOE Decision*, at 30. Student's parent was told that there would be no additional record **[**46]** review and that the purpose of the meeting was only to address the second question which had been neglected at the previous meeting, and thus, she was precluded from presenting additional evidence. *See id*. Furthermore, as to the review of the record and the psychiatric report, the Hearing Officer concluded that the error was in the fact that no additional review took place, not *when* the review took place, as was the case in *Fitzgerald*. *Id*.; *see also Fitzgerald*, 556 F. Supp. 2d at 558-59 ("[T]he [Hearing Officer's] factual finding regarding the information actually reviewed by the MDR committee members is entitled to deference."). Finally, while *Fitzgerald* may support the School Board's contention that the Hearing Officer erroneously determined that it was error for different team members to be present at the second MDR than were present at the first and for members to be present who did not personally know Student, this mistake does not give rise to a duty to overturn the Hearing Officer's ultimate conclusion that Student was denied FAPE based on the procedurally faulty MDR.

The other errors that the Hearing Officer relied on offer generous support for her conclusion that the manner **[**47]** in which the July 9 MDR was conducted denied Student educational benefit. Unlike the MDR conducted in *Fitzgerald*, it appears that the second MDR was approached with a closed mind and the outcome was predetermined, Student's parent was denied parental participation, and no meaningful discussion took place. *Cf. Fitzgerald*, 556 F. Supp. 2d at 561 (noting that "the MDR committee did not approach the hearing with closed minds, but rather carefully considered all information at the hearing before making their determination" and that the student's parents "were afforded an opportunity to participate in the MDR hearing, that team members carefully discussed [the student's] background and his role in the [disciplinary] incident, and, only at the conclusion of the meeting, did the committee members conclude that [the student's] conduct was not a manifestation of his disability"). Thus the Court finds that the Hearing Officer's conclusion was supported by substantial evidence. Accordingly, Plaintiffs Motion for Summary Judgment is **DENIED** and Defendant's Motion for Summary Judgement is **GRANTED** as to Counts IV and V of the Complaint.

b. Count VI: MDR Substantive Violation

In addition to arguing that **[**48]** the Hearing Officer erroneously determined that the **[*949]** July 9 MDR was procedurally faulty, in Count VI of the Complaint, the School Board also asserts that the Hearing Officer erred in concluding that the MDR team should have found that Student's conduct which led to the disciplinary incident of February 2009 was "a direct result of the School Board's failure to implement the Student's IEP." Compl. ¶ 28. Specifically, the School Board asserts that it was required only to implement the IEP that was in effect at the time of the disciplinary action, and that particular IEP did not include a BIP. Pl.'s Mem. Supp. at 40. This allegation relates not to the procedure that the MDR team followed, but rather to the substance of the MDR team's determination. *See generally AW ex rel Wilson v. Fairfax Cnty. Sch. Bd.*, 372 F.3d 674, 684-85 (4th Cir. 2004).

As indicated above, the IDEA requires the MDR team to consider whether "the conduct in question was the direct result of the local educational agency's failure to implement the IEP." 20 U.S.C. § 1415(k)(1)(E)(i)(II). The Hearing Officer apparently found that the MDR team erroneously answered this particular inquiry in the negative based on the fact **[**49]** that the School Board had previously violated the "child find" provisions of the IDEA by not conducting a functional behavioral assessment or BIP prior to February 2009. *See VDOE Decision*, at 33. Although the courts have not interpreted this provision of the IDEA, it appears that the Hearing Officer misapplied the plain language of the statute in reaching her conclusion that the inquiry should have been answered in the affirmative.

In this case, it is undisputed, as Student never raised the issue, that the School Board had been implementing student's most recent IEP, dated January 9, 2009. The January 2009 IEP did not include any behavioral goals or a BIP. The clear language of the statute indicates that the MDR team must consider whether Student's conduct was based on the School Board's failure to implement the *IEP* and not on the School Board's failure to provide Student with a *FAPE*. The two concepts, though related, are not synonymous. So even where, as here, it is clear that the School Board failed to meet its obligations under "child find," and that this failure deprived Student of FAPE, this was not the inquiry that was anticipated by the IDEA. Had the IDEA provided that a student's **[**50]** conduct shall be determined to be a manifestation of his disability where the school board fails to provide the student with a FAPE, the Hearing Officer's ruling would stand. However, the Court will not read into the plain language of the statute, a meaning that Congress did not anticipate. Accordingly, the Court finds that the Hearing Officer's application of the law was erroneous, as there is nothing to suggest that Student's conduct was a direct result of the School Board's failure to implement the IEP of January 2009. Thus, Plaintiffs Motion for Summary Judgment is **GRANTED** and Defendant's Motion for Summary Judgement is **DENIED** as to Count VI of the Complaint. However because the Court determined that the MDR was so procedurally faulty as to constitute a denial of FAPE, no further action is warranted from the Hearing Officer on this issue. *See* discussion *infra* Part III.B.2.a.

3. The Chrysalis Placement

In Counts I and XI of the School Board's Complaint, the School Board raises procedural and substantive challenges to the Hearing Officer's determination that Student's placement in the Chrysalis Program, which followed the disciplinary incident of February 2009, was erroneous. Procedurally, **[**51]** in Count XI, the School Board claims that the Hearing Officer erred in ruling that Student's placement in **[*950]** Chrysalis was improper because there was no consensus of the IEP team. Compl. ¶ 43. According to the School Board, there was no evidence in the record to support the Hearing Officer's finding that there was no consensus of the IEP team in determining Student's educational placement. Pl.'s Mem. Supp. at 45. Substantively, in Count I, the School Board contends that the Hearing Officer erred in concluding that the School Board's placement of Student in Chrysalis for the 2009-2010 academic year failed to provide him with a FAPE in the least restrictive environment. Compl. ¶ 12. Specifically, the School Board asserts that the IDEA does not require a school board to duplicate educational services for a student who has been assigned to an alternative educational program due to a disciplinary incident, so long as the student's IEP may still be implemented. Pl.'s Mem. Supp. at 23-24. Again, the Court will address the alleged procedural violations and substantive violations separately.

a. Count XI: Change in Placement Procedural Violation

The IDEA provides that, where a disabled child's "change **[**52]** in placement" "would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a "manifestation of the child's disability", the "interim alternative educational setting" shall be determined by the IEP team. [1] 20 U.S.C. § 1415(k)(2); *see also* 34 C.F.R. § 300.530(d)(5) ("If the removal is a change of placement under §300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section."). Pursuant to 34 C.F.R. § 300.536, a "change of placement" occurs where, *inter alia*, "[t]he removal is for more than 10 consecutive school days." Furthermore, the IDEA specifically anticipates that decisions pertaining to a disabled child's educational placement be "made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options." 34 C.F.R. § 300.116.

The School Board contends that there was no evidence in the record to support the Hearing Officer's determination that the decision to place Student in Chrysalis was made by the School Board and not by the IEP team as required under the IDEA. However, the School Board's letter, dated June 18, 2009, which notified Student and his parent of the decision to place Student in Chrysalis, specifically indicates that the decision was made by the School Board at a meeting held **[**54]** on June 17, 2009. Furthermore, none of the IEP notifications from the time of the original MDR on March 3, 2009 to the date of Student's removal to Chrysalis indicate that Student's interim educational placement had been discussed or decided by the IEP team. Thus, there was substantial evidence to support the Hearing Offer's conclusion that the decision to place Student **[*951]** in Chrysalis was made by the School Board and not by the IEP team as required. As indicated above, the IDEA mandates that the IEP team, which consists of the student's parent and other persons with personal knowledge of the student, shall make any determination about a disabled student's interim educational placement. This procedural violation constitutes a denial of FAPE as it has "[s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child." *See* 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2)(ii). Thus, Plaintiffs Motion for Summary Judgment is **DENIED** and Defendant's Motion for Summary Judgement is **GRANTED** as to Count XI of the Complaint.

b. Count I: Change in Placement Substantive Violation

In addition to finding that **[**55]** the decision to place Student in the Chrysalis Program was procedurally flawed because it was not made by the IEP team, the Hearing Officer also found that the Chrysalis placement was inappropriate because it failed to provide Student with a FAPE in the least restrictive environment. *VDOE Decision*, at 28, 31. The School Board contends that the Hearing Officer erred in reaching her conclusion because the School Board was not required to duplicate educational services for a student who had been placed in an alternative educational program as a result of a disciplinary incident. Pl.'s Mem. Supp. at 23. Moreover, the School Board asserts that the Chrysalis placement was a general education setting in which Student's IEP could be successfully implemented. *Id*. at 24-25. However, as Brown pointed out in her brief, the School Board's arguments presume that a MDR was properly conducted and correctly determined that Student's conduct was not a manifestation of his disability, prior to his assignment to Chrysalis. *See* Def.'s Mem. Opp. at 9. As previously mentioned, the Court finds that neither MDR was properly conducted and Student should have never been removed from his current

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[1] For the purposes of addressing the argument in Count XI of the Complaint, the Court will presume that Student was removed from his current educational setting based upon a determination that his conduct was not a "manifestation of his disability," though the Court ruled above **[**53]** that the MDR team failed to properly conduct this inquiry prior to Student's removal to the Chrysalis Program. The IDEA requires that, outside of the disciplinary context, "the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child." 20 U.S.C. § 1414(e). Thus, because the record makes clear that Student's parent did not participate in the determination that Student should be placed in Chrysalis, the procedural requirements of the IDEA would not have been satisfied based on the Court's determination that the MDR was improper and thus, Student should have been returned to the placement from which he was removed. *See* 20 U.S.C. § 1415(k)(1)(F)(iii).

educational placement **[**56]** based on the procedurally faulty March 3 MDR or the subsequent, and equally flawed, July 9 MDR. *See* discussion *infra* Part III.B.2.a.

Furthermore, even had Student been properly disciplined under 20 U.S.C. § 1415(k)(1)(C), substantial evidence exists to support the Hearing Officer's conclusion that the Chrysalis Program would not constitute the least restrictive environment in which Student could receive a FAPE. Where a disabled child has been correctly removed from his current educational placement for a violation of a code of conduct, the school board must, nevertheless, ensure that the child "[c]ontinue[s] to receive educational services ... so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." 34 C.F.R. § 300.530(d)(1)(i). The requirement that the child be educated in the "general education curriculum" reflects the notion that disabled children must be placed in the "least restrictive environment" in which they can receive a FAPE. *See M.S. ex rel. Simchickv. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009); *DeVries By DeBlaay v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989) **[**57]** ("Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the Act."). Particularly, the IDEA requires that "[t]o the maximum extent appropriate, children with disabilities ... are educated with children **[*952]** who are not disabled." 20 U.S.C. § 1412(a)(5)(A).

While the "mainstreaming" requirement is vital to the provision of FAPE, it is not absolute. *See AW*, 372 F.3d at 681; *see also* 20 U.S.C. § 1412(a)(5)(A) (noting that removal of disabled children from the regular educational environment should occur "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily"). Accordingly, "mainstreaming" is not required where "(1) the disabled child would not receive an educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting; or, (3) the disabled child is **[**58]** a disruptive force in a regular classroom setting." *Hartmann*, 118 F.3d at 1001.

In this case, the Hearing Officer found that Student was receiving educational benefit in his general education placement that he would not receive in the Chrysalis setting. *VDOE Decision*, at 28. At Campostella Elementary School, Student was actively participating in various activities and courses with other, non-disabled students and those courses were specifically included within his IEP. *Id*. The Hearing Officer found that access to such programs was essential to Student's development of social skills and peer relationships and that Student would be restricted from such access in the Chrysalis program. *Id*. *Cf. AW*, 372 F.3d at 682 ("To the extent that a new setting replicates the educational program contemplated by the student's original assignment and is consistent with the principles of "mainstreaming" and affording access to a FAPE, the goal of protecting the student's "educational placement" served by the "stay-put" provision appears to be met. Likewise, where a change in location results in a dilution of the quality of a student's education or a departure from the student's LRE-compliant setting, a **[**59]** change in "educational placement" occurs."). Furthermore, there is no evidence in the record to suggest that Student was a disruptive force in the classroom setting, as the majority of Student's disciplinary incidents, including the subject incident of February 2009, occurred outside of the classroom. Such factual determinations by the Hearing Officer are entitled to deference under the *Doyle* standard and this Court will not disturb them. Accordingly, the Court finds that there was substantial evidence to support the Hearing Officer's determination that the Chrysalis placement was not the least restrictive environment in which Student could receive FAPE.

Thus, because the Court concludes that Student should have never been removed from his general education placement at Compostella Elementary School and, in any event, the Chrysalis Program was not the least restrictive environment in which Student could receive FAPE, Plaintiffs Motion for Summary Judgment is **DENIED** and Defendant's Motion for Summary Judgement is **GRANTED** as to Count I of the Complaint.

C. Counts VII, VIII, IX, and X: The Hearing Officer's Ordered Relief

In Counts VII, VIII, IX, and X of the School Board's Complaint, the **[**60]** School Board challenges four orders that the Hearing Officer issued in favor of Student. First, in Count VII, the School Board argues that it was error for the

Hearing Officer to order that Brown was entitled to an independent educational evaluation ("IEE") at public expense because there was no evidence that Brown disagreed **[*953]** with the evaluation the school psychologist conducted. Pl.'s Mem. Supp. at 41-42. Second, in Count VIII, the School Board finds error in the Hearing Officer's order that the School Board test Student for ADHD and amend the IEP based upon the test results. *Id*. at 42-43. Third, in Count IX, the School Board states that it should not be required to implement the draft IEP of July 9, 2009 because Student's parent specifically rejected that IEP. *Id*. at 43. Finally, in Count X, the School Board disputes the Hearing Officer's order that the School Board provide Student with guidance counseling services as an IEP accommodation, because parental consent was never granted to do so. *Id*. at 44-45. In response to each of these contentions, Brown argues in her brief that the issues raised in Counts VII, VIII, IX, and X are now moot. *See* Def.'s Mem. Opp. at 22-23. The Court agrees **[**61]** that Counts VII, VIII, and IX are now moot and are thus, non-justiciable, however, the Court concludes that the issue raised in Count X is "capable of repetition, yet evading review" and will therefore address it on the merits *See DeVries*, 853 F.2d at 268 (quoting *Honig v. Doe*, 484 U.S. 305, 318, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)).

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M*., 529 U.S. 277, 287, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (quoting *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979)). However, where the controversies raised are "ongoing and viable," the issues cannot be considered moot. *See Cnty. Sch. Bd. of York Cnty, Va. v. A.L*., 194 Fed. Appx. 173, 178 (4th Cir. 2006). In this case, the IEE and ADHD testing which the School Board contests have already been completed. Thus, there is no present controversy which exists for the Court to adjudicate. Similarly, the draft IEP that the School Board argues it is unable to implement because Student's parent failed to provide written consent for it to do so, has now been superceded by Student's current IEP. Thus, this issue is also moot. Accordingly, Plaintiffs Motion for Summary **[**62]** Judgment is **DENIED** and Defendant's Motion for Summary Judgement is **GRANTED** as to Counts VII, VIII, and IX of the Complaint.

The Hearing Officer's order that the School Board provide Student with guidance counseling services, however, is not moot and remains an issue of controversy as it is "capable of repetition, yet evading review." The School Board may be required to continue the provision of guidance counseling services in the future as an IEP accommodation. The School Board asserts that the Hearing Officer had no authority to order regular guidance counseling services as an IEP accommodation. Pl.'s Mem. Supp. at 45. However, a Hearing Officer may order that "compensatory" educational services be provided prospectively to compensate for a past deficient program. *Compare G ex rel. RG v. Fort Bragg Dependent Sch*., 343 F.3d 295, 308-09 (4th Cir. 2003) (applying the theory of "compensatory education" to courts reviewing a hearing officer's decision under the IDEA), *with Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 522, 365 U.S. App. D.C. 234 (D.C. Cir. 2005) (citing *RG*, 343 F.3d at 308 and extending the theory of "compensatory education" to hearing officers). "Compensatory education involves discretionary, **[**63]** prospective, injunctive relief crafted ... to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." *RG*, 343 F.3d at 309.

In this case, the Hearing Officer found that Student was entitled to counseling **[*954]** services to address escalating behavior which the School Board had previously ignored, in violation of the "child find" provisions of the IDEA. The Hearing Officer's order compelling the School Board to provide counseling services was not an abuse of discretion. As addressed *infra* Part III.B.1, the School Board failed to provide Student with a FAPE by failing to adequately address Student's emerging behavioral and psychological issues after having adequate reason to suspect that Student may have a disability and that special education services may be necessary to address that disability. Accordingly, the Hearing Officer found, based on the behavioral intervention plan developed by AVBP, that Student could benefit from guidance counseling services. *VDOE Decision*, at 34. The Court finds that the Hearing Officer's equitable order for the provision of guidance counseling services was supported **[**64]** by substantial evidence. Thus, Plaintiffs Motion for Summary Judgment is **DENIED** and Defendant's Motion for Summary Judgement is **GRANTED** as to Count X of the Complaint.

IV. CONCLUSION

For the foregoing reasons, Plaintiff School Board of the City of Norfolk's Motion for Summary Judgment is **DENIED** in part and **GRANTED** in part and Defendant Brown's Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part. Plaintiffs Motion for Summary Judgment is **DENIED** and Defendant's Motion for Summary Judgment is **GRANTED** on Counts I, II, III, IV, V, VII, VIII, IX, X, XI, and XII. Plaintiffs Motion for Summary Judgment is **GRANTED** and Defendant's Motion for Summary Judgment is **DENIED** on Count VI. Accordingly, the final decision of the due process hearing officer is **AFFIRMED** in part and **REVERSED** in part in accordance with this Opinion. However, based on the procedural posture of this case as discussed *infra* Part III.B.2.b, no further action from the Hearing Officer is required.

The Court **DIRECTS** the Clerk to send a copy of this Memorandum Opinion and Order to counsel and parties of record.

IT IS SO ORDERED.

/s/ Raymond A. Jackson

Raymond A. Jackson

United States District Judge

Norfolk, Virginia

December **[**65]** 13, 2010

Sumter County Sch. Dist. 17 v. Heffernan

United States Court of Appeals for the Fourth Circuit

December 8, 2010, Argued; April 27, 2011, Decided

No. 09-1921

Reporter
642 F.3d 478 *; 2011 U.S. App. LEXIS 8548 **

SUMTER COUNTY SCHOOL DISTRICT 17, Plaintiff-Appellant, v. JOSEPH HEFFERNAN, on behalf of his son TH; MAY BAIRD, on behalf of her son TH, Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the District of South Carolina, at Columbia. Joseph F. Anderson, Jr., District Judge. (3:07-cv-01357-JFA).

Heffernan v. Sumter County Sch. Dist. 17, 2010 U.S. Dist. LEXIS 102521 (D.S.C., Sept. 28, 2010)

Disposition: AFFIRMED.

Case Summary

Procedural Posture
In an action under the Individuals with Disabilities Education Act (IDEA), appellant school district appealed from the U.S. District Court for the District of South Carolina an order finding that the school district failed to provide a free, appropriate public education (FAPE) to a child and that the program established by appellee parents of the child to educate him at home was appropriate.

Overview
According to the school district, the district court erred by failing to give proper deference to a hearing officer's factual findings on whether it provided the child with FAPE. The court disagreed, finding that the district court acknowledged and accepted the officer's factual findings, but reached a different legal conclusion. That was entirely appropriate and consistent with the district court's obligation to make its own independent determination of whether the district provided the child with FAPE. The district court did not commit clear error when it found that the failure to implement a material portion of the 2005-06 individual education plan constituted a denial of FAPE. The court also could not conclude that the district court erred by not finding that the district, despite its remedial efforts, was capable of providing FAPE at the time of the due process hearing. Finally, the district court properly considered the restrictiveness of the home placement as a factor in deciding the appropriateness of the home placement. The district court did not clearly err by finding that the home placement was reasonably calculated to enable the child to receive educational benefits.

Outcome
The court affirmed the decision of the district court.

Counsel: ARGUED: David Thomas Duff, DUFF, WHITE & TURNER, LLC, Columbia, South Carolina, for Appellant.

Erik T. Norton, NELSON MULLINS RILEY & SCARBOROUGH, LLP, Columbia, South Carolina, for Appellees.

ON BRIEF: Meredith L. Seibert, DUFF, WHITE & TURNER, LLC, Columbia, South Carolina, for Appellant.

Matt Bogan, NELSON MULLINS RILEY & SCARBOROUGH, LLP, Columbia, South Carolina, for Appellees.

Judges: Before TRAXLER, Chief Judge, WYNN, Circuit Judge, and David A. FABER, Senior United States District Judge for the Southern District of West Virginia, sitting by designation. Chief Judge Traxler wrote the majority opinion, in which Senior Judge Faber joined. Judge Wynn wrote an opinion concurring in part and dissenting in part.

Opinion by: TRAXLER

Opinion

[*481] TRAXLER, Chief Judge:

In this action under the Individuals with Disabilities Education Act (the "IDEA"), Sumter County School District #17 (the "District") appeals from the district court's order finding that the District had failed to provide a free and appropriate public education to T.H. and that the program established **[**2]** by T.H.'s parents to educate him at home was appropriate. For the reasons set forth below, we affirm.

I.

T.H. falls on the moderate-to-severe end of the autism spectrum. He is functionally non-verbal, in that he does not often use language spontaneously, and he is very sensitive to noise. When this action was commenced, T.H. attended Bates Middle School in Sumter County, South Carolina. His individual education plan ("IEP") for the 2005-06 school year called for 15 hours per week of applied behavioral analysis ("ABA") therapy; the IEP for the 2006-07 school year called for 27.5 hours per week of ABA therapy.

In the fall of 2005, the District was providing T.H. with approximately 7.5-10 hours per week of ABA therapy instead of the 15 hours required by the IEP. T.H. did not do well that fall, and he began exhibiting problematic "self-

stimulating" behavior, such as biting himself (or others) and wiping his nose and face so much that his nose bled and his skin chafed. T.H. also began to wet his pants several times a day while at school.

The parents removed T.H. from school in December 2005 for a medical treatment. By the time he returned to school in January 2006, the District had hired Cassandra **[**3]** Painter, a board-certified ABA therapist, to work in the autism classroom along with the lead teacher and the other aides. Painter immediately made some changes in the District's approach to teaching T.H., and the problematic behaviors began to subside. The lead teacher resigned in March 2006, and Painter became the lead teacher of the autism classroom.

Painter testified at the due process hearing that she believed T.H.'s problems during the 2005-06 school year were largely caused by improper teaching techniques that had been used before she arrived. She testified that the lead teacher and the aides "didn't have a very good understanding of the terminology, of the techniques that are used in applied behavior therapy." J.A. 364. Painter testified that when she arrived, T.H. "was very aversive to the teaching situation. He would not sit for more than a second or two without someone physically prompting him to ... be there. He was not able to retain information that we had taught him." J.A. 366. Painter believed that if proper ABA techniques had been used in the fall of 2005, T.H. would have "been able to sit and work. It would have, should have been a situation where he was a willing **[**4]** learner." J.A. 367. She testified that she spent a considerable portion of her time in the spring of 2006 correcting the problems that had been caused by improper teaching techniques. *See* J.A. 367. With Painter's efforts, T.H. by July 2006 had progressed to the point where he would sit **[*482]** and work with Painter for 20 minutes at a time.

In August 2006, Painter took a position with a different school, and the District hired Sharon James as lead teacher for the autism class. James was a certified special education teacher and the mother of an autistic child, but she had never been trained in ABA therapy. T.H. did not do well under James. James had limited ability to control T.H.'s behavior?she testified that he was out of his chair and running around the classroom about 50% of the time—and T.H.'s problematic behaviors (wiping his face, wetting his pants) returned.

The District hired ABS, Inc., an educational consulting company, to provide ABA training and continuing supervision for James and the classroom aides. ABS provided a three-day training seminar for James and the classroom aides on September 13-15, 2006, more than a month after the school year had begun. After the training session **[**5]** had been completed, an ABS consultant observing the classroom believed that James was verbally and physically abusing the students and that James was actively resistant to the ABA approach. The consultant reported her observations to her supervisor, who in turn reported the problems to the District. Although the District investigated the matter, it could not substantiate the allegations of abuse and did not fire James. ABS then terminated its contract with the District, concluding that the District had, in essence, determined that its consultant had lied about James.

On September 26, 2006, shortly after ABS terminated its contract with the District, the parents removed T.H. from Bates. The parents then brought in Painter, T.H.'s former teacher, to conduct an assessment. Painter concluded that T.H. had regressed from where he had been in July, when she last worked with him, and she found that he had again become aversive to teaching. For T.H.'s education the parents hired an experienced ABA "line therapist" to provide approximately 30 hours per week of ABA therapy to T.H. in the parents' home.

The parents thereafter initiated due process proceedings, seeking a determination that the District **[**6]** was not providing T.H. with the "free appropriate public education" ("FAPE") required by the IDEA. After conducting an evidentiary hearing, the first-line local hearing officer ("LHO") issued an opinion concluding that, in light of the District's failure to provide all of the ABA therapy required by the IEPs, the parents were entitled to some level of compensatory educational services from the District. The LHO, however, determined that the home placement was not appropriate because it did not provide the least restrictive environment for T.H.

The parents appealed to a state review officer ("SRO"). The SRO expressed some uncertainty about whether the LHO had actually concluded that the District denied T.H. a FAPE, but, after reviewing all of the evidence, the SRO ultimately determined that the District had not provided T.H. with a FAPE. As to the appropriateness of the home placement, the SRO explained that the IDEA's least-restrictive-environment requirement does not strictly apply to

private placements and that the overriding issue was whether the home placement was "reasonably calculated to enable the child to receive educational benefits." J.A. 807. The SRO concluded that the home **[**7]** placement was appropriate, given that it provided proper ABA therapy to T.H.; that T.H. had made educational progress in the home placement; and that the parents and the therapist made sure T.H. had regular opportunities to interact with other children. **[*483]** Because it was not entirely clear whether the parents were seeking reimbursement for the expenses associated with the home placement or whether the approval of the home placement would affect the need for any compensatory educational services, the SRO remanded the case to the LHO for additional proceedings related to the remedy.

The District then initiated this action in federal district court challenging the SRO's decision. The district court expressed general agreement with the factual findings of the LHO, but determined that the LHO's legal conclusions "do not logically flow from his factual findings, and therefore are not entitled to deference." J.A. 39. Agreeing with the SRO's analysis, the district court concluded that the District had denied T.H. a FAPE and that the home placement was appropriate. This appeal followed.

In the proceedings below, the District contended that it had provided T.H. with a FAPE in both the 2005-06 and **[**8]** the 2006-07 school years. On appeal, however, the District now concedes that, in light of the issues that arose after Painter resigned as lead teacher shortly before school started, it *did not* provide T.H. with a FAPE for part of the 2006-07 school year. The District contends, however, that by the time of the administrative hearing in December 2006, it had remedied all of the problems in the autism classroom. The District therefore concedes only that it denied T.H. a FAPE from the beginning of the 2006 school year through December 6, 2006, the date of the due process hearing. Accordingly, the District in this appeal raises two issues related to its obligation to provide a FAPE. It contends that the district court erred by concluding that the District failed to provide T.H. a FAPE during the 2005-06 school year, and that the district court failed to recognize that the District had remedied all of the problems by the time of the due process hearing and was at that time capable of providing T.H. with a FAPE. The District also argues that the district court erred by concluding that T.H.'s home placement was appropriate.

II.

A.

The District first contends that the district court erred by concluding **[**9]** that it failed to provide T.H. with a FAPE for the 2005-06 school year. Although the District acknowledges that it did not provide T.H. with all of the hours of ABA therapy required by the IEP, the District insists that it delivered significant portions of the services required by the IEP that provided some educational benefit to T.H., which is sufficient under the IDEA.

The IDEA requires states receiving federal funds for education to provide disabled schoolchildren with a "free appropriate public education." 20 U.S.C.A. § 1412(a)(1)(A) (West 2010). A FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." *Board of Educ. v. Rowley*, 458 U.S. 176, 188-89, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982) (internal quotation marks omitted). [1] Although the IDEA requires an appropriate education, it "does not require a perfect education." *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 328 **[*484]** (4th Cir. 2009). Instead, "a FAPE must be reasonably calculated to confer *some educational benefit* on a disabled child." *M. ex rel. DM v. School Dist. of Greenville Cnty.*, 303 F.3d 523, 526 (4th Cir. 2002) **[**10]** (emphasis added).

Given the relatively limited scope of a state's obligations under the IDEA, we agree with the District that the failure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate public education. However, as other courts have recognized, the failure to implement a material or significant portion of the IEP can

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[1] The statute under consideration in *Rowley* was the "Education of the Handicapped Act," *see Board of Educ.* v. *Rowley*, 458 U.S. 176, 179, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), which was amended in 1990 and retitled as the IDEA, *see Gadsby ex rel. Gadsby v. Grasmick*, 109 F.3d 940, 942 n.1 (4th Cir. 1997).

amount to a denial of FAPE. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) ("[A] *material* failure to implement an IEP violates the IDEA."); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003) ("[W]e cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit."); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) **[**11]** ("[A] party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP."). Accordingly, we conclude that a material failure to implement an IEP, or, put another way, a failure to implement a material portion of an IEP, violates the IDEA.

The District contends that its failure to completely implement the 2005-06 IEP was not material because, as determined by the LHO, T.H. in fact received some educational benefit during that school year. According to the District, the district court erred by failing to give proper deference to the LHO's factual findings on this point. We disagree.

Preliminarily, we note that it is not entirely clear whether the LHO concluded that the District failed to provide a FAPE for the 2005-06 school year. Portions of the LHO's opinion seem to indicate that it found a denial of FAPE — the LHO stated that the District "den[ied] T.H. a FAPE for the approximately 5.0 to 7.5 hours each week he was to be provided ABA therapy and didn't receive it in the [f]all **[**12]** of 2005," J.A. 778, and that the District's "violations of T.H.'s IEPs did interfere somewhat with T.H.'s access to a FAPE," J.A. 780. However, the LHO also stated that T.H. had made progress and that T.H. received more than minimal educational benefit during the 2005-06 and 2006-07 school years, *see* J.A. 781, statements that, when considered in light of the scope of a state's obligation under the IDEA, suggest the District's failings did *not* deny T.H. a FAPE. *See, e.g., MM ex rel. DM*, 303 F.3d at 526. There is, however, no need for us to decide whether the LHO determined that the District did not deny T.H. a FAPE, as the District argues, or that the District did deny T.H. a FAPE, as the parents argue, because the district court gave sufficient deference to the LHO's decision.

A district court considering a challenge to a state administrative decision in an IDEA case makes an independent decision based on its view of the preponderance of the evidence. *See* 20 U.S.C.A. § 1415(i)(2)(C)(iii) (West 2010). The district court must give "due weight" to the administrative proceedings, but the findings of fact and ultimate decision as to whether the state has complied with the IDEA are made by **[**13]** the district court. *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 103 (4th Cir. 1991). "Due **[*485]** weight" means that administrative findings "are entitled to be considered *prima facie* correct, akin to the traditional sense of permitting a result to be based on such fact-finding, but not requiring it." *Id.* at 105.

In this case, the district court explicitly recognized that the LHO's factual findings were "regularly made" and thus did not fall within the exception to the due-weight requirement articulated in *Doyle. See id.* at 104, 105 (explaining that if an administrative officer departs "so far from the accepted norm of a fact-finding process designed to discover truth" — for example, by rejecting credibility determinations made by the hearing officer — the findings cannot be considered "regularly made" and those findings are entitled to no weight); *see also J.P. ex rel. Peterson v. County Sch. Bd. of Hanover Cnty., Va.*, 516 F.3d 254, 259 (4th Cir. 2008) ("When determining whether a hearing officer's findings were regularly made, our cases have typically focused on the *process* through which the findings were made."). The district court acknowledged and accepted the LHO's factual findings, **[**14]** but the court believed that the evidence considered as a whole pointed to a different legal conclusion than that reached by the LHO. This was entirely appropriate and consistent with the district court's obligation to make its own independent determination of whether the District had provided T.H. with a FAPE.

Moreover, when arguing that the court failed to give proper deference to the LHO's findings, the District largely ignores the significance of the SRO's findings. Like the district court, the SRO was obligated under the IDEA to review the record and make an independent decision based on his view of the preponderance of the evidence. The SRO weighed the evidence differently than did the LHO and drew different conclusions from the evidence, but the SRO did not improperly reject credibility findings made by the LHO or otherwise depart from the accepted norm of fact-finding. Because the SRO's findings were regularly made, they, too, were entitled to due weight by the district

court. *See Doyle*, 953 F.2d at 105 ("When a state administrative appeals authority has departed from the fact-finding norm to such an extent as here, we think the facts so found as a result of that departure are **[**15]** entitled to no weight. . . ."); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 981 (4th Cir. 1990) (rejecting as "simply incorrect" the parents' claim that "deference was due *only* to the review officer's conclusion" (emphasis added)).

The question, then, is whether the district court committed clear error when making its independent determination that the District's failure to implement the 2005-06 IEP constituted a denial of FAPE. *See County Sch. Bd. of Henrico Cnty. v. Z.P.*, 399 F.3d 298, 309 (4th Cir. 2005) (whether a school has satisfied its obligations under the IDEA is a factual issue reviewed for clear error). We believe that question must be answered in the negative. The evidence in the record shows that the 2005-06 school year was an extraordinarily difficult one for T.H. In the fall of 2005, he was "very aversive to the teaching situation," would not sit still "for more than a second or two," J.A. 366, and was engaging in harmful behaviors like biting himself and wiping his face until it bled. Painter, the board-certified ABA therapist who worked in the classroom in 2005-06, testified that T.H.'s problems were caused by the failure of the lead teacher and the classroom **[**16]** aides to properly understand and implement ABA techniques, and that it took her until July 2006 to bring T.H. back to the point where he previously should have and would have **[*486]** been if the teachers had understood and properly implemented the ABA methodology.

While there is evidence showing that T.H. made some gains in certain skill areas tested in the spring of 2006, these gains were not so significant as to *require* a conclusion that T.H. received some non-trivial educational benefit from the 2005-06 IEP as implemented by the District. When the evidence of T.H.'s small improvements in a few tested areas is considered against the District's conceded failure to provide the 15 hours of ABA therapy required by the IEP, the evidence that the lead teacher and aides (other than Painter) did not understand or use proper ABA techniques, and the evidence that it took Painter months of working with T.H. to correct the problems caused by the improper implementation of ABA techniques, we cannot say that the district court erred, much less clearly erred, by concluding that the District's failure to properly implement material portions of the IEP denied T.H. a FAPE for the 2005-06 school year. *Cf. Hall ex rel. Hall v. Vance Cnty. Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985) **[**17]** ("Congress did not intend that a school system could discharge its duty ... by providing a program that produces some minimal academic advancement, no matter how trivial.").

B.

Although the District now concedes that it did not provide a FAPE for the first part of the 2006 school year, it contends that as of the date of the due process hearing (December 6, 2006), it had remedied the problems with its autism program. The District thus argues that the district court should have held that the District was *capable* of providing a FAPE as of December 6, 2006. The District contends that such a conclusion is relevant to the determination of the scope and extent of the remedy to be imposed for the District's failure to provide a FAPE.

We agree as a general matter that post-removal changes or improvements to a school's educational program can be relevant in the remedial context, *cf. M.S. ex rel. Simchick*, 553 F.3d at 325 (noting that when determining whether reimbursement is appropriate, the district court may consider, among other things, "the existence of other, perhaps more appropriate, substitute placements"), and we will assume that the District's post-removal capability to properly implement **[**18]** an IEP would be relevant to the remedial question in this case. Even with that assumption, however, we cannot conclude that the district court erred by not finding that the District was capable of providing a FAPE at the time of the due process hearing.

The evidence of the District's improved capabilities was far from concrete. The evidence established that the District had entered into a contract with MaySouth, Inc., to provide ABA consultation services, technical assistance, and training as needed by the District. As of the time of the hearing, however, a MaySouth consultant had observed the autism classroom, but there had been no ABA training or supervision, nor had MaySouth and the District even yet settled on a schedule for visits by a consultant. (A MaySouth consultant testified that he expected a consultant would probably visit the school about once a week, but certainly no less than once every two weeks.) The District had also engaged the services of Dr. Eric Drasko, a professor from the University of South Carolina and an acknowledged expert in the field, but again, the evidence of the services he was to provide was far **[*487]** from

certain or specific. [2] This evidence certainly shows **[**19]** that the District was taking seriously the need to improve its program for educating autistic students. We cannot say, however, that the District's evidence so compellingly established the District's capability at the time of the due process hearing that the district court committed clear error by not finding the District capable of providing a FAPE to T.H.

III.

We turn now to the District's challenge to the determination that the home placement was appropriate and therefore would serve as the "stay put" placement until the District established an adequate program. [3] According to the District, the home placement is not appropriate because it is too restrictive and because the parents failed to present sufficient evidence that the home placement was reasonably calculated to provide an educational benefit **[**20]** to T.H.

The IDEA requires states seeking education funding to ensure that

> [t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.A. § 1412(a)(5)(A) (West 2010). **[**21]** The LHO applied this statutory preference for "mainstreaming" to T.H.'s home placement, concluding that the home placement was not the least restrictive environment and therefore was not appropriate.

As the district court noted, however, this circuit has "never held that parental placements must meet the least restrictive environment requirement." *M.S. ex rel. Simchick*, 553 F.3d at 327. As we have explained,

> mainstreaming is a policy to be pursued so long as it is consistent with the Act's primary goal of providing disabled students with an appropriate education. Where necessary for educational reasons, main-streaming assumes a subordinate role in formulating an educational program. In any event, the Act's preference for mainstreaming was aimed at preventing schools from segregating handicapped students from the general student body; the school district has presented no evidence that the policy was meant to restrict parental options when the public schools fail to comply with the requirements of the Act.

Carter ex rel. Carter v. Florence Cnty. Sch. Dist. Four, 950 F.2d 156, 160 (4th Cir. **[*488]** 1991), *aff'd*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993). Thus, while a parental placement is not inappropriate simply because **[**22]** it does not meet the least-restrictive-environment requirement, it is nonetheless proper for a court to consider the restrictiveness of the private placement *as a factor* when determining the appropriateness of the placement. *See M.S. ex rel. Simchick*, 553 F.3d at 327 ("[T]he district court's consideration of [the private placement's] restrictive nature was proper because it considered the restrictive nature only as a factor in determining whether the placement was appropriate under the IDEA, not as a dispositive requirement.").

The evidence established that the parents were well aware of the need for T.H. to interact with non-disabled children. To meet this need, the line therapist who provided ABA therapy to T.H. regularly took T.H. to parks and into the community for social interactions, and T.H.'s father likewise took T.H. into the community on a daily basis.

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[2] Dr. Shawn Hagerty, the District's special education coordinator, testified that Drasko was "looking at the big picture...., seeing what independent functional skills the kids need in order to generalize, maintain, and to expand across all the environments," J.A. 646, and that Drasko was otherwise "always available" by email, J.A. 646, and would be available for meetings once a month.

[3] Under the "stay put" provision of the IDEA, "during the pendency of any proceedings conducted pursuant to this section, ... the child shall remain in the then-current educational placement of the child" absent the consent of the parents and school officials. 20 U.S.C.A. § 1415(j) (West 2010). We further note that while the question of remedy is not at issue in this appeal, the appropriateness of a home placement also affects parents' eligibility for reimbursement of the costs associated with the home placement. *See M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 324 (4th Cir. 2009).

The district court properly considered this evidence and the restrictiveness of the home placement as a factor, but not the dispositive factor, in its determination of the appropriateness of the home placement.

While more detailed evidence of the nature of the community outings and the manner in which the parents were using the **[**23]** outings to improve T.H.'s social skills would have been preferable, we cannot say that the evidence was so thin that the district court clearly erred by considering it. The District's claim that the more restrictive nature of the home placement and its more limited opportunities for social interaction makes the home placement inappropriate is in reality a complaint about the weight the district court gave this factor when determining the appropriateness of the placement. We see no basis in the record, however, for concluding that the district court's determination about the relative weight to be given to this factor amounted to clear error.

And on the broader question of whether the parents' evidence was sufficient to support the district court's conclusion that the home placement was appropriate, we again find no clear error. A parental placement is appropriate if the placement is "reasonably calculated to enable the child to receive educational benefits," *M.S. ex rel. Simchick*, 553 F.3d at 325 (internal quotation marks omitted), or stated somewhat differently, if "the private education services obtained by the parents were appropriate to the child's needs," *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 679-80 (4th Cir. 2007). **[**24]** T.H.'s mother, herself board-certified in ABA therapy, testified that T.H. was receiving approximately 30 hours per week of ABA services provided by an experienced ABA line therapist; that the parents and the ABA therapist made sure T.H. had sufficient opportunities to interact with other children; and that T.H. was progressing both educationally and behaviorally under the home program, in that he was happier, learning more, and was no longer engaging in the problematic behaviors like wiping his face until it bled.

The SRO, applying the correct legal standard, considered the parents' evidence and concluded that the home placement was appropriate, and the district court properly gave weight to the SRO's analysis. [4] And after considering all of the evidence **[*489]** and the SRO's views, the district court likewise determined that the home placement was appropriate.

The parents' evidence about the home placement was not very extensive, and it was short on details and specifics. Nonetheless, the evidence established that T.H. was receiving intensive ABA therapy, the kind of therapy that the District through its IEPs had concluded was necessary to provide T.H. with an appropriate education, and that T.H. was responding well to the program. Under these circumstances, we believe the evidence was sufficient, if barely, to support the district court's conclusion. We therefore cannot conclude that the district court clearly erred by determining that the home placement was reasonably calculated to enable T.H. to receive educational benefits.

IV.

Accordingly, for the foregoing reasons, we hereby affirm the decision of the district court.

AFFIRMED

Concur by: WYNN (In Part)

Dissent by: WYNN (In Part)

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[4] The LHO's conclusion that the home placement was not appropriate was premised on the fact that the home placement was not the least restrictive environment. As the finding was based on an incorrect understanding of the law, the LHO's finding was not entitled to deference by the SRO or the district court. *See A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 679-80 (4th Cir. 2007) **[**25]** ("[A] finding is not entitled to deference to the extent that it is based upon application of an incorrect legal standard.").

Dissent

WYNN, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that Sumter County School District 17 ("the School District") failed to provide T.H. with a free appropriate public education. However, I write separately to dissent from the **[**26]** majority's holding that there was sufficient evidence in the record to show that home-placement was appropriate. In light of this lack of evidence, I would remand this matter to the district court for additional fact finding.

I.

As the majority details, the services provided by the School District were insufficient to provide the educational services needed to comply with the Individualized Education Plans ("IEPs") developed for T.H., an autistic student. *See* 20 U.S.C. § 1401(9) (indicating that, to satisfy their obligation to provide a free appropriate public education, schools must provide special education and related services "in conformity with the individualized education program" designed for the student). Specifically, the School District's failure to ensure the effective provision of Applied Behavior Analysis ("ABA") therapy constituted a failure to implement a material element of each IEP designed to guide T.H.'s education. *See Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003) (concluding that the IDEA is violated "if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive **[**27]** an educational benefit"); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) ("[T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP."). Thus, I agree with the majority's conclusion that the School District failed to provide T.H. with a free appropriate public education.

I also agree with the majority's analysis of the weight that courts should give to the "least-restrictive environment requirement" when considering the appropriateness of home-placement. Though failure to meet this requirement might establish a **[*490]** school district's failure to comply with the IDEA, *see* 20 U.S.C. § 1412(a)(5)(A), this "requirement" must logically be relaxed when considering the appropriateness of an educational program designed for implementation in the relative isolation of a child's home. However, as the majority recognizes, whether the private placement adheres to this relaxed conception of the restrictiveness requirement is still **[**28]** a factor to be considered when assessing the overall appropriateness of private placement.

Still, notwithstanding my substantial agreement with portions of the majority opinion, I cannot agree with the majority that the home-placement program in place to educate T.H. is "reasonably calculated to enable the child to receive educational benefits." *See M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 324 (4th Cir. 2009); *Carter v. Florence Cnty. Sch. Dist. Four*, 950 F.2d 156, 163 (4th Cir. 1991) (internal quotation marks omitted).

II.

When assessing the appropriateness of private placement, subject to limited exceptions, [1] we should consider "the same considerations and criteria that apply in determining whether the School District's placement is appropriate[.]" *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 364 (2d Cir. 2006). As such, we must determine whether the proposed placement provides "educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction." *Bd.*

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[1] For instance, **[**29]** the private placement can be deemed appropriate even if failing to meet the state education standards or requirements. *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 14, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993). Also, as indicated above, parents "may not be subject to the same mainstreaming requirements as a school board." *M.S.*, 231 F.3d at 105.

of Educ. v. Rowley, 458 U.S. 176, 188-89, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)(internal quotation marks omitted).

Here, the only evidence provided as to the design of the educational program provided for T.H. at home was the testimony of his mother, May Baird. Baird testified that she had hired Laura Walkup, "a young woman who has experience working in an ABA program," to work with T.H. during the school week. When pressed on cross-examination, she admitted that she was unsure how many hours Walkup worked with T.H. during a given week, stating that her husband "would be a better one to answer that." Indeed, Baird indicated throughout her testimony that she was "not the best one to answer" questions regarding the details of the services provided to T.H. because she is "often not home." However, Baird was able to approximate that Walkup worked with T.H. for "20 to 30 hours" per week.

Notably, Baird failed to elaborate on the details of the educational **[**30]** services provided by Walkup. Problematically, she made no mention of the goals of the therapy, indicating merely that Walkup was "working on specific objectives." This lack of specificity stands in stark contrast to the IEPs developed for T.H., which include pages of detailed educational objectives related to, *inter alia*, his "socialization skills," "classroom work skills," "general knowledge and comprehension skills," "daily living skills," and "functional communication skills." Moreover, Baird provided no testimony regarding how the program was designed to measure progress toward the unidentified "specific objectives," or how much progress was required to demonstrate accomplishment of said objectives. In short, given **[*491]** that the Court is asked to consider whether the program designed for T.H. would meet his "unique needs," without more clarification of the contents of the program, I cannot answer that question affirmatively.

In addition, Baird made no mention of the services other than ABA therapy, if any, that were provided for T.H. at home. [2] As noted by the School District, there was "no evidence that speech-language therapy or occupational therapy, two related services included in **[**31]** the school IEP as supportive services . . . were provided in the home program." Brief of Appellant at 47. To be sure, given T.H.'s autism, properly administered ABA therapy was a necessary component of any plan reasonably calculated to confer on him an educational benefit. But the ill-defined nature of that therapy counsels us to remand this matter to the district court for the fact-finding necessary to determine whether its provision was sufficient to demonstrate the appropriateness of home-placement.

That said, the evidence concerning therapy was not the only evidence offered concerning the program in place to educate T.H. at home. Baird also testified about opportunities provided for T.H. to socialize. Presumably, this testimony was given in an attempt to demonstrate compliance with the least-restrictive-environment requirement. But, even under an appropriately relaxed restrictiveness inquiry, there was insufficient evidence to demonstrate that **[**32]** the home-placement program would provide T.H. with adequate opportunities to interact with children who are not disabled. This point is acknowledged, in part, by the majority opinion which states that "more detailed evidence of the nature of the community outings and the manner in which the parents were using the outings to improve T.H.'s social skills would have been preferable."

Indeed, scant evidence was provided regarding opportunities for T.H. to interact with non-disabled children. Baird testified that the therapist hired to work with T.H. "fairly regularly" took him "for social opportunities on playgrounds and stuff around locally." She also indicated that T.H.'s father took the child into the community "on a daily basis." However, Baird, who was not present during these outings, was unable to testify as to their duration. Also, her testimony is unclear regarding the frequency with which T.H. interacted with *non-disabled* children during these trips into the community. [3] If undefined periods of socialization with other children, regardless of whether or not they are

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[2] As noted by the District, there was "no evidence that speech-language therapy or occupational therapy, two related services included in the school IEP as supportive services . . . were provided in the home program." Brief of Appellant at 47.

[3] Baird was asked if T.H. had "an opportunity to relate to ... typically developing peers, other peers, or other opportunities for social interaction." She replied, "He does out in the community, yes, and with, with friends, family members of friends." Baird did not clarify whether, in mentioning these friends or their family members, she was identifying "typically developing peers" or instead "other peers." Similarly, when asked on cross-examination about T.H.'s social interactions with "typically developing

disabled, are sufficient to satisfy the "least-restrictive-environment requirement," that requirement is rendered **[**33]** a nullity.

In sum, where there was insufficient evidence as to how the plan designed to educate a child at home is calculated to actually provide an educational benefit, it **[*492]** was error for the district court to say that the "calculation" was reasonable. Accordingly, this matter should be remanded so that the district court can further examine the contents and structure of the plan proposed during home-placement. Without more evidence explaining the contents of the plan, a conclusion regarding its **[**34]** adequacy cannot be drawn absent considerable speculation.

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peers," Baird mentioned "family friends that have children that are [T.H.'s] age that he can interact with," but did not discuss how often those children were available to interact with T.H.

T.B. v. Prince George's Cty. Bd. of Educ.

United States Court of Appeals for the Fourth Circuit

March 20, 2018, Argued; July 26, 2018, Decided

No. 17-1877

Reporter
897 F.3d 566 *; 2018 U.S. App. LEXIS 20826 **; 2018 WL 3579681

T.B., JR., by and through his Parents, T.B., SR. and F.B., Plaintiff - Appellant, v. PRINCE GEORGE'S COUNTY BOARD OF EDUCATION; PRINCE GEORGE'S COUNTY PUBLIC SCHOOLS; DR. KEVIN M. MAXWELL, in his official capacity as Chief Executive Officer of Prince George's County Public Schools, Defendants - Appellees.COUNCIL OF PARENT ATTORNEYS AND ADVOCATES; DISABILITY RIGHTS MARYLAND, Amici Supporting Appellant.

Subsequent History: US Supreme Court certiorari denied by T. B. v. Prince George?s County Bd., 2019 U.S. LEXIS 1695 (U.S., Mar. 4, 2019)

Prior History: **[**1]** Appeal from the United States District Court for the District of Maryland, at Greenbelt. (8:15-cv-03935-GJH). George Jarrod Hazel, District Judge.

T.B., Jr. ex rel T.B., Sr. v. Prince George's Cnty. Bd. of Educ., 2016 U.S. Dist. LEXIS 174512 (D. Md., Dec. 13, 2016)

Case Summary

Overview
HOLDINGS: [1]-The administrative law judge properly found that the student was not entitled to compensatory education under the Individuals with Disabilities Education Act (IDEA) because, although school district inexcusably failed to respond to the parents' requests for an evaluation, the student failed to show that the failure in the process had an adverse effect on his education or that he was deprived of a free appropriate public education (FAPE) as required by 20 U.S.C.S. § 1412(a).

Outcome
Judgment affirmed.

Counsel: ARGUED: Dennis Craig McAndrews, MCANDREWS LAW OFFICES, Berwyn, Pennsylvania, for Appellant.

Andrew Wayne Nussbaum, NUSSBAUM LAW, LLC, Clarksville, Maryland, for Appellees.

ON BRIEF: Anastasia L. McCusker, Joel I. Sher, SHAPIRO SHER GUINOT & SANDLER, Baltimore, Maryland; Michael E. Gehring, MCANDREWS LAW OFFICES, Berwyn, Pennsylvania, for Appellant.

Selene Almazan-Altobelli, Catherine Merino Reisman, COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC., Towson, Maryland, for Amici Curiae.

Judges: Before GREGORY, Chief Judge, and WILKINSON and AGEE, Circuit Judges. Judge Wilkinson wrote the opinion, in which Judge Agee joined. Chief Judge Gregory wrote an opinion concurring in the judgment only.

Opinion

[*569] WILKINSON, Circuit Judge:

T.B., a former student of Prince George's County Public Schools (PGCPS), alleges that the school district failed to provide him a free appropriate public education in violation of the Individuals with Disabilities Education Act (IDEA). While we agree with the administrative law judge and district court that the school district committed a procedural **[**2]** violation of the IDEA, we also agree with them, that on these facts, the violation did not actually deprive T.B. of a free appropriate public education. We thus affirm the district court's grant of summary judgment to PGCPS.

I.

T.B. began attending PGCPS schools in elementary school. As an elementary schooler, he received mostly As and Bs, although his performance in reading and math was below grade level. T.B.'s grades took a turn for the worse in middle school. In seventh grade, he received two Cs and four Ds. The following year, he received five Cs, two Ds, and one failing grade (E). His middle school teachers noted that T.B. did "not follow instructions," did "not participate in class," had "[m]issing/incomplete assignments," and received "[p]oor test/quiz grades." J.A. 1900, 1904.

Things did not improve when T.B. began at Friendly High School in 2012. T.B.'s grades, for the most part, continued to decline. He finished ninth grade with two Ds and four Es. He did, however, receive an A in Personal Fitness and a B in Naval Science. In tenth grade, T.B. failed every class except Algebra, in which he received a B. T.B. accordingly failed the tenth grade as a whole and was not able to **[**3]** advance to eleventh grade.

These declining grades reflected, in part, T.B.'s declining attendance. In his two years at Friendly, T.B. recorded a total of 68.5 days of absence. More than 90% of these absences were unexcused. Near the end of T.B.'s tenth grade year, he stopped attending school entirely. On the days that T.B. did attend school, he regularly skipped class or was tardy. In class, T.B. was often disruptive. He would ignore instructions, use his cell phone, and talk to other students during class time. Even in classes he went on to fail, though, T.B. generally performed adequately when he attended class and completed assignments.

T.B.'s academic issues during this time did not go unnoticed. In October 2012, shortly after T.B. started ninth grade, T.B.'s father emailed the guidance counselor at Friendly to request that T.B. be tested for a disability or provided special education services. PGCPS held an Individualized Education Program (IEP) meeting the following month. The IEP team concluded that T.B.'s difficulties were not the result of any learning or other disability. It therefore determined further assessment to be unnecessary, and scheduled a parent-teacher conference **[**4]** for the following January. At the conference, T.B. and his parents met with his teachers and other PGCPS staff to discuss his academic progress **[*570]** and strategies to get him back on track.

When T.B.'s academic performance did not improve, T.B.'s parents continued to request testing or special education services. Because the school district maintained that no testing was necessary, T.B.'s parents retained Basics Group Practice, LLC, to perform an Independent Educational Evaluation (IEE). Basics tested T.B. in May 2014 and diagnosed him with moderate Attention Deficit Hyperactivity Disorder (ADHD), Specific Learning Disorder with impairment in written expression, and unspecified depressive disorder. T.B.'s father provided the Basics report to PGCPS shortly after receiving it in August 2014.

T.B. transferred from Friendly to Central High School for his second year in tenth grade. T.B.'s career at Central, however, was short-lived. He attended the school for only the first few days of the fall semester before halting his attendance altogether. His parents offered various explanations, among them noise in the school, asthma, and panic attacks.

Finding the school district insufficiently responsive **[**5]** to their requests for special education, T.B.'s parents filed a Due Process Complaint with the Maryland Office of Administrative Hearings on January 13, 2015. The complaint alleged that T.B. had been denied a free appropriate public education and requested both compensatory education and reimbursement for the Basics IEE.

While proceedings based on that complaint were ongoing, T.B.'s family and PGCPS continued to negotiate appropriate education for T.B. At a January 26, 2015, IEP meeting, T.B.'s parents explained that T.B.'s anxiety had prevented him from attending school in the fall. Following that meeting, the IEP team determined that T.B. should receive additional testing to determine his eligibility for special education.

A PGCPS school psychologist conducted the testing and concluded in late February that T.B. had severe problems with anxiety and was eligible for special education. Following this recommendation, an IEP team concluded in March that T.B. was eligible for special education services on the basis of an emotional disability—namely, anxiety that prevented him from regularly attending school. The team also granted summary judgment to the school district. It agreed that the **[**6]** "finding that T.B. would not have attended school even if he had been tested" supported the "conclusion that the procedural failure to respond to [T.B.'s parents'] request for an evaluation did not actually interfere with the provision of" a free appropriate public education. J.A. 168. The district court accordingly affirmed the ALJ's denial of compensatory education. T.B. now appeals to this court.[1]

[*571] II.

A.

The IDEA was enacted "to throw open the doors of public education and heed the needs" of students with disabilities who had for too long been "either completely ignored or improperly serviced by American public schools." *In re Conklin*, 946 F.2d 306, 307 (4th Cir. 1991).[2] It operates by way of a simple exchange: the federal

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[1] The ALJ and district court also both addressed the statute of limitations in this case. Because no party has appealed the district court's decision on that issue, we do not consider the statute of limitations arguments made by amici.

[2] Early cases refer to the Act by its original title: the "Education of the Handicapped Act." Its title was changed to the "Individuals with Disabilities Education Act" in 1990. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, §

government provides funding to the states, who must in return have "in effect policies and procedures to ensure" that every child with a disability has the opportunity to receive a "free appropriate public education" (FAPE). 20 U.S.C. § 1412(a).

Under the IDEA, a FAPE is defined to include "special education and related services" that are provided "without charge" to the child's family and that "meet the standards of the State educational agency." *Id.* § 1401(9). A FAPE will also involve an "individualized education program" (IEP) for each eligible **[**7]** child. *Id.* The Supreme Court has described the IEP as "the centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). It must include "a statement of the child's present levels of academic achievement and functional performance," "a statement of measurable annual goals," and "a statement of the special education and related services and supplementary aids and services . . . to be provided to the child." 20 U.S.C. § 1414(d)(1)(A)(i). To meet the IDEA's "substantive obligation," the school must offer an IEP that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999, 197 L. Ed. 2d 335 (2017).

In addition to providing an IEP for all students known to have disabilities, states receiving IDEA funding have an ongoing obligation to ensure that "[a]ll children with disabilities . . . who are in need of special education and related services[] are identified, located, and evaluated." 20 U.S.C. § 1412(a)(3)(A). This obligation, known as Child Find, extends to all "[c]hildren who are suspected of being **[*572]** a child with a disability . . . and in need of special education." 34 C.F.R. § 300.111(c). Failure to meet this obligation "may constitute a procedural violation of the IDEA." *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). But such a procedural violation "will **[**8]** be 'actionable' only 'if [it] affected the student's substantive rights.'" *Leggett v. District of Columbia*, 793 F.3d 59, 67, 417 U.S. App. D.C. 59 (D.C. Cir. 2015) (quoting *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 832, 834, 371 U.S. App. D.C. 53 (D.C. Cir. 2006)).

B.

The IDEA rightly "recogni[zes] that federal courts cannot run local schools." *Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997). Complaints under the IDEA thus do not begin their journey in the federal courts. Instead, parents who disagree with a school district's educational plan for their child first have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child," as well as an "opportunity for mediation" with the school district. 20 U.S.C. § 1415(b). If the parents remain unsatisfied, they are entitled to "an impartial due process hearing, which shall be conducted by the State [or local] educational agency." *Id.* § 1415(f)(1)(A).

In light of the IDEA's manifest preference for local control of schools, we apply a "modified de novo review" to a state ALJ's decision in an IDEA case, "giving due weight to the underlying administrative proceedings." *M.L. by Leiman v. Smith*, 867 F.3d 487, 493 (4th Cir. 2017) (quoting *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015)). We determine independently whether the school district violated the IDEA but consider the ALJ's factual findings to be "prima facie correct." *O.S.*, 804 F.3d at 360 (quoting *Lorsson v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509, 517 (4th Cir. 2014)).

Performed correctly, this sort of review ensures that courts do not "substitute their own notions of **[**9]** sound educational policy for those of the school authorities which they review." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). Indeed, ALJs within state and local educational agencies are themselves expected to "give appropriate deference to the decisions of professional educators." *M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 533 (4th Cir. 2002). The IDEA thus serves to set standards for the education of children with disabilities without displacing the traditional notion that primary responsibility for education belongs to state and local school boards, educators, parents, and students themselves.

III.

901(a)(1), 104 Stat. 1103, 1141-42 (codified as amended at 20 U.S.C. § 1400(a)). For simplicity, we refer to the Act by its contemporary title throughout.

We first consider whether PGCPS violated the IDEA in this case. Both the ALJ and district court concluded that PGCPS committed a procedural IDEA violation, and we agree. While our concurring friend suggests that the ALJ and majority place all the blame in this case on T.B. and his parents and absolve PGCPS of all responsibility, Concurring Op. at 28, that is simply incorrect.

The ALJ ultimately concluded that PGCPS had violated the IDEA by "failing to respond to the Parents' requests and conduct a timely evaluation" of whether T.B. was eligible for special education or related services. J.A. 31. The ALJ found that T.B.'s parents had made and PGCPS had ignored "repeated requests for evaluation" **[**10]** throughout T.B.'s ninth- and tenth-grade years. J.A. 30. Indeed, in October of T.B.'s ninth grade year, his father wrote an e-mail to a PGCPS guidance counselor **[*573]** with the subject line: "Having my son get tested." J.A. 1899. E-mails to teachers also demonstrated that T.B.'s father wanted him to get tested, noting that he was "willing to take it as far as [he] can to get [T.B.] the help he need[s]." J.A. 1864. As the ALJ concluded, "[n]ot all of the requests . . . were clear, articulate requests for testing, but some were." J.A. 30.

Both the IDEA itself and the implementing Maryland laws permit parents to refer their children for a special education assessment. *See* 20 U.S.C. § 1414(a)(1)(B); Md. Code Regs. 13A.05.01.04(A)(2)(a). When such a referral is made, these state and federal laws dictate that certain procedures must be followed. In this case, the school district provided no testing in response to T.B.'s parents' requests for an evaluation until after they had filed a formal complaint. The school district declined to test even after T.B.'s parents supplied it with the results of the Basics IEE, which diagnosed T.B. with qualifying disabilities. As the ALJ found, "the failure of PGCPS to timely respond to the Parents' requests for evaluation **[**11]** is inexcusable." J.A. 31.

This is not to say, however, that T.B. was neglected throughout his time at PGCPS. The ALJ found that, on multiple occasions, T.B.'s teachers had been in touch with his parents regarding his academic shortcomings, but that such attempts at a dialogue were often rebuffed. Ms. Eller, T.B.'s tenth-grade English teacher, testified that she had "made contact with" T.B.'s parents and "had also requested a face-to-face meeting." J.A. 1142. But that meeting never happened. Ms. Deskin, T.B.'s tenth-grade Art teacher, testified that she wrote T.B.'s father to "inform him that this student was in danger of failing that quarter." J.A. 1117. But she received no response. Ms. Wilkinson, T.B.'s ninth-grade English teacher, testified that she "sent letters home by [T.B.] for his parents regarding his work." J.A. 1084. But instead of responding to her concerns, T.B.'s parents accused her of "picking on him." *Id.*

Individual educators in this case attempted to promote T.B.'s academic progress. But the ALJ's finding that the school district as a whole failed to timely respond to T.B.'s parents' requests for an evaluation is based on a 6-day hearing and extensive evidence. We, like **[**12]** the district court, see no reason to disturb it.

IV.

The fact of a procedural IDEA violation does not necessarily entitle T.B. to relief, however. To obtain the compensatory education he seeks, T.B. must show that this defect in the process envisioned by the IDEA had an adverse effect on his education.

A.

A procedural violation of the IDEA may not serve as the basis for recovery unless it "resulted in the loss of an educational opportunity for the disabled child." *M.M.*, 303 F.3d at 533. A "'mere technical contravention of the IDEA'" that did not "actually interfere with the provision of a FAPE" is not enough. *DiBuo*, 309 F.3d at 190 (quoting *M.M.*, 303 F.3d at 533). Rather, the procedural violation must have caused substantive harm. Specifically, the prospect of recovery for a procedural violation of the IDEA depends on whether the student's disability resulted in the loss of a FAPE.

Thus, this court has held procedural violations to be harmless where the student nonetheless received an IEP and achieved reasonable educational progress. *See Burke Cty. Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (concluding that a student was not entitled to compensatory education where "the procedural **[*574]** faults committed by the [school district] . . . did not cause [the student] to lose any educational opportunity"); *Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990) (denying **[**13]** reimbursement for special education

services where there was no allegation that "violations of the evaluation time limits had any detrimental effect on the substance of th[e] IEP"). We have also found that a school district's failure to properly finalize a student's IEP was harmless because the parents had refused to cooperate with the school and the student suffered no educational harm. *M.M.*, 303 F.3d at 535 (agreeing with the district court that "it would be improper to hold [the] School District liable for the procedural violation of failing to have the IEP completed and signed, when that failure was the result of [the parents'] lack of cooperation" (alterations in original)). We have also explained that "refusal to consider . . . private evaluations" of a student is a harmless procedural violation if the student was not actually entitled to additional services. *DiBuo*, 309 F.3d at 191.

Other courts have taken a similar approach to causation and harmlessness. *See, e.g., Alvin Indep. Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F.3d 378, 384 (5th Cir. 2007) (declining to address potential procedural violations after concluding that the student was ineligible for special education services in any event); *Lesesne*, 447 F.3d at 834 ("[A]n IDEA claim is viable only if th[e] procedural violations affected the student's *substantive* rights."); **[**14]** *C.M. v. Bd. of Educ. of Union Cty. Reg'l High Sch. Dist.*, 128 F. App'x 876, 881-82 (3d Cir. 2005) (per curiam); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990), *superseded by regulation on other grounds*, 34 C.F.R. § 300.116; *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994-95 (1st Cir. 1990).

Of course, the question of causation is not always an easy one. The premise of the IDEA is that struggling students sometimes owe their difficulties to a disability that special education services could remedy. But not always. Not every student who falters academically owes his difficulties to a disability. Academic challenges may reflect "personal losses," "family stressors," or "unwilling[ness] to accept responsibility" on the part of the student. *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 F. App'x 887, 892 (5th Cir. 2012) (per curiam). They might simply reflect that a child is "going through a difficult time in her life." *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 2d 635, 663 (S.D.N.Y. 2011). Therefore, schools are not required "to designate every child who is having any academic difficulties as a special education student." *A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F. Supp. 2d 221, 225 (D. Conn. 2008), *aff'd*, 370 F. App'x 202 (2d Cir. 2010).

These alternative explanations for academic difficulties make it imperative to identify those students whom "special education and related services" would assist and those whom they would not. Because academic struggles may arise from such a vast array of circumstances, determining whether intervention would help a student achieve a FAPE, and what type and degree of intervention would do so, is necessarily a "fact-intensive exercise." **[**15]** *Endrew F.*, 137 S. Ct. at 999.

It is axiomatic in this sort of inquiry that deference is due to the trier of fact. *See Doyle v. Arlington Cty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991) ("[F]indings of fact by the hearing officers in cases such as these are entitled to be considered *prima facie* correct."). Faced with thorny counterfactuals, it is the duty of the fact-finder to carefully weigh the evidence to discern whether a procedural violation has in fact adversely affected a student's education. Giving due deference to such determinations **[*575]** recognizes that "the primary responsibility for developing IEPs belongs to state and local agencies in cooperation with the parents, not the courts." *Spielberg v. Henrico Cty. Pub. Sch.*, 853 F.2d 256, 258 (4th Cir. 1988). It also recognizes that ALJs are typically "in a far superior position to evaluate . . . witness testimony" than are reviewing courts. *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 329 n.9 (4th Cir. 2004). Such evaluations almost inevitably rely on "various cues that . . . are lost on an appellate court later sifting through a paper record." *Cooper v. Harris*, 137 S. Ct. 1455, 1474, 197 L. Ed. 2d 837 (2017). This is in part why, throughout the federal system, "deference to the original finder of fact" is "the rule, not the exception." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985).

All of this, of course, assumes that the trier of fact did a conscientious job with the case. And as shown below, the ALJ's review here was anything but cursory. Indeed, he went out of his **[**16]** way to exhaustively determine whether there was any scenario in which special education would have been of any assistance to T.B. within the ambit of the IDEA.

B.

The ALJ in this case concluded that "PGCPS['s] failure to promptly schedule testing in this case did not establish a failure to provide [a] FAPE" and that therefore T.B. could not recover under the IDEA. J.A. 31. The ALJ described his reasoning as "simple": "the entirety of the record before me establishes that the Student simply does not want to go to school. This is the case regardless of the school, the teachers, the courses, the programs, the placement, the accommodations, the class size, or the compensatory services offered." *Id.* In other words, no type or amount of special education services would have helped T.B. achieve a FAPE. This conclusion was reached following a 6-day, 21-witness, 95-exhibit hearing, and represents the culmination of 67 specific factual findings.

After reviewing the extensive record in this case, the ALJ found "no evidence support[ing] the view that, had testing been promptly provided, the Student would have regularly attended school." *Id.* All of the testimony—that marshalled by the defendant and **[**17]** that marshalled by the plaintiff—pointed to one thing: that T.B.'s problems were rooted in his refusal to go to class or attend school.

This view was vindicated when T.B. failed even to attend the transition program at Wise recommended by his IEP team. That program "is a self-contained program within the Wise building for students with emotional disabilities." J.A. 21. Classes "typically have 8-12 students" and are capped at 12 students. *Id.* The ALJ found that this program "would provide the Student with a FAPE." J.A. 22. At the meeting where this program was recommended, T.B.'s parents participated and "were provided with all required procedural safeguards and documentation." J.A. 21. T.B. was, albeit belatedly, offered the academic services he sought, yet he chose not to take advantage of them. T.B. "has never attended the Transition Program at Wise," and his parents "have never told PGCPS why" this is the case. *Id.* As the ALJ reasoned, all this therefore "tends to corroborate the view that either the Student, or his Parents, or both, are not interested in the Student receiving academic services from PGCPS." J.A. 49.

It was apparent that T.B. had in the past gotten—and was capable **[**18]** of again earning—decent grades if he applied himself. For example, at the January 2013 parent-teacher conference, T.B.'s teachers explained that T.B. did well enough on his completed assignments, but that the real **[*576]** difficulty was getting him to turn in the assignments. When asked why he was not doing his assignments, T.B. "just said he wasn't trying." J.A. 968-69.

T.B.'s widely variable grades, even within single courses, also reflect that he often failed to perform in settings where he was capable of performing well. The fluctuation is remarkable: In ninth-grade U.S. History, T.B. received a grade of 43 in the first quarter but 74 in the third quarter. J.A. 1873. In his ninth-grade Integrating the Sciences course, he received a high of 81 in the first quarter and a low of 45 in the fourth quarter. *Id.* Variation over the course of T.B.'s tenth-grade year was even more extreme: T.B.'s first quarter English grades were 83 and 79, slipping to 17 and 29 by third quarter, and all the way to 0 and 0 by fourth quarter. J.A. 1834.

Consistent with this evidence, "[v]irtually every teacher . . . testified that the Student was capable of performing satisfactory work but that his frequent absences **[**19]** and failure to do assignments necessarily led to poor or failing grades." J.A. 36. Indeed, the teachers' testimony speaks for itself:

- T.B.'s guidance counselor testified that when T.B. "chose to work, he could perform. When he chose not to work, he didn't perform." J.A. 1312.

- T.B.'s tenth-grade Foundations of Technology teacher testified that T.B. "was capable of doing the work required of him" and, in fact, "did well on a number of tests." J.A. 38. The problem was that T.B. "simply didn't do homework and showed little effort or motivation." *Id.*

- T.B.'s ninth-grade English teacher testified that when T.B. "wanted to do work, his work was satisfactory." *Id.* She also testified that he "failed every quarter because he simply did not do the work." *Id.*
- T.B.'s tenth-grade Spanish teacher testified that a student cannot pass his class "if he doesn't do homework, has irregular attendance, doesn't pay attention in class, and/or does not show any motivation or desire to learn." J.A. 37.

- T.B.'s tenth-grade Art teacher testified that T.B. "was capable" and that "the work [he] did turn in was satisfactory." J.A. 38-39, 1123. She also testified that "she gave [T.B.] an opportunity to turn in **[**20]** work late when he was absent, but that he never did so." J.A. 39.

• T.B.'s tenth-grade English teacher testified that T.B. "was capable of doing the work required of the course" but that he "made little or no effort" and was "absent . . . a total of 46 times and was also tardy on numerous occasions." *Id.*

These teachers were intimately familiar with T.B. and his work product. They had interacted with him in class, observed his work habits, and evaluated the assignments he submitted. Yet they almost universally testified that "there was no reason to suspect that the Student suffered from a learning disability or any other condition mandating special education services." J.A. 36-37. This is true of not only the teachers the school district called but also the teachers T.B. called. Most, if not all, of the teachers who testified had recommended other students for special education evaluation in other cases. But in T.B.'s case, their professional judgment and experience led them to the opposite conclusion. Like the ALJ, this court is rightfully "reluctant to second-guess" the educational decisions of professionals with first-hand experience not only with the student in this case, but with **[**21]** a wide variety of other students. *M.M.*, 303 F.3d at 532; *see also Cty. Sch. Bd. of Henrico Cty. v. Z.P. ex rel. R.P.*, 399 F.3d 298, 307 (4th Cir. 2005) ("[A]t all levels of an IDEA proceeding, **[*577]** the opinions of the professional educators are entitled to respect.").

The educational professionals who interacted with T.B. were nearly unanimous in their conclusion: T.B. had no disability that special education would have remedied; he was simply unwilling to take his education seriously. And routinely, this disinterest manifested itself in outright contempt. T.B.'s teachers reported that he would talk, text, play cell phone games, and otherwise cause disruptions during class. Ms. Eller testified that T.B. "need[ed] to be told multiple times per day to do his work and to stop talking with other students" and "routinely ha[d] to be told to put his phone away." J.A. 1136. Ms. Wilkinson testified that T.B. simply "wouldn't follow the rules." J.A. 1090. These behaviors detracted not only from his own education but also from the education of his classmates, and required frequent intervention from teachers. When not actively disruptive, T.B. would occasionally sleep through class. J.A. 1336.

Perhaps most tellingly, his disdain for schooling at times ventured into pure meanness: T.B. ridiculed his tenth-grade **[**22]** English teacher, who was a transgender woman. He would refer to her as "Mr.," "sir," "he," and "him," even after she pleaded with him to respect her gender preference. J.A. 1139.

In contrast to the consistent refrain from T.B.'s teachers that his academic challenges stemmed from his lack of effort, the contrary testimony T.B.'s father offered "was frequently shifting or contradicted by other testimony and documentary evidence." J.A. 41. The ALJ therefore discounted his testimony as "unreliable." *Id.* This type of credibility determination by the fact-finder is the type of conclusion to which we afford the greatest deference, and it is amply supported by the record here.

The ALJ found much of the plaintiff's other evidence similarly inconsistent or incredible. The Basics report was unpersuasive because "the qualifications and training (and, indeed, the identi[t]y) of the person administering the test [were] uncertain," because "the author or authors of the report were not present to testify and therefore were not subject to cross-examination," and because the "Basics documents contradict each other" with respect to T.B.'s diagnosis. J.A. 42, 47. Finally, the ALJ noted that the authors **[**23]** of the Basics report "had no contact with any of [T.B.'s] teachers or other PGCPS educators." J.A. 43.

The plaintiff's expert opinions, too, were "in a jumble." J.A. 47. In contrast to T.B.'s teachers, each expert had very limited contact with T.B., and they offered differing diagnoses. One expert concluded that "T.B. suffers from situational depression and anxiety" rather than a learning disability. J.A. 47-48. Another "adopt[ed] the views of the Basics author" without making clear which of the contradictory Basics documents she agreed with. *Id.*

In the face of such a consistent conclusion from the educational professionals who best knew T.B. and such an inconsistent message from the plaintiff's evidence, it is no wonder the ALJ concluded that "the overwhelming evidence . . . establishes that the Student was capable of doing satisfactory work when he wanted to and that his poor performance was due to the fact that he failed to attend an almost preposterous number of classes and rarely did either homework or class work." J.A. 36. Testimony from teachers, testimony from parents, and testimony from

experts can all be effective to demonstrate a substantive violation of the IDEA. Yet many **[**24]** of the witnesses T.B. ultimately called turned out to be effective witnesses for PGCPS.

[*578] T.B. has given us no reason to disturb the well-reasoned conclusions of the ALJ and the district court. It is unfortunate that T.B. did not do better in PGCPS. But the fault does not lie with the school district. Teachers tried repeatedly to get T.B. to take even a modest interest in his education, and their efforts just as repeatedly came up short. Holding the school district liable for regrettable results in every case would simply deplete its resources without improving outcomes for anyone, a result Congress could not have intended.

V.

School systems have obligations under the IDEA, and PGCPS in this case defaulted in failing to promptly evaluate T.B. On the other hand, the IDEA is focused precisely and humanely on ensuring that students with disabilities are not left behind by their schools. In this case, as the ALJ found, the record is devoid of any credible evidence that an unaddressed disability caused T.B.'s educational difficulties and replete with credible evidence that T.B. himself was the cause.

Every child possesses a gift within, something unique that he or she can contribute to society. **[**25]** Many times special education is needed to nurture that gift. But there are times too when students need to assist educators in developing their own inner capabilities. Poor motivation and poor performance do not always and invariably lie at the feet of teachers and schools. Students themselves also have to try.

Based on the foregoing, the judgment of the district court is

AFFIRMED.

Concur by: GREGORY

Concur

GREGORY, Chief Judge, concurring in the judgment only:

Although I join the Court's judgment, I do so solely on the grounds that the plaintiffs failed to present sufficient evidence at the due process hearing to establish that T.B. was denied FAPE. I write separately to express my view that I cannot agree with the majority's characterization in its opinion of either T.B. and his parents or PGCPS and its employees. While I am constrained to conclude that the plaintiffs have failed to demonstrate that the school division's egregious child find violations actually interfered with the provision of FAPE, I cannot agree that the blame lies with T.B. and his parents, and that PGCPS should bear little or no responsibility for a student in its care or for the unfortunate outcome of this case. Accordingly, I concur **[**26]** in the judgment only.

I.

T.B. first showed signs of academic difficulty in elementary school, where he was already performing below grade level in both reading and math. By middle school, his challenges were evident, as his grades had fallen to Cs and Ds and he failed a class for the year. T.B.'s father sounded the alarm in October of his freshman year of high school, where T.B.'s grades had continued their steady decline. He informed T.B.'s guidance counselor that T.B. was "having trouble remembering things" and was "struggling to process the information in class." He asked

whether "there is a program or some kind of test he could take. I want to help my son [sic] he need before it is too late and he fall behind."[1] J.A. 1899.

[*579] PGCPS unilaterally scheduled an IEP meeting on a date when only T.B.'s mother could attend, despite the requirement that the meeting be scheduled at "a mutually agreed on time and place." 34 C.F.R. § 300.322(a)(2). *See also* Md. Code Regs. 13A.05.01.07(D)(1). PGCPS also failed to include, as required by 34 C.F.R. § 300.321(a)(2) and Reg. 13A.05.01.07(A)(1)(b), any regular education teachers at the meeting even though he was receiving full-time regular education instruction.[2] Not surprisingly, the IEP team concluded, without testing T.B., that he **[**27]** was "proficient" and did not have a disability, and that no further assessment was necessary. No other academic supports were offered or provided.

When T.B.'s academic performance did not improve, and after more desperate pleas by T.B.'s parents for testing and special education services for their son,[3] T.B.'s guidance counselor responded that T.B.'s records did not indicate a need for special education testing, and that he could not be reassigned to smaller special education classes as he was appropriately placed in regular education classes. By the end of ninth grade, T.B. failed four core subjects for the year and received a D in History. J.A. 1873. T.B. was promoted to, and then repeated the tenth grade, but his attendance was poor due to his academic and emotional difficulties. Even after T.B.'s parents provided PGCPS a copy of an IEE indicating that T.B. had a learning disability, PGCPS did nothing. It was only after his parents filed a due process complaint that PGCPS convened an IEP meeting to consider the IEE it had received at the beginning of the school year, and to pursue testing of T.B. PGCPS's testing found that T.B. had average intellectual abilities, but was from four **[**28]** to seven years behind his chronological age/grade level in several academic areas. Yet the IEP team found him eligible for special education services only in the category of emotional disability. PGCPS placed T.B. in a self-contained program for students with emotional disabilities, but T.B. never attended **[*580]** the program and his parents never informed the school district why he did not.

II.

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[1] This was T.B.'s parents' first request for an evaluation. Over the next few years, they made over a dozen additional requests, in writing, for testing or special education services. J.A. 1805-11, 1816, 1818, 1822, 1827, 1833, 1864, 1871, 1881, 1887, 1899, 2110, 2119.

[2] Unfortunately, this violation was not raised in the due process complaint, thus it was not considered by the ALJ or the district court, J.A. 16, and is not before this Court for consideration on appeal.

[3] T.B.'s father wrote his son's guidance counselor on January 4, 2013:

> I wanted to see if there is [sic] any programs that can help him in school or after school. He is struggling very badly and I asked him to go to his teacher after class to get further assistance. . . . He is getting discourage, [sic] because if he don't [sic] understand the concept and it [sic] not being explained then he will be lost . . . . I am open to any suggestions that you can recommend for my son, we are trying to work with him at home. He understands then but when in class it's something different. *I'm trying to save my son before he give* [sic] *up*. (emphasis added).

J.A. 1887.

Just six days later, he wrote again:

> Is there way we can move [T.B.] to a smaller class? He may need to be moved from a regular class to [a] smaller group. He is having trouble keeping up in the classroom, a lot of his teachers are agreeing with me about my son. He don't **[**29]** [sic] understand the work and he may need to be put in [a] special classroom. Mrs. Dent, I wrote a while back about getting my son tested because he was having trouble remembering things and keeping up. When [my] wife came to the meeting on November 7th, they didn't know what to do. They looked at his transcripts and said he was proficient, and they was [sic] suppose [sic] to reschedule the meeting. Nothing happened [and] he didn't get tested or we haven't heard anything else.
>
> If we have to go to special education classes I looking [sic] for a solutions [sic]? Do [sic] Friendly have smaller classes where he can be changed too [sic]? I was told to come to you as far as helping my son.

J.A. 1881.

I must take issue with the majority's attempt to place blame on T.B.'s parents for the regrettable outcome of his educational experience in PGCPS. The majority, in stating that the teachers' "attempts at a dialogue were often rebuffed," Maj. Op. 11, strongly suggests that T.B.'s parents displayed only a halfhearted interest in T.B.'s education, and ignored teachers' concerns about T.B.'s performance. A review of the entire record does not support such a suggestion. T.B., Sr. was a father desperate to **[**30]** help his son. He understood that his son stood at an academic crossroads where frustration and anxiety could cause him to give up on his education. Despite PGCPS's determination in October 2012 that T.B. was "proficient," and thus no testing was necessary, T.B., Sr. continued to advocate for his son. He regularly advised teachers, counselors and PGCPS administrators *for over two years* that he was aware of T.B.'s struggles, describing in detail problems with comprehension and focus that he believed were the result of a learning disability. He both initiated and responded to communications from teachers about absences, missed assignments, and makeup work. He also repeatedly asked for advice about available programs and strategies to help T.B. with his learning challenges.[4] T.B., Sr. continued to seek testing and T.B.'s placement in a classroom setting conducive to his educational needs and learning style, but his pleas fell on deaf ears.[5] By the time PGCPS offered T.B. any type of IEP, he was several years behind academically.

I submit that it was PGCPS and its employees, not T.B.'s parents, that displayed a lackadaisical attitude toward T.B.'s education. The school division and **[*581]** its administrators seemingly had inadequate concern for his academic success. Based on a determination made at a procedurally deficient IEP meeting, PGCPS refused to test T.B., even after it was presented with conflicting IEE testing results. PGCPS failed to offer, or even to suggest, to T.B. and **[**32]** his parents educational resources typically offered to regular education students to help them succeed in the classroom. Sadly, the majority places blame on T.B. and his parents, and absolves PGCPS of responsibility.

III.

While these facts clearly demonstrate the abysmal failure of PGCPS to meet its child find obligations, this Court's holding in *DiBuo ex rel. DiBuo v. Board of Education of Worcester County*, 309 F.3d 184 (4th Cir. 2002), requires that plaintiffs demonstrate that the violation "actually interfere[d] with the provision of a free appropriate public

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[4] On November 20, 2013, T.B., Sr. emailed, "[I]s there anything I can do to help my son improve in your class, I see he [sic] struggling. I think he may have trouble comprehending with the procedure on how to do what is asked of him." J.A. 2110. On the same date, he wrote another teacher asking the same question, but adding, "I have tried to contact you in the pass [sic] but no response I am trying to help my son." J.A. 1871.

He emailed yet another teacher on February 10, 2014, "This year has been very trying for [T.B] and we are trying to do our best to help him focus in all of your classes." J.A. 1868. On the same date, he emailed a teacher a second time, stating that they "sent T.B. to the doctor on January 20 to see his pediatrician. They wouldn't do a KAT [sic] Scan on him they said he need to be tested first by the school. No one is trying to set this up for us. I am willing to go as far as I have to so I will keep you informed." J.A. 1867.

On March 6, 2014, T.B., Sr. wrote another teacher. "For your FYI we are trying to get my son additional help with his learning, because we believe he has a learning disability. No one wants to test him to see, I am working on this matter and I am willing to take it as far as I can to get him the help he need. I will go over what assignments he has missed and try my best to get it to you." J.A. 1864.

[5] On March 10, 2014, T.B., Sr. contacted the school division's administrative offices:

> I writing this in concern for my son . . . . My wife and I has [sic] seen some changes in my [son's] learning ability and we have requested for him to be tested . **[**31]** . . . This request has been ignored and my son is falling behind because he don't [sic] understand what he is doing. He writes certain letters backwards, he has a hard time remembering things which causes him to get frustrated. All I heard . . . [is] that he is proficient, they are missing the signs. We took him to his Pediatrician and he said the school needed to test him. Teachers . . . has [sic] labeled my son as not wanting to do anything, but not realizing he is in trouble. This has [sic] went on for 2 years now . . . .
>
> I would like to ask for special transfer to a school where he can be properly tested and to get the attention he need [sic] to better himself. To take him out of this negative environment before something happens to him.

J.A. 2119.

education." *Id.* at 190. The ALJ concluded, as the majority does here, that "[n]o type or amount of special education services would have helped T.B. to achieve a FAPE" because his problems were "rooted in his refusal to go to class or attend school." Maj. Op. 16. The easy explanation for T.B.'s educational demise is that he did not attend school regularly, and when he did, he did not put forth his best effort. The unfortunate reality of this case, however, is that the evidence presented at the due process hearing fails to answer the obvious question: "Why?" In the special education context, the answer is rarely that a student "simply does not want to go to school." J.A. 31. While one could certainly argue that the ALJ's conclusion **[**33]** that T.B. would not have come to school even with an appropriate IEP was speculative, the plaintiffs' evidence offered nothing to counter it.

The evidence presented by the plaintiffs failed to establish that T.B. was denied FAPE. Educational experts who could have supported the IEE's finding that T.B. had a previously undiagnosed learning disability, and established a link between the long-term denial of special education services and T.B.'s failure to attend school due to frustration and anxiety, either failed to provide helpful testimony or did not testify at all. No witness challenged in any meaningful way PGCPS's self-serving conclusion that its failures had no impact on T.B.'s lack of academic progress. No evidence effectively refuted the conclusion that T.B. did not have a learning disability, or demonstrated that T.B.'s frustration at school led to his emotional problems and school avoidance. No one testified as to why T.B. did not attend the self-contained program or otherwise accept the much delayed compensatory services offered to him. Based on the record here, I must concur with the judgment.

I reach this conclusion solely on the basis of the insufficiency of legal proof in **[**34]** support of the claim presented to and considered by the ALJ. It is in no wise based upon blaming T.B. or his parents. The proof of T.B.'s parents' love, support, and advocacy for him is clearly demonstrated in this record. His father repeatedly made clarion cries seeking help for his son. The majority, however, concludes that the blame lies at T.B.'s feet. T.B., Sr. only wanted the school district's help to save his son before he gave up. Carl Hasen, former Superintendent of Schools in Washington, D.C., said "[e]ducation is a difficult enough process under any condition because educational effort is primarily an expression of hope on the part of the student." Sometimes a student "is asked to have faith and confidence which at the moment he is in school seems unreasonable and unjustifiable." T.B. has been denied a reason to have hope.

AN ADJUDICATIVE CHECKLIST OF CRITERIA FOR THE TWO PRIMARY REMEDIES UNDER THE IDEA*

Perry A. Zirkel

The Individuals with Disabilities Education Act (IDEA)[1] accounts for a significant and expanding segment of P–12 education litigation.[2] The adjudicative remedies under the IDEA include declaratory relief and purely prospective injunctive relief but do not extend to money damages; however, the two primary remedies are tuition reimbursement and, by partial analogy,[3] compensatory education.[4] Both of these remedies are based on a denial of the IDEA's core obligation of a "free appropriate public education" (FAPE).[5]

The criteria for each of these two remedies are respectively outlined in a flowchart-like sequence in the checklist that follows. For tuition reimbursement, the basis, as cited in the

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[1] 20 U.S.C. §§ 1400 *et seq*. (2016).

[2] *E.g.*, Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 Ed.Law Rep. 1 (2011) (showing the increasing segment within the P–12 context); *see also* Zorka Karanxha & Perry A. Zirkel, *Longitudinal Trends in Special Education Case Law: Frequencies and Outcomes of Published Court Decisions*, 27 J. SPECIAL EDUC. LEADERSHIP 55 (2014) (showing the continuing increase specific to the IDEA context).

[3] *E.g.*, Perry Zirkel, *Compensatory Education under the Individuals with Disabilities Education Act: The Third Circuit's Partially Mis-Leading Position*, 111 PENN. STATE L. REV. 879, 894 (2006).

[4] *See generally* 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 ASS'N ADMIN. L. JUDICIARY 505 (2018). For a frequent but narrow issue that overlaps with reimbursement, see Perry A. Zirkel, *Independent Educational Evaluation Reimbursement under the IDEA: The Latest Update*, 341 Ed.Law Rep. 555 (2017) (summarizing the case law for IEEs at public expense per 34 C.F.R. § 300.502(b)). For one of the least frequently used remedies within the broad equitable authority of adjudicators under the IDEA, see Perry A. Zirkel, *Safeguarding Procedures under the IDEA: Restoring the Balance in the Adjudication of FAPE*, 39 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2020) (recommending prospective orders of corrective action for procedural violations).

[5] 20 U.S.C. §§ 1402(9) and 1412(a)(1) (2014). For the underlying companion to this remedies overview, see Perry A. Zirkel, *An Adjudicative Checklist of Criteria for the Four Dimensions of FAPE under the IDEA*, 346 Ed.Law Rep 18 (2017). For a frequency and outcomes analysis of these two remedies, see Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 214 (2013).

footnotes, is limited to the underlying IDEA provisions[6] and Supreme Court decisions.[7] For compensatory education, in the absence of directly applicable authority in the IDEA[8] and Supreme Court cases, the basis is a representative sampling of lower court decisions.

[6] 20 U.S.C. § 1412(a)(10)(C).

[7] *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009) (ruling that the child's lack of previous enrollment in special education did not preclude application of the reimbursement test); *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993) (ruling that parents are not held to the same standards as districts, thus making the second step of the test relatively relaxed); *Sch. Comm. of Burlington v. Mass. Dep't of Educ.*, 471 U.S. 359 (1985) (setting forth the three-part test for tuition reimbursement—appropriateness of district's proposed placement, appropriateness of the parent's unilateral placement, and application of the equities); *cf. Endrew F. v. Douglas Cty. Sch. Dist. RE-1.*, 137 S. Ct. 988 (2017) (refining the substantive standard for FAPE, thus indirectly applying to the appropriateness of the parents' unilateral placement in tuition reimbursement cases.

[8] The very limited exception is in the IDEA regulations and is specific instead to the complaint procedures avenue. 34 C.F.R. § 300.151(b)(1).

Tuition Reimbursement[9]

1. Threshold equities step:

   a) Did the parent provide timely notice to the district of their rejection of the proposed placement?[10]

      - at either the most recent IEP meeting or in writing at least 10 business days before the parent's' "removal" of the child

      - "including stating their concerns and their intent to enroll their child in a private school at public expense"

   b) If, prior to the child's removal, did the district request to evaluate the child and the parent refuse to make the child available for this purpose?[11]

2. Appropriateness steps:

   a) Was the district's proposed placement appropriate, or, more specifically, did the district "make a [FAPE] available to the child in a timely manner prior to [the parent's unilateral placement][12]?

   b) If not, was the parent's unilateral placement appropriate[13] (even if it does not meet state standards)?[14]

3. Final equities step:

   a) Were the actions of the parent—beyond those in items a)i and a)ii and—unreasonable?[15]

   b) If so (including for Step 1), the adjudicator "may" reduce or deny reimbursement.[16]

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[9] *E.g.*, Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA*, 282 Ed.Law Rep. 785 (2012).

[10] 20 U.S.C. § 1412(a)(10)(C)(iii)(I). The exception is where the reason for the lack of timely notice is (a) the parent is illiterate and cannot write in English," (b) the district prevented the parent from providing said notice, or (c) the district did not inform, via the procedural safeguards notice, of this requirement. *Id*.

[11] The exception is where the parent's compliance would "likely result in physical or serious emotional harm to the child." *Id*.

[12] 20 U.S.C. § 1412(a)(10)(C)(ii). **This determination must be made on a year-by-year basis. *M.S. v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315 (4th Cir. 2009).**

[13] This step is only implicit in the IDEA and its regulations. Its basis is *Florence County School District No. 4 v. Carter*, 510 U.S. at 9–10, which may be viewed as either implicitly incorporated in or a residuum beyond the statutory codification. Moreover, the courts have belatedly recognized that the *Endrew F.* standard for this determination. *E.g.*, *L.H. v. Hamilton Cty. Dep't of Educ.*, 900 F.3d 779, 796, 357 Ed.Law Rep. 76 (6th Cir. 2018); *G.S. v. Fairfield Bd. of Educ.*, 70 IDELR ¶ 93 (D. Conn. 2017).

[14] 34 C.F.R. § 300.148(c). The issue in *Carter* was a bit broader, referring to whether the parents' private placement needed to meet the statutory definition of FAPE, which includes various other criteria, including an IEP according to IEP specifications. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. at 13.

[15] 20 U.S.C. § 1412(a)(10)(C)(iii)(III). The narrow language is: "upon a judicial finding of unreasonableness with respect to actions taken by the parents." *Id*. However, the *Burlington-Carter* reference to "equitable considerations" would appear to encompass the traditional balancing of the equities, extending to the reasonableness of the district's actions.

Compensatory Education[17]

1) Did the district deny FAPE to the child?

2) If so which approach applies to calculate the appropriate amount:[18]

   a) Qualitative approach: what amount of compensatory education would place the child in the same position s/he would have occupied but for the school district's violations of IDEA?[19] – primarily D.C. and Sixth Circuits

      i) What are the child's "specific educational deficits"?

      ii) Which and how much of these specific deficits resulted from the child's "loss of FAPE"?

      iii) What are "the specific compensatory measures needed to best correct [the] deficits [in first bulleted item]?[20]

   The adjudicator may not delegate this calculation to the IEP team.[21]

   b) Quantitative approach: hour-for-hour or day-for-day for the period of the denial of FAPE (minus time for reasonable rectification)[22] - primarily and decreasingly Third Circuit

   c) Relaxed approach: either effectively blended[23] or merely cryptic[24] - majority of jurisdictions[25]

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[16] *Id.* § 1412(a)(10)(C)(iii).

[17] *E.g.*, Perry A. Zirkel, *Compensatory Education: The Latest Annotated Update of the Case Law*, 376 Ed.Law Rep. 850 (2020).

[18] *E.g.*, Perry A. Zirkel, *The Competing Approaches for Calculating Compensatory Education under the IDEA: An Update*, 339 Ed.Law Rep. 10 (2017). **The authority in the Fourth Circuit is insufficient to categorize the approach. R.S. v. Bd. of Directors of Woods Charter Sch. Co., 706 F. App'x 229 (4th Cir. 2020) (brief affirmance of what appears to be quantitative calculation and reimbursement-type implementation).**

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

[20] The three indicators are from the lead decision for the qualitative approach. *Reid v. District of Columbi*a, 401 F.3d 516, 196 Ed.Law Rep. 402 (D.C. Cir. 2005). They serve indirectly to provide guidance only to the extent that the Sixth Circuit relied on the *Reid* decision w/o specifically incorporating these specifics.

[21] *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d at 318; *Reid v. District of Columbia*, 401 F.3d at 526. For the more detailed view, including opposing and distinguishing case law, see Zirkel, *supra* note 17, at 861 n.94.

[22] *E.g.*, *M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397, 108 Ed.Law Rep. 522 (3d Cir. 1996).

[23] *E.g.*, *D.G. v. Flour Bluff Indep. Sch. Dist*., 832 F. Supp. 2d 755, 280 Ed.Law Rep. 132 (S.D. Tex. 2011) (qualitative approach yielding result that approximates quantitative approach), *vacated on other grounds*, 481 F. App'x 887, 286 Ed.Law Rep. 131 (5th Cir. 2012).

[24] *E.g.*, *Student W. v. Puyallup Sch. Dist. No. 3,* 31 F.3d 1489, 93 Ed.Law Rep. 547 (9th Cir. 1994).

[25] Reflecting the relatively fluid rather than clearly settled state of the relevant law, some cases in the Sixth and Third Circuits have also tended toward this relaxed alternative. *E.g., Woods v. Northport Sch. Dist*. 487 F. App'x 968, 287 Ed.Law Rep. 746 (6th Cir. 2012); *B.H. v. W. Clermont Bd. of Educ*., 788 F. Supp. 2d 682, 272 Ed.Law Rep. 445 (S.D. Ohio 2011); *Brandywine Heights Area Sch. Dist. v. B.M*., 69 IDELR ¶ 212 (E.D. Pa. 2017); Pennsbury Sch. Dist. v. C.E., 59 IDELR ¶ 13 (Pa. Commw. Ct. 2012).