COMPENSATORY EDUCATION

HEARING OFFICER TRAINING – D.C.
Wednesday, February 9, 2011

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I. INTRODUCTION

A. This outline provides a concise summary of the case law concerning compensatory education services under the Individual with Disabilities Education Act[1] ("IDEA").

B. Recent decisions handed down by district courts in the District of Columbia can be read to suggest that compensatory education is a matter of absolute right once a denial of a free and appropriate public education ("FAPE") has been established. These decisions also raise a question on who bears the burden of producing evidence and ultimately fashioning a fact-specific award of compensatory education.[2]

C. It is this writer's opinion that there is not an absolute right to compensatory education and that an award of compensatory education continues to be discretionary with the hearing officer and/or court. It is also the writer's opinion that the parent bears responsibility to present sufficient evidence to justify a specific award of compensatory education but that the hearing officer ultimately should fashion an award of

[1] In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. *See* Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005. 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] *See*, *e.g.*, *Gill v. District of Columbia*, 55 IDELR 191, n.2 (D.D.C. 2010) ("A remaining question is who bore the burden of producing evidence and ultimately fashioning a fact-specific award of compensatory education."); *Cf. Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010) ("The task of 'designing [the student's] remedy will require a fact-specific exercise of discretion by either the district court or a hearing officer' … not by the parties themselves.") (*citing Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005)).

compensatory education when s/he determines that there has been a denial of a FAPE and compensatory education is due.

II. OVERVIEW

A. Remedies Under IDEA and/or Caselaw. The IDEA empowers a hearing officer and/or court to grant the relief that s/he / it determines to be appropriate.[3] Some of the commonly requested and awarded remedies are as follows:

1. Appropriate education to meet the unique needs of a child with a disability, such as:

   a. A particular educational placement[4]

   b. Specially designed instruction

   c. Related services

   d. Test accommodations

   e. Qualified personnel that can implement the child's Individualized Education Program ("IEP")[5]

2. Tuition reimbursement

   a. A local educational agency ("LEA") may be required to reimburse parents for their tuition payment to a private school for the services obtained for the student by his or her parents if the services offered by the LEA were inadequate or inappropriate, the services selected by the parents were appropriate under the Act, and equitable considerations support the parents' claim.[6]

   b. In *Burlington*, the Court found that Congress intended retroactive reimbursement to parents by an LEA as an available remedy in a proper case.[7]

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[3] 34 C.F.R. § 300.516(c)(3).

[4] *See Educational Placements: Decoded* outline dated Wednesday, January 12, 2011 for a full discussion of the term "educational placement."

[5] This is other than a "highly qualified special education teacher," as the term is defined by IDEA. *See* 20 U.S.C. § 1401(10)(F); 34 C.F.R. § 300.18.

[6] *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 20 IDELR 532 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 103 LRP 37667 (1985).

[7] *Burlington*, 471 U.S. at 370-71.

c. "Reimbursement merely requires [an LEA] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."[8]

d. The mere fact that the state educational agency and/or the LEA has not approved the private school placement does not bar the parents from reimbursement.[9]

3. Order related to evaluations, IEPs or placements

a. An order requiring one of the parties to take a specific action (e.g., development/implementation/revision of IEP[10]; allow the observation of a student by an independent evaluator[11])

b. Independent educational evaluation ("IEE")[12]

4. Preliminary injunctive relief

a. When seeking an order preventing an LEA from taking certain action, the parents must demonstrate

i. irreparable harm; and

ii. either a likelihood of success on the merits, or sufficiently serious questions going to the merits of the case, and a balance of hardships tipping decidedly in the parents' favor.[13]

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[8] *Id.*

[9] *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

[10] *See*, *e.g.*, *Williamson County Bd. of Educ. v. C.K.*, 52 IDELR 40 (M.D. Tenn. 2009) (upholding the ALJ's administrative order requiring the LEA to develop an IEP for a gifted student with AD/HD).

[11] *See*, *e.g.*, *School Bd. of Manatee County, Fla. v. L.H.*, 666 F. Supp. 2d 1285, 53 IDELR 149 (M.D. Fla. 2009) (upholding the ALJ's due process decision ordering the LEA to allow an in-school observation of a child with Asperger Syndrome by an independent evaluator).

[12] 20 U.S.C. § 1415(d)(2)(A); 34 C.F.R. § 300.502. Also note that the hearing officer can request an IEE as part of a hearing on a due process complaint to, for example, enable him/her to craft a remedy. *See* 34 C.F.R. § 300.502(d).

[13] *D.D. v. New York City Dep't of Educ.*, 465 F.3d 503, 46 IDELR 181 (2d Cir. 2006); *see also B.T. v. Department of Educ., State of Hawaii*, 51 IDELR 12 (D. Hawaii 2008) (The court enjoined the Hawaii ED from terminating the special education services of a 20-year-old student with autism who had purportedly "aged-out" because the ED allowed non-disabled students to attend high school through age 21.)

b. When seeking an order requiring an LEA to perform a certain action, the parents must demonstrate

i. irreparable harm; and

ii. make a clear or substantial showing that they are likely to succeed on the merits of their claim.[14]

5. Permanent injunctive relief

a. A party seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A party must demonstrate:

i. that it has suffered an irreparable injury;

ii. that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;

iii. that, considering the balance of hardships between the parties, a remedy in equity is warranted; and

iv. that the public interest would not be disserved by a permanent injunction.[15]

b. The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.[16]

[14] *D.D. v. New York City Dep't of Educ.*, 465 F.3d 503, 46 IDELR 181 (2d Cir. 2006); *see also Cave v. East Meadow Union Free Sch. Dist.*, 480 F. Supp. 2d 610, 47 IDELR 162 (E.D.N.Y. 2007) (The court denied a request for a mandatory injunction that would allow a student with a hearing impairment to bring his service dog to school.)
[15] *See*, *e.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-313 (1982); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987).
[16] *See*, *e.g.*, *Romero-Barcelo*, 456 U.S., at 320.

6. Monetary damages

a. The U.S. Supreme Court has not decided whether parents can seek monetary damage for a denial of a free appropriate public education ("FAPE"). In Burlington, however, the Court noted that tuition reimbursement is permissible because it does not qualify as monetary damages, suggesting that the Court does not see IDEA as permitting awards of compensatory or punitive damages.[17]

b. However, a majority of Circuit Courts have held that compensatory or punitive damages are not available under the IDEA.[18]

c. A number of Circuit Courts have held that monetary damages are available under Section 504[19] and at least one Circuit decision suggests that it may be available under Section 1983[20].

7. Compensatory education

[17] *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 103 LRP 37667 (1985) ("In this Court, the Town repeatedly characterizes reimbursement as "damages," but that simply is not the case. Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP. Such a post hoc determination of financial responsibility was contemplated in the legislative history[.]")

[18] *See Nieves-Marquez v. Commonwealth of Puerto Rico*, 353 F.3d 108, 40 IDELR 90 (1st Cir. 2003); *Polera v. Board of Educ. of the Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 36 IDELR 231 (2d Cir. 2002); *Sellers v. School Bd. of the City of Manassas*, 141 F.3d 524, 27 IDELR 1060 (4th Cir. 1998); *Gean v. Hattaway*, 330 F.3d 758, 39 IDELR 62 (6th Cir. 2003); *Charlie F. v. Board of Educ. of Skokie Sch. Dist. 68,* 98 F.3d 989, 24 IDELR 1039 (7th Cir. 1996); *Heidemann v. Rother*, 84 F.3d 1021, 24 IDELR 167 (8th Cir. 1996); *Robb v. Bethel Sch. Dist. #403*, 308 F.3d 1047, 37 IDELR 243 (9th Cir. 2002); *Ortega v. Bibb County Sch. Dist.*, 397 F.3d 1321, 42 IDELR 200 (11th Cir. 2005).

[19] *See, e.g., Mark H. v. Lemahieu*, 513 F.3d 922, 49 IDELR 91 (9th Cir. 2008); *Sellers v. School Bd. of the City of Manassas*, 27 IDELR 1060 (4th Cir. 1998).

[20] *See N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 24 IDELR 270 (11th Cir. 1996). For a district court decision in the District of Columbia finding that monetary damages are available for IDEA violations under Section 1983 *see*, *e.g.*, *Walker v. District of Columbia*, 969 F. Supp. 794, 26 IDELR 996 (D.D.C. 1997).

B. Definition. An award of compensatory education is an equitable remedy[21] 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."[22] It is not a contractual remedy.[23] More specifically, "[c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court [and/or hearing officer] to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student."[24]

C. Authority of HO to Grant. Both the Office of Special Education Programs[25] ("OSEP") and the courts[26] have established that hearing officers do have the authority to award compensatory education.

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[21] *Reid v. District of Columbia,* 401 F.3d 516, 523 – 524, 43 IDELR 32 (D.C. Cir. 2005) (finding that compensatory education is not a "form of damages" because the courts act in equity when remedying IDEA violations and must "'do equity and … mould each decree to the necessities of the particular case'") (*quoting Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)); *Gill v. District of Columbia*, 55 IDELR 191 (D.D.C. 2010) ("[W]hether to award compensatory education is a question for the Court's equity jurisdiction, and is not a matter of legal damages.")

[22] *Reid,* 401 F.3d at 518 (Compensatory education is "replacement of educational services the child should have received in the first place.")

[23] *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).

[24] *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).

[25] *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).

[26] *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.")

D. Threshold Matters to Consider.

1. Available beyond age 21[27]

2. Two year statute of limitations applies[28]

3. Exhaustion doctrine applies[29]

4. Mootness doctrine applies when the student is no longer eligible under IDEA.[30] It possibly applies when the student has graduated.[31] It does not apply when the student moves from one LEA to another and the first LEA denied the student a FAPE[32]; the student has dropped out of school and s/he is no longer required to attend school[33]; or the parties reached an agreement but did not resolve the compensatory education issue.[34]

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[27] *Barnett v. Memphis City Schools*, 113 F. App'x 124, 42 IDELR 56 (6th Cir. 2004) (holding that the now 24-year-old student was entitled to compensatory education).
[28] 20 U.S.C. § 1415(f)(3)(C); *see also* 20 U.S.C. § 1415(b)(6)(B); *but see Draper v. Atlanta Indep. Sch. System*, 518 F.3d 1275, 49 IDELR 211 (11th Cir. 2008) (finding that because the family did not have enough information about the student's misdiagnosis and misplacement by the LEA until several years later, the family should not be blamed for not being experts about learning disabilities).
[29] *Honig v. Doe*, 484 U.S. 305 (1988) (failure to exhaust administrative remedies under the IDEA generally precludes judicial review).
[30] *M.L. v. El Paso Independent Sch. Dist.*, 610 F. Supp. 2d 582, 52 IDELR 159 (W.D. Tex. 2009).
[31] *See, e.g., San Dieguito Union High Sch. Dist. v. Guray-Jacob*, 44 IDELR 189 (S.D. Cal. 2005) ("[G]raduation from high school is not a per se indication that a student has received a FAPE. [It] is certainly a factor in determining whether a student has received a FAPE"); *Jessie v. Bullitt County Bd. Of Educ.*, 43 IDELR 112 (W.D. Ky. 2005) (a factor to consider among others). *See also Barnett v. Memphis City Sch. Sys.*, 113 Fed. Appx. 124 (6th Cir. 2004) ("Compensatory education is a judicially-constructed form of relief designed to remedy past educational failings for students who are no longer enrolled in public school due to their age or graduation.")
[32] *Shank v. Howard Road Academy*, 562 F. Supp. 2d 126, 50 IDELR 191 (D.D.C. 2008); *Brown v. Bartholomew Consol. Sch. Corp.*, 442 F.3d 588 (7th Cir. 2006).
[33] *See Garcia v. Bd. of Educ.*, 520 F.3d 1116, 49 IDELR 241 (10th Cir. 2008).
[34] *See Lesesne v. Dist. of Columbia*, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. 2006); *Flores v. District of Columbia*, 437 F. Supp. 2d 22, 46 IDELR 66 (D.D.C. 2006). However, although the mootness doctrine may not apply in instances where the parties execute a settlement agreement, consideration should be given to whether the settlement agreement includes a broad form release and, if so, whether compensatory education is carved out in said release.

5. Whether it needs to be pled depends on whether it is perceived as an issue that warrants inclusion in the due process complaint[35] or simply a remedy available to the hearing officer should s/he find a denial of a FAPE for which compensatory education may be warranted.[36]

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[35] The IDEA requires the complaining party to provide sufficient notice to the other side. Failure to provide sufficient notice may result in the complaining party not having a hearing or in a reduction of attorneys' fees if the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint. 34 C.F.R. § 300.507(c); 34 C.F.R. § 300.517(c)(4)(iv).

The complaining party, however, is not required to include in the due process complaint all the facts relating to the nature of the problem. *Escambia County Bd. of Educ. v. Benton*, 406 F. Supp. 2d 1248, 1259 – 1260, 44 IDELR 272 (S.D. Ala. 2005). Nor is the complaining party required to set forth in the due process complaint all applicable legal arguments in "painstaking detail." *Id*. *See also Anello v. Indian River Sch. Dist.*, 47 IDELR 104 (Del. Fam. Ct. 2007) (finding that the alleged facts and requested relief contained in the parents' due process complaint were consistent with a child find claim and that the school district was not denied ample notice to prepare for a child find claim because of the parents' failure to explicitly cite the child find provisions of the IDEA). *But see Lago Vista Independent Sch. Dist. v. S.F.*, 50 IDELR 104, (W.D. Tex. 2007) (finding that the hearing officer acted outside the scope of his authority by deciding the appropriateness of the 2006 – 2007 IEP despite the issue not being properly raised in the due process complaint).

The IDEA's due process requirements imposes "minimal pleading standards." *Schaffer v. Weast,* 546 U.S. 49, 54, 44 IDELR 150 (2005). *But see M.S.-G., et. al v. Lenape Regional High Sch. Dist. Bd. of Ed.*, 306 Fed. Appx. 772, 775, 51 IDELR 236 (3d Cir. 2009) (unpublished) (refusing to accept the suggestion that Schaffer's "minimal" pleading standard equates to a "bare notice pleading requirement").

[36] The IDEA does not require that the complaining party specify a particular remedy when filing a due process complaint. Specifically, the IDEA simply requires that the complaining party proposes a solution to the problem, to the extent known and available to the complaining party at the time. *See* 34 C.F.R. § 300.508(b)(6). *See also Dep't of Educ., State of Hawaii v. E.B.*, 45 IDELR 249 (D. Hawaii 2007) (finding that where the Hearing Officer clearly articulated at a pre-hearing conference his understanding that the parent requested an award of compensatory education, and the Hearing Officer indicated at that conference (and in a subsequent letter and order) that he would consider making such an award, the Hearing Officer was not barred from making such an award simply because compensatory education was not explicitly requested in the DPC).

III. AVAILABILITY – THE WHEN

A. For Denials of FAPE. When an LEA deprives a child with a disability of a FAPE in violation of the IDEA, a court and/or hearing officer fashioning appropriate relief[37] may order compensatory education.[38] Said denial must be more than *de minimis*.[39] Only material failures are actionable under the IDEA.[40] Thus, under the IDEA for an award of compensatory education to be granted, a court and/or hearing officer must first ascertain whether the aspects of the IEP that were not followed were "substantial or significant," or, in other words, whether the deviations from the IEP's stated requirements were "material."[41]

B. Presumption of Educational Deficit. If a parent presents evidence that her child has been denied a FAPE, she has met her burden of proving that the child may be entitled to compensatory education.[42]

C. 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."[43]

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[37] *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).

[38] *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).

[39] *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).

[40] *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).

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

[42] *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 49 IDELR 183 (D.D.C. 2008); *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010).

[43] *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).

D. Sins of the Father Can Be Visited on the Child.[44] Courts have recognized that in setting an award of compensatory education, the conduct of the parties' may be considered.[45]

IV. CALCULATING THE AWARD – THE HOW

A. Period. Generally, the starting point in calculating a compensatory education award is when the parent knew or should have known of the denial of a FAPE.[46] Its duration (i.e., the end point) is the period of denial.[47]

B. Extent. An award of compensatory education "must be reasonably calculated to provide the educational benefits that likely would have accrued."[48] "This standard 'carries a qualitative rather than quantitative focus,' and must be applied with '[f]lexibity rather than rigidity.'"[49] In crafting the remedy, the court or hearing officer is charged with the responsibility of engaging in "a fact-intensive analysis that includes

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[44] *See Exodus* 20:5.

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

[46] 20 U.S.C. § 1415(f)(3)(C); 20 U.S.C. § 1415(b)(6)(B); *See also 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.") Note, however, that although the comments to the regulations suggest that the statute of limitations discuss in § 1415(f)(3)(C) is the same as § 1415(b)(6)(B), *see Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, 46706 (August 14, 2006), this is open to interpretation. § 1415(f)(3)(C) requires a party to request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint. In contrast, § 1415(b)(6)(B) allows a party to present a complaint which sets forth an alleged violation that occurred not more than 2 years *before* the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint. Arguably, read together, the claim may extend back as much as four years.

[47] *See id.*

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

[49] *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).

individualized assessments of the student so that the ultimate award is tailored to the student's unique needs."[50] 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.[51]

Reid rejects an outright "cookie-cutter approach," i.e., an hour of compensatory instruction for each hour that a FAPE was denied.[52] 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."[53] 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."[54]

An IEP must provide some educational benefit going forward.[55] Conversely, compensatory education must compensate for the prior FAPE denials[56] and must "yield tangible results."[57]

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[50] *Mary McLeod*, 555 F. Supp. 2d at 135 (*citing Reid*, 401 F.3d at 524).
[51] *Id.*
[52] *Reid*, 401 F.3d at 523.
[53] *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt ("Nesbitt I")*, 532 F. Supp. 2d 121, 124 (D.D.C. 2008).
[54] *Id. See, e.g., Mary McLeod Bethune Day Acad. Pub. Charter Sch.*, 555 F. Supp. 2d 130, 50 IDELR 134 (D.D.C. 2008) (finding that, although the hearing officer awarded the exact number of service hours that the LEA had denied, the hearing officer nonetheless conducted a fact-specific inquiry and tailored the award to the student's individual needs by taking into account the results of an assessment and the recommendations of a tutoring center). *But see Brown v. District of Columbia*, 568 F. Supp. 2d 44, 50 IDELR 249 (D.D.C. 2008) (though agreeing with the hearing officer that a "cookie-cutter" approach to compensatory education was inappropriate, remanded the matter to the hearing officer for further proceedings).
[55] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 553 IDELR 656 (1982).
[56] *Reid*, 401 F.3d at 525.
[57] *D.W. v. District of Columbia*, 561 F. Supp. 2d 56, 61, 50 IDELR 193 (D.D.C. 2008).

A presently appropriate educational program does not abate the need for compensatory education.[58] 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."[59]

C. Sufficient Record. The hearing officer cannot determine the amount of compensatory education that a student requires unless the record provides him with sufficient "insight about the precise types of education services [the student] needs to progress."[60] Pertinent findings to enable the hearing officer to tailor the ultimate award to the student's unique needs should include the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services requested, and the student's current educational abilities.[61]

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."[62] However, "*Reid* certainly does not require [a parent] to have a perfect case to be entitled to a compensatory education award…."[63] Once the parent has established that the student may be entitled to an award because the LEA denied the student a FAPE, simply refusing

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[58] *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).

[59] *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.")

[60] *Mary McLeod Bethune Day Acad. Pub. Charter Sch.*, 555 F. Supp. 2d 130, 50 IDELR 134 (D.D.C. 2008) *citing Branham v. District of Columbia*, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 2005). *See also Stanton v. District of Columbia*, 680 F. Supp. 2d 201, 53 IDELR 314 (D.D.C. 2010) ("[T]he record in an IDEA case is supposed to be made not in the district court but primarily at the administrative level[.]")

[61] *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).

[62] *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).

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

to grant one clashes with *Reid*.[64] The hearing officer may provide the parties additional time[65] to supplement the record if the record is incomplete to enable the hearing officer to craft an award.[66] Simply "[c]hoosing instead to award [the parent] nothing does not represent the 'qualitative focus' on [the child's] 'individual needs' that *Reid* requires."[67]

V. SCOPE – THE WHAT

A. Form. Compensatory education can come in many forms and both hearing officers and courts have fashioned varying awards of services to compensate for denials of FAPE. Awards have included, but are not limited to, tutoring, summer school[68], teacher training[69], assignment of a consultant to the LEA[70], postsecondary education[71], prospective tuition award[72], full-time aides[73] and assistive technology[74].[75]

B. Continued Eligibility. Courts have also awarded compensatory education beyond age 22.[76]

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[64] *Id.*

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

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

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

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

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

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

[71] *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).

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

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

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

[75] 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).

[76] *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 54 IDELR 274 (3d Cir. 2010); *Barnett v. Memphis City Schools*, 113 F. App'x 124, 42 IDELR 56 (6th Cir. 2004); *Manchester Sch. Dist. v. Christopher B.*, 807 F. Supp. 860, 19 IDELR 389 (D.N.H. 1992).

VI. IMPLEMENTATION

A. Who Decides. Compensatory education is to be determined by a hearing officer or a court.[77] The hearing officer "may not delegate his authority to a group that includes an individual specifically barred from performing the hearing officer's functions."[78]

B. Who Provides. Both independent providers and/or school personnel can provide compensatory education. However, school personnel providing compensatory services should meet the same requirements that apply to personnel providing the same types of services as a part of a regular school program.[79]

C. Failure to Provide. The failure to provide the student an award of compensatory education is not necessarily a harmless procedural violation.[80]

VII. DEVELOPING / COMPLETING THE RECORD

A. Can It Be Done. 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.[81] The

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[77] *Reid v. District of Columbia,* 401 F.3d 516, 523 – 524, 43 IDELR 32 (D.C. Cir. 2005); *see also Bd. of Educ. of Fayette Cty, Ky. v. L.M.*, 478 F.3d 307, 47 IDELR 122 (6th Cir. 2007) ("We therefore hold 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); *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).

[78] *Reid*, 401 F.3d at 526.

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

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

[81] *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).

hearing officer's primary role is to make findings of fact and ultimately decide the issues raised in the due process complaint.[82]

When the record evidence is insufficient – whether because the parent appears pro se or counsel has done an inadequate job – and prior to the conclusion of the hearing, the hearing officer has the 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.[83]

B. When and How. Should the hearing officer exercise his authority/discretion, or state law mandates that the hearing officer completes the record, the following steps would constitute good practice:

1. Consider the issue(s) prior to the pre-hearing conference and, if necessary, research the law applicable to the issue(s). At the pre-hearing conference, when reviewing the issue(s), also discuss the type of evidence necessary for the hearing officer to decide the issue(s) and craft a remedy.[84]

2. During the hearing, ask the party, or his representative, whether the answer to a particular question, or a particular line of questioning, document or testimony, might be necessary to determine an issue / craft a remedy. Should the party agree, the party should then be given the opportunity to ask the question, admit the document, or present the testimony of a witness.

3. Should the party disagree, consider asking the question(s) directly or calling the additional witness. The hearing officer should explain on the record why he has chosen to seek the additional evidence despite whatever objection might have been voiced by any given party; phrase questions carefully; and, allow the parties to ask follow up questions of their own.

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

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

[84] The Pre-Hearing Conference Summary and Order should accurately reflect the discussions had with the parties. Should any given party choose not to present the needed evidence, the hearing officer would have afforded the party the opportunity to develop the record without necessitating the hearing officer's direct involvement in the hearing.

4. Grant the parties additional time to supplement the record if the record is incomplete to enable the hearing officer to craft an award.

5. Consider an IEE.[85]

VIII. DISCUSSION

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

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

[85] When weighing whether to seek an IEE, thought should be given to the impact on the 45-day timeline. Keep in mind, however, that a hearing officer may grant specific extensions of time beyond the 45 days only when it is at the request of either party. 34 C.F.R. § 300.515(c). The hearing officer cannot unilaterally extend the 45-day timeline. *See id.*