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**SPECIAL EDUCATION LAW 102 FOR ALJs:
REMEDIES UNDER THE IDEA**

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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 focuses on the school district’s central obligation of providing a “free appropriate public education” under an “individualized education program” (IEP).³

The adjudicative remedies under the IDEA include declaratory relief and purely prospective injunctive relief but do not extend to money damages.⁴ With the limited exception

¹ 20 U.S.C. §§ 1400 *et seq.* (2013).

² *E.g.*, Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. L. 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 *Id.*

⁴ 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). Although attorneys’ fees are a major factor in IDEA cases, these awards are not within the typical meaning of “remedies” and are beyond the authority of hearing and review officers under the IDEA,

of prospective injunctive relief for nonprejudicial procedural FAPE violations,⁵ the broad remedial authority of ALJs and other hearing officers⁶ under the IDEA only applies upon the denial of FAPE.⁷

For the parties, in addition to prospective orders to revise the individual education program (IEP), the primary concern is with the retrospective injunctive remedies of tuition reimbursement and, by partial analogy,⁸ compensatory education.⁹ In practice, these two remedies overlap, with compensatory education being particularly broad¹⁰ and jurisdictionally varied¹¹ in the absence of Supreme Court jurisprudence and IDEA codification.¹²

The remainder of this presentation is an adjudicative checklist for each of these two remedies, representing an outline in a flowchart-like sequence. For tuition reimbursement, the basis, as cited in the footnotes, is limited to the underlying IDEA provisions¹³ and Supreme

although an occasional state law requires the hearing officer to identify the prevailing party for each issue. *Id.* at 518 and 555–56.

⁵ *E.g.*, 20 U.S.C. § 1415(f)(3)(E)(iii). “Nonprejudicial” in this context refers to situations where the hearing officer does not find the requisite loss to the child or the parent under this provision.

⁶ Although the use of ALJs has steadily risen among the state systems for IDEA hearings, approximately thirty states still rely on part-time independent contractors for their hearing officers. Jennifer Connolly, Perry Zirkel, *State Due Process Hearing Systems under the IDEA*, ___ J. DISABILITY POL’Y STUD. ___ (under review).

⁷ 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 EDUC. L. REP. 18 (2017).

⁸ *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).

⁹ 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).

¹⁰ *E.g.*, *P. v. Newington Bd. of Educ.*, 546 F.3d 111, 238 (2d Cir. 2008) (awarding use of a consultant under the rubric of compensatory education); *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, (awarding training within the rubric of compensatory education).

¹¹ The principal area of variance is in the calculation of this remedy, which is the focus of the checklist coverage *infra*.

¹² 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).

¹³ 20 U.S.C. § 1412(a)(10)(C).

Court decisions.¹⁴ For compensatory education, in the absence of such overriding authority, the basis is a representative sampling of lower court decisions.

¹⁴ *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).

Tuition Reimbursement¹⁵

1. Threshold equities step:
 - a) Did the parent provide timely notice to the district of their rejection of the proposed placement?¹⁶
 - 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?¹⁷

2. Appropriateness steps:
 - a) Was the district’s proposed placement appropriate, or, more specifically, did the district “make a free appropriate public education available to the child in a timely manner prior to [the parent’s unilateral placement]”¹⁸?
 - b) If not, was the parent’s unilateral placement substantively appropriate¹⁹ (even if it does not meet state standards)?²⁰

3. Final equities step:
 - a) Were the actions of the parent—beyond those in items a)i and a)ii and—unreasonable?²¹
 - b) If so (and for step 1), the adjudicator “may” reduce or deny reimbursement.²²

¹⁵ For a fuller version, with detailed illustrative case law, see Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA*, 282 EDUC. L. REP. 785 (2012).

¹⁶ 20 U.S.C. § 1412(a)(10)(C)(iii)(I). Timeliness in this context means at either the most recent IEP meeting or in writing at least 10 business days before the parent’s “removal” of the child. Moreover, the notice must include the parents’ concerns and their intent to enroll their child in a private school at public expense.”

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.*

¹⁷ The exception is where the parent’s compliance would “likely result in physical or serious emotional harm to the child.” *Id.*

¹⁸ 20 U.S.C. § 1412(a)(10)(C)(ii).

¹⁹ This step is only implicit in the IDEA and its regulations. Its basis is *Carter*, which may be viewed as either implicitly incorporated in or a residuum beyond the statutory codification. Moreover, the courts have been slow in the inevitable application of the *Andrew F.* standard for this determination.

²⁰ 34 C.F.R. § 300.148(c). The issue in *Carter* was a bit broader, referring to whether the parents’ private placement met 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.

²¹ 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.*

²² *Id.* § 1412(a)(10)(C)(iii).

Compensatory Education²³

- 1) Did the district deny FAPE to the child?
- 2) If so, which approach applies to calculate the appropriate amount?²⁴
 - 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?²⁵ – 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]"?²⁶

The adjudicator may not delegate this calculation to the IEP team.²⁷

- b) Quantitative approach: hour-for-hour or day-for-day for the period of the denial of FAPE (minus time for reasonable rectification)²⁸ - primarily and decreasingly Third Circuit
- c) Relaxed approach: either effectively blended²⁹ or merely cryptic³⁰ - majority of jurisdictions³¹

²³ E.g., Perry A. Zirkel, *Compensatory Education: The Next Annotated Update of the Case Law*, 336 EDUC. L. REP. 654 (2016) (comprehensive annotated outline).

²⁴ E.g., Perry A. Zirkel, *The Two Competing Approaches for Calculating Compensatory Education under the IDEA: An Update*, 339 EDUC. L. REP. 10 (2017) (more detailed annotated outline).

²⁵ E.g., *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307 (6th Cir. 2007).

²⁶ The three indicators are from the lead decision for the qualitative approach. *Reid v. District of Columbia*, 401 F.3d 516 (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.

²⁷ *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 22, at 665 n.89.

²⁸ E.g., *M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996).

²⁹ E.g., *D.G. v. Flour Bluff Indep. Sch. Dist.*, 832 F. Supp. 2d 755 (S.D. Tex. 2011) (qualitative approach yielding result that approximates quantitative approach), *vacated*, 481 F. App'x 887 (5th Cir. 2012).

³⁰ E.g., *Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, (9th Cir. 1994).

³¹ Reflecting the relatively fluid rather than clearly settled state of the relevant law, some cases in the Sixth and Third Circuits have tended toward this relaxed alternative. E.g., *Woods v. Northport Sch. Dist.* 487 F. App'x 968 (6th Cir. 2012); *B.H. v. W. Clermont Bd. of Educ.*, 788 F. Supp. 2d 682 (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).