**A FRAMEWORK TO CONSIDER WHEN MEDIATING COMPENSATORY EDUCATION DISPUTES**

IDEA VETERAN SPECIAL EDUCATION MEDIATOR TRAINING
NEW YORK STATE EDUCATION DEPARTMENT

VIRTUAL PROGRAM

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## I. INTRODUCTION

A. Crafting an award of compensatory education is not an easy task. Many IDEA hearing officers struggle with crafting awards of compensatory education, in part, because typically the record is void of the necessary information required to apply a difficult standard. Mediation can offer the parties an appreciable opportunity to develop a compensatory education program for the student that is tailored to his/her needs.

This outline provides mediators with an explanation of the framework that IDEA hearing officers employ (or should employ) in crafting an appropriate award of compensatory education.[1] This framework also provides special education mediators with a roadmap to frame the compensatory education discussion with the parties.

B. An award of compensatory education is an equitable remedy[2] that "should aim to place disabled children in the same position they

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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.*

 

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]

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

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*v. Bowles*, 321 U.S. 321, 329 (1944)); *Gill v. District of Columbia*, 751 F. Supp. 2d 104, 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."). *See also Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 54 IDELR 274 (3d Cir. 2010) (holding that awards of compensatory education are appropriate because "there is nothing in the IDEA that evinces Congressional intent to limit courts' equitable power to awards of only financial support").

[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). Accordingly, it is within the court's or hearing officer's discretion to deny compensatory education. *See Parents of Student W. v. Puyallup Sch. Dist., No. 3*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994); *Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116, 49 IDELR 241 (10th Cir. 2008). "It may be a rare case when compensatory education is not appropriate…." *Parents of Student W. v. Puyallup Sch. Dist., No. 3*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994). *But see Stanton v. Dist. of Columbia*, 680 F. Supp. 2d 201, 255 IDELR 120 (D.D.C. 2010) (finding that "[o]nce a [student] has established that she is entitled to an award, simply refusing to grant one clashes with *Reid*…").

[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).

[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) (opining that hearing officers have the authority to grant any relief deemed necessary, inclusive of compensatory education).

[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);

to award compensatory education. But, as is noted above, crafting the award that is tailored to the student's needs is difficult. Mediation dispenses with the formalities found in administrative hearings and allows the parties to speak candidly on how to best compensate the student for [perceived] failures in meeting the special education needs of the student. The special education mediator can play an important role in facilitating the discussion, particularly when the mediator is versed on the applicable standards.

D. There are primarily two competing approaches utilized in fashioning a compensatory education award, namely the "quantitative" approach authored by the Third Circuit,[8] and the "qualitative" approach relied upon by the Sixth and D.C. Circuits.[9] (The Ninth Circuit has adopted a somewhat relaxed approach, citing equitable flexibility,[10] but seems to lean towards the qualitative approach.[11])

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*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] *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).

[9] *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), *cert. denied*, 552 U.S. 1042, 110 LRP 48155 (2007).

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

[11] *See, e.g., R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 56 IDELR 31 (9th Cir. 2011) (citing to *Reid* and stating that the lower court "could well have provided for additional services to help [the student] make up for lost time"); *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 46 IDELR 151 (9th Cir. 2006) (reaffirming that "[t]here is no obligation to provide a day-for-day compensation for time missed" and upholding the hearing officer's award of compensatory education in the form of training to the student's teacher).

The Second Circuit has not taken a position on a preferred approach. Neither have the New York courts.[12] With the lack of binding authority, either approach may be considered. The qualitative approach, however, is not to the exclusion of the quantitative approach.

## 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[13] may order compensatory education.[14] Generally, said denial must be more than *de minimis*.[15] Under this interpretation, only material failures are actionable under the IDEA.[16] 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."[17]

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

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[12] *See, e.g., Student X v. New York City Dep't of Educ.*, 51 IDELR 122 (E.D.N.Y. 2008) (noting that the Second Circuit has not adopted a test for determining how to calculate an award of compensatory education, but awarding hour-for-hour).

[13] *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).

[14] *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).

[15] *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).

[16] *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).

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

procedural violation of the IDEA."[18]

C. Sins of the Father Can Be Visited on the Child.[19] Courts have recognized that in setting an award of compensatory education, the conduct of the parties' may be considered.[20]

## 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 statute of limitations.[21] Its duration (i.e., the end point) is the period of denial.[22]

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[18] *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). *But see L.O. v. New York City Dep't of Educ.*, 822 F.3d 95, 67 IDELR 225 (2d Cir. 2016) (finding that the various procedural violations, taken together, displayed a "pattern of indifference" resulting in a denial of a FAPE and warranting compensatory education even though it would extend beyond the student's 21st birthday).

[19] *See Exodus* 20:5.

[20] *Parents of Student W.* 31 F.3d at 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).

[21] *See* 20 U.S.C. § 1415(f)(3)(C); 20 U.S.C. § 1415(b)(6)(B). Compensatory education can be awarded to whatever extent is necessary to make up for the denial of FAPE and it is not necessarily limited to the two-year limitations period. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015).

[22] *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.").

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.[23]

b. Courts relying on this approach consider the "time reasonably required for the school district to rectify the problem" when calculating the award.[24]

2. Qualitative Approach.

a. An award of compensatory education "must be reasonably calculated to provide the educational benefits that likely would have accrued."[25] "This standard 'carries a qualitative rather than quantitative focus,' and must be applied with '[f]lexibity rather than rigidity.'"[26] 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."[27] 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.[28]

*Reid* rejects an outright "cookie-cutter approach," i.e., an hour of compensatory instruction for each hour that a FAPE was denied.[29] However, while there is no obligation, and it might not be appropriate to craft an

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[23] *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).

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

[25] *Reid*, 401 F.3d at 524.

[26] *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).

[27] *Mary McLeod*, 555 F. Supp. 2d at 135 (*citing Reid*, 401 F.3d at 524).

[28] *Id.*

[29] *Reid*, 401 F.3d at 523.

hour for hour remedy, an "award constructed with the aid of a formula is not *per se* invalid."[30] 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."[31]

An IEP must provide some educational benefit going forward.[32] Conversely, compensatory education must compensate for the prior FAPE denials[33] and must "yield tangible results."[34]

A presently appropriate educational program does not abate the need for compensatory education.[35] 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."[36]

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[30] *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt ("Nesbitt I")*, 532 F. Supp. 2d 121, 124 (D.D.C. 2008).

[31] *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).

[32] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 553 IDELR 656 (1982).

[33] *Reid*, 401 F.3d at 525.

[34] *D.W. v. District of Columbia*, 561 F. Supp. 2d 56, 61, 50 IDELR 193 (D.D.C. 2008).

[35] *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). *Cf. Wheaten v. Dist. of Columbia*, 55 IDELR 12 (D.D.C. 2010), *aff'd*, 2010 WL 5372181 (D.C. Cir. 2010) (affirming hearing officer's denial of compensatory education because school district subsequent private school placement remedied denial of a FAPE).

[36] *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.

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."[37] 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 current educational abilities.[38]

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."[39] However, "*Reid* certainly does not require [a parent] to have a perfect case to be entitled to a compensatory education award…."[40] 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*.[41] The hearing

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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.").

[37] *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[.]").

[38] *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).

[39] *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).

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

[41] *Id.*

officer may provide the parties additional time[42] to supplement the record if the record is incomplete to enable the hearing officer to craft an award.[43] Simply "[c]hoosing instead to award [the parent] nothing does not represent the 'qualitative focus' on [the child's] 'individual needs' that *Reid* requires."[44]

## 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, but are not limited to, tutoring, summer school,[45] teacher training,[46] assignment of a consultant to the LEA,[47] postsecondary education,[48] prospective tuition award,[49] full-time aides,[50] assistive

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[42] 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. But see Lee v. Dist. of Columbia*, 69 IDELR 56 (D.D.C. 2017) (stating, but without addressing the 45-day timeline requirement to render a decision, that the hearing officer who finds that more information is needed to craft an award has the option to provide the parties additional time to supplement the record or to order additional assessments as needed); *B.D. v. Dist. of Columbia*, 817 F.3d 792, 67 IDELR 135 (D.C. Cir. 2016) (similar, but limiting discussion to additional assessments).

[43] *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.

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

[45] *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 24 IDELR 831 (3d Cir. 1996).

[46] *See, e.g., Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 46 IDELR 151 (9th Cir. 2006).

[47] *P. v. Newington Bd. Of Educ.*, 546 F.3d 111, 51 IDELR 2 (2d Cir. 2008).

[48] *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).

[49] *Draper v. Atlanta Indep. Sch. System*, 518 F.3d 1275, 49 IDELR 211 (11th Cir. 2008).

[50] *See, e.g., Prince Georges Cty. Pub. Sch.*, 102 LRP 12432 (SEA Md. 2001).

technology,[51] reimbursement for out-of-pocket educational expenses,[52] and private placement.[53, 54]

B. Continued Eligibility. Courts have also awarded compensatory education beyond age 21.[55]

## 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.[56] However, once a decision has been made on whether 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.[57]

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

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[51] *See, e.g., Matanuska-Susitna Borough Sch. Dist. v. D.Y.*, 54 IDELR 52 (D. Ak. 2010).

[52] *Foster v. Bd. of Educ. of the City of Chicago*, 611 F. App'x 874, 65 IDELR 161 (7th Cir. 2015) (unpublished).

[53] *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 49 IDELR 211 (11th Cir. 2008, *cert. denied*, 131 S. Ct. 342, 110 LRP 57266 (2010).

[54] 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).

[55] *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).

[56] *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* and 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 would receive provided that it did not exceed once weekly sessions for 15 months).

[57] *Id.*

services as a part of a regular school program.[58]

C. Failure to Provide. The failure to implement an award of compensatory education is not a harmless procedural error.[59]

## VI. PRACTICE TIPS

A. Pre-Mediation Call / Mediation Session.

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-mediation call.[60] Requiring the plan in advance of the mediation session affords the mediator the opportunity to share the parents' plan with the school district prior to the mediation and would also allow the mediator to obtain any necessary clarification prior to the mediation.

2. Discuss with the parties a general approach to calculating compensatory education, taking into consideration the various approaches available in the Second Circuit (i.e., quantitative, qualitative, or relaxed hybrid), as outlined below.

   Be mindful that, in mediation, the parties are not subject to applying any one approach to an exacting degree. This affords the mediator and the parties greater flexibility in resolving a compensatory education dispute.

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

[59] *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).

[60] The plan should specify the service(s) being requested (e.g., tutoring, speech and language therapy, etc.), the general goals for the service, the duration/frequency for the service, and a timeline (i.e., anticipated start/end).

B. 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. Identify 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. Identify 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 that may be due to the student.

- In the existence of overlap, first identify 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 parties may want to take into consideration that one-on-one tutoring is a higher intensity intervention than the group setting provided in the resource room.

f. Establish whether the school district claims the presence of any equitable factors that may result in an additional reduction.

- Student focused: absences, illness, or emotional crisis

- Unreasonable parental conduct

g. Firm up what the compensatory education that is agreed upon between the parties. In drafting the mediation agreement, the terms of the mediation agreement should address the following –

- whether the service(s) should be directed towards the child, the parents, school personnel, or a combination thereof.
- 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).
- the qualifications of the provider(s).
- a reasonable timeline by when the services are to be completed.
- 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. Identify 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, identify 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. Establish whether the school district claims the presence of any equitable factors that may result in an additional reduction.

- 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[61]

i. Firm up what the compensatory education that is agreed upon between the parties. In drafting the mediation agreement, the terms of the mediation agreement should address the following –

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

[61] *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).

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

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

**NOTE: REDISTRIBUTION OF THIS OUTLINE WITHOUT EXPRESSED, PRIOR WRITTEN PERMISSION FROM ITS AUTHOR IS PROHIBITED.**

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