# WEBINAR FOR N.Y. IMPARTIAL HEARING OFFICERS (IHOS)

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## I. Organizing Framework[1]

- definition of compensatory education
- whether the child is entitled to compensatory education (i.e., "trigger")
- if so, how much compensatory education (i.e., "calculation")
- other issues – e.g., hearing procedures and vague orders

[1] For successive case compilations, see, e.g., 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 1[01 (2010); Perry A. Zirkel, *Compensatory Education Services under the IDEA: An Annotated Update*, 190 EDUC. L. REP. [45 (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).

## II. Definition

Equitable remedy that provides in-kind special education and other related services for denials of a free and appropriate public education (FAPE)[2]

- FAPE denial could be substantive, prejudicially procedural (i.e., two-part test), the combination, or lack of implementation[3]
- FAPE denial could also be via other issues, such as child find,[4] eligibility,[5] or LRE[6]
- incomplete analogy to tuition reimbursement[7]

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[2] See, e.g., Lester H. v. Gilhool, 916 F.2d 865, 868 (3d Cir. 1990) ("to restore [the FAPE] that which had been denied him"); *see also* Somoza v. New York City Dep't of Educ., 538 F.2d 106, 109 n.2 (2d Cir. 2008) ("prospective equitable relief, requiring a school district to fund education beyond the expiration of a child's eligibility as a remedy for any earlier deprivations in the child's education"). The SRO has reached the same definition under the rubric of "compensatory additional services." See, e.g., N.Y. SRO Decision No. 13-048 (Sept. 18, 2013); N.Y. SRO Decision No. 12-235 (Sept. 3, 2013) ("an equitable remedy that is tailored to meet the unique circumstances of each case," citing Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y.1997)). Sometimes the concept is confused with tuition reimbursement. *See, e.g.,* Brown v. Bartholomew Consol. Sch. Corp., 442 F.3d 588, 597 (7th Cir. 2006).

[3] For a systematic sampling of the frequency of each type of denial and the resulting remedies at both the hearing/review officer and judicial levels, 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 a recent example of the least frequent basis, lack-of-implementation, for compensatory education, see Tyler v. Upper Perkiomen Sch. Dist., __ F. Supp. 2d __ (E.D. Pa. 2013).

[4] See, e.g., Sch. Bd. v. Brown, 769 F. Supp. 2d 928 (E.D. Va. 2010); Linda E. v. Bristol Warren Reg'l Sch. Dist., 758 F. Supp. 2d 75 (D.R.I. 2010). *But cf*. D.G. v. Flour Bluff Indep. Sch. Dist., 481 F. App'x 887 (5th Cir. 2012) (not where ineligible).

[5] See, e.g., Compton Unified Sch. Dist. v. Addison, 598 F.3d 1181 (9th Cir. 2010); G.D. v. Wissahickon Sch. Dist., 832 F. Supp. 2d 455 (E.D. Pa. 2011).

[6] See, e.g., P. v. Newington Bd. of Educ., 546 F.3d 111 (2d Cir. 2008); Millersburg Area Sch. Dist. v. Lynda T., 707 A.2d 572 (Pa. Commw. Ct. 1998).

[7] 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, 894 (2006). Moreover, unlike tuition reimbursement, compensatory education is not expressly allocated as an adjudicative remedy in the IDEA. See, e.g., Sabatini v. Corning-Painted Post Area Sch. Dist., 78 F. Supp. 2d 138, 145 (W.D.N.Y. 1999) (characterizing the compensatory education remedy as "rather . . . a creature of case law . . . stem[ming] from the Supreme Court's decision in *Burlington*).

## III. Trigger

- elsewhere – denial of FAPE beyond de minimis[8]

- New York – two competing interpretations:

  - only for a gross denial[9]

  - the gross violation standard only applies to students over the age of 21[10]

  - In recent cases, the SRO has followed the second approach, thus not requiring that the denial be gross when occurring during the age range of student eligibility.[11]

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[8] See, e.g., M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389 (3d Cir. 1996). For examples of cases that did not reach the requisite minimum denial of FAPE, see Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007); Shawsheen Valley Reg'l Vo-Tech. Sch. Dist., 367 F. Supp. 2d 44 (D. Mass. 2005).

[9] See, e.g., V.M. v. N. Colonie Sch. Dist., __ F. Supp. 2d __ (N.D.N.Y. 2013) (citing Mrs. C. v Wheaton, 916 F.2d 69 (2d Cir. 1990)); J.A. v. E. Ramapo Sch. Dist., 603 F. Supp. 2d 684 (S.D.N.Y. 2009) (citing Mrs. C. v Wheaton, 916 F.2d 69 (2d Cir. 1990); Burr v. Ambach, 863 F.2d 1071 (2d Cir. 1988)); *cf*. French v. New York State Educ. Dep't, 476 F. App'x 468, 471 (2d Cir. 2011) ("for a 'gross procedural violation' . . . [resulting] in the student's complete deprivation of a FAPE during her period of eligibility," citing Garro v. Dep't of Educ., 23 F.3d 734 (2d Cir. 1994)).

[10] P. v. Newington Bd. of Educ., 512 F. Supp. 2d 89 (D. Conn. 2007), *aff'd on other grounds*, 546 F.3d 111 (2d Cir. 2008) (citing Garro v. Dep't of Educ., 23 F.3d 734 (2d Cir. 1994); Mrs. C. v Wheaton, 916 F.2d 69 (2d Cir. 1990)); *cf*. Student X v. New York City Dep't of Educ., 51 IDELR ¶ 122 (E.D.N.Y. 2008) (resting on alternative approaches); R.C. v. Bd. of Educ., 50 IDELR ¶ 225 (S.D.N.Y. 2008) (providing possible indirect support by finding no denial of FAPE).

[11] See, e.g., N.Y. SRO Decision No. 13-048 (Sept. 18, 2013); N.Y. SRO Decision No. 12-235 (Sept. 3, 2013); N.Y. SRO Decision No. 12-209 (May 3, 2013). For a state appellate court decision that upheld such an award for a lack of implementation denial of FAPE, see Bd. of Educ. v. Munoz, 793 N.Y.S.2d 275 (App. Div. 2005).

## IV. Calculation[12]

- elsewhere - three competing approaches:

  1. quantitative (e.g., Third Circuit)[13]

  2. qualitative (e.g., D.C. and Sixth Circuits)[14]

  3. relaxed hybrid (e.g., Ninth Circuit)[15]

- New York – not directly addressed thus far in unpublished or published court decisions to date,[16] although the SRO has followed approach 2 and/or 3.[17] In any event, the case law in New York has applies a balancing of the equities in terms of reducing or eliminating an award in cases of net unreasonable parental conduct.[18]

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[12] For a comprehensive overview, see Perry A. Zirkel, *The Two Competing Approaches for Calculating Compensatory Education*, 257 EDUC. L. REP. 551 (2010).

[13] See, e.g., Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999)

[14] See, e.g., Bd. of Educ. v. L.M., 478 F.3d 307 (6th Cir. 2007), *cert. denied*, 552 U.S. 1042 (2007); Reid v. Dist. of Columbia, 401 F.3d 516 (D.C. Cir. 2005).

[15] See, e.g., Park v. Anaheim Sch. Dist., 464 F.3d 1025 (9th Cir. 2006). *But cf*. R.P. v. Prescott Unified Sch. Dist., 631 F.3d 1117, 1125 (9th Cir. 2011) (dicta suggesting qualitative approach, citing *Reid*).

[16] See, e.g., Student X v. New York City Dep't of Educ., 51 IDELR ¶ 122 (E.D.N.Y. 2008) (acknowledging that the Second Circuit has not addressed this issue, while awarding an hour-for-hour amount in a lack of implementation case). The limited exception, which does not dictate any particular approach, is the net reduction for unreasonable parental conduct.

[17] See, e.g., N.Y. SRO Decision No. 13-048 (Sept. 18, 2013); N.Y. SRO Decision No. 12-235 (Sept. 3, 2013); N.Y. SRO Decision No. 12-209 (May 3, 2013).

[18] See, e.g., French v. New York State Educ. Dep't, 476 F. App'x 468 (2d Cir. 2011); J.G. v. Kiryas Joel Sch. Dist., 777 F. Supp. 2d 606 (S.D.N.Y. 2011); N.Y. SRO Decision No. 11-027 (Apr. 29, 2011); N.Y. SRO Dec. No. 11-096 (Sept. 12, 2011) (upholding the portion of an IHO decision that denied compensatory education services due to the parents' failure to cooperate with the district).

1. Quantitative approach

   - duration: the period of denial of FAPE[19]
   - alternatives of service-unit[20] or total-package approach[21]
   - deduction at the start for period estimated for reasonable rectification[22]
   - reduction for net inequities in terms of unreasonable parental conduct[23]

2. Qualitative approach

   - 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]
     - What are the child's "specific educational deficits"?
     - Which and how much of these specific deficits resulted from the child's "loss of FAPE"?
     - What are "the specific compensatory measures needed to best correct [the] deficits [in the second item]"?
     - Will there be a deduction for reasonable rectification or unreasonable parental conduct? If so, calculate and explain.

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[19] See, e.g., Westendorp v. Indep. Sch. Dist. No. 273, 35 F. Supp. 2d 1134 (D. Minn. 1998).

[20] See, e.g. Heather D. v. Northampton Area Sch. Dist., 511 F. Supp. 2d 549 (E.D. Pa. 2007).

[21] See, e.g., Keystone Cent. Sch. Dist. v. E.E., 438 F. Supp. 2d 519 (E.D. Pa. 2006).

[22] See, e.g., M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996) ("the time reasonably required for the school district to rectify the problem"). For an exception, see Tyler W. v. Perkiomen Sch. Dist., __ F. Supp. 2d __ (E.D. Pa. 2013).

[23] See, e.g., Garcia v. Bd. of Educ., 520 F.3d 1116 (10th Cir. 2008).

[24] Reid v. Dist. of Columbia, 401 F.3d 516, 524 (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.

3. Relaxed approach

   - citing equitable flexibility[25]
   - providing facially fitting amount, form, and explanation[26]

[25] See, e.g., Parents of Student W. v. Puyallup Sch. Dist. No. 3, 31 F.2d 1489, 1496 (9th Cir. 1994); Mt. Vernon Sch. Corp. v. A.M., 59 IDELR ¶ 100 (magistrate's recommendation), *adopted*, 59 IDELR ¶ 187 (S.D. Ind. 2012). Often this approach is a relaxed qualitative approach. See, e.g., Dep't of Educ., State of Hawaii v. R.H., 61 IDELR ¶ 127 (D. Hawaii 2013). For advocacy of such an approach, see Terry J. Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?* 45 URB. LAW. 281 (2013). In some cases this approach seems to be a hybridization. See, e.g., Cent. Sch. Dist. v. K.C., 61 IDELR ¶ 125 (E.D. Pa. 2013) (upholding qualitative approach in quantitative jurisdiction); D.G. v. Flour Bluff Indep. Sch. Dist., 832 F. Supp. 2d 755 (S.D. Tex. 2011) (upholding qualitative approach yielding result that approximated quantitative approach), *vacated*, 481 F. App'x 887 (5th Cir. 2012).

[26] *Id*.

## V. Other Issues[27]

- procedural issues for qualitative approach
    - e.g., prehearing instructions – yes[28]
    - bifurcated hearing – ??[29]
- statute of limitations – two years (w. two exceptions)[30]
- mootness – e.g., no longer eligible but before statutory ceiling[31]

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[27] For various other issues, see Zirkel, *supra* note 1.

[28] Determining whether compensatory education is at issue and instructing the parties on the necessary evidence is critical to avoiding undue problems and reversible errors.

[29] One approach is via dismissal without prejudice for this purpose. See, e.g., Dep't of Educ., State of Hawaii v. R.H., 61 IDELR ¶ 127 (D. Hawaii 2013).

[30] 20 U.S.C. § 1415(f)(3)(C) (2005); *see also id*. §1415(b)(6)(B). The language is not entirely clear and includes two narrow, specific exceptions. For these misrepresentation and withholding exceptions, see, e.g., Sch. Dist. v. Deborah A., 52 IDELR ¶ 67 (E.D. Pa. 2009. This provision, added in the 2004 amendments does not directly address the issue of tolling. *See, e.g*., D.K. v. Abington. Sch. Dist., 696 F.3d 233 (3d Cir. 2012); Lynn Daggett, Perry A. Zirkel, & Leann Gurysh, *For Whom the School Bell Tolls But Not the Statute of Limitations: Minors and the Individuals with Disabilities Education Act*, 38 U. MICH. J.L. REFORM 717 (2005). Additionally, although a "look-back" application is easier, the triggering language is in terms of calculating forward after an ambiguous starting point, which arguably extends back to four years. 20 U.S.C. § 1415(b)(6)(B) ("alleged violation that occurred not more than 2 years *before* the date the parent or public agency knew or should have known" [emphasis added]). *Compare* Elizabethtown Sch. Dist., 50 IDELR ¶ 24 (Pa. SEA 2008), *with* Gwinnett Cnty. Sch. Dist. v. A.A., 54 IDELR ¶ 316 (N.D. Ga. 2010). Finally, the qualitative approach may effective extend beyond the limitations period the amount available via the quantitative approach. See, e.g., Cent. Sch. Dist. v. K.C., 61 IDELR ¶ 125 (E.D. Pa. 2013).

[31] *See, e.g*., M.L. v. El Paso Indep. Sch. Dist., 610 F. Supp. 2d 582 (W.D. Tex. 2009), *aff'd*, 369 F. App'x 573 (5th Cir. 2010).

- possible problem of remand to CSE – prohibition of delegation for reduction/termination[32] - extends to calculation?[33]

- forms:

  - consultant[34] or training[35]

  - postsecondary education – ??[36]

  - prospective private school placement – in appropriate circumstances[37]

  - escrow account – permissible[38]

- fallback for tuition reimbursement where unilateral placement is inappropriate?[39]

- reversible insufficiency – fatal vagueness for approach, evidentiary basis, or enforceability[40]

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[32] See, e.g., Bd. of Educ. v. L.M., 478 F.3d 307, 318 (6th Cir. 2007), *cert. denied*, 552 U.S. 1042 (2007); Reid v. Dist. of Columbia, 401 F.3d 516, 526 (D.C. Cir. 2005).

[33] See, e.g., Meza v. Bd. of Educ., 56 IDELR ¶ 167 (D.N.M. 2011) (negating delegation to IEP team and consultant team, citing rationale of *Reid* and *L.M.*). *But see* Mr. I. v. Maine Sch. Admin. Unit No. 55, 480 F.3d 1 (1st Cir. 2007) (finding delegation to IEP a sensible approach where insufficient record); *cf*. A.L. v. Chicago Pub. Sch. Dist., 57 IDELR ¶ 215 (N.D. Ill. 2011) (finding no delegation problem with choice of reading program in prospective IEP revisions).

[34] See, e.g., P. v. Newington Bd. of Educ., 546 F.3d 111 (2d Cir. 2008).

[35] See, e.g., Park v. Anaheim Sch. Dist., 464 F.3d 1025 (9th Cir. 2006).

[36] See, e.g., Streck v. Bd. of Educ., 409 F. App'x 411 (2d Cir. 2010); Sabatini v. Corning-Painted Post Area Sch. Dist., 78 F. Supp. 2d 138, 145 (W.D.N.Y. 1999).

[37] See, e.g., Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275 (11th Cir. 2008); Dep't of Educ., State of Hawaii v. R.H., 61 IDELR ¶ 127 (D. Hawaii 2013).

[38] See, e.g., Streck v. Bd. of Educ., 409 F. App'x 411 (2d Cir. 2010). *But cf*. Millay v. Surry Sch. Dep't, 56 IDELR ¶ 257 (D. Me. 2011) (rejecting trust fund in the circumstances of the case.

[39] See, e.g., P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 739 (3d Cir. 2009) (ruling that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school").

[40] See, e.g., Streck v. Bd. of Educ., 280 F. App'x 66, 68–69 (2d Cir. 2008) (vacating and remanding compensatory education award due to insufficient evidentiary basis); Susquehanna Twp. Sch. Dist. v. Frances, 823 A.2d 249 (Pa. Commw. Ct. 2003) (modifying the order not to be indefinite or open-ended). For more complete citations, including New York SRO decisions, see Perry A. Zirkel, *"Appropriate" Decisions under the Individuals with Disabilities Education Act*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 242, 259-60 nn.76–77 (2013).