AGENDA

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
IDEA TRAINING FOR ADMINISTRATIVE HEARING COMMISSIONERS

WEDNESDAY, OCTOBER 2, 2024

8:30 a.m. – 9:00 a.m.	*Open Session – Deusdedi Merced, Esq.* The Administrative Hearing Commissioners will be given the opportunity to ask questions and discuss issues/problems they have encountered while presiding over IDEA hearings since we last met.
9:00 a.m. – 9:30 a.m.	*Independent Educational Evaluations (IEE)* The basic provisions governing IEEs under IDEA will be reviewed, as well as permissible school district policies governing IEEs.
9:30 a.m. – 11:30 a.m.	*Managing IDEA's Timelines* This session will review IDEA's various hearing related timelines, appropriate practices for adjusting the resolution meeting period timeline, when mediation is available and its effects on the timeline, and other timeline related requirements of the DESE and in the MO State Plan. In addition, the requirements governing the granting of continuances or extensions of the timeline will be reviewed.
11:30 a.m. – 1:30 p.m.	*Framework to Consider in Determining a Compensatory Education Remedy* This session will review the standards governing an award of compensatory education services under the IDEA and outline a framework that can assist the Commissioners in determining a compensatory education remedy.

INDEPENDENT EDUCATIONAL EVALUATION ISSUES UNDER THE IDEA

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
IDEA TRAINING FOR ADMINISTRATIVE HEARING COMMISSIONERS

WEDNESDAY, OCTOBER 2, 2024

PRESENTED BY DEUSDEDI MERCED, ESQ.

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Parents of children with disabilities frequently obtain independent educational evaluations (IEEs). They also frequently ask for public funding for IEEs. Disputes over IEEs are a challenging component of many due process hearings, so the law on the topic is of importance to impartial hearing officers (IHOs). This outline discusses:

- Relevant Provisions of the Individuals with Disabilities Education Act, the Federal Regulations, and Missouri Statutes and Regulations
- The essentials of the right to an IEE
- Bases for obtaining publicly funded IEEs
- Procedures for obtaining publicly funded IEEs
- Uses of IEEs
- Remedies in IEE cases

The IDEA and the Federal Regulations

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, a state educational agency, state agency, or local educational agency (typically a school district) that receives federal special education funding must provide, "An opportunity for the parents of a child with a disability . . . to obtain an independent educational evaluation of the child." 20 U.S.C. § 1415(b)(1). The procedural safeguards notice furnished to parents must explain the statutory and regulatory provisions relating to independent educational evaluations. *Id.* § 1415(d)(2)(A); *see also* 34 C.F.R. § 300.504(c)(1).

Under the federal regulation, an IEE is "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.F.R. § 300.502(a)(3)(i). School districts and other public agencies have to afford parents of children with disabilities the right to obtain an IEE. *Id.* § 300.502(a)(1). The agency has to provide the parents who make a request for

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independent evaluation the information they need about where to obtain the evaluation and the agency's criteria that apply to IEEs. *Id.* § 300.502(a)(2).

Parents may have the right to an educational evaluation at public expense. "Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with [34 C.F.R.] § 300.103," one of the regulations interpreting the requirement to provide free, appropriate public education (FAPE). *Id.* § 300.502(a)(3)(ii). The federal regulation on educational evaluation at public expense provides:

> Parent right to evaluation at public expense.
>
> (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.
>
> (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—
>
> (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
>
> (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.
>
> (3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.
>
> (4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.
>
> (5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

Id. § 300.502(b).

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The section of the federal regulation covering "agency criteria" that apply to IEEs at public expense states:

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

Id. § 300.502(e).

Independent educational evaluations requested by hearing officers as part of a hearing on a due process complaint must also be at public expense. *Id.* § 300.502(d).

Publicly funded or not, the IEE has to be considered by the school district and may be used in a due process hearing and state level appeal:

> Parent-initiated evaluations.
>
> If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation—
>
> (1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and
>
> (2) May be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child.

Id. § 300.502(c).

The Missouri State Plan for Special Education (State Plan) has a number of provisions that bear on independent educational evaluations, *see*, *e.g.*, State Plan, § V(B) (Procedural Safeguards / Discipline) (March 2022), p. 62, and said regulations harmonize with the federal requirements regarding independent evaluations at public expense. The State Plan also includes additional requirements that are consistent with interpretations from the U.S. Department of Education Office of Special Education Programs (OSEP) and federal district court decisions. These include:

> (4) If the responsible public agency has a policy regarding reimbursement for independent evaluations, that policy will specify the factors to be considered in

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the determination of public funding for the evaluation. That determination should be based on:

> a. The qualifications and locations of the evaluators, and
> b. The cost of the evaluation.

The public agency may only impose limitations on the cost of an IEE if the agency uses those same limitations when conducting an evaluation. If a public agency uses such cost limitations, it must ensure that its procedures require payment for an IEE at a higher rate if an appropriate IEE cannot, in light of the student's unique needs and other unique circumstances, be obtained within those cost limitations. If the cost of an IEE at public expense exceeds the agency's cost limitations, the public agency must either:

> a. Initiate a due process hearing or
> b. Pay the full cost of the IEE.

(5) If the responsible public agency has a policy regarding reimbursement for independent evaluations and that policy establishes allowable maximum charges for specific tests or types of evaluations, the maximum set will still enable parents to choose from among qualified professionals in the area and will result only in the elimination of excessive fees. The policy shall specify that the responsible public agency will pay the fee for the independent evaluation up to the maximum established. Additionally, the policy will anticipate that a student's "unique circumstances" may justify an evaluation that exceeds the allowable cost criteria.

(6) If the responsible public agency has no policy which sets maximum allowable charges for specific tests or types of evaluation, then the parents will be reimbursed for services rendered by a qualified evaluator.

Id.

The Essentials of the Right to an IEE

The right to an IEE exists against a background of duties on the part of public school authorities to evaluate all children suspected of having disabilities. A public agency has to conduct a comprehensive evaluation, using a variety of assessment tools and strategies to obtain relevant functional, developmental, and academic information about the child. Information obtained through the evaluation is to assist in determining whether the child is a child with a disability as well as determining the content of an eligible child's IEP to enable the child to be involved in, and make progress in, the general education curriculum. 34 CFR § 300.304(b)(1). The public agency must ensure that each child is assessed in all areas related to the suspected disability, including as appropriate, academic performance. 34 CFR § 300.304(c)(4). Nevertheless, "There is no provision in the IDEA that gives a parent the right to dictate the specific areas that the public agency must assess as part of the comprehensive evaluation; the public agency is only required to assess the child in particular areas related to the child's suspected

disability, as it determines appropriate." *Letter to Unnerstall*, 68 IDELR 22 (OSEP Apr. 25, 2016). "However, if a determination is made through the evaluation process that a particular assessment for dyslexia is needed to ascertain whether the child has a disability and the child's educational needs, including those related to the child's reading difficulties, then the public agency must conduct the necessary assessments." *Id.*

A court has emphasized that access to school district evaluations are critical to the ability of parents to exercise their IDEA right to an independent evaluation, and that the information has to be made available to the parents early enough for them to obtain an IEE:

> The right to examine a district's evaluations undergirds the parents' right to request an independent evaluation if they disagree. In order for these rights to be effectuated, they need to be available far enough in advance of the school year for the independent evaluation to be conducted and reviewed by the [IEP] team. By failing to provide a copy of R.Y.'s evaluation until the May 2012 [IEP] meeting was already underway, the DOE violated the Parents' right to be involved in the IEP decisionmaking.

S.Y. v. New York City Dep't of Educ., 210 F. Supp. 3d 556, 569, 68 IDELR 230 (S.D.N.Y. 2016) (citation omitted) (finding violation not sufficient to invalidate IEP in light of other steps taken to inform parents).

The IDEA regulations contain extensive provisions on evaluations and reevaluations at 34 C.F.R. § 300.301-.311. Beyond the authorities requiring or withholding public funding for independent evaluations considered below, there is an abundance of case law concerning what constitutes an adequate evaluation. For a discussion of the topic, see Mark C. Weber, *"All Areas of Suspected Disability,"* 59 Loy. L. Rev. 289 (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235090.

Parents are, of course, free to have evaluations done on their children independently of the public school's IDEA evaluation process. When parents undertake such an evaluation, the school authorities must consider the evaluation in making special education eligibility, program, and placement decisions, even if the district has done its own evaluation, as long as the independent evaluation meets the criteria set by the district. *See* 34 C.F.R. § 300.502(c)(1). *See generally T.S. v. Bd. of Educ. of the Town of Ridgefield*, 10 F.3d 87, 20 IDELR 889 (2d Cir. 1993); *M.Z. v. New York City Dep't of Educ.*, No. 12 CIV. 4111, 2013 WL 1314992, at *5 (S.D.N.Y. 2013), *appeal dismissed*, No. 13-1508 (2d Cir. June 17, 2013). As indicated above, the evaluation may also be used as evidence in a due process or review proceeding. *Id.* § 300.502(c)(2). The criteria for the IEE have to be the same as the criteria that the school district uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an IEE. *Id.* § 300.502(e)(1). An evaluation is deemed independent if conducted by an examiner who is qualified and not employed by the public agency responsible for the education of the child. *Id.* § 300.502(a)(3)(i).

As noted above, parents may demand an IEE at public expense if they disagree with the public school's evaluation of their child. *Id.* § 300.502(b)(1). The school district

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may avoid paying for the IEE only if it requests a due process hearing and establishes at the hearing that its evaluation was appropriate. *Id.* § 300.502(b)(3). A federal court of appeals has upheld the regulation requiring school districts and other public agencies to fund IEEs when the parents disagree with the public school's evaluation and the public agency fails to request a due process hearing and show that its evaluation is appropriate. In *Philip C. v. Jefferson County Board of Education*, 701 F.3d 691, 60 IDELR 30 (11th Cir. 2012), the court held that the regulation requiring that an IEE be at public expense if the specified conditions are met was a valid exercise of the Department of Education's rulemaking power, even though the right to funding was not specifically listed in the IDEA's text.

The regulation on IEEs at public expense does not clarify which parent prevails when one demands the IEE and the other objects. The Second Circuit ruled that a parent's whose parental rights to participate in her daughter's education had been revoked by a Vermont family court lacked standing to invoke due process on a demand she made for an IEE when the parent with the right to educational decision making disagreed. *Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768 (2d Cir. 2002) (Sotomayor, J.).

The regulation does not require notice to the district before the parent who disagrees with the district evaluation obtains the IEE and seeks reimbursement, and courts have required reimbursement when the parents did not give notice before hiring the evaluator and incurring the cost. *E.g., Warren G. v. Cumberland Cnty. Sch. Dist.*, 190 F.3d 80, 31 IDELR 27 (3d Cir. 1999) (not requiring parents to express disagreement with district's evaluation before getting IEE for child); *Hiller v. Board of Educ.*, 687 F. Supp. 735, 441 IDELR 194 (N.D.N.Y. 1988). The school district or other public agency may ask the parent about the reason for disagreement with the school's evaluation, but the parent does not have to answer, and the district must not delay in providing the IEE or filing the due process hearing request. 34 CFR § 300.502(b)(4). A written statement of the nature of the disagreement cannot be required, nor is the request for the publicly funded IEE subject to consideration by the IEP team. *Letter to Anonymous*, 55 IDELR 106 (OSEP Jan. 4, 2010) ("While it is reasonable for a public agency to require that it be notified prior to the parent obtaining an IEE at public expense, it is inconsistent with 34 CFR § 300.502 to deny reimbursement prior to discussion of the district's evaluation at an IEP meeting, or to require the parent to provide a written statement of its disagreement with the district's evaluation, or to provide notice of their request for an IEE in an IEP team meeting for consideration by the IEP team.").

As stated above, school district or the other relevant public agency criteria for evaluations must be followed with regard to publicly funded IEEs. *Letter to Savit*, 67 IDELR 216 (OSEP Jan. 19, 2016) ("[U]nder 34 CFR § 300.502(e), if an IEE is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an IEE."). But a school district must not restrict the providers of IEEs to a set list, and must give parents the chance to show that unique circumstances require choosing an evaluator who does not meet school district criteria.

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Letter to Parker, 41 IDELR 155(OSEP 2004) ("[W]hen enforcing IEE criteria, the district must allow parents the opportunity to select an evaluator who is not on the list but who meets the criteria set by the public agency. In addition, when enforcing IEE criteria, the district must allow parents the opportunity to demonstrate that unique circumstances justify the selection of an evaluator that does not meet agency criteria.").

School districts or other public agencies may set cost caps for IEEs at public expense. *See M.V. v. Shenendehowa Cent. Sch. Dist.*, No. 1:11-CV-0070, 2013 WL 936438, 60 IDELR 213 (N.D.N.Y. Mar. 8, 2013) (noting that parents failed to contact several experts in area who would perform requested evaluation for less than cap set by district); *Shafi A. v. Lewisville Indep. Sch. Dist.*, 69 IDELR 66 (E.D. Tex. 2016) (rejecting the parents' argument that their child was denied FAPE when the school district declined to pay for an IEE because the fee charged by the independent evaluator significantly exceeded the district's fee schedule). The Office of Special Education Programs has cautioned, however:

> The denial of an IEE based solely on financial cost would be inconsistent with 34 CFR § 300.502. To avoid unreasonable charges for IEEs, the school district may establish maximum allowable charges for specific tests. When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's criteria. If an IEE that falls outside the district's criteria is justified by the child's unique circumstances, that IEE must be publicly-funded. If the total cost of the IEE exceeds the maximum allowable costs and the school district believes that there is no justification for the excess cost, the school district cannot in its sole judgment determine that it will pay only the maximum allowable cost and no further. The public agency must, without unnecessary delay, initiate a hearing to demonstrate that the evaluation obtained by the parent did not meet the agency's cost criteria and that unique circumstances of the child do not justify an IEE at a rate that is higher than normally allowed.

Letter to Anonymous, 103 LRP 22731 (OSEP 2002).

A parent is entitled to only one IEE at public expense each time the school district or other public agency conducts an evaluation with which the parent disagrees. 34 C.F.R. § 300.502(b)(5). The limit of one school district reevaluation per year, 34 C.F.R. § 300.303(b)(1), does not apply to independent evaluations at public expense. *Meridian Joint Sch. Dist. No. 2 v. D.A.*, No. 1:11-cv-00320-CWD, 60 IDELR 282 (D. Idaho Mar. 20, 2013), *aff'd*, 792 F. 3d 1054, 65 IDELR 253 (9th Cir. 2015).

School districts may not limit the amount of time that independent evaluators spend with the child in completing the evaluation. *See Letter to Anonymous*, 72 IDELR 251 (OSEP Aug. 23, 2018) ("[I]t would be inconsistent with the right of a parent to have an IEE considered by the public agency for a public agency to limit an independent evaluator's access in a way that would deny the independent evaluator the ability to conduct an evaluation in a way that meets agency criteria. Such criteria would include

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the amount of time that the independent evaluator spends with the child.”). Other restrictions on independent evaluators may also run afoul of the federal law. *See School Bd. of Manatee Cnty. v. L.H.*, No. 8:08–cv–1435–T–33MAP, 2009 WL 3231914, 53 IDELR 149 (M.D. Fla. Sept. 30, 2009) (ruling that not permitting private psychologist conducting IEE to make observations in classroom violated IDEA; affirming order that observation at least two hours long be allowed).

Requesting an IEE at public expense does not by itself trigger the right to maintenance of placement (i.e., stay-put) under 20 U.S.C. § 1415(j). *See Letter to Anonymous*, 72 IDELR 163 (OSERS June 28, 2018) (“It is important to note that the parent’s request for an IEE alone would not require the school district to continue the child’s current educational placement unless a due process complaint was filed in the matter. If the public agency agrees to a parent’s request for an IEE it may either delay the issuance of the prior written notice until the IEE has been completed and reviewed by the IEP Team or it may issue the prior written notice within a reasonable time and discontinue special education services, pending the completion and review of the IEE.”).

Bases for Obtaining Publicly Funded IEEs

The ordinary basis for obtaining a publicly funded IEE is that the school district’s evaluation is not appropriate. For example, in *Rose Tree Media Sch. Dist. v. M.J.*, No. 18-CV-1063, 2019 WL 1062487, 74 IDELR 15 (E.D. Pa. Mar. 6, 2019), the court considered the case of a high school student with various disorders but with top grades, whose grades deteriorated as she became frequently absent from school. She received an evaluation by a school psychologist that covered a cognitive assessment, academic achievement testing, social, emotional and behavior scales, teacher input, observations, and a records review, which resulted in a finding that she was not eligible for IDEA services on the ground that she did not need specialized instruction despite her mental health needs. The court affirmed a hearing officer ruling that the district failed to evaluate her in all areas of suspected disabilities in a manner that properly considered all of her special education needs, and thus an independent evaluation at public expense should be provided. The court noted that the district did not evaluate the student or consider her eligibility under the other health impairment (OHI) category when there appeared to be no dispute that OHI was an area of suspected disability, and the district did not sufficiently explain why the student did not meet the emotional disturbance classification despite many indicators. *See also Letter to Baus*, 65 IDELR 81 (OSEP Feb. 23, 2015) (“When an evaluation is conducted in accordance with 34 CFR §§ 300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs.”).

A court has ruled that specific deficiencies as to individual assessments by the district result in an entitlement to a publicly funded IEE in all relevant areas, even those in which the assessments were sufficient. In *Jones-Herrion v. District of Columbia*, No. CV 18-2828, 2019 WL 5086693, 75 IDELR 92 (D.D.C. Oct. 10, 2019), the school system performed only four of the five assessments it agreed to do when evaluating a seventh grader for eligibility for special education. Of the four, the district could defend only

three before the special education hearing officer. The five areas were assistive technology; occupational therapy; speech/language; functional behavior; and comprehensive psychological. The parents asked for funding for an IEE that would cover all five assessments, and in litigation the school system agreed to fund an IEE for the one assessment that it did not perform (the assistive technology assessment) and the one it could not defend (the occupational therapy assessment, which was conducted by a therapist who could not attend the hearing). The court granted the parents' motion for summary judgment, awarding payment for all five assessments. The court ruled that when an IEE is requested the district must defend the appropriateness of the evaluation as a whole, and that the hearing officer erred in finding that the partial evaluation by the school system was appropriate. The court stated: "Congress recognized that assessments cannot be separated from the evaluation which they inform. Here, DCPS determined which assessments were needed to evaluate K.H. but failed to perform them all or even to defend successfully all of those it did perform. Without necessary assessments, its evaluation was clearly deficient. IDEA entitles K.H. to a publicly funded independent educational evaluation, and therefore entitles her to all of the independent assessments necessary to formulate that evaluation." *Id.* at *4.

Similarly, in *D.S. v. Trumbull Board of Education*, 975 F.3d 152, 77 IDELR 122 (2d Cir. 2020), the Second Circuit held that a functional behavioral assessment (FBA) that the parent disagrees with does not trigger a parent's right to an IEE at public expense. The case involved a student with ADHD and signs of developmental and behavioral disorders, such as autism. He entered fifth grade in 2013 and as of 2014 was served in a therapeutic day school. He received a comprehensive triennial reevaluation in October 2014, which reported a decline in his abilities and performance. He was scheduled for another reevaluation in October 2017. In addition, his parents and the school agreed to conduct a functional behavioral assessment (FBA) for him in the spring of each year. The school conducted the annual FBA in March 2017, but the parents contested the adequacy of both the 2017 FBA and the 2014 comprehensive evaluation. They sought an IEE at public expense as to behavior and all other areas of the student's disability. They also sought to withdraw their consent for the comprehensive reevaluation scheduled for October 2017. The school refused the requests and filed for due process to challenge the request for an IEE at public expense. The hearing officer denied the parents' request for a publicly funded IEE that addressed non-behavioral concerns. The hearing officer granted the parents an independent assessment of the student's behavior at public expense, though apparently the hearing officer also ruled that the request was mooted by the district's agreement to pay for the independent FBA. *Id.* n.6. The parents filed suit in district court. That court found that the school waived any argument that the FBA is not an evaluation triggering the publicly funded IEE right, but it affirmed the hearing officer's decision that denied the request for an IEE that would exceed the scope of the behavioral assessment. The district court also ruled that any disagreement with the 2014 evaluation could no longer be pursued due to the two-year statute of limitations. The court of appeals vacated the judgment, reversed the decision, and remanded. Despite a concession by the defendant, the Second Circuit panel ruled that an FBA, by itself, is not an evaluation for purposes of the parent's right to an IEE at public expense. The opinion reasoned that the relevant section of the IDEA established just two types of evaluations: initial evaluations and reevaluations. The court

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declared that an FBA, standing alone, is neither an initial evaluation nor a reevaluation because it lacks the comprehensiveness the statutory definition requires. The court disagreed with district court caselaw and U.S. Department of Education policy letters (*see*, *e.g*., *Letter to Christiansen*, 48 IDELR 161 (OSEP 2007); *Letter to Scheinz*, 34 IDELR 34 (OSEP 2000)) that state that insufficient FBAs support the right to a publicly funded IEE. The court did identify a different option for parents: "Rather than demand a comprehensive IEE at public expense in response to this targeted assessment of D.S.'s behavior, the parents could have requested that the school conduct another reevaluation of D.S. . . . [I]f the new evaluation and its suggestions came up short, then D.S.'s parents could have voiced their disagreement and obtained the publicly funded comprehensive evaluation they seek in this case." *Id*. at 167.

In any instance, when the parents' IEE request challenges the entirety of a school district's evaluation or reevaluation, it is error for the hearing officer to focus only on the specific assessments that were performed and not consider whether further assessments were needed. *L.D. v. Anne Arundel Pub. Schs*., No. CV CCB-18-1637, 2019 WL 6173818, 119 LRP 44337 (D. Md. Nov. 20, 2019) (stating that evidence should have been allowed regarding the failure to assess student for learning disability when parents' IEE request stated disagreement with triennial evaluation as a whole, but ALJ decided that hearing would focus only on reading, writing, math, pragmatic language, and social emotional development assessments; remanding case to hearing officer).

Parents' rights to a publicly funded IEE do not hinge on the school district's failure to cure defects in the school's evaluation. In other words, there is no safe harbor in which a district may try to fix inadequacies of the evaluation; the district must demand the hearing or pay for the IEE. *See Letter to Carroll*, 68 IDELR 279 (OSEP Oct. 22, 2016) ("The IDEA affords a parent the right to an IEE at public expense and does not condition that right on a public agency's ability to cure the defects of the evaluation it conducted prior to granting the parent's request for an IEE. Therefore, it would be inconsistent with the provisions of 34 CFR § 300.502 to allow the public agency to conduct an assessment in an area that was not part of the initial evaluation or reevaluation before either granting the parents' request for an IEE at public expense or filing a due process complaint to show that its evaluation was appropriate.").

Similarly, the right to the publicly funded evaluation does not depend on the district's evaluation having resulted in a finding of IDEA eligibility for the child. *See Letter to Zirkel*, 74 IDELR 142 (OSEP May 2, 2019) ("Question 1: Does the parent have the right to obtain an IEE at public expense if the child is evaluated under IDEA and found not to be a child with a disability in need of special education and related services? Answer: Yes. Under 34 C.F.R. § 300.502(a), the parents of a child with a disability have the right under Part B of IDEA to obtain an IEE, subject to 34 C.F.R. § 300.502(b) through (e). Under 34 C.F.R. § 300.15, the term 'evaluation' means the procedures used in accordance with 34 C.F.R. §§ 300.304 through 300.311 to determine whether a child has a disability (emphasis added), and the nature and extent of the special education and related services that the child needs. Because the definition of evaluation includes eligibility determinations under IDEA, we believe an IEE can be obtained after an initial evaluation regardless of whether the child was found eligible as

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a child with a disability, if the parent disagrees with the initial evaluation obtained by the public agency, subject to certain conditions. 34 C.F.R. § 300.502(b)(1). The right to an IEE at public expense, therefore, would extend to parents who suspect their child might be a child with a disability and who disagree with the initial evaluation obtained by the public agency.").

When the district demonstrates at hearing that its evaluation is appropriate, payment for a parent's IEE is denied; a parent is not entitled to an IEE when the district has properly assessed a child in all areas related to the child's suspected disability. *R.Z.C. v. North Shore Sch. Dist.*, 755 F. App'x 658, 118 LRP 50704 (9th Cir. 2018) (finding evaluation appropriate when it did not omit needed information, but instead included results of student's cognitive, attention, social, emotional, medical, and physical assessments, as well as general education teacher reports, parent input, past and current grades, progress measurements, teacher observations, psychologist's report, specific assessment results, and transition assessment, minor omission was harmless, and classroom observation was adequate); *Avila v. Spokane Sch. Dist. 81*, 686 F. App'x 384, 69 IDELR 204 (9th Cir. 2017) (affirming district court decision that denied independent evaluation at public expense, stating that district assessed child in all areas related to his suspected disability when it gave him battery of tests for reading and writing deficiencies, including many of same tests parent's private evaluator used).

Minor deficiencies in the district's evaluation do not justify public funding for the parent's IEE. In *B.G. v. City of Chicago Sch. Dist. 299*, 901 F.3d 903, 72 IDELR 231 (7th Cir. 2018), the court affirmed the district court's denial of a motion to overturn a hearing officer decision rejecting a request for independent educational evaluations at public expense for a teenager with medical conditions and emotional and learning disabilities. The court reasoned that substantial evidence supported the hearing officer's decision that the school district's evaluations were appropriate. Regarding the district's psychological evaluation, the court held that the district's evaluators were qualified, that errors in test administration were harmless, that testing in English was appropriate for the student, that support for the recommended emotional disability classification was adequate, and that the evaluators considered the possibility of ADHD. The court further said that the belief of the evaluator that the student did not have a learning disability did not cause harm when the student was classified as having a learning disability and provided access to audiobooks and a multisensory approach to decoding. The court also found the occupational therapy evaluation sufficient. It ruled that the social work evaluation was adequate though it did not include a home visit, and that the functional behavioral assessment was sufficient. With regard to the physical therapy evaluation, the court found that the hearing officer's error about the evaluator's finding of pain was harmless. As to the speech and language evaluation, the court affirmed that the evaluator's loss of test protocols was harmless when the evaluator had them at the meeting on eligibility and the findings had additional corroboration.

Courts have ruled that for the parent to have a right to a publicly funded IEE, there has to be a district evaluation for the parent to disagree with. *G.J. v. Muscogee Cnty. Sch. Dist.*, 668 F.3d 1258, 1266, 58 IDELR 61 (11th Cir. 2012) ("The district court correctly determined that the statutory provisions for a publicly funded independent

educational evaluation never kicked in because no reevaluation ever occurred. The right to a publicly funded independent educational evaluation does not obtain until there is a reevaluation with which the parents disagree."). This principle applies when the parent withholds consent to the public school evaluation, which prevents the district's evaluation from taking place. *Id.*; *see also M.S. v. Hillsborough Twp. Pub. Sch. Dist.*, No. 19-1510, 2019 WL 6817169, 75 IDELR 212 (3d Cir. Dec. 13, 2019) (unpublished).

In one case, however, a court held that parents might be able to obtain district funding for an IEE by contesting an earlier evaluation that was still within the limitations period, while refusing consent to a later evaluation; but in that instance, said the court, the hearing on the district's earlier evaluation and the IEE, if ordered, would have to relate to the time period of the earlier evaluation. *N.D.S. v. Academy for Sci. & Agric. Charter Sch.*, No. 18-CV-0711, 2018 WL 6201725, 73 IDELR 114 (D. Minn. Nov. 28, 2018). Nevertheless, a court has ruled that when the evaluation with which the parent disagrees is obsolete because it took place too long ago, requiring a district to provide an IEE at public expense is futile because it will not aid in the parents' assertion of the child's right to FAPE. *See T.P. v. Bryan Cnty. Sch. Dist.*, 792 F.3d 1284, 1293, 65 IDELR 254 (11th Cir. 2015) ("The parental right to an IEE is not an end in itself; rather, it serves the purpose of furnishing parents with the independent expertise and information they need to confirm or disagree with an extant, school-district-conducted evaluation. The evaluation in connection with which Parents sought an IEE at public expense—the 2010 initial evaluation of T.P.—is no longer current because more than three years have passed since September 2010. Regardless of the merits of Parents' case, ordering an IEE at public expense in these circumstances would be futile because the District cannot be forced to rely solely on an independent evaluation conducted at the parents' behest.") (citations and internal quotation marks omitted).

A court has also ruled that there is no entitlement to a publicly funded IEE if the parent has no actual disagreement with the district's evaluation. *M.C. v. Katonah/Lewisboro Union Free Sch. Dist.*, No. 10 CV 6268(VB), 2012 WL 834350, at *11 (S.D.N.Y. Mar. 5, 2012) ("[P]arent's claim depends on whether the Flaum evaluation was obtained because she disagreed with a district evaluation within the meaning of that statute."); *see also R.L. v. Plainville Bd. of Educ.*, 363 F. Supp. 2d 222, 43 IDELR 57 (D. Conn. 2005) (stating that parents seeking IEE did not disagree with the district's evaluation, but merely desired additional evaluation).

Nevertheless, in various cases, courts have required IEE reimbursement for parents when school districts have improperly failed to evaluate children for suspected disabilities, and so no district evaluation exists. *See, e.g., A.S. v. Norwalk Bd. of Educ.*, 183 F. Supp. 2d 534, 36 IDELR 92 (D. Conn. 2002) (requiring reimbursement for evaluation when district did not conduct educational assessment before proposing movement of child to non-mainstreamed setting); *J.P. v. Anchorage Sch. Dist.*, 260 P.3d 285, 57 IDELR 169 (Alaska 2011) (affirming order that parents be reimbursed for independent evaluation when parents requested evaluation of child and district did not act within 45 school days, and even though ultimately child was not found eligible for special education,; noting that right to publicly funded IEE does not depend on eligibility, and that district made use of private evaluation); *see also J.G. v. Douglas*

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Cnty. Sch. Dist., 552 F.3d 786, 51 IDELR 119 (9th Cir. 2008) (reversing decision to refuse full reimbursement of private evaluations of twins with autism when district did not promptly evaluate twins after special education referral, even though parents refused to share private evaluations with school district).

Of course, there may be disputes over just what constitutes an evaluation with which the parents can disagree, for purposes of the parents' entitlement to a publicly funded IEE. In *Haddon Township School District v. New Jersey Department of Education*, No. A-1626-14T4, 2016 WL 416531 (N.J. App. Div. Feb. 4, 2016), the New Jersey Appellate Division ruled that under the federal regulations, a review of existing data constitutes an evaluation with which parents may disagree so as to entitle them to an IEE at public expense. *See id.* at *3 ("[T]he School District also seeks to define an evaluation as 'something more than a review of data.' The federal regulation does not support this interpretation. Evaluations are defined as procedures used 'to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.' 34 C.F.R. § 300.15 (2016)."). *F.C. v. Montgomery County Public Schools*, No. TDC-14-2562, 2016 WL 3570604, 68 IDELR 6 (D. Md. June 27, 2016), took a contrary view. It stated, "[I]t is evident that the May 2012 meeting was not an evaluation under 34 C.F.R. § 300.502(b). The meeting consisted of reviewing 2009 assessment data, report card data, and teacher observations." *Id.* at *3. The Office of Special Education programs has issued a letter stating that a request for an IEE at public expense made "early during" the Response to Intervention process is not subject to reimbursement "because the district has not completed an evaluation." *Letter to Zirkel*, 52 IDELR 77 (OSEP Dec. 11, 2008).

The federal regulation provides that when the IHO orders an independent evaluation, it must be at public expense. 34 C.F.R. § 300.502(d). Circumstances in which an IHO may order the evaluation will vary, but one court has ruled that a hearing officer may need to order an independent educational evaluation to determine specific deficits due to the denial of appropriate education and what compensatory services will remedy them. *Butler v. District of Columbia*, 275 F. Supp. 3d 1, 5, 70 IDELR 149 (D.D.C. 2017) ("A hearing officer who finds that he needs more information to make such an individualized assessment [of needs for compensatory education due to denial of FAPE] has at least two options. He can allow the parties to submit additional evidence to enable him to craft an appropriate compensatory education award . . . , or he can order the assessments needed to make the compensatory education determination, . . . In the end, he must solicit the evidence necessary to determine the student's 'specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits.' What he cannot do is what the hearing officer did here, that is, outright reject an award for compensatory services and terminate the proceedings.") (citations omitted).

<u>Procedures for Obtaining Publicly Funded IEEs</u>

If a parent requests an IEE at public expense, the school district must, without any unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation was appropriate, or make sure that an IEE is provided at public expense "unless the agency demonstrates in a hearing pursuant to . . . that the

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evaluation obtained by the parent did not meet agency criteria." 34 C.F.R. § 300.502(b)(2). The burden is on the school district to show that its evaluation is appropriate. *Collette v. District of Columbia*, No. CV 18-1104, 2019 WL 3502927, 74 IDELR 251 (D.D.C. Aug. 1, 2019) (ruling that hearing officer incorrectly shifted burden of showing appropriateness of independent evaluation onto parents).

Courts will look at the reason for a school district's delay in requesting the hearing to determine whether reimbursement for the parent is appropriate. In *L.C. v. Alta Loma Sch. Dist.*, 849 F. App'x 678, 680, 78 IDELR 271 (9th Cir. June 8, 2021), the parents requested an independent evaluation regarding the student's visual processing. The district delayed filing for due process from the August 21, 2017, request to December 5, 2017, while asking for justification of a fee in excess of the district's area plan limits. The district court held that the delay was unreasonable, pointing out that the district failed to provide the parents full information on cost maximums and on how much the parents' chosen evaluator exceeded the maximum. The court said that "a district's unreasonable actions during attempts to resolve a dispute with parents regarding an IEE, including the withholding of pertinent information necessary for the parents to defend their position, could fairly amount to 'unnecessary delay' under the particular circumstances of a given case." *Id.* at 866. The Ninth Circuit disagreed. The court of appeals ruled that the district court erred in finding that the school district unnecessarily delayed in providing an IEE or filing a due process complaint to oppose the request, stating: "In this case, the District exchanged numerous emails and letters with Student's parents from August 10, 2017, until it filed for a due process hearing on December 5, 2017. These communications reflect the parties' attempts to reach agreement on Dr. Stephey's IEE and other issues. Indeed, the parties reached agreement on a contested issue as late as December 1. Further, the longest delay in communications, November 17–30, was largely due to the District's Thanksgiving break. The parties reached final impasse on the IEE issue on Thursday, November 30, and the District filed for a due process hearing the following Tuesday, December 5. Thus, we conclude there was no unnecessary delay." *See also Pajaro Valley Unified Sch. Dist. v. J.S.*, No. C 06-0380, 2006 WL 3734289, 47 IDELR 12 (N.D. Cal. 2006) (entering judgment in favor of parent for publicly funded IEE when district lacked justification for waiting 11 weeks before filing due process request challenging demand for IEE and when evidence indicated public school assessment was not adequate).

Parents are entitled to prior written notice when a school district proposes or refuses to initiate or change the evaluation of a child, 20 U.S.C. § 1415(b)(3), but a court found that that provision did not support the parents' claim that they did not receive notice that the district was not going to follow their independent evaluator's conclusions when the district had not made that decision at the time of the notice, but was instead planning a reevaluation in order to review the private psychologist's assessment. *R.Z.C. v. North Shore Sch. Dist.*, 755 F. App'x 658, 660 (9th Cir. 2018). A school district may conduct its own evaluation in addition to one that is privately obtained and is not bound to rely on the privately obtained evaluation. *A.B. v. Lawson*, 354 F.3d 315, 326 & n.4, 40 IDELR 121 (4th Cir. 2004); *Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 24 IDELR 693 (7th Cir. 1996); *V.M. v. North Colonie Cent. Sch. Dist.*, 954 F. Supp. 2d 102, 118 (N.D.N.Y. 2013) ("A parent seeking special education services for their child under the

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IDEA must allow the school to evaluate the student and cannot force the school to rely solely on an independent evaluation.”).

At least one circuit has held that delays in challenging a school district’s evaluation is not subject to IDEA’s statute of limitations. In *D.S. v. Trumbull Board of Education*, 975 F.3d 152, 77 IDELR 122 (2d Cir. Sept. 17, 2020), the Second Circuit held that the IDEA’s two-year statute of limitations for due process complaints does not apply to requests for IEEs at public expense. The court reasoned that the parent does not need to file a due process complaint to obtain a publicly funded IEE. Only if the school fails to accede to the IEE request and does not file a due process complaint would the parents need to file a hearing request, and then the limitations would run from the date of the district’s statutory violation in failing to agree or to file for due process. Hence, the parents’ request for a publicly funded IEE on the ground that the 2014 reevaluation was inadequate was timely because it occurred before October 2017, the date for the next reevaluation. The appropriateness of the 2014 evaluation would be judged on the basis of the child’s condition at that time. The case was thus remanded to the district court to address the 2014 evaluation.

Uses of IEEs

The failure to consider an IEE may result in the denial of FAPE, and that conclusion applies even after a student graduates. In *Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 70 IDELR 113 (5th Cir. 2017), the court considered a case in which a student with schizophrenia and learning disabilities enrolled in private school in Texas pursuant to a settlement agreement with a school district in California regarding the 2012-13 school year. The parent then changed residency at the start of the 2013-14 school year to a Texas school district, keeping the student in the private school in Texas. Although the court held that the Texas district was not obligated to adopt the California IEP nor offer an immediate interim IEP, and could proceed with reasonable promptness to determine the student’s eligibility and needs, the court also held that the Texas district was obligated to reconsider its proposed IEP in light of an independent evaluation even after the student graduated in the spring of 2014. Thus the district denied the student appropriate education from April 24 to the end of the semester, and the court required tuition reimbursement for that period. *But see J.S. v. New York City Dep’t. of Educ.*, 104 F. Supp. 3d 392 (S.D.N.Y. May 6, 2015) (holding that failure to consider 2011 IEE provided by parents was violation of 34 C.F.R. § 300.502(c)(1), but it did not invalidate IEP when later evaluation with similar findings was considered and mother was active participant in IEP meeting who had ability to bring information from 2011 evaluation to committee’s attention), *aff’d*, 648 F. App’x 96 (2d Cir. 2016).

That the district must consider the IEE does not mean that the district has to follow the IEE. In *Mr. P v. West Hartford Board of Education*, 885 F.3d 735, 753, 71 IDELR 207 (2d Cir.), *cert. denied*, 139 S. Ct. 322 (2018), the parents complained that, among other things, the district failed to consider a report from a private neuropsychologist engaged by the parents. The court commented, “While the IDEA required the District to consider this neuropsychological report, the District was not required to implement Dr. Isenberg's suggestions.” *Id.* at 753. Testimony showed that the evaluation was reviewed and commented upon at the relevant IEP meeting. *See also*

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T.S. v. Board of Educ. of Town of Ridgefield, 10 F.3d 87 (2d Cir. 1993) (finding IEE to have been adequately considered); *Y.N. v. Board of Educ. of Harrison Cent. Sch. Dist.*, No. 17-CV-4356, 2018 WL 4609117, 73 IDELR 73 (S.D.N.Y. Sept. 25, 2018) ("It is Defendant's burden to demonstrate which evaluative materials were reviewed during the [IEP] meeting in reaching the terms of the IEP . . . . Ultimately, Plaintiffs are arguing that the [IEP team] did not adopt, or at least give enough credence to, Dr. Tagliareni's recommendation. However, the [IEP team] was not required to do so, and therefore, this cannot establish a procedural violation of the IDEA.") (internal quotation marks and brackets omitted).

If the school district files a due process complaint to request a hearing and the final decision is that the district's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense. 34 C.F.R. § 300.502(b)(3). Hence, the privately funded IEE must be considered by the district and may be used in an IEP meeting or as evidence in a hearing. *See Letter to Zirkel*, 74 IDELR 142, at Question 2 (OSEP May 2, 2019).

<u>Remedies in IEE Cases</u>

Reimbursement is a proper remedy for an improper denial of an IEE at public expense. The reimbursement should be for the full bill, even if the parents made use of third-party payments. *Jason O. v. Manhattan Sch. Dist. No. 114*, 173 F. Supp. 3d 744, 67 IDELR 142 (N.D. Ill. 2016) (requiring reimbursement for full cost of evaluations, not net cost after insurance payments, noting school district's use of evaluations in lieu of its own), *vacated as moot sub nom. Ostby v. Manhattan Sch. Dist. No. 114*, 851 F.3d 677, 69 IDELR 175 (7th Cir. 2017)

Substantial compliance with agency criteria for the evaluation is all that is required for full reimbursement but, as noted above, caps on reimbursement may be imposed as long as there is an opportunity to demonstrate unique circumstances supporting an exemption. These caps may diminish otherwise applicable remedies. *Seth B. v. Orleans Parish Sch. Bd.*, 810 F.3d 961, 67 IDELR 2 (5th Cir. 2016) (in case of child with autism whose parents secured assent from school district for independent evaluation at public expense but whose request for reimbursement was rejected on ground evaluation did not meet state criteria, vacating and remanding decision in favor of school district; holding that substantial compliance with educational agency criteria suffices for reimbursement; applying $3,000 cap in light of failure to respond to opportunity to demonstrate unique circumstances supporting exemption); *see also Collette v. District of Columbia*, No. CV 18-1104, 2019 WL 3502927, 74 IDELR 251 (D.D.C. Aug. 1, 2019) (ruling that parents were entitled to reimbursement of full cost of independent evaluation even though it did not include classroom observation and was more expensive than defendant allowed).

As these cases suggest, remedies in IEE cases in which parents prevail will most likely be either an order to fund a prospective evaluation or an order to reimburse parents for an evaluation that has already taken place. There may, however, be some situations in which other remedies, such as compensatory education or tuition reimbursement could be a proper remedy for an inappropriate school district

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evaluation. In *Letter to Zirkel*, 74 IDELR 142 (OSEP May 2, 2019), OSEP responded to the question,

> In a case where the parent files for a due process hearing to claim a child find violation but either: (a) the district's belated evaluation determines that the child is not eligible under IDEA; or (b) the district never evaluated the child, is the parent deprived of the right to a FAPE-denial remedy (e.g., compensatory education or tuition reimbursement) and to attorneys' fees under the IDEA?

The answer: "The determination of a specific remedy resulting from a due process hearing is made on a case-by-case basis in light of the specific facts of each case at the discretion of the hearing officer. . . ." *Id*. Question 3.

In one recent case, an ALJ ordered an IEE at public expense when a school district failed to comply with a scheduling order in a hearing over the parents' right to the publicly funded IEE; a court subsequently denied the district's motion for preliminary relief on the ground that the district did not have a strong likelihood of success on the merits. *Independent Sch. Dist. No. 720 v. C.L.*, No. 18–CV–00936, 2018 WL 2108205, at *6, 72 IDELR 64 (D. Minn. May 7, 2018) ("[H]ere, the ALJ explicitly found that the District was 'attempting to cause unnecessary delay in either proceeding to hearing or in providing the IEE at public expense.' That, in light of the time–sensitive nature of proceedings under the IDEA, can justify the harsh result of a dismissal with prejudice.") (citation to record omitted) (also finding that ongoing needs of child weighed against stay).

When a parent has requested an IEE at public expense and the hearing officer finds that the district evaluation is not appropriate, relief restricted to a redo or enlargement of the district evaluation is not sufficient. *M.Z. v. Bethlehem Area Sch. Dist.*, No. 11–2313, 2011 WL 2669248, 57 IDELR 5 (E.D. Pa. 2011) (requiring publicly funded IEE, finding that hearing officer committed error of law when, after correctly finding school district's report of evaluation on which it based discontinuance of child's special education to be inappropriate, hearing officer did not order IEE requested by parents but instead ordered expansion and updating of district's evaluation), *aff'd*, 521 F. App'x 74, 60 IDELR 273 (3d Cir. 2013).

An IEE may be needed to determine a proper remedy in a case in which parents establish denial of FAPE. As noted above, an IHO may need to order an IEE where evidence about the scope of compensatory education required to remedy a denial of FAPE is deficient. See *Butler v. District of Columbia*, 275 F. Supp. 3d 1, 5, 70 IDELR 149 (D.D.C. 2017).

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Additional Reference: Mark C. Weber, "Independent Evaluation," *Special Education Law and Litigation Treatise* § 4.5 (LRP Pubs. 4th ed. 2017).

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MANAGING IDEA'S TIMELINES

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
IDEA ADMINISTRATIVE HEARING COMMISSIONER TRAINING

WEDNESDAY, OCTOBER 2, 2024

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I. INTRODUCTION

A. When the parent files a due process complaint, the Individuals with Disabilities Education Act (IDEA)[1] and its implementing regulations[2] require that a final decision be reached and mailed to each of the parties not later than 45 calendar days after the expiration of the 30-day resolution period, or the adjusted time periods described in 34 C.F.R. § 300.510(c).[3]

B. There is no provision requiring a resolution meeting when a local educational agency (LEA) is the complaining party.[4] Since the resolution process is not required when the LEA files a complaint, the 45-day timeline for issuing a written decision begins the day after the parent and

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[1] In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act. *See* Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) ("This chapter may be cited as the 'Individuals with Disabilities Education Act.'").

[2] Implementing regulations followed the reauthorized IDEA in August 2006. *See* 34 C.F.R. Part 300 (August 14, 2006). In December 2008, the regulations were clarified and strengthened in the areas of parental consent for continued special education and related services and non-attorney representation in due process hearings. *See* 34 C.F.R. Part 300 (December 1, 2008). In June 2017, the regulations were further amended to conform to changes made to the IDEA by the Every Student Succeeds Act (ESSA).

[3] 34 C.F.R. § 300.515(a). Parts II through V of this outline focuses on the 45-day timeline and extensions of it, and not on the disciplinary, expedited timelines, which are governed by a different set of rules. Part VI speaks to the expedited timelines. *See infra*.

[4] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46700 (August 14, 2006).

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the state education agency (SEA) receive the LEA's complaint.[5]

C. A hearing officer may grant specific extensions of time beyond the 45-day period at the request of either party.[6] The IDEA does not prescribe a standard for extending the 45-day timeline. Many states, however, enforce a good cause standard, which is subject to the discretion of the hearing officer and any state law/regulation/policy.[7]

II. CALCULATING TIMELINES, IN GENERAL

A. The IDEA defines "day" to mean calendar day, unless indicated otherwise as a business day or school day. A "business day" means Monday through Friday, excluding any Federal or State holidays (unless holidays are specifically included in the designation of business day). A "school day" means any day, including a partial day, in which children, including children with or without disabilities, attend school for instructional purposes.[8]

B. All timelines in the IDEA begin the day after the event. For example, if the timeline is triggered from receipt of a document, the date the document is received is excluded from the calculation.

C. Unless indicated as a business day or school day, the last day of the period is computed even if the last day falls on a weekend day or legal holiday. Calendar day timelines cannot be extended to the next business day when the last day falls on a weekend or holiday. A State's general law of construction (i.e., rollover provision) does not apply.[9]

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[5] *Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Act*, 61 IDELR 232, Question D-2 (OSEP 2013).

[6] 34 C.F.R. § 300.515(c); *see* MO State Plan for Special Education (rev. April 2023) (hereinafter, "State Plan"), p. 80.

[7] *See, e.g.*, *P.J. v. Pomona Unified Sch. Dist.*, 107 LRP 47645 (9th Cir. 2007) (unpublished); *J.D. v. Kanawha County Bd. of Educ.*, 53 IDELR 225 (S.D. W.Va. 2009); *J.R. ex rel. W.R. v. Sylvan Union Sch. Dist.*, 49 IDELR 253 (E.D. Cal. 2008); *Lessard v. Wilton-Lyndborough Cooperative Sch. Dist.*, 47 IDELR 299 (D.N.H. 2007); *O'Neil v. Shamokin Area Sch. Dist.*, 41 IDELR 154 (Pa. Commw. Ct. 2004).

[8] 34 C.F.R. § 300.11.

[9] *Letter to LaCrosse* (OSEP 2018) (unpublished) (on file with author).

III. AMENDING THE DUE PROCESS COMPLAINT

A. New Issues. Under the IDEA, the party requesting the due process hearing may not raise issues at the hearing that were not raised in the complaint, unless the other party agrees otherwise.[10]

B. Amending the Complaint. A party may amend its due process complaint notice only if –

1. the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a resolution meeting; or

2. the hearing officer grants permission. The hearing officer may only grant such permission at any time not later than five (5) calendar days before a due process hearing occurs.[11]

C. Timeline Recommences. When an amended due process complaint is filed, the timelines restart anew, including the resolution meeting timeline.[12]

IV. RESOLUTION PROCESS

A. Resolution Meeting. Prior to the opportunity for an impartial due process hearing, the LEA shall convene a meeting with the parents and the relevant member(s) of the IEP team who have specific knowledge of the facts identified in the due process complaint –

1. within 15 calendar days of receiving notice of the due process complaint;

2. which shall include a representative of the LEA who has decision-making authority on behalf of the LEA;

3. which may not include an attorney of the LEA unless the parent is accompanied by an attorney; and

4. where the parents discuss their due process complaint, and the facts that form the basis of the complaint, and the LEA is provided the opportunity to resolve the complaint.

The resolution meeting is not required when the parents and the LEA agree in writing to waive the meeting or agree to use the mediation process in lieu of the

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[10] 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d).
[11] 20 U.S.C. § 1415(c)(2)(E)(i); 34 C.F.R. § 300.508(d)(3).
[12] 20 U.S.C. § 1415(c)(2)(E)(ii); 34 C.F.R. § 300.508(d)(4).

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resolution process.[13]

B. Agreement. When the parents and the LEA resolve the complaint at the resolution meeting, the parties shall execute a legally binding, written agreement that is –

1. signed by both the parents and a representative of the LEA who has the authority to bind the LEA; and

2. enforceable in any State court of competent jurisdiction or in a district court of the United States.[14]

C. Review Period. Either party may void the signed, written settlement agreement within three (3) business days of the agreement's execution.[15]

D. Timelines

1. 30-day Resolution Period. If the LEA has not resolved the due process complaint to the satisfaction of the parents within 30 calendar days of the receipt of the complaint, the due process hearing may occur.[16]

2. Adjustments to 30-day Resolution Period. The 45-day timeline for the due process hearing starts the day after –

a. both parties agree in writing to waive the resolution meeting;

b. the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; or

c. both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or the LEA withdraws from the mediation process.[17]

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[13] 20 U.S.C. § 1415(f)(1)(B)(i); 34 C.F.R. § 300.510(a).

[14] 20 U.S.C. § 1415(f)(1)(B)(iii); 34 C.F.R. § 300.510(d). Agreements reached outside the resolution meeting(s) or beyond the 30-day timeline, would not be considered an agreement under the resolution process. *See* 34 C.F.R. § 300.510(d). Agreements reached in mediation in lieu of a resolution meeting would be considered mediated agreements under the IDEA. *See* 34 C.F.R. § 300.506(b)(6).

[15] 20 U.S.C. § 1415(f)(1)(B)(iv); 34 C.F.R. § 300.510(e).

[16] 20 U.S.C. § 1415(f)(1)(B)(ii); 34 C.F.R. § 300.510(b)(1).

[17] 34 C.F.R. § 300.510(c). The IDEA specifically lists the circumstances in which the 30-day resolution period can be adjusted in 34 C.F.R. § 300.510(c). The Office of Special Education and Rehabilitative Services (OSERS) for the U.S. Department of

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3. Failure to File with the DESE. The Part B regulations do not address the question on what happens to the resolution period timeline when the parent does not forward a copy of the due process complaint to the SEA. A State, however, can adopt procedures that include a requirement that an LEA or SEA advise the parent in writing that the timeline for starting the resolution process will not begin until the parent provides the LEA *and* SEA with a copy of the due process complaint, as required by 34 C.F.R. § 300.508(a)(2).[18]

   Missouri requires the complainant to file the complaint with the other party and the DESE. However, the State Plan does not specifically address what happens when the complainant only files with the other party.[19]

E. LEA Complainant. There is no provision requiring a resolution meeting when an LEA is the complaining party.[20] Since the resolution process is not required when the LEA files a complaint, the 45-day timeline for issuing a written decision begins the day after the parent and the SEA receive the LEA's complaint.[21]

F. Failure to Participate / Hold Meeting

1. Except where the parties have jointly agreed in writing to waive the resolution process or to use mediation, the failure of the parent to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.[22]

2. When the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and

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Education, however, has said that the parties can agree to extend the resolution timeline beyond the 30 days. *See Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, 76 IDELR 104 (OSERS/OCR March 21, 2020) ("While the IDEA specifically mentions circumstances in which the 30-day resolution period can be adjusted in 34 C.F.R. § 300.510(c), it does not prevent the parties from mutually agreeing to extend the timeline because of unavoidable delays caused by the COVID-19 pandemic.").

[18] *Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Act*, 61 IDELR 232, Question D-5 (OSEP 2013).

[19] *See* State Plan, p. 74.

[20] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46700 (August 14, 2006).

[21] *Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Act*, 61 IDELR 232, Question D-2 (OSEP 2013).

[22] 34 C.F.R. § 300.510(b)(3).

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documented, the LEA may request that the due process complaint be dismissed at the conclusion of the 30-day period.[23]

3. Should the LEA fail to hold the resolution meeting within 15 calendar days of receiving notice of the parent's due process complaint or fails to participate in the meeting, the parent may seek the intervention of the hearing officer to begin the 45-day timeline.[24]

V. EXTENSIONS TO THE 45-DAY TIMELINE

A. In Missouri, the timeline for the hearing officer to render a decision is consistent with the federal timeline.[25] Not all hearings can be heard and decided within the 45-day timeline. Specific extensions of time beyond the 45-day timeline are, therefore, permissible.[26] However, the granting of specific extensions should be done sparingly and, when granted, should be limited in duration. The IDEA's "abbreviated" timeline establishes a clear federal policy that hearings are to be conducted expeditiously.[27]

B. The hearing officer may not extend the timeline on his or her own initiative or pressure a party to request an extension.[28]

C. The scheduling conflicts of the hearing officer are not a good cause basis for extending the 45-day timeline. The same would be true when the request is predicated on vacations, scheduling conflicts of the parties' or their representatives', avoidable witness scheduling, or other similar reasons.

D. Agreement of the parties is generally not considered sufficient basis for granting an extension. It is incumbent upon the hearing officer to find good cause.

E. An indefinite extension is impermissible.[29]

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[23] 34 C.F.R. § 300.510(b)(4).

[24] 34 C.F.R. § 300.510(b)(5).

[25] *See* State Plan, p. 80.

[26] 34 C.F.R. § 300.515(c).

[27] *Engwiller v. Pine Plains Cent. Sch. Dist.*, 110 F. Supp. 2d 236, 33 IDELR 90 (S.D.N.Y. 2000) ("[T]he brevity of the 45-day requirement indicates Congress's intent that children not be left indefinitely in an administrative limbo while adults maneuver over the aspect of their lives that would, in large measure, dictate their ability to function in a complex world.").

[28] 34 C.F.R. § 300.515(c). *See also Letter to Kerr*, 22 IDELR 364 (OSEP 1994).

F. In weighing whether to grant an extension to the decision timeline, the hearing officer should consider the cumulative impact of the following factors, as applicable:

1. Whether the delay in the hearing will positively contribute to, or adversely affect, the student's educational interest;

2. The requesting party's ability to have avoided the necessity for an extension.

3. Whether the requesting party has been afforded a fair opportunity to adequately prepare for the hearing.

4. Whether the requesting party has been afforded a fair opportunity to present its case at the hearing consistent with due process.

5. Any adverse financial or other detrimental consequences likely to be suffered by a party in the event of delay.

6. The negative effects (whether to the student, the school district, or the process) of denying the request for an extension.

7. The intent the IDEA to expedite an informal administrative proceeding.

8. Whether granting the extension will override the intent of the IDEA in favor of the convenience of the parties.

G. The reason for each extension should be documented in the record, and the hearing officer should respond in writing to a request for an extension without delay. The written order should include the facts relied upon, an analysis of the factors considered, and a discussion of the applicable standard. Should the hearing officer grant the request for an extension, the written order should include the hearing dates (or any revisions to the hearing dates), as well as the new decision date.

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[29] *See J.D. v. Kanawha City Bd. of Educ.*, 53 IDELR 225 (S.D.W.V. 2009) (finding that the hearing officer did not abuse his discretion when the hearing officer denied the parent's request for an indefinite continuance).

VI. SETTING HEARING DATES

A. IDEA hearing officers may limit the number of days for the hearing,[30] provided that the parties are afforded a meaningful opportunity to exercise their hearing rights.[31] It is, therefore, important that the hearing officer, when initially scheduling hearing dates, takes great care to appropriately assess the reasonable time necessary to address the matters in the complaint in a fair, efficient and effective manner, and err on the side of caution by scheduling reasonably more time to hopefully avoid setting more dates later in the process. Tabling the discussion on additional dates typically results in greater delays due to the lack of immediate availability of both the parties and the hearing officer at the time of the discussion.

B. The hearing officer should also consider that there are generally two ways to manage the hearing itself. First, the traditional approach of "micromanaging" the evidence as it is introduced. Second, by setting a time in hours that each party must present their case. Like some judges, this could be done at a prehearing conference based upon the issues, their complexity, and other relevant factors. The hearing officer would keep time, considering cross examination and objections. Adjusting the time set for good cause might be necessary. When used, attorneys seem to initially object. But, after the fact, the attorneys almost seem to welcome the "nudge" to be efficient.

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[30] In Missouri, hearings should not last longer than two (2) days unless good cause is shown and documented in the record. *See* State Plan, p. 82.

[31] *Letter to Kane*, 65 IDELR 20 (OSEP 2015); *Letter to Kerr*, 23 IDELR 364 (OSEP 1994). *See also B.S. v. Anoka Hennepin Pub. Sch.*, 799 F.3d 1217, 66 IDELR 61 (8th Cir. 2015) (upholding an ALJ's time limitation of nine hours to present IDEA claims); *B.G. v. City of Chicago Sch. Dist 299*, 69 IDELR 177 (N.D. Ill. 2017) (upholding the hearing officer's use of time limitations on witness testimony and denial of a sixth day of hearing); *L.S. v. Bd. of Educ. of Lansing Sch. Dist.*, 65 IDELR 225 (N.D. Ill. 2015) (noting that hearing officers, "like judges, have the inherent authority to manage hearings to avoid needless waste and delay…, including imposing reasonable time limits where appropriate"). *Cf. S.W. v. Florham Park Bd. of Educ.*, 70 IDELR 46 (D.N.J. 2017) (remanding case for a new due process hearing because ALJ improperly declined to consider the parents' evidence after the parents moved for judgment in their favor after the school district presented its case).

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VII. PRACTICE POINTERS

A. Immediately after being appointed and accepting the appointment, the hearing officer should establish a mechanism by which the parties are required to report back on whether any of the events described in 34 C.F.R. § 300.510(c) require the hearing officer to adjust the resolution period timeline.[32] An effective approach may be to issue an order requiring the parties to provide this information within a prescribed number of days from the occurrence of the event.[33] Alternatively, albeit potentially less effective, would be for the hearing officer to simply "shoot" the parties an email asking to be kept inform.[34]

B. Upon notification that the resolution period has ended, the hearing officer should confirm in writing with the parties his/her understanding of when the 45-day timeline started to run and when the decision must be rendered and mailed to the parties.

C. The hearing officer should also immediately schedule the prehearing conference. Though in Missouri prehearing conferences are optional at the discretion of the Hearing Commissioner,[35] best practice would be to hold a prehearing conference and to do so within five to seven days from the end of the resolution period (or, in the case of a school district filing, from the date of the due process complaint).

D. If the parties anticipate the need for an extension, the hearing officer should encourage/require the parties to submit their request in writing, incorporating the relevant information, as appropriate, pertaining to the

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[32] Pursuant to 34 C.F.R. § 300.515(a), a decision in a due process hearing must be reached and mailed to each of the parties not later than 45 days after the expiration of the 30-day resolution period under 34 C.F.R. § 300.510(b), or the adjusted time periods described in 34 C.F.R. § 300.510(c). Under 34 C.F.R. § 300.510(c), the 45-day timeline for the due process hearing starts the day after one of the following events: (1) both parties agree in writing that no agreement is possible; (2) after either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; or (3) if both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

[33] Inaction by a parent and LEA following the filing of a due process complaint does not toll the 45-day timeline. The timelines regarding due process complaints remain in effect and the hearing officer should contact the parties upon the expiration of the 30-day resolution period for a status report and/or to convene a hearing. *Letter to Worthington*, 51 IDELR 281 (OSEP 2008).

[34] The more structured approach affords the hearing officer a means by which to exact sanctions for the failure to comply with the directive of the hearing officer.

[35] *See* State Plan, p. 81.

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factors discussed above.

E. At the prehearing conference, to the greatest extent possible under the circumstances, once the start date of the 45-day timeline (and, accordingly, the decision date) has been reconfirmed, the hearing officer should work backwards from the 45th day to establish the hearing date(s), taking into consideration the time needed to obtain/receive clarifying information regarding the parties' allegations/response, motions that would need to be filed and addressed in advance of the hearing, the five-business day timeline, anticipated post-hearing memoranda (if any), and the time for the rendering of the decision. At a subsequent prehearing conference, and within 5 to 7 calendar days from the end of the resolution period, confirm the hearing dates and decision date and, as appropriate, adjust the hearing timeline (and any other deadlines, e.g., five-business day disclosure date) to conform to the 45-day timeline when the resolution period has been adjusted. The hearing officer should work backwards from the 45th day to establish the hearing date(s).

   If as a result of this planning process, it becomes clear that the 45-day timeline cannot be met, the process will need to be dramatically compressed. Alternatively, the hearing officer can explore with the parties whether either party (or both) desire(s) an extension of the 45-day timeline, provided that any of the factors noted above do not outweigh the need for an extension.

If, during the prehearing conference (or at any point) it becomes clear to the hearing officer that the granting of an extension has the potential to have a significant adverse educational impact on the student absent the stay-put being adjusted, the hearing officer can condition the granting of any extension on the condition that the parties address the particular concern (e.g., the parties agreeing to a change in the stay put).

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VIII. DISCIPLINE

A. Expedited Hearing. A parent of a child with a disability may challenge the placement decision resulting from a disciplinary removal or the manifestation determination.[36] A local educational agency (LEA) that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may seek to have the child placed in an interim alternative educational setting (IAES).[37] In matters such as these, the parent or LEA must be given an opportunity for an expedited due process hearing, which must occur within 20 school days of the date the complaint is filed.[38] A decision must be made and provided to the parties within 10 school days after the hearing.[39]

B. Resolution Period. A resolution meeting must occur, unless waived in writing by both parties, within seven calendar days of receiving notice of the due process complaint and the due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 calendar days of the receipt of the due process complaint.[40] The resolution period runs concurrent with the hearing period.[41]

C. Sufficiency Challenges and Response. The sufficiency provision in § 300.508(d) do not apply to the expedited due process hearing.[42] Also, a response is not required from the non-filing party.[43]

D. Extensions. A hearing officer has no authority to extend the timeline of an expedited hearing at the request of either party.[44]

E. Waiver. The parties to an expedited hearing cannot mutually waive the expedited timelines.[45] Nor can the parties agree to treat the hearing as a regular hearing.[46]

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[36] 34 C.F.R. § 300.532(a).

[37] 34 C.F.R. § 300.532(a).

[38] 34 C.F.R. § 300.532(c)(1) and (2).

[39] 34 C.F.R. § 300.532(c)(2).

[40] 34 C.F.R. § 300.532(c)(3).

[41] *Letter to Gerl*, 51 IDELR 166 (OSEP 2008).

[42] *See* 34 C.F.R. § 300.532(c) (the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of §§ 300.508(a) through (c)). *See also Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46725 (August 14, 2006).

[43] *See* 34 C.F.R. § 300.532(c).

[44] 34 C.F.R. § 300.532(c). *See also Letter to Snyder*, 67 IDELR 96 (OSEP 2015).

[45] *Letter to Zirkel*, 68 IDELR 142 (OSEP 2016).

[46] *See Letter to Snyder*, 67 IDELR 96 (OSEP 2015).

F. Bifurcation. A hearing officer has discretion to hear only those issues identified by IDEA as proper for expedited hearings under the expedited timelines, leaving all other issues to be heard under the timelines governing non-expedited hearings.[47]

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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 PRESENTERS ARE NOT RENDERING LEGAL ADVICE TO THE PARTICIPANTS.

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[47] *Letter to Snyder*, 67 IDELR 96 (OSEP 2015).

COMPENSATORY EDUCATION:
A FRAMEWORK TO AID THE ALJ IN CRAFTING AN AWARD

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
IDEA ADMINISTRATIVE HEARING COMMISSIONER TRAINING

WEDNESDAY, OCTOBER 2, 2024

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I. INTRODUCTION

A. This outline provides a framework to aid the administrative law judge (ALJ) 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,

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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*, 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*

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"[c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court [and/or ALJ] 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 IDEA hearing officers / ALJs do have the authority to award compensatory education.

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

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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); *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

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"qualitative" approach relied upon by the Sixth and D.C. Circuits.[9] Many courts, however, have gravitated towards the qualitative approach, though there is an emerging relaxed hybrid approach.[10]

What standard applies in the Eighth Circuit seems unclear. In the one hand, the Eighth Circuit appears to subscribe to an hour-for-hour approach,[11] yet it has also upheld a decision of an ALJ that awarded a private tutor "until the Student earns the credits expected of her same-age peers."[12]

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

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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] 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). For an annotated outline providing "a cumulatively comprehensive and concise canvassing of the case law" concerning compensatory education, *see* Perry A. Zirkel, *Compensatory Education: The Latest Annotated Update of the Law*, 376 Ed.Law Rep. [850] (June 25, 2020).

[11] *See*, *e.g.*, *Osseo Area Sch. v. A.J.T.*, 96 F.4th 1062, 124 LRP 9021 (8th Cir. 2024) (affirming a district court decision that upheld a quantitative award); *Knox v. St. Louis City Sch. Dist.*, No. 4:18-CV-216-PLC, 2020 WL 3542286, 76 IDELR 286 (E.D. Mo. June 30, 2020) (upholding an award equivalent to four months of compensatory education in math and reading, which represented the period of time when the school district denied the student FAPE); *Independent Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 76 IDELR 203 (8th Cir. 2020).

[12] *Independent Sch Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 76 IDELR 203 (8th Cir. 2020) (reinstating the ALJ's award of a private tutor, "to be provided only so long as the Student suffers from a credit deficiency caused from the years she spent without a FAPE").

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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 ALJ 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 IDEA hearing officer / ALJ 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 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

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[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).

[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.

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]

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

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[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.").

[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).

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 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]

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[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.

[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.*

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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]

b. Sufficient Record. The ALJ 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 ALJ to tailor

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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. 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

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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 ALJ may provide the parties additional time[42] to supplement the record if the record is incomplete to enable the ALJ to craft an award.[43] Simply "[c]hoosing instead to award

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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.*

[42] Should said additional time go beyond the 45-day timeline, the ALJ may grant an extension of time at the request of either party. 34 C.F.R. § 300.515(c). The ALJ 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 ALJ with additional evidence that demonstrates that additional educational services are necessary to compensate the student for the denial of a FAPE, then

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

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the ALJ 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).

[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).

B. Continued Eligibility. Courts have also awarded compensatory education beyond age 21.[55] And, the Eighth Circuit recently joined its sister courts in holding that compensatory education may be available beyond a student's twenty-first birthday.[56]

V. IMPLEMENTATION

A. Who Decides. An IDEA hearing officer / ALJ or a court determines compensatory education. Typically, the ALJ may not delegate his authority to a group that includes an individual specifically barred from performing the ALJ's functions.[57] However, once a decision has been made on whether an award is appropriate and what the "parameters" for the award should be, the ALJ 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

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[55] *Pihl v. Mass. Dep't of Educ.*, 9 F.3d 184, 189 (1st Cir. 1993) ("[C]ompensatory education must be available beyond a student's twenty-first birthday."); *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 249 (3d Cir. 1999) ("An award of compensatory education allows a disabled student to continue beyond age twenty-one in order to make up for the earlier deprivation of a free appropriate public education."); *Bd. of Educ. of Oak Park v. Ill. State Bd. of Educ.*, 79 F.3d 654, 656 (7th Cir. 1996) (noting the IDEA "empowers a court to order adult compensatory education if necessary to cure a violation"); *Jefferson Cnty. Bd. of Educ. v. Breen*, 853 F.2d 853, 857 (11th Cir. 1988) ("Compensatory education, like retroactive reimbursement, is necessary to preserve a handicapped [student's] right to a free education.").

[56] *Kass v. Western Dubuque Comm. Sch. Dist.*, 101 F.4th 562, 124 LRP 15032 (8th Cir. 2024).

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

[58] *Id.*

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 ALJ'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 ALJ has the authority/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.[63]

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[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.

[63] The hearing process and, by extension, the ALJ, 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

B. Prehearing 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 prehearing conference. Requiring the plan in advance of the five-day disclosures affords the school district and ALJ 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 ALJ 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 timeline, in the absence of a valid extension, must be considered with this approach to the hearing.

5. Carefully document the discussion in the prehearing 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

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protected, and the IDEA hearing officer / ALJ 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).

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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 offer 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).

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- 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[64]

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 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.

[64] *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).

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