Compensatory Education:
A Framework to Aid the IHO in Crafting an Award

NYSED Impartial Hearing Officer Training, Webinar 2
Wednesday, March 12, 2014 • Tuesday, March 25, 2014 (repeat session)

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I. INTRODUCTION

A. This outline provides a framework to aid the hearing officer in gathering the necessary information required to craft an appropriate award of compensatory education.[1]

B. An award of compensatory education is an equitable remedy[2] that "should aim to place disabled children in the same position they would have occupied but for the school district's violation of the IDEA."[3] It is not a contractual remedy.[4] More specifically, "[c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court [and/or hearing officer] 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."[5]

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[1] The author acknowledges with appreciation source material in Perry A. Zirkel, *Compensatory Education: An Annotated Update of the Law*, 291 Educ. L. Rep. 1 (2013); Perry A. Zirkel, *The Two Competing Approaches for Calculating Compensatory Education*, 257 Educ. L. Rep. 551 (2010).
[2] *Reid v. District of Columbia,* 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005) (finding that compensatory education is not a "form of damages" because the courts act in equity when remedying IDEA violations and must "'do equity and … mould each decree to the necessities of the particular case'") (*quoting Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)); *Gill v. District of Columbia*, 55 IDELR 191 (D.D.C. 2010) ("[W]hether to award compensatory education is a question for the Court's equity jurisdiction, and is not a matter of legal damages.")
[3] *Reid,* 401 F.3d at 518 (Compensatory education is "replacement of educational services the child should have received in the first place.")
[4] *Reid*, 401 F.3d at 523 *citing Parents of Student W. v. Puyallup Sch. Dist., No. 3*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994).
[5] *Reid*, 401 F.3d at 523 *citing G. ex rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309, 40 IDELR 4 (4th Cir. 2003).

C. Both the Office of Special Education Programs[6] ("OSEP") and the courts[7] have established that hearing officers do have the authority to award compensatory education.

D. There are primarily two competing approaches utilized in fashioning a compensatory education award,[8] namely the "quantitative" approach authored by the Third Circuit,[9] and the "qualitative" approach relied up by the Sixth and D.C. Circuits.[10] Other courts have adopted a relaxed approach citing equitable flexibility.[11]

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[6] *See*, *e.g.*, *Letter to Riffel*, 34 IDELR 292 (OSEP 2000) (discussing a hearing officer's authority to grant compensatory education services); *Letter to Anonymous*, 21 IDELR 1061 (OSEP 1994) (advising that hearing officers have the authority to require compensatory education); *Letter to Kohn*, 17 IDELR 522 (OSEP 1991).

[7] *See*, *e.g.*, *Reid v. District of Columbia,* 401 F.3d 516, 522, 43 IDELR 32 (D.C. Cir. 2005); *D.W. v. District of Columbia*, 561 F. Supp. 2d 56, 50 IDELR 193 (D.D.C. 2008); *Diatta v. District of Columbia*, 319 F. Supp. 2d 57, 41 IDELR 124 (D.D.C. 2004) (finding that the hearing officer erred in determining that he lacked authority to grant the requested compensatory education); *Harris v. District of Columbia*, 1992 WL 205103, 19 IDELR 105 (D.D.C. Aug. 6, 1992) (declaring that hearing officers possess the authority to award compensatory education, otherwise risk inefficiency in the hearing process by inviting appeals); *Cocores v. Portsmouth Sch. Dist.*, 779 F. Supp. 203, 18 IDELR 461 (D.N.H. 1991) (finding that a hearing officer's ability to award relief must be coextensive with that of the court); *cf. Lester H. v. Gilhool*, 916 F.2d 865, 16 IDELR 1354 (3d Cir. 1990) (where the Third Circuit commented, in dicta, that the hearing officer "had no power to grant compensatory education.")

[8] For a more in depth discussion of the three competing approaches, *see* Perry A. Zirkel, *Webinar for N.Y. Impartial Hearing Officers* (Jan. 2014).

[9] *See*, *e.g.*, *M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 23 IDELR 1181 (3d Cir. 1996) (holding that when a school district knows or should know that a disabled child's program is deficient yet fails to correct it, the child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem).

[10] *See*, *e.g.*, *Reid v. District of Columbia,* 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005) (adopting a flexible, fact-specific approach in which the ultimate award is reasonably calculated to provide the educational benefits that likely would have accrued from special education services that the school district should have supplied in the first place). *See also Bd. of Educ. of Fayette Cty, Ky. v. L.M.*, 478 F.3d 307, 47 IDELR 122 (6th Cir. 2007).

[11] *See*, *e.g.*, *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994). For further discussion on the relaxed approach, *see*

E. The Second Circuit has not yet ruled on which approach it believes is appropriate. NYSED hearing officers, therefore, have the flexibility to use either approach or a hybrid of the two.

F. It is important to note, however, that regardless of what approach the hearing officer adopts, the hearing officer should diligently work to obtain the necessary evidence to craft an appropriate award and write an informed decision.

II. AVAILABILITY – THE WHEN

A. For Denials of FAPE. When an LEA deprives a child with a disability of a FAPE in violation of the IDEA, a court and/or hearing officer fashioning appropriate relief[12] may order compensatory education.[13] Generally, said denial must be more than *de minimis*.[14] Under this interpretation, only material failures are actionable under the IDEA.[15] Thus, for an award of compensatory education to be granted, a court and/or hearing officer must first ascertain whether the aspects of the IEP that were not followed were "substantial or significant," or, in other words, whether the deviations from the IEP's stated requirements were "material."[16]

However, the Second Circuit has not clearly embraced the substantial or significant deviation interpretation and has, from time to time, conditioned an award of compensatory education on the presence of a "gross" deprivation of the right to free and

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Terry J. Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?* 45 URB. LAW 281 (2013).

[12] *See* 20 U.S.C. 1415(i)(2)(C)(iii); 34 C.F.R. 300.516(c)(3); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 103 LRP 37667 (1985).

[13] *Reid*, 401 F.3d at 522 – 523. The refusal of a parent to cooperate with an evaluation request or participate in an IEP Team meeting cannot serve as the basis for denying the parent's claim for compensatory education for IDEA violations that preceded an evaluation or IEP Team meeting request. *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36, 49 IDELR 38 (D.D.C. 2007).

[14] *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 75, 47 IDELR 223 (D.D.C. 2007) (court found no evidence that the handful of missed speech therapy sessions added up to a denial of FAPE) *quoting Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 348 – 349, 31 IDELR 185 (5th Cir. 2000), *cert. denied*, 531 U.S. 817, 111 LRP 30885 (2000).

[15] *Banks v. District of Columbia*, 720 F. Supp. 2d 83, 54 IDELR 282 (D.D.C. 2010); 583 F. Supp. 2d 169; *S.S. v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 51 IDELR 151 (D.D.C. 2008); *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 47 IDELR 223 (D.D.C. 2007).

[16] *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 47 IDELR 223 (D.D.C. 2007).

appropriate education.[17] Lower courts are equally split. Some would require the parents to demonstrate a gross violation,[18] while others would not[19] or would limit the gross violation standard to students over the age of 21.[20]

B. Limited for Procedural Violations. While substantive violations of the IDEA may give rise to a claim for compensatory relief, "compensatory education is not an appropriate remedy for a purely procedural violation of the IDEA."[21]

C. Sins of the Father Can Be Visited on the Child.[22] Courts have recognized that in setting an award of compensatory education, the conduct of the parties' may be considered.[23]

III. CALCULATING THE AWARD – THE HOW

A. Period. The right to compensatory education accrues from the point that FAPE was denied (i.e., the starting point), subject to the

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[17] *See*, *e.g.*, *Garro v. Connecticut,* 23 F.3d 734, 21 IDELR 126 (2d Cir. 1994) (requiring "gross procedural violation"); *Mrs. C. v. Wheaton,* 916 F.2d 69, 16 IDELR 1394 (2d Cir. 1990) (requiring "gross violation," defined as coercion of disabled child into terminating his right to further education). *But see P. v. Newington Bd. of Educ.*, 512 F. Supp. 2d 89, 48 IDELR 280 n.13 (D. Conn. 2007), *aff'd on other grounds*, 546 F.3d 111, 51 IDELR 2 (2d Cir. 2008) (opining that the requirement of a gross violation before any compensatory education relief can be granted has been applied only to cases involving claimants over the age of 21, citing to *Mrs. C. and Garro*, *supra*); *Somoza v. N.Y. City Dep't of Educ.,* 538 F.3d 106, 50 IDELR 182 n.2 (2d Cir. 2008).

[18] *See*, *e.g.*, *V.M. v. Colonie Central Sch. Dist.*, 61 IDELR 134 (N.D.N.Y. 2013); *J.A. v. East Ramapo Central Sch. Dist.*, 603 F. Supp. 2d 684, 52 IDELR 196 (S.D.N.Y. 2009).

[19] *See*, *e.g.*, *Student X v. New York City Dep't of Educ.*, 51 IDELR 122 (E.D.N.Y. 2008).

[20] *Newington Bd. of Educ.*, 512 F. Supp. 2d 89, 48 IDELR 280 n.13 (D. Conn. 2007), *aff'd on other grounds*, 546 F.3d 111, 51 IDELR 2 (2d Cir. 2008).

[21] *Maine Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 19 (1st Cir. 2003). *See also* 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2).

[22] *See Exodus* 20:5.

[23] *Parents of Student W.* 31 F.3d 1489, 1497, 21 IDELR 723 (9th Cir. 1994) (holding that the parent's behavior is also relevant in fashioning equitable relief but cautioning that it may be in a rare case when compensatory education is not appropriate); *Reid v. District of Columbia,* 401 F.3d 516, 524, 43 IDELR 32 (D.C. Cir. 2005); *Hogan v. Fairfax Cty. Sch. Bd.*, 645 F. Supp. 2d 554, 572, 53 IDELR 14 (E.D. Va. 2009).

statute of limitations.[24] Its duration (i.e., the end point) is the period of denial.[25]

B. Quantitative versus Qualitative.

1. Quantitative Approach.

a. Under this approach, the length of time of the compensatory education award commonly equals the period of denial of services or the length of the inappropriate placement.[26]

b. Courts relying on this approach consider the "time reasonably required for the school district to rectify the problem" when calculating the award.[27]

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[24] *See* 20 U.S.C. § 1415(f)(3)(C); 20 U.S.C. § 1415(b)(6)(B). Note that, although the comments to the regulations suggest that the statute of limitations discussed in § 1415(f)(3)(C) is the same as § 1415(b)(6)(B), *see Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, 46706 (August 14, 2006), this is open to interpretation. § 1415(f)(3)(C) requires a party to request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint. In contrast, § 1415(b)(6)(B) allows a party to present a complaint which sets forth an alleged violation that occurred not more than 2 years *before* the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint. Arguably, read together, the claim may extend back as much as four years. For a recent case that has adopted the look-back approach, *see G.L. v. Ligonier Valley Sch. Dist. Auth.*, 113 LRP 53205 (W.D. Pa. 2013).

[25] *See Reid*, 401 F.3d at 523 ("'[C]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court 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.'") (*quoting G. ex rel. RG v. Fort Brag Dependent Schs.*, 343 F.3d 295, 343 F.3d 295, 309 (4th Cir. 2003)); *Brown v. District of Columbia*, 568 F. Supp. 2d 44, 50 IDELR 249 (D.D.C. 2008) *citing Peak v. District of Columbia*, 526 F. Supp. 2d 32, 49 IDELR 38 (D.D.C. 2007) ("Because compensatory education is a remedy for past deficiencies in a student's educational program, however, [] a finding [of the relevant time period] is a necessary prerequisite to a compensatory education award.").

[26] *See, e.g., M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 23 IDELR 1181 (3d Cir. 1996); *Manchester Sch. Dist. v. Christopher B.*, 807, F. Supp. 860, 19 IDELR 389 (D.N.H. 1992).

[27] *See, e.g., M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 23 IDELR 1181 (3d Cir. 1996).

2. Qualitative Approach.

a. An award of compensatory education "must be reasonably calculated to provide the educational benefits that likely would have accrued."[28] "This standard 'carries a qualitative rather than quantitative focus,' and must be applied with '[f]lexibity rather than rigidity.'"[29] In crafting the remedy, the court or hearing officer is charged with the responsibility of engaging 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."[30] For some students, the compensatory education services can be short, and others may require extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.[31]

Reid rejects an outright "cookie-cutter approach," i.e., an hour of compensatory instruction for each hour that a FAPE was denied.[32] However, while there is no obligation, and it might not be appropriate to craft an hour for hour remedy, an "award constructed with the aid of a formula is not *per se* invalid."[33] Again, the inquiry is whether the "formula-based award … represents an individually-tailored approach to meet the student's unique needs, as opposed to a backwards-looking calculation of educational units denied to a student."[34]

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[28] *Reid*, 401 F.3d at 524.
[29] *Mary McLeod Bethune Day Academy Pub. Charter Sch. v. Bland*, 555 F. Supp. 2d 130, 135, 50 IDELR 134 (D.D.C. 2008) (*quoting Reid*, 401 F.3d at 524).
[30] *Mary McLeod*, 555 F. Supp. 2d at 135 (*citing Reid*, 401 F.3d at 524).
[31] *Id.*
[32] *Reid*, 401 F.3d at 523.
[33] *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt ("Nesbitt I")*, 532 F. Supp. 2d 121, 124 (D.D.C. 2008).
[34] *Id. See, e.g., Mary McLeod Bethune Day Acad. Pub. Charter Sch.*, 555 F. Supp. 2d 130, 50 IDELR 134 (D.D.C. 2008) (finding that, although the hearing officer awarded the exact number of service hours that the LEA had denied, the hearing officer nonetheless conducted a fact-specific inquiry and tailored the award to the student's individual needs by taking into account the results of an assessment and the recommendations of a tutoring center). *But see Brown v. District of Columbia*, 568 F. Supp. 2d 44, 50 IDELR 249 (D.D.C. 2008) (though agreeing with the hearing officer that a "cookie-cutter" approach to compensatory education was inappropriate, remanded the matter to the hearing officer for further proceedings).

An IEP must provide some educational benefit going forward.[35] Conversely, compensatory education must compensate for the prior FAPE denials[36] and must "yield tangible results."[37]

A presently appropriate educational program does not abate the need for compensatory education.[38] However, even if a denial of a FAPE is shown, "[i]t may be conceivable that no compensatory education is required for the denial of a [FAPE] ... either because it would not help or because [the student] has flourished in his current placement."[39]

b. Sufficient Record. The hearing officer cannot determine the amount of compensatory education that a student requires unless the record provides him with sufficient "insight about the precise types of education services [the student] needs to progress."[40] Pertinent findings to enable the hearing officer to tailor the ultimate award to the student's unique needs should include the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services requested, and the student's

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[35] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 553 IDELR 656 (1982).
[36] *Reid*, 401 F.3d at 525.
[37] *D.W. v. District of Columbia*, 561 F. Supp. 2d 56, 61, 50 IDELR 193 (D.D.C. 2008).
[38] *See*, *e.g.*, *D.W. v. District of Columbia*, 561 F. Supp. 2d 56, 61, 50 IDELR 193 (D.D.C. 2008) *citing Flores ex rel. J.F. v. District of Columbia*, 437 F. Supp. 2d 22, 46 IDELR 66 (D.D.C. 2006) (holding that even though the LEA had placed the student in an appropriate school and revised the IEP, the student may still be entitled to an award of compensatory education).
[39] *Phillips v. District of Columbia*, 55 IDELR 101 (D.D.C. 2010) *citing Thomas v. District of Columbia*, 407 F. Supp. 2d 102, 115, 44 IDELR 246 (D.D.C. 2005). *See also Gill v. District of Columbia*, 55 IDELR 191 (D.D.C. 2010) ("The Court agrees that there may be situations where a student who was denied a FAPE may not be entitled to an award of compensatory education, especially if the services requested, for whatever reason, would not compensate the student for the denial of a FAPE.")
[40] *Mary McLeod Bethune Day Acad. Pub. Charter Sch.*, 555 F. Supp. 2d 130, 50 IDELR 134 (D.D.C. 2008) *citing Branham v. District of Columbia*, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 2005). *See also Stanton v. District of Columbia*, 680 F. Supp. 2d 201, 53 IDELR 314 (D.D.C. 2010) ("[T]he record in an IDEA case is supposed to be made not in the district court but primarily at the administrative level[.]")

current educational abilities.[41]

The parent has the burden of "propos[ing] a well-articulated plan that reflects [the student's] current education abilities and needs and is supported by the record."[42] However, "*Reid* certainly does not require [a parent] to have a perfect case to be entitled to a compensatory education award...."[43] Once it is established that the student may be entitled to an award because the LEA denied the student a FAPE, simply refusing to grant one clashes with *Reid*.[44] The hearing officer may provide the parties additional time[45] to supplement the record if the record is incomplete to enable the hearing officer to craft an award.[46] Simply "[c]hoosing instead to award [the parent] nothing does not represent the 'qualitative focus' on [the child's] 'individual needs' that *Reid* requires."[47]

IV. SCOPE – THE WHAT

A. Form. Compensatory education can come in many forms and both hearing officers and courts have fashioned varying awards of services to compensate for denials of FAPE. Awards have included,

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[41] *Branham v. District of Columbia*, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 2005). *See also Mary McLeod Bethune Day Acad. Pub. Charter Sch.*, 555 F. Supp. 2d 130, 50 IDELR 134 (D.D.C. 2008).

[42] *Phillips v. District of Columbia*, 2010 WL 3563068, at *6, 55 IDELR 101 (D.D.C. Sept. 13, 2010) *quoting Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt ("Nesbitt II")*, 583 F. Supp. 2d 169, 172, 51 IDELR 125 (D.D.C. 2008). *But see Gill v. District of Columbia*, 55 IDELR 191 (D.D.C. 2010) (commenting that a remaining question is who bears the burden of producing evidence and ultimately fashioning a fact-specific award of compensatory education).

[43] *Phillips*, 2010 WL 3563068, at *6 *quoting Stanton v. District of Columbia*, 680 F. Supp. 2d 201, 53 IDELR 314 (D.D.C. 2010).

[44] *Id.*

[45] Should said additional time go beyond the 45-day timeline, the hearing officer may grant an extension of time at the request of either party. 34 C.F.R. § 300.515(c). The hearing officer cannot unilaterally extend the 45-day timeline. *See id.*

[46] *Nesbitt I*, 532 F. Supp. 2d at 125. If the parent is unable to provide the hearing officer with additional evidence that demonstrates that additional educational services are necessary to compensate the student for the denial of a FAPE, then the hearing officer may conclude that no compensatory award should be granted. *Phillips*, 2010 WL 3563068, at *8 n.4.

[47] *Phillips*, 2010 WL 3563068, at *6 *quoting Nesbitt I*, 532 F. Supp. 2d at 125.

but are not limited to, tutoring, summer school[48], teacher training[49], assignment of a consultant to the LEA[50], postsecondary education[51], prospective tuition award[52], full-time aides[53] and assistive technology[54].[55]

B. Continued Eligibility. Courts have also awarded compensatory education beyond age 21.[56]

V. IMPLEMENTATION

A. Who Decides. A hearing officer or a court determines compensatory education. Typically, the hearing officer may not delegate his authority to a group that includes an individual specifically barred from performing the hearing officer's functions.[57] However, once a decision has been made on whether

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[48] *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 24 IDELR 831 (3d Cir. 1996).
[49] *See, e.g., Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 46 IDELR 151 (9th Cir. 2006).
[50] *P. v. Newington Bd. Of Educ.*, 546 F.3d 111, 51 IDELR 2 (2d Cir. 2008).
[51] *Streck v. Board of Educ. of the E. Greenbush Cent. Sch. Dist.*, 642 F. Supp. 2d 105, 52 IDELR 285 (N.D.N.Y. 2009) (ordering a New York district to pay $7,140 for a graduate's compensatory reading program at a college for students with learning disabilities) *aff'd Streck v. Bd. of Educ. of the E. Greenbush Cent. Sch. Dist.*, 55 IDELR 216 (2d Cir. 2010) (unpublished).
[52] *Draper v. Atlanta Indep. Sch. System*, 518 F.3d 1275, 49 IDELR 211 (11th Cir. 2008).
[53] *See, e.g., Prince Georges Cty. Pub. Sch.*, 102 LRP 12432 (SEA Md. 2001).
[54] *See, e.g., Matanuska-Susitna Borough Sch. Dist. v. D.Y.*, 54 IDELR 52 (D. Ak. 2010).
[55] Thought should also be given to whether the child requires ancillary services to effectuate the compensatory education (e.g., transportation to the tutoring site when said services are being provided by an independent provider).
[56] *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 54 IDELR 274 (3d Cir. 2010); *Barnett v. Memphis City Schools*, 113 F. App'x 124, 42 IDELR 56 (6th Cir. 2004); *Manchester Sch. Dist. v. Christopher B.*, 807 F. Supp. 860, 19 IDELR 389 (D.N.H. 1992).
[57] *See, e.g., Reid v. Dist. of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005); *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d 307, 47 IDELR 122 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 693, 110 LRP 48155 (2007) (holding that "neither a hearing officer nor an Appeals Board may delegate to a child's IEP team the power to reduce or terminate a compensatory-education award"). *Cf. State of Hawaii, Dept. of Educ. v. Zachary B.*, 52 IDELR 213 (D. Haw. 2009) (where the court distinguished *Reid* an upheld a hearing officer's decision to allow the private tutor and psychologist who were to provide the compensatory education the responsibility to determine the specific type of tutoring the child

an award is appropriate and what the "parameters" for the award should be, the hearing officer may "delegate" to an IEP team (or others) limited decision-making authority.[58]

B. Who Provides. Both independent providers and/or school personnel can provide compensatory education. However, school personnel providing compensatory services should meet the same requirements that apply to personnel providing the same types of services as a part of a regular school program.[59]

C. Failure to Provide. The failure to implement an award of compensatory education is not a harmless procedural error.[60]

VI. PRACTICE TIPS

A. Developing / Completing the Record. IDEA mandates resort in the first instance to the administrative due process hearing so as to develop the factual record and resolve evidentiary disputes concerning the identification, evaluation or educational placement of a child with a disability, or the provision of a free and appropriate public education to the child (FAPE).[61] The hearing officer's primary role is to make findings of fact and ultimately decide the issues raised in the due process complaint.[62]

When the record evidence is insufficient – whether because the parent appears pro se or counsel has done an inadequate job – and prior to the conclusion of the hearing, the hearing officer has the

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would receive provided that it did not exceed once weekly sessions for 15 months).

[58] *Id.*

[59] *Letter to Anonymous*, 49 IDELR 44 (OSEP 2007).

[60] *D.W. v. District of Columbia*, 561 F. Supp. 2d 56, 50 IDELR 193 (D.D.C. 2008) (rejecting the school district's argument that the student's progress should offset the district's obligation to provide compensatory education).

[61] *See*, *e.g.*, *W.B. v. Matula*, 67 F.3d 484, 23 IDELR 411 (3d Cir. 1995) (determining that the parents were not required to exhaust their administrative remedies prior to coming to the district court because, in part, the factual record had been developed, and the substantive issues were addressed, at the administrative due process hearing rendering the action ripe for judicial resolution); *see also*, *Hesling v. Avon Grove Sch. Dist.*, 428 F. Supp. 2d 262, 45 IDELR 190 (E.D. Pa. 2006) *aff'd sub nom. Hesling v. Seidenberger*, 286 F. App'x 773, 108 LRP 39506 (3d Cir. 2008) (unpublished) (explaining that allowing the parent not to exhaust her administrative remedies would promote judicial inefficiency).

[62] *See*, *generally*, 34 C.F.R. § 300.512(a)(5) and 34 C.F.R. § 300.513.

authority[63]/discretion and, perhaps, the obligation or responsibility, to develop at least the minimal record necessary to determine the issue(s) presented and craft appropriate remedies for denials of FAPE.[64]

B. Pre-Hearing Matters.

1. Establish whether the parents are seeking compensatory education and seek to understand what specific measures are being requested. Consider requiring the parents to submit in writing a proposed compensatory education plan within a reasonable time after the initial pre-hearing conference. Requiring the plan in advance of the five-day disclosures affords the school district and hearing officer the opportunity to obtain any necessary clarification.

2. Determine, perhaps after consulting with the parties, the applicable standard (i.e., materiality or gross violation) and the approach to be applied when calculating the award (i.e., quantitative, qualitative or relaxed hybrid).

3. Review with the parties what documentary/testimonial evidence is to be expected in order to establish whether compensatory education is due and in what form.

4. Discuss with the parties the option of bifurcating the hearing to allow the hearing officer an opportunity to first determine whether there are any actionable violations and, if so, to return for a subsequent day of hearing(s) to hear testimony on how said violations should be remedied. The 45-day

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[63] In New York, hearing officers have been granted explicit authority to complete and clarify the record. *See* 8 NYCRR § 200.5(j)(3)(vii) ("Nothing contained in this subparagraph shall be construed to impair or limit the authority of an impartial hearing officer to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record.").

[64] The hearing process and, by extension, the hearing officer, serves as the primary vehicle by which all children with disabilities have available to them a free and 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. *See*, *generally*, 34 C.F.R. § 300.1(a), 34 C.F.R. § 300.2 and 34 C.F.R. § 300.511. A further purpose of IDEA is to ensure that the rights of children with disabilities and their parents are protected, and the hearing officer is charged with the specific responsibility to accord each a meaningful opportunity to exercise his rights during the course of the hearing. 34 C.F.R. § 300.1(b); *Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995).

timeline, in the absence of a valid continuance, must be considered with this approach to the hearing.

5. Carefully document the discussion in the pre-hearing order.

C. Criteria to Consider Under Either Approach.

1. Quantitative Approach.

a. Identify and list the specific denials of FAPE (e.g., inappropriate placement, missed services).

b. Determine the period of denial of FAPE for each identified denial.

c. Establish the time reasonably required for the school district to rectify the problem and modify the period of denial accordingly.

d. Determine whether one denial impacted other aspects of the student's IEP and/or placement to establish whether a broader remedy is required.

- If discreet denial (e.g., missed PT services) without any overlap to other aspects of the IEP and/or placement, determine the "subtotal" of services to be awarded.

- In the existence of overlap, first determine whether the severity of the denial requires compensating on a class-by-class basis or on a school-day basis and then factor this into the "subtotal."

e. Identify the specific compensatory education measures needed to correct the deficits and consider whether the "subtotal" should be modified based on the anticipated method of delivery. For example, if remedying the failure to provide resource room in a group setting with one-on-one tutoring, the award must take into consideration that one-on-one tutoring is a higher intensity intervention than the group setting provided in the resource room.

f. Determine the presence of any equitable factors that warrant an additional reduction.

- Student focused: absences, illness, or emotional crisis

- Unreasonable parental conduct

g. Determine final award. In drafting the final order, the hearing should –

- determine whether the service(s) should be directed towards the child, the parents, school personnel, or a combination thereof.

- determine when the compensatory education services are to be provided (e.g., if to the student, in/after school), where (i.e., in school, local library, the home) and by whom (e.g., school personnel or private provider).

- identify the qualifications of the provider(s).

- establish a reasonable timeline by when the services are to be completed.

- determine whether transportation is required to allow the student or parent to access the compensatory education services.

2. Qualitative Approach.

a. Identify the specific denials of FAPE (e.g., inappropriate placement, missed services).

b. Determine the period of denial of FAPE for each identified denial.

c. Establish where the student was functioning prior to the start of the denial.

d. Estimate the student's rate of progress to help determine where the student would have been but for the denial.

e. For each denial, determine the educational deficits that accrued during the period of denial and reasonably calculate where the student would have been but for the denial (i.e., the educational benefits that likely would have accrued had there not been any denial).

f. Identify any ancillary deficits resulting from the educational deficits identified in subparagraph "e."

g. Identify the specific compensatory education measures needed to correct the identified deficits and that would "yield tangible results."

h. Determine the presence of any equitable factors that warrant a reduction or denial of the anticipated award.

- Student focused:
  - absences
  - illness
  - emotional crisis
  - the student has "flourished" in his/her current placement despite the denial(s) as determined by reviewing the student's current functioning, through progress reports, state/district wide assessments, and progress in meeting his/her annual goals
  - it would not "help" the student
- Parent focused: unreasonable parental conduct
- School district focused: attempt to replace, mitigate, or make up for any of the denials
- IEP focused: the IEP following the challenged IEP takes into account the previous denials[65]

i. Determine final award. In drafting the final order, the hearing should –

- determine whether the service(s) should be directed toward the child, the parents, school personnel, or a combination thereof.
- determine when the compensatory education services are to be provided (e.g., if to the student, in/after school), where (i.e., in school, local

[65] *Mr. I. and Mrs. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 47 IDELR 121 (1st Cir. 2007) (where the First Circuit upheld the district court's decision declining to award compensatory education on the grounds that the ordered "IEP will necessarily take into account" the effect of the denial of a FAPE).

library, the home) and by whom (e.g., school personnel or private provider).

- identify the qualifications of the provider(s).
- establish a reasonable timeline by when the services are to be completed.
- determine whether transportation is required to allow the student or parent to access the compensatory education services.

THIS OUTLINE IS INTENDED TO PROVIDE WORKSHOP PARTICIPANTS WITH A SUMMARY OF SELECTED STATUTORY PROVISIONS AND SELECTED JUDICIAL INTERPRETATIONS OF THE LAW. THE PRESENTER IS NOT, IN USING THIS OUTLINE, RENDERING LEGAL ADVICE TO THE PARTICIPANTS.