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Equity in Education: Fixing Compensatory Education for Students with Disabilities

Melia Cerrato

INTRODUCTION

In March 2020, the United States went into lockdown because of the COVID-19 pandemic. As a result, school districts were given little guidance on whether to cancel classes, provide distance learning, or give a mix of both. There are over 7 million students with disabilities, and while it is unknown how many of these were denied access to their statutory right to a free appropriate public education (FAPE)[1] under the Individuals with Disabilities Education Act (IDEA), the multitude of class action lawsuits that arose out of the shutdown demonstrate how wide-spread the problem was for families.[2] However, the denial of a FAPE is not unique to COVID-19 times and is the number one claim against schools in the pre-pandemic era.[3] Students with disabilities that are denied a FAPE are entitled to have schools provide

[1] 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1)(A).

[2] U.S. Gov't Accountability Office, GAO-21-43, *Distance Learning: Challenges providing services to K-12 English Learners and Students with Disabilities during COVID-19,* at 1, 16 (Nov. 2020),

https://www.gao.gov/products/gao-21-43.

[3] Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., https://www2.ed.gov/about/offices/list/ocr/docs/20210608-

impacts-of-covid19.pdf (last visited Jan. 10, 2022).

them the education they missed – also known as compensatory education.[4] This Article presents the problematic nature of the current compensatory education scheme that has been brought to fore because of the ongoing COVID-19 pandemic and proposes legislation which would ensure that all children with disabilities have the same opportunity to enjoy their rights under the IDEA, not just those from affluent families.[5]

Compensatory education has been problematic since its creation in *Sch. Comm. of Town of Burlington, Mass. v. Dep't. of Educ. of Mass.*[6] and has been called the "poor man's tuition reimbursement."[7] Wealthy families who are dissatisfied with their local public school and believe that their children are being denied a FAPE often resort to a local private school[8] to remedy their situation.[9] After removing their child, they can seek tuition reimbursement from the public school via a due process hearing.[10] This system ensures that affluent children with disabilities receive every educational opportunity. Meanwhile, poorer families are often forced to keep their child within the public school that is providing little to no appropriate education.[11] They must seek remedy via due process only after multiple denials of the school to provide adequate educational services and continue to wait until a hearing officer decides the quantity and quality of services that

[4] Parents of Student W. v. Puyallup Sch. Dist., No. 3, 31 F.3d 1489, 1497 (9th Cir. 1994) "[C]ompensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting appropriate relief." *Id.* (internal quotation marks omitted).

[5] For a discussion the effects of poverty and the ability of families to access the IDEA's benefits, see, e.g. Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413 (2011); M. Hannah Koseki, *Meeting the Needs of All Students: Amending the Idea to Support Special Education Students from Low-income Households*, 44 FORDHAM URB. L. J. 793, 814 (2017).

[6] *See* Sch. Comm. of Town of Burlington, Mass. v. Dep't. of Educ., 471 U.S. 359 (1985).

[7] Terry Jean Seligmann & Perry A. Zirkel, *Compensatory Education for Idea Violations: The Silly Putty of Remedies?*, 45 URB. LAW. 281, 296 (2013).

[8] Of course, students in certain communities might not have this private school option regardless of their economic level.

[9] *Burlington,* 471 U.S. at 370; Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 18 (1993); Forest Grove v. T.A., 557 U.S. 230, 241–42 (2009).

[10] *Burlington,* 471 U.S. at 370; *Carter*, 510 U.S. at 13; *Forest Grove*, 557 U.S. at 246–47.

[11] Seligmann & Zirkel, *supra* note 7, at 301.

should be provided for the past denial of FAPE.[12] Ultimately, poorer children, who have higher rates of disabilities,[13] are left without an appropriate education, often for months if not years.[14]

The COVID-19 closures and distance learning models have only exacerbated this issue between appropriate compensatory education services for both wealthy and poor families of children with disabilities. In light of COVID-19 and the different ways in which states handled the shutdown of the spring 2020 semester, there is a potential for families of special education students to file due process complaints requesting compensatory education because of the denial of FAPE.[15] Furthermore, while poor and working class families were at the whim of the school district in terms of what services would be provided to their children with disabilities and how they would be provided, more affluent families were able to create "pandemic pods" and hire trained educators and therapists to work directly with a small group of students.[16] Thus, wealthy parents might seek cost reimbursement for these "pandemic pods," while the children of less affluent families will again be forced to languish in uncertainty on whether their student deserves compensatory education after being denied the services and education outlined in their child's Individual Education Program (IEP).

[12] *Id.*

[13] Jiyeon Park, Ann P. Turbnall & H. Rutherford Turnbull III, *Impacts of Poverty on Quality of Life in Families with Children with Disabilities,* 68 COUNCIL FOR EXCEPTIONAL CHILDREN 152 (2002) ("Among children with disabilities aged 3 to 21 in the United States, 28% are living in poor families by contrast, among children with disabilities in the same age range, only 16% are eliding in poverty.") (citation omitted).

[14] *See, e.g.*, Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 (11th Cir. 2008); M.C. v. Central Reg'l Sch. Dist., 81 F.3d 389, 395 (3d. Cir. 1996).

[15] Notably, pandemics and other devastating disease emergencies are likely to increase in frequency. David M. Morens & Anthony S. Fauci, *Emerging Pandemic Diseases: How We Got to Covid-19*, CELL, v. 182(5), 1089 (Sept. 3, 2020), https://www.cell.com/action/showPdf?pii=S0092-8674%2820%2931012-6.

[16] Bryan C. Hassel & Sharon Kebschull Barrett, *Will Learning Pods Be Only for the Rich?,* EDUC. WEEK (Aug. 25, 2020), https://www.edweek.org/leadership/opinion-will-learning-pods-be-only-for-the-rich/2020/08; https://www.nytimes.com/2020/08/14/us/covid-schools-learning-pods.html; Hannah Seligson, *Posh Pod or Resort Academy? The Rich Head Back to School in a Pandemic,* TOWN & COUNTRY (Sept. 18, 2020), https://www.townandcountrymag.com/society/money-and-power/a33912536/coronavirus-learning-pod-rich-parents/.

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While Congress created statutory guidelines for tuition reimbursements for a FAPE denial in 2004, they neglected to create guidelines for compensatory education.[17] Congress failed to provide clarification on how compensatory educational services should be calculated, resulting in a judicially created remedy that varies by circuit.[18] During the COVID-19 closures, the U.S. Department of Education did nothing to clarify these issues during the pandemic. In fact, the only guidance provided was that if a Local Education Agency[19] (LEA) continued educational services to the general student population, the LEA must also provide services for students with Individual Education Programs (IEPs).[20] Consequently, if the LEA failed to provide FAPE to their special education students, then the LEA would be required to provide compensatory services. Thus, as an equitable remedy, there is currently no set standard for how compensatory education services are crafted.

Poverty already negatively affects child development, and studies demonstrate that children living in poverty often begin school behind more affluent children both academically and cognitively.[21] This trend continues through high school and is exacerbated by the fact that children with disabilities are two to five times more likely to drop out of school than their non-disabled peers.[22] Poverty often leads to a

[17] 20 U.S.C. § 1412(a)(10)(C)(ii) ("If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.").

[18] T. Daris Isbell, *Distinguishing Between Compensatory Education and Additional Services as Remedies Under the IDEA*, 76 BROOK. L. REV. 1717, 1717 (2011).

[19] Depending on the State, the Local Education Agency is most often the school district. For the purposes of this article, these terms will be used interchangeably.

[20] OSERS, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak,* p. 2 (March 12, 2020), https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf.

[21] H.B. Ferguson, S. Bovaird, & M.P. Mueller, *The Impact of Poverty on Educational Outcomes for Children*, 12 PEDIATRIC CHILD HEALTH, 701, 701 (2007).

[22] Jennifer Rosen Valverde, *A Poor Idea: Statute of Limitations Decisions Cement Second-Class Remedial Scheme for Low-Income Children with Disabilities in the Third Circuit*, 41 FORDHAM

power imbalance between the school and the parents of the child with disabilities because these parents often lack basic knowledge about special education and the access to legal support or expert advocacy in order to better understand their child's rights under the IDEA.[23] Furthermore, the lack of codification for compensatory education creates an invisible barrier to these already disadvantaged families because it is not found within the IDEA.[24]

This Article argues that a legislative remedy of compensatory education awards should be crafted using a mix of qualitative and quantitative data to place the child in the same place they would have been but for the FAPE denial. Part II will address when the court awards education services and how the circuit courts are split on quantifying the total amount awarded. Part III examines potential alternatives and proposes a clearer standard for what compensatory education should look like for historically underserved vulnerable populations.

I. THE WHY AND HOW BEHIND COMPENSATORY EDUCATION

The initial issue in deciding whether compensatory education is an appropriate remedy is a judicial finding of liability which occurs after a denial of FAPE.[25] Section A will define key terms found in IDEA that create the liability for the compensatory education award. Next, Section B will provide context on how this judicially created remedy further deprives low-income families of a FAPE.

A. Liability for not Providing a FAPE

Under IDEA, school districts that receive federal funds for education must provide students with disabilities a FAPE.[26] A FAPE is provided to students through "special education and related services that

URB. L.J. 599, 616 (2013) (citing Suzanne E. Kemp, *Dropout Policies and Trends for Students with and Without Disabilities*, 41 ADOLESCENCE 235, 236 (2006)).

[23] *Id.*

[24] *Id.* at 663.

[25] Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017).

[26] 20 U.S.C. § 1412(a)(1)(A).

have been provided at public expense… [and] are provided in conformity with the individualized education program [IEP]."[27] Therefore, a school district must develop and review an IEP that complies with both the procedural requirements of IDEA[28] and provides an "educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[29] The word "appropriate" in FAPE is not defined because IDEA requires that each IEP be "specially designed to meet a child's unique needs through an individualized education program."[30] The definition of FAPE is important because parents of children with disabilities must first prove that the school violated FAPE in order to receive compensatory education services as a remedy.[31]

Once a child is provided with an IEP, the school district must follow it by providing the designated amount of special education minutes and other related services.[32] While minor discrepancies between the services provided and the services called for by the IEP do not give rise to a FAPE violation,[33] a failure to provide a material implementation will,[34] because IDEA requires services be delivered "in conformity" to the IEP.[35] Courts look to whether the provision of the student's IEP that was not implemented was essential, significant, or material in determining whether there was a denial of FAPE.[36] Other

[27] *Id*. § 1401(9).

[28] *Id.* § 1414(d)(1)(A). An IEP is "developed, reviewed and revised" and contains the following: "the child's present levels of academic achievement and functional performance… measurable annual goals, including academic and functional goals… a statement of the special education and related services…[and] the program modifications or supports for school personnel that will be provided for the child." Id.

29 Endrew F., 137 S. Ct. at 1001.

30 Id. at 999 (quoting 20 U.S. C. §§ 1401(29), (14)) (internal quotation marks omitted).

31 See, e.g., Somberg on behalf of Somberg v. Utica Cmty. Sch., 908 F.3d 162, 171 (6th Cir. 2018).

32 20 U.S.C.A. § 1414.

33 Van Duyn ex. rel. Van Duyn v. Baker Sch. Dist. 5J, 502 F. 3d 811, 821 (9th Cir. 2007).

34 Neosho R-V Sch, Dist. v. Clark, 315 F.3d 1022, 1028 (8th Cir. 2003).

35 20 U.S.C.A. § 1401(9).

36 See, e.g., Van Duyn, 502 F.3d at 822 (concluding, consistent with "sister circuits, . . . that a material failure to implement an IEP violates the IDEA"); Neosho R-V Sch. Dist., 315 F.3d at 1027 (holding that failure to implement an "essential element of the IEP" denies a FAPE); Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000) (ruling that failure to

factors that courts can weigh in determining whether there has been a material failure are the child's circumstances and education achievement, the proportion of services provided, and the educational context.[37] This materiality standard "does not require that the child suffer demonstrable educational harm in order to prevail."[38] However, a child's lack of educational progress towards their goals, can be evidence that they have been denied a FAPE.[39] Importantly, a violation of FAPE does not require the school to be acting in bad faith.[40] This is relevant for the context of school shutdowns due to the COVID-19 pandemic in Spring 2020.[41]

It is well established that when a school district fails to provide the type of instruction or the majority of necessary minutes mandated in the IEP, that school district has denied students a FAPE.[42] A failure to implement the IEP could occur because of staffing issues, teacher error, district-wide issues, or other causes.[43] For example, the school in *Stanton ex rel. K.T. v. District of Columbia* denied a child a FAPE after it failed to follow the IEP for nearly two years because the teachers were unaware of its existence.[44] In contrast, in *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, the IEP required 15 hours per week of applied behavioral analysis (ABA) therapy, but the school was only providing 7.5–10 hours of these services.[45] In the second semester, the school hired a certified ABA technician and the child greatly improved with the 15 hours a week services provided.[46] However, the

implement the "significant provisions of the IEP" denies a FAPE).

37 L.J. by N.N.J. v. Sch. Bd. of Broward Cnty., 927 F.3d 1203, 1216 (11th Cir. 2019)

38 Van Duyn, 502 F.3d at 822; see also Sch. Bd. of Broward Cnty., 927 F.3d at 1214.

39 Van Duyn, 502 F.3d at 822.

40 M.C. v. Central Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996).

41 For the purposes of this Article, other FAPE procedural violations will not be addressed in regard to liability for schools.

42 See, e.g., N.D. et al. v. Hawaii Dept. of Educ., 600 F.3d 1104 (9th Cir. 2010).

43 See, e.g., Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH, 642 F.3d 478, 481 (4th Cir. 2011); Stanton ex rel. K.T. v. D.C., 680 F. Supp. 2d 201 (D.D.C. 2010).

44 Stanton, 680 F. Supp. 2d at 203.

45 Sumter Cty. Sch. Dist. 17, 642 F.3d at 481.

46 Id.

following year, the ABA technician left and the IEP was again not implemented.[47] The court reasoned that this was a material violation because the school failed to provide both the total hours required and a properly trained ABA technician, which adversely effected the child.[48] Alternatively, in *N.D. v. Hawaii Dep't of Educ.*, a fiscal crisis led the public schools to move to a four-day week.[49] The court noted that this could be cause for a FAPE claim, as it would likely result in a material failure to implement students' IEPs.[50] Therefore, a denial of FAPE can be the result of bad faith on the part of the school or of circumstances beyond the control of school personnel.

If there was a material failure to implement the IEP, the school has recourse to some minor defenses. For example, a district can establish substantial compliance by showing students made progress toward their goals, improved their grades, and passed state assessments.[51] Alternatively, if the school acted in good faith in an attempt to provide a FAPE, but the parents or guardians hindered the appropriate implementation of the IEP, then the child may not receive an award of compensatory education.[52] In *C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, the parents were seeking a residential placement for their child at the cost of the school.[53] However, after the evaluation process a public school non-residential placement was determined to be most appropriate to provide a FAPE, at which point the parents disrupted the IEP process and stalled its creation and implementation by unilaterally removing the child to the residential placement.[54] Therefore, the court found that the IDEA[55] explicitly barred reimbursement for parental conduct that was unreasonable.[56] This case demonstrates that courts give great deference to the schools in the

47 Id. at 482

48 *Id.* at 486.

49 *Hawaii Dept. of Education*, 600 F.3d at 1117.

50 *Id.*

51 Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 350 (5th Cir. 2000).

52 C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist., 513 F.3d 279, 288 (1st Cir. 2008).

53 *Id.* at 287.

54 *Id.* at 288.

55 20 U.S.C. § 1412(a)(10)(C)(iii)(III)

56 *Id.*

decision-making process, and that parents must attempt to work through any issues prior to making any unilateral choices for their child that might hinder the implementation of the IEP and the school's ability to provide a FAPE.

B. A Denial of FAPE Results in Compensatory Education

When there is a violation of a child's right to FAPE, a hearing officer[57] or court can award appropriate compensatory education services.[58] All remedies under the IDEA are equitable and as such compensatory education is the most common. Compensatory education, like FAPE, is not defined in IDEA and is actually a judicially created equitable remedy, designed to place children with disabilities in the same position they would have occupied but for the school district's violation of IDEA.[59] The purpose of compensatory education services is to "give the child back the years lost languishing in an inappropriate placement."[60] Therefore, compensatory education for the FAPE violation should seek to "provide services prospectively to compensate for a past deficient program."[61] Every federal Circuit Court of Appeals recognizes this as an appropriate remedy; however, the circuits are split on whether to use a qualitative or quantitative approach in crafting the remedy.[62]

[57] Depending on the State, parents will first attend a due process hearing that is overseen by an administrative law judge (ALJ) or a hearing officer. This Article will use these words interchangeably.

[58] *Letter to Kohn,* 17 ELHR 522 (OSEP 1991); 20 U.S.C.A. § 1415(i)(2)(C)(iii).

[59] Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 717–18 (3d Cir. 2010); Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 (11th Cir. 2008); Somberg on behalf of Somberg v. Utica Cmty. Sch., 908 F.3d 162, 171 (6th Cir. 2018); Reid ex rel. Reid v. Dist. of Columbia, 401 F.3d 516, 518 (D.C.Cir. 2005); Westendorp v. Indep. Sch. Dist. No. 273, 35 F. Supp. 2d 1134, 1137 (D. Minn. 1998); see, also 20 U.S.C.A. § 1415(i)(2)(C)(iii).

[60] Brown v. Wilson Cnty. Sch. Bd., 747 F. Supp. 436 (M.D. Tenn. 1990); *see also Reid*, 401 F.3d at 522.

[61] *Draper*, 518 F.3d at 1280.

[62] Pihl v. Mass. Dept. of Educ., 9 F.3d 184, 188 (1st Cir. 1993); Burr v. Ambach, 863 F.2d 1071 (2d Cir. 1988), *vacated & remanded sub nom* Sobol v. Burr, 492 U.S. 902 (1989), *re aff'd on reconsideration*, Burr v. Sobol, 888 F.2d 258 (1989); Lester H. v. Gilhool, 916 F.2d 865, 868–69 (3rd Cir. 1990); G. v. Fort

At issue is the ambiguity around how hearing officers and courts craft the total amount of compensatory education services that are given to the child. Whereas Congress codified[63] the Supreme Court ruling in *Sch. Comm. of Town of Burlington, Mass. v. Dep't. of Educ. of Mass.*, [64] which provides for tuition reimbursement when students with disabilities are placed at private schools, neither the Supreme Court[65] nor Congress have addressed the issue of compensatory education awards.[66] Thus, when an upper income child is denied a FAPE the parents can unilaterally choose to place their child in a private school, and subsequently seek full reimbursement if they are the prevailing party in a due process hearing. Again, this FAPE denial could be due to an inappropriate IEP or a failure to provide the services contained therein. In contrast, economically disadvantaged families are more likely to have to forego this option and wait until the hearing officer first finds that the district denied the child a FAPE. They then are at the will of the hearing officer to determine the total amount of compensatory education services. This can be even more problematic, as the Supreme Court has found that IDEA requires deference to the

Bragg Dependent Schools, 343 F.3d 295, 309 (4th Cir. 2003); Spring Branch Independent School Dist. v. O.W., 938 F.3d 695, 712 (5th Cir. 2019); Hall v. Knott County Board of Education, 941 F.2d 402, 406 (6th Cir. 1991); Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Ill. State Bd. of Educ., 79 F.3d 654, 656 (7th Cir. 1996); Meiner v. Missouri, 800 F.2d 749, 753-54 (8th Cir. 1986); Parents of Student W. v. Puyallup Sch. Dist., No. 3, 31 F.3d 1489, 1496 (9th Cir. 1994); Erickson v. Albuquerque Public Schools, 199 F.3d 1116, 1123 (10th Cir. 1999); Jefferson Cnty. Bd. of Educ. v. Breen, 853 F.2d 853, 857–58 (11th Cir. 1988); *Reid*, 401 F.3d at 518m; *Infra* § III

[63] 20 U.S.C. §1412(a)(10)(C).

[64] *See generally* Sch. Comm. of Town of Burlington, Mass. v. Dep't. of Educ., 471 U.S. 359 (1985).

[65] Since *Burlington*, the Supreme Court has addressed the limits of tuition reimbursement in the subsequent cases including *Florence County School District Four v. Carter* and *Forest Grove School District v. T.A.*. However, it has yet to address compensatory education awards and has denied cert. on a variety of compensatory education cases such as; Lester H. v. Gilhool, 916 F.2d 865 (3d Cir.1990), *cert. denied,* 499 U.S. 923 (1991); Miener v. Missouri, 800 F.2d 749, 754 (8th Cir. 1986), *cert. denied*, 459 U.S. 909 (1982).

[66] Perry A. Zirkel, *Compensatory Education Under the Individuals with Disabilities Education act: The Third Circuit's Partially Mis-Leading Position*, 110 PENN ST. L. REV. 879, 901 (2006).

schools' opinions as experts.[67] Therefore, parents with the monetary means are able to get a more robust equitable remedy in which their child never has to sit in a sort of "purgatory," awaiting FAPE because the services were not appropriate, and the child could not access the education provided.

Moreover, the fact that tuition reimbursement is codified, while compensatory education is not, makes it difficult for parents to even know that it exists as a potential remedy.[68] The remedy of compensatory education is not found in the IDEA. [69] Instead it is briefly mentioned as a recourse in a state complaint process.[70] Importantly, attorneys are not required to file due process complaints, leaving many parents on their own against represented school districts. In sum, this ambiguity does a grave injustice to children with disabilities who come from lower economic classes.

Courts have found that compensatory education is a remedy presupposed by Congress even though it is missing from the IDEA, because otherwise low-income families would essentially be barred from any viable remedy to FAPE violations.[71] Therefore, the remedy is often prospective in nature, looking to provide services that will help the child regain the lost progress.[72] In some cases a paraprofessional is provided so the student with disabilities can make progress towards his/her goals.[73] Compensatory education can also provide for services during the school year as well as access to extended school year (ESY).[74] At times, the use of a one-on-one tutor that works with

[67] Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017).

[68] Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the IDEA: An Update*, 31 J. NAT'L ASS'N OF ADMIN. L. JUDICIARY 1, 22 (2011) [hereinafter *Remedial Authority of Hearing Officers*]

[69] *See id.*

[70] 34 C.F.R. § 300.151(b)(1).

[71] Reid ex rel. Reid v. Dist. of Columbia, 401 F.3d 516, 522 (D.C.Cir. 2005)

[72] Spring Branch Indep. Sch. Dist. v. O.W., 938 F.3d 695, 712 (5th Cir. 2019

[73] Westendorp v. Indep. Sch. Dist. No. 273, 35 F. Supp. 2d 1134, 1138 (D. Minn. 1998).

[74] Johnson v. Bismarck Pub. Sch. Dist., 949 F.2d 1000, 1002 (8th Cir. 1991).

the student after school or on the weekends is an appropriate remedy.[75] Even assistive technology[76] and more appropriate accommodations can be appropriate awards that fall under compensatory education.[77] Finally, in the most extreme cases a private placement paid for by the school district can be necessary for an equitable remedy of the FAPE violation.[78]

Hearing officers are given wide latitude to create appropriate remedies for FAPE denials, and may award compensatory education to whatever extent necessary to make up for the child's lost progress.[79] Importantly, the courts have agreed that in certain circumstances an award of compensatory education that extends beyond the age of twenty-one is appropriate to remedy a FAPE violation.[80] One statutory requirement that courts agree to impose from the tuition reimbursement codification onto the compensatory education awards is a two year statute of limitations on these claims.[81] Also, the IDEA does not allow hearing officers to delegate their authority by allowing

[75] Pihl v. Mass. Dept. of Educ., 9 F.3d 184, 188 (1st Cir. 1993); Somberg on behalf of Somberg v. Utica Cmty. Sch., 908 F.3d 162, 177 (6th Cir. 2018) (school district paid for 1,200 hours of tutoring and transition services).

[76] Doe v. East Lyme Bd. of Educ., No. 3:11CV291, 2020 WL 7078727, at *20 (D. Conn. Dec. 3, 2020).

[77] Reg'l Sch. Unit 51 v. Doe, 920 F. Supp. 2d 168, 216 (D. Me. 2013).

[78] Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1283–85 (11th Cir. 2008); (providing a private school placement until the student received a high school diploma or until a specific date); Sch. Comm. of Town of Burlington, Mass. v. Dep't. of Educ. of Mass., 471 U.S. 359, 369 (1985) ("but the Act also provides for placement in private schools at public expense where this is not possible.") Loren F. ex rel. Fisher v. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 1312 (11th Cir.2003).

[79] G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 625 (3d Cir. 2015).

[80] *Pihl*, 9 F.3d at 190; Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 249 (3d Cir.1999); G. v. Fort Bragg Dependent Schools, 343 F.3d 295, 309 (4th Cir. 2003); Hall v. Knott County Bd. of Ed., 941 F.2d 402, 407 (6th Cir. 1991); Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Ill. State Bd. of Educ., 79 F.3d 654, 656 (7th Cir. 1996); Miener v. Missouri, 800 F.2d 749, 753 (8th Cir. 1986); Parents of Student W. v. Puyallup Sch. Dist., No. 3, 31 F.3d 1489, 1496 (9th Cir. 1994); Jefferson Cnty. Bd. of Educ. v. Breen, 853 F.2d 853, 857–58 (11th Cir. 1988).

[81] 20 U.S.C. § 1415(f)(3)(C).

the IEP team to reduce or discontinue the award of compensatory education.[82] In order to award compensatory education, the hearing officer must employ a fact-specific inquiry explaining why the relief would compensate the student.[83] However, circuit courts have diverged when crafting awards of compensatory education on whether a qualitative or quantitative approach is necessary.[84]

C. Compensatory Education and COVID-19

In March 2020, many States chose to shut down all non-essential businesses and services, which included schools for many districts. Importantly, IDEA does not address the possibility of school closures due to exceptional circumstances, such as a pandemic.[85] Limited guidance from the U.S. Department of Education provided that school districts would not be in violation of IDEA in denying FAPE for students with disabilities, as long as classes for general education students were also not provided.[86] In essence, school districts that canceled school for all students would not be liable to students with disabilities because they would not be providing an education to any students. However, if a school district did provide a free and appropriate public education to the general education students while the school was physically shut down, it would need to make appropriate plans to ensure the IEP of a student with disabilities would be implemented.[87] Even if the school districts made every effort to provide special education and related services to students with IEPs, they could still be failing to provide a FAPE under IDEA if the IEP was not materially implemented.[88] For example, in *Brennan and James v. Wolf*, the teachers provided remote learning to students but their IEPs required the teachers to provide physical prompts such as "hand over

[82] *Id.* § 1415(f)(3)(E)(i).

[83] Reid ex rel. Reid v. Dist. of Columbia, 401 F.3d 516, 524 (D.C. Cir. 2005)

[84] The First Circuit Court of Appeals is the only court that has not issued strict guidance on what approach to utilize in crafting this remedy. Arroyo-Delgado v. Dep't of Educ. of P.R., 199 F. Supp. 3d 548 (D.P.R. 2018)

[85] OSERS, *supra* note 4, at 2.

[86] *Id.*

[87] *Id.*

[88] *Id.*

hand" instruction to assist with task completion.[89] Also, many IEPs call for a paraprofessional to assist the child, but that became impossible during the pandemic. The U.S. Department of Education did not grant a waiver or relaxation of pre-COVID-19 IDEA requirements.[90]

For these reasons, the U.S. Department of Education Office of Special Education and Rehabilitative Services (OSERS) instead advised school districts that compensatory education might be appropriate for those students whose COVID-19-developed educational programs denied them a FAPE.[91] Further guidance stated that "[w]here, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services . . . IEP teams . . . must make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations."[92] Many schools did not resume normal operations during the entirety of the 2020–21and 2021–22 school years and instead offered fully remote learning or a mix of in-person and on-line learning that could be grossly deficient for students with disabilities. Furthermore, the pandemic caused major disruptions to the educational system over the past two years, making it less likely that IEP teams will be able to provide individually tailored compensatory education for each student with an IEP, possibly leading to an increase in due process complaints being brought by the parents of students with disabilities.[93]

In September 2020, the Office of Special Education Programs (OSEP) provided guidance on implementing services during the COVID-19 pandemic.[94] Again, these recommendations reiterated that

[89] *Brennan and James v. Wolf*, 2: 20-cv-02320-CFK (3rd Cir. 2020).

[90] OSERS, *supra* note 4, at 2.

[91] *Id.*

[92] OSERS, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities,* p. 2 (March 21, 2020), https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf.

[93] Anya Kamenetz, *Families of Students with Special Needs are Suing in Several States. Here's Why,* NPR (July 23, 2020, 7:06 AM), https://www.npr.org/2020/07/23/893450709/families-of-children-with-special-needs-are-suing-in-several-states-heres-why.

[94] OSEP, *IDEA PART B SERVICE PROVISION*, p. 2 (Sept. 28, 2020), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-provision-of-services-idea-

if schools did not offer in-person learning that they would not be relieved of their obligations to provide a FAPE.[95] Notably, when a child received ESY services in their IEP that were not provided due to COVID-19, the school still needed to find a method of implementing those lost services.[96] OSEP recommended that the ESY services could be made up during "the normal school year, during school breaks or vacations where appropriate to the child's needs and consistent with applicable standards."[97] These recommendations are important in creating an equitable remedy of compensatory education because they exemplify the necessity to place the child in the same position they would have been but for the denial of FAPE created by the pandemic. Recent due process complaints and decisions provide an insight into how different regions of the country are awarding compensatory education in the times of COVID, and how they struggled to provide compensatory education adequately because of the uncertainty surrounding the requirements.[98]

II. THE CIRCUIT COURT SPLIT AND DECODING APPROPRIATE COMPENSATORY EDUCATION

The circuit split created even more issues for families seeking compensatory education services for their children. Not only is compensatory education missing from the statute, but now parents, in their request for relief, must articulate how much compensatory education services should be provided by the school. Part A of this article will explain the quantitative approach and Part B the new qualitative approach, both noting the benefits and drawbacks that parents have or will face with this type of computation. Section C will look to how some hearing officers and circuit courts have actually created a hybrid approach that uses both of these methods.

Consider the following case example. Jack is a third grader with autism who was identified with his exceptionality at four years old

part-b-09-28-2020.pdf.

[95] *Id.*

[96] *Id.* at 5

[97] *Id.*

[98] *Infra* Section III.C.

and an IEP was provided since attending school. He spends the majority of his day in a self-contained classroom with four other peers with autism, one special education teacher, and a paraprofessional. He receives the following related services: occupational therapy, counseling with a social worker, speech therapy, and adapted physical education. At the end of second grade, the school conducted a tri-annual review to write a new IEP and Jack's mother noticed that he had made limited progress both academically and socially. Socially, the evaluation showed that Jack was largely non-verbal and only able to speak one- to two-word phrases. Academically, his math and reading skills were still at pre-K levels. Finally, Jack was still struggling with self-help goals such as fastening his clothes, handwriting, and proper bathroom behavior. After the evaluation, none of his goals or objectives were changed and although Jack's mother requested an increase in speech therapy minutes, the district found that it was not necessary.

In March 2020, Jack's school went completely virtual due to COVID-19. During reading and math, Jack struggled to pay attention to the computer and often wandered away or shut the screen. The physical education therapist sent Jack's mother some videos so that Jack could dance with them and follow directions; the speech pathologist never met with Jack; the occupational therapist emailed some activities to complete; and Jack's mother never heard from the social worker. Jack's mother kept track of the missed services and minutes, finding that Jack was owed forty-five hours of academic instruction in math and reading, six hours of speech therapy, three hours of occupational therapy, nine hours of adapted physical education, and two hours of social work services. As of March 2021, Jack's mother remained frustrated that Jack was still not making progress towards his IEP goals. The district had not offered any compensatory education services for the distance learning during the last ten weeks of school during the shutdown.

In this case an adjudicator is likely to find that the district denied Jack a FAPE in both of the above scenarios. First, by providing an inappropriate IEP that they should have known about after the new evaluation in the Spring of 2020; but also by failing to provide the total minutes and services required by the IEP due to the COVID-19 shutdown. Now it will be up to Jack's mother to request compensatory education services to make up for these deprivations. These services

could look like tutoring services[99] that are given after school to make up for the lack of math and reading progress or to make up for the lost minutes for the related services. Jack's mother could also request summer school or ESY services.[100] Finally, in addition to direct services provided to Jack, his mother could request training for Jack's teachers and service providers to address the implementation of his self-help goals and how best to work with children with autism.[101] The circuit court's issue is how to calculate the duration for these types of compensatory education awards.

A. The Quantitative Method of Calculating Compensatory Education

One approach to calculating compensatory education awards is to compensate the child on a quantitative one-to-one ratio, where for every hour, day, or year the child was denied FAPE the school must provide the equal amount of lost time.[102] The Third and Eighth Circuit Courts use the calculation of minutes lost as the starting point for crafting the remedy and in this way maintains the individual tailoring requirement of the IDEA.[103] The adjudicator then looks at the period of denial of FAPE and subsequently reduces the award based on the following factors: "the time reasonably required for the school district to rectify the problem,"[104] absences of the student,[105] and parental interference.[106] Alternatively, the adjudicator can also increase the award if the evidence shows that more education is required to place the child in the same position but for the FAPE denial, often applied when a child regressed.[107] The Third Circuit repeatedly states that a

[99] Pihl v. Mass. Dept. of Educ., 9 F.3d 184, 188 n.8 (1st Cir. 1993);

[100] Johnson v. Bismark Pub. Sch. Dist., 949 F.2d 1000, 1002 (8th Cir. 1991).

[101] Park, ex rel. Park v. Anaheim Union High Sch. Dist., 464 F.3d 1025, 1034 (9th Cir. 2006)

[102] M.C. v. Central Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996).

[103] Jana K. ex rel. Tim K. v. Annville-Cleona Sch. Dist., 39 F. Supp. 3d 584, 608 (M.D. Pa. 2014); see generally Moubry v. Indep. Sch. Dist. 696, Ely, Minn., 9 F. Supp. 2d 1086, 1103 (D. Minn. 1998).

[104] *M.C.*, 81 F.3d at 397.

[105] Garcia v. Bd. of Educ. of Albuquerque Pub. Sch., 520 F.3d 1116, 1130 (10th Cir. 2008).

[106] *Moubry*, 9 F. Supp. 2d at 1103.

[107] *Annville-Cleona Sch. Dist.*, 39 F. Supp. 3d at 608.

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FAPE denial does not require bad faith on the part of the school.[108] This is important in terms of COVID-19 and distance learning, but also because sometimes a FAPE violation is beyond the school's control, such as in the case of hiring practices or difficulties in finding qualified personnel.[109]

A seminal case in the one-to-one approach is *M.C. v. Central Reg'l Sch. Dist.*, where the school had provided an inappropriate IEP such that the parents sough to relocate the child to a residential placement.[110] The child had made little improvement towards his self-help goals in his IEP.[111] In fact, there was evidence that he regressed during the five year period at issue.[112] His lack of progression towards his IEP goals was compounded by the fact that the IEP itself lacked important objectives and parental training, the latter of which could be a related service.[113] Ultimately the denial of FAPE was the result of an inappropriate placement and an inappropriate IEP.[114] The lower court had awarded a residential placement but denied compensatory education for the five years that J.C. spent learning under an inappropriate IEP because the court found the school to be in good faith and that it had attempted to provide some educational benefit.[115] The Third Circuit disagreed and reasoned that a failure of an IEP to provide educational benefit places the school district on notice and that compensatory education accrues from that point onward.[116] The court found that when a child is denied a FAPE that "a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem."[117] The court reversed the denial of the compensatory education award with the guidance that this child's deprivation had lasted a long time; therefore, the lower court should determine the

[108] *M.C.,* 81 F.3d at 397.

[109] *See supra* I. Part A.

[110] *M.C.*, 81 F.3d at 391.

[111] *Id.* at 392.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at 393.

[116] *Id.* at 396.

[117] *Id.* at 397.

reasonable time to rectify any issues with the IEP and exclude that amount from the time where the district was placed on notice that the IEP was inappropriate.[118]

Overall, the quantitative approach appears to match the tuition reimbursement scheme because families are awarded the total of what they were deprived, just as families who choose tuition reimbursement are awarded the total tuition paid. In Jana K., the court found that full days of compensatory education was warranted when the FAPE denial resulted in a "pervasive loss of educational benefit to the student."[119] Furthermore, the court noted that it is beneficial to err by awarding too much compensatory education than too little.[120]

In certain circuits, when the school denied the child a FAPE for multiple academic weeks or years, courts found that compensatory education should be awarded for the full time period that the child was denied a FAPE in order to provide equity.[121] For example, in the past courts awarded students compensatory education awards in the amount of six years after being denied a FAPE for the same time period.[122] There were opponents of these lengthy awards, and, in 2004, IDEA was amended to include a statute of limitations of two years.[123] This helped to alleviate the issue of scheduling compensatory education for students over multiple academic years.

Recently, in Colorado,[124] when the state closed schools due to the pandemic, certain LEAs created Interim Student Plans (ISP) to supplement students' IEP's during distance learning.[125] The ISP pro-

[118] *M.C.*, 81 F.3d at 397.

[119] *Id.* at 610 (finding that when student makes little to no academic progress, it indicates that the district's failure to address his needs pervaded his entire school day and warrants the award of full days compensatory education).

[120] *Id.*

[121] Westendorp v. Indep. Sch. Dist. No. 273, 35 F. Supp. 2d 1134, 1137 (D. Minn. 1998).; Linda E. v. Bristol Warren Reg'l Sch. Dist., 758 F. Supp. 2d 75, 93 (D.R.I. 2010).

[122] *Westendorp,* 35 F. Supp. 2d at 1138*;* Lester H. v. Gilhool, 916 F.2d 873 (3d Cir. 1990). Although, since the two-year statute of limitations is now applicable to compensatory education awards, it is likely that multiple year awards will be limited to two years.

[123] 20 U.S.C.A. § 1415(f)(3)(c)

[124] Colorado is also located within the Eighth Circuit.

[125] *El Paso Cty. Sch. Dist.*, 77 IDELR 236, at 9 (CO SEA, Sept. 18, 2020).

vided an amount of reduced service minutes that the child would receive via teleconference or consultation services.[126] The school was required to fully implement this ISP; however, in this student's case, only two of the six services were provided in their entirety.[127] The ALJ found that this amounted to a denial of FAPE and entitled the child to compensatory education services.[128] Noting the relatively low amount of minutes missed, the ALJ decided that a quantitative approach was appropriate and tailored the award to provide for an hour by hour award.[129]

B. The Qualitative Method of Calculating Compensatory Education

Alternatively, the Fourth, Sixth, Ninth, and D.C. Circuit Courts of Appeals reject the one-to-one ratio approach and instead craft a qualitative remedy that focuses strictly on the educational benefit lost while attempting to place the child in the same educational position but for the FAPE denial.[130] In requiring a fact-specific inquiry, the hearing officer must tailor the award to meet the student's unique needs based on individual assessments.[131] The D.C. Circuit has rea-

[126] *Id.* at 11. These service minutes were a gross reduction than those provided by the IEP where the child was to receive direct instruction for the following amounts: 6.5 hours per day of SPED; 30 minutes per month of occupational therapy (OT); 1 hour a month of Orientation and Mobility (O&M); 3 hours per month of speech therapy; 1 hour per month of physical therapy; and 30 minutes per month of Vision Services. *Id.* at 3. Instead, the ISP called for the following services: 20 minutes per week SPED; 20 minutes per month OT; 15 minutes per week O&M; 20 minutes per month speech; 20 minutes per month of physical therapy; and only consultations for vision services. *Id.* at 6.

[127] *Id.* at 11.

[128] *Id.* at 13

[129] *Id.* The ALJ also provided that the school complete these hours, if necessary remotely, by December. 18, 2020, because of the ongoing pandemic. *Id.*

[130] Reid ex rel. Reid v. Dist. of Columbia, 401 F.3d 516, 524 (D.C. Cir. 2005); Bd. of Educ. of Fayette Cty. v. L.M., 478 F.3d 307, 316 (6th Cir. 2007); Hogan v. Fairfax Cty. Sch. Bd., 645 F. Supp. 2d 554, 576 (E.D. Va. 2009); Parents of Student W. v. Puyallup Sch. Dist., No. 3, 31 F.3d 1489, 1497 (9th Cir. 1994)

[131] *Reid*, 401 F.3d at 524; *see also Puyallup Sch. Dist.,* 31 F.3d at 1497.

soned that the one-to-one quantitative approach acts more as a damage award instead of an equitable remedy.[132] Using the qualitative approach, the remedy could provide an intensive, albeit short, compensatory education award or even an extended program that would exceed the one-to-one replacement.[133] Circuit courts which follow this approach find that the compensatory award should be guided by IDEA and provide a FAPE that meets the individual needs of the child by providing the necessary services to provide the "educational benefit that likely would have accrued from special education services" that were lost.[134]

In *Reid*, the hearing officer originally awarded 810 hours or "1 hour each day of special education services not provided."[135] The court found that the initial award of hour-for-hour compensation was not appropriate because a qualitative approach was necessary under the IDEA.[136] Instead, the court remanded the issue with the instruction to provide evidence that showed the child's "specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits."[137] This is the same inquiry used by circuit courts following the qualitative approach today.

In *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbit*, the first attempt at crafting compensatory education services was left to a multi-disciplinary team that included the parents and school.[138] Unfortunately, no progress was made.[139] The hearing officer then ordered a compensatory education award that required 3,300 hours of tutoring, based on a failure to provide 27.5 hours per week

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

[133] *Id.* at 524; Park v. Anaheim Union High Sch. Dist.,464 F.3d 1025, 1033 (9th Cir. 2006); *Bd. of Educ. Of Oak Park,* 79 F.3d at 657; *M.C.,* 81 F.3d at 397.

[134] *Reid,* 401 F.3d at 524; *see also* Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 717–18 (3d Cir. 2010).

[135] *Reid,* 401 F.3d at 520. The hearing officer also crafted a clause that allowed the IEP team to conclude compensatory education services when they were no longer needed, which the court found counter to IDEA

[136] *Id.* at 523.

[137] *Id.* at 526.

[138] Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt, 532 F. Supp. 2d 121, 122 (D.D.C. 2008).

[139] *Id.*

BYU Education & Law Journal, Vol. 2022, Iss. 1 [2022], Art. 3

for over forty weeks, but the adjudicator noted that the record was woefully inadequate.[140] On appeal, the district court called this award a "mechanical hour-per-hour calculation" and vacated it because the award was not individually tailored, used a "backwards-looking calculation of educational units denied to a student," and because the hearing officer failed to provide reasoning for this decision.[141] During the interim, the child received 1,400 hours of individualized tutoring.[142] The family received new evaluations, and, at an evidentiary hearing, provided for an expert witness that proposed a compensatory education plan which included the 1,400 hours already provided, and called for an additional 950 hours in both math and reading tutoring.[143] The court noted that this amounted to the same 3,300 hours initially awarded, but found that, in this instance, the formula-based calculations were supported by qualitative analysis to place the child in the same situation but for the denial of FAPE.[144]

C. A Hybrid Method of Calculating Compensatory Education

Although the circuit courts are split, there is still evidence that, among the lower courts and within the hearing officers' jurisdiction, judges are often using a split of both qualitative and quantitative approaches.[145] This occurs because the IDEA does not provide guidelines for crafting compensatory education awards; nor has the Supreme Court provided an applicable test. Therefore, the adjudicator often resorts to the remedy requested by the parents and the experts' opinions from each side.[146] Even in the D.C. Circuit, which created the qualitative approach method, courts have utilized the one-for-one

[140] *Id.*

[141] *Id.* at 123–124.

[142] Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt, 669 F. Supp. 2d 80, 82 (D.D.C. 2009).

[143] *Id.* at 83.

[144] *Id.* at 87.

[145] Perry A. Zirkel, *The Two Competing Approaches for Calculating Compensatory Education under the IDEA: An Update.* 339 WEST'S EDUC. L. REP. 12 (2017) [hereinafter *Compensatory Education Update*].

[146] Woods v. Northport Pub. Sch., 487 F. App'x 968, 978 (6th Cir. 2012) (upholding the hearing officers 758 hour award for the 12 hours denied over the course of two years based on

approach, where expert's methodology supports the total amount.[147] In fact, as long as the record is clear that the court's decision is based on placing the child where she would have been but for the violation, these hidden quantitative methods have been upheld.[148]

In recent months, a variety of ALJ's have been faced with this very issue as parents bring due process complaints for the denial of FAPE for their children with disabilities. The opinions of the ALJ's provide insight into potential compensatory remedies that are appropriate, but also demonstrate the variances between states and circuit courts. These variances are problematic because a child's state of residence should not determine the type of compensatory education services awarded, especially considering that this is not the case for the tuition reimbursement scheme.

In a recent due process hearing within the Ninth Circuit,[149] a now aged out child was in the midst of postsecondary transition counseling services that provided hands-on vocational training and community-based instruction as mandated by her IEP.[150] These services were necessary for her continued success after graduation.[151] The school had provided a distance learning program during the shutdown, but the total amount of minutes provided was far less than required and did not incorporate the community-based instruction.[152] Although the LEA argued that they had done their best in adhering to the IDEA requirements to the max extent possible, once regular school resumed the LEA did not make any individualized decisions on whether the student needed compensatory services.[153]

expert testimony that child's window of opportunity to be literate was closing); B.H. v. W. Clermont Bd. of Educ., 788 F. Supp. 2d 682, 701 (S.D. Ohio 2011) (finding that the two year award was appropriate where the child was denied FAPE for two years, but the expert recommended 3–4 years of physical and occupational therapy).

[147] *Nesbitt*, 669 F. Supp. 2d at 253.

[148] Matanuska-Susitna Borough Sch. Dist. v. D.Y., No. 3:09-CV-0073 JWS, 2010 WL 679437, at *6 (D. Alaska Feb. 24, 2010)

[149] The Ninth Circuit has followed the qualitative method.

[150] *Los Angeles Unified Sch. Dist.,* 77 IDELR 116, at 2 (CA SEA. Aug. 24, 2020).

[151] *Id.* at 7.

[152] *Id.* at 10. (During shutdown the student missed half of their minutes for life training and independent living skills totaling 910 minutes lost.)

[153] *Id.* at 13.

Ultimately, the ALJ found that the distance learning fell materially short of actual implementation of the IEP and that the LEA failed to follow OSERS advice by not creating compensatory services.[154] At the time of the decision, in-person schooling, hands-on vocational training, and community training were all unavailable given the continued COVID-19 pandemic.[155] The ALJ cited Reid in crafting the type of compensatory services necessary to compensate the child for the violation of FAPE.[156] Consequently, the ALJ reasoned that the child needed an immediate remedy because the student had shown a regression of skills during the shutdown and distance learning.[157] The award required funding of forty hours of postsecondary transition counseling to compensate for the lack of related services during the shutdown, which was much less than the 116 hours of training she should have received; as well as a one-hour session of group speech and language for the one-hour session that was missed.[158] Consequently, the award for compensatory education included a qualitative and quantitative approach so that it was tailored to the individual needs of the student.

In contrast, in *Brookings Sch. Dist.*,[159] a school was found to have provided most of the child's minutes during distance learning, and, that because the child was able to make progress towards the annual goals, compensatory education was not warranted.[160] The reports during distance learning showed that the student received less direct educational service minutes than required by the IEP and less related service minutes in speech/language and occupational therapy (OT) than required by the IEP.[161] However, the parents lacked evidence and documentation to demonstrate that the student had not made appropriate progress. In contrast, the LEA provided evidence that the

[154] *Id.* at 9.

[155] *Id.*

[156] *Id.* at 14 (citing *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 525 (D.C. Cir. 2005)).

[157] *Id.* at 15.

[158] *Id.* at 16.

[159] Located in within the Eighth Circuit Court of Appeals.

[160] *Brookings Sch. Dist.*, 77 IDELR 55, at 10 (S.D. SEA, Aug. 7, 2020).

[161] *Id.* at 10.

student had made progress and did not need compensatory education.[162] Therefore, the ALJ found that during the COVID-19 shutdown there was not a FAPE denial.[163] However, the ALJ did award a one-day replacement via distance learning or in-person for the first day of ESY that the child missed and mandated that it be completed prior to the beginning of the 2020–21 school year.[164] Thus, compensatory education was awarded to replace the one missed day, even though there was no evidence that it negatively affected the student's academic progress.[165] Perhaps the discrepancy between these two decisions is explained by the fact that the LEA had agreed to provide compensatory education for the one day missed and disagreed with the necessity of compensatory education for the missed time during distance learning.[166] Ultimately, this decision seems at odds with the ALJ's own reasoning.

III. APPROPRIATE REMEDY FOR FAPE VIOLATIONS

Students with disabilities who are denied FAPE might find themselves in one of three groups. The first group is those that made adequate progress towards their goals in spite of the denial and will not need compensatory education services. The next group of students are those that make some limited progress or none at all. This lack of progress could have been the result of a deficient learning program because of the lack of related services, missed minutes, or improperly trained teachers and service providers. Finally, the last group of students are those that the school failed to identify as a child with a disability or perhaps failed to implement the IEP with fidelity, leading to educational regression. These last two groups of students deserve compensatory education services that will place them in the same position they would have been but for the FAPE denial. Notably, these last two groups are analogous to the children with disabilities who were adversely affected by the COVID-19 school closures.[167]

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[162] *Id.* at 16.

[163] *Id.*

[164] *Id.* at 18.

[165] *Id.* at 16.

[166] *Id.*

[167] Children from low-income families often are overrepresented in special education; therefore, many students with disabilities may not have equal access to on-line learning because

BYU Education & Law Journal, Vol. 2022, Iss. 1 [2022], Art. 3

Section A, which follows, will identify the problems that the circuit split has on these last two groups of students. Section B will focus on a legislative solution that will attempt to provide equity for all students with disabilities across the United States. Finally, the potential issues with the judicial solution will be addressed in Section C.

A. The Problem with an Imprecise Remedy

The recent ALJ decisions show the inadequacy of the current standards, especially as they pertain to FAPE denials during COVID-19. The Brookings School District and El Paso County School Districts are located in the Eighth Circuit, where historically a quantitative one-to-one approach has been utilized; whereas Los Angeles Unified School District lies within the Ninth Circuit, where precedent calls for a qualitative approach.[168] These discrepancies in how compensatory education is awarded demonstrate the necessity for a standard that utilizes unbiased expert opinions and provides unique tailoring of compensatory education services that utilize both qualitative and quantitative methods. Moreover, multiple circuits repeatedly cite to Reid, where the court stated the purpose of compensatory education is to place the student in the position that the student would have been had the LEA provided FAPE in the first place.[169] "[O]rdinary [educational programs] need only provide 'some benefit,' compensatory awards must do more—they must compensate."[170] If this is the goal, then, arguably, these recent COVID-19 cases, and many other compensatory education cases, were wrongly decided.

1. Differing Treatment Based on Geographic Location

One of the biggest problems with the current circuit court split is that children with disabilities might receive less appropriate compensatory education awards, depending on their geographic region.

of financial constraints. Kamenetz, *supra* note 93.

[168] *See supra* Section II.C.ii.

[169] Reid ex rel. Reid v. Dist. of Columbia, 401 F.3d 516, 525 (D.C. Cir. 2005).

[170] Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 (11th Cir. 2008) (quoting *Reid,* 401 F.3d at 525).

https://scholarsarchive.byu.edu/byu_elj/vol2022/iss1/3

While education activists and politicians have recently attempted to change current policies (which have yielded a system in which a child's zip code dictates her educational outcomes),[171] awards for compensatory education have failed to meet this goal.

Going back to our case example, depending on whether Jack was located in a quantitative or qualitative circuit could vastly change the type of compensatory education awarded. If he lived in a quantitative circuit, Jack could receive after-school services or private tutoring for a duration of 110 hours, just for the time missed during the COVID-19 distance learning. This would be in addition to the deprivation that occurred due to the inappropriate IEP during his third-grade school year, which could amount to over 180 hours for both math and reading.[172] In contrast, using the qualitative approach, Jack's mother might struggle to find or afford an expert, resulting in the adjudicator agreeing with the school that perhaps only a change in IEP and seven weeks of Extended School Year services would be sufficient. Seven weeks of services would mean that Jack would get a total of 56 hours to make up for the deprivation in both math and reading, as well as the four related services. More optimistically, in the case where Jack's mother does find an expert, the adjudicator may be persuaded that, even though Jack received some math and reading during the COVID-19 shutdown, his disability made it impossible for Jack to gain any academic benefit. So, although Jack's mother asked for 45 hours of compensatory services for math and reading for that deprivation, the adjudicator could find Jack is actually entitled to seventy hours for both subjects. This same reasoning could result in a compensatory education award for the inappropriate IEP during third grade to also be much longer in duration. But it is apparent that the nature of these awards may be dependent on a parent's income level, their ability to find appropriate experts, and even the adjudicator's general understanding of special education.

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[171] Mark A. Elgart, *Student Success Comes Down to Zip Code,* HUFFINGTON POST (May 26, 2017), https://www.huffpost.com/entry/too-often-student-success_b_10132886; Nicole Daniels, *How Much Has Your ZIP Code Determined Your Opportunities?,* N.Y. TIMES (May 19, 2020), https://www.nytimes.com/2020/05/19/learning/how-much-has-your-zip-code-determined-your-opportunities.html; Lexie Woo, *Zip Code Should Not Determine a Student's Access to Quality Education,* EDUC. POST (Oct. 28, 2015), https://educationpost.org/zip-code-should-not-determine-a-students-access-to-quality-education/.

[172] Assuming he was due five hours of special education math and reading services each week for the average school year which is thirty-six weeks.

2. Rogue ALJs and the Income Disparity

Furthermore, as seen Section II.C, adjudicators often apply a hybrid approach, using both qualitative and quantitative methods of creating a remedy. This stems from the main issue that ALJs are not educators and have not been given clear guidance.[173] As the court noted in *Nesbit*, "[w]hile I do have the authority to fashion a compensatory education award, I certainly do not have the expertise of an educator."[174] ALJs can rely on LEA's opinions for the creation of compensatory education services. However, an over-reliance on schools that are systemically discriminating against students with disabilities is likely to only promulgate more problems.[175] The question remains: how are hearing officers to decide what services are necessary, and to what degree a child would have progressed but for the violation?[176]

One way parents from higher income brackets can combat an ALJ's overreliance on the LEA's experts is by hiring their own experts. Although the IDEA does allow the court to provide attorney's fees for the prevailing party,[177] the Supreme Court found that expert fees are not recoverable in IDEA cases.[178] Parents have a high burden of proof to not only show when the FAPE denial has occurred, but also why and how compensatory education awards should be crafted. Generally, evidence about "educational methodology, complex behavioral supports, medical issues, and other technical subjects" are necessary; which means that multiple expert witnesses would be needed.[179] Expert witnesses can cost thousands of dollars, placing a large burden

[173] Terry Jean Seligmann & Zirkel, *supra* note 7, at 301.

[174] Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt, 669 F. Supp. 2d 80, 84 (D.D.C. 2009).

[175] *See* Class Action Complaint, Z.Q. v. N.Y.C. Dept. of Educ. No. 20-cv-09866, p. 2 (S.D.N.Y. 11/23/20); Complaint, *W.G. v. Kishimoto,* Case No. 20-cv-00154 (D. Haw. 4/13/20); Anya Kamenetz, *supra* note 93.

[176] Seligmann & Zirkel, *supra* note 7, at 301.

[177] 20 U.S.C. § 1415(i)(3)(B)(i)(I)

[178] *Id.* § 1415(i)(3)(B); Arlington Cent. Sch. Dist. v. Murphy, 548 U.S. 291, 304 (2006).

[179] *Reinstate Prevailing Parents' Right to Expert Witness Fees*, COPAA (last accessed May 6, 2021), https://www.copaa.org/page/ExpertWitness.

on lower-income families.[180]

Finally, the problems of income disparity are most prevalent when students with wealthy parents unilaterally choose a private school or tutoring services and simply wait for total tuition reimbursement once they are successful in their due process claim. In our case example, if Jack's mother were part of the upper (or upper-middle) class, she may respond to the fact that the new IEP is grossly inappropriate for her autistic child by sending him to a private school, which may offer innovative therapies and services for children with autism. Under the IDEA, if she was successful at showing that the school denied Jack a FAPE, she could not only be awarded tuition reimbursement for the third grade, but an adjudicator might also find that the private school was the appropriate placement, and that the LEA must continue to pay the private tuition. If, however, Jack's mother came from a middle-class income bracket, she may not be able to afford private school; but could still likely afford a private tutor to work with Jack after school during the COVID-19 shutdown and the third-grade school year. Here again, if she was successful at proving a FAPE denial, the adjudicator could award tuition reimbursement and order that the tutoring continue as compensatory education award for the deprivation. Lastly, if Jack's mother were from a lower socio-economic level, she would likely have no such options as those described above. Jack would likely be forced to stay at the district school, in which he would likely continue to receive the same sub-par education, based on the inappropriate IEP. It is reasonable to assume that, in such a scenario, nothing would change until Jack's mother fully litigated her due process complaint and the adjudicator awarded compensatory education services.

This hypothetical case example highlights the different outcomes for children with disabilities, based on their families' income levels. The majority of ALJs are not experts in special education and rely on experts to explain what is appropriate and necessary for children with disabilities. If parents cannot afford their own experts, then ALJs will rely on the LEA's opinions, which may be to the detriment of the child. Similarly, it is much simpler for ALJs to award tuition reimbursement because it is codified in the IDEA, and because it is a straightforward quantitative measure. If a parent paid $10,000 for tuition, the ALJ can simply award that same amount. The issue of income

[180] *See id.*

disparity in the context of special education is crucial to understanding the importance of codification, because "approximately two-thirds of children with disabilities live in households that qualify as (or are just over) low-income."[181] These issues will continue unless a new method for calculating compensatory education is codified.

3. The Disadvantages of the Quantitative Method

Using the case example of Jack, an adjudicator using a quantitative method would most likely find that Jack is owed compensatory services for the inappropriate IEP that was created in February of 2020. As of March 2021, it has now been a full year of the same goals and services that have not provided educational benefit to Jack. He remains at a pre-k level and will soon be entering the fourth grade. Therefore, an award that provides compensatory education for one year of each of the related services (speech, occupational therapy, social work, and adapted physical education) should be awarded. For example, Jack's mother wanted him to receive an additional thirty-minute session each week, but the school had refused, so the award of compensatory education should be a total of 1,152 minutes.[182] It also should provide an award for instruction in math and reading for the year of deprivation. Additionally, the adjudicator could award extra time for the deprivation during the shutdown, which Jack's mother has already calculated by totaling the amount of missed services during the ten weeks.

There are multiple positives for this approach. First, it allows for low-income parents to rely on accessible data instead of expensive experts. One source of accessible data could include independent educational evaluations (IEEs), which could show a FAPE denial by the district. If parents are concerned about the placement of their child, the IEP goals, objectives, or related services, or even the failure to identify their child as in need of special education, they are entitled to an independent educational evaluation at public expense.[183] The IEEs can demonstrate the types of services that the student requires, any

[181] Seligmann & Zirkel, *supra* note 176, at 664.

[182] The average school year is 36 weeks, so the time is calculated by multiplying 36 weeks x 30 minutes.

[183] 34 C.F.R. § 300.502

deficits that are not being addressed by the IEP goals or objectives, and the current academic, social, and physical levels of achievement. Alternatively, IEP progress reports, grades and attendance records also provide valuable information, such as when the student began failing to make progress or regress. This type of information can be used by the adjudicator to pinpoint a time where the school knew, or should have known, of the FAPE denial, in order to rectify the issues with the IEP.

Once that time is calculated, the adjudicator can craft the appropriate remedy for that period of deprivation. For example, if the school failed to identify a kindergarten child, and the IEE that same year reveals the student did qualify for speech services, the adjudicator could provide speech services for that missed year. Alternatively, if a current sixth grader's progress reports consistently show that he is not progressing on his reading goals, and that he has continued to read at the fourth-grade level, has perfect attendance, and has been failing reading since the fifth grade, the adjudicator might award compensatory education services for a reading tutor for the year and a half that the student failed to make progress because the IEP goals, objectives, or services were inappropriate for reading. Or, in the case of COVID-19, where a child's IEP required two thirty-minute sessions of occupational therapy, but distance learning made this inappropriate during seven weeks of Spring 2020, the adjudicator can award seven hours of occupational therapy services for the failure to implement the IEP.

Critics of this approach point out that adherence to IDEA requires that services take the unique needs of the child into consideration, which is a tenet of IEP.[184] However, if an IEP that has been especially crafted for a child was not properly implemented, resulting in forty hours of missed special education services, why must the parent subsequently prove those forty hours were necessary, since the initial IEP stated that they were necessary? Similarly, even in cases where the IEP was inappropriate, or the district failed to identify the child, once an appropriate IEP is written it will contain the total amount of minutes for the special education services during the regular school year, which can serve as a blueprint for the total amount that should have been provided during the period of deprivation. Again, this new IEP would have taken into consideration the unique needs of the child,

[184] *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005).

and using it as a guide for quantifying the time lost would then mean the award has also been uniquely crafted to the child. Issues arise when the child has received some academic benefit during those classes, but not nearly enough to be considered a FAPE. In that case quantifying the compensatory award is not as simple as adding up the missed hours of classes. The quantitative method fails because there is often ambiguity surrounding the circumstances of a child's academic growth. Sometimes providing more hours of instruction will not support the child. In fact, doing so could conceivably be more detrimental, due to factors such as student resistance to the lengthy school days or loss of summer vacation.

4. The Disadvantages of the Qualitative Method

In Jack's case, if he was located in a qualitative circuit, his mother could present the same quantitative data as stated above, but she would need to have some sort of expert testimony that affirmed this amount as necessary for placing Jack in the same place he would have been but for the deprivation. Jack would likely need to be tested again to show that he failed to make adequate progress during the third grade as well as during the COVID-19 shutdown. Multiple experts would be necessary, because Jack is receiving related services for occupational therapy, adapted physical education, social work, and speech therapy. They would need to explain why Jack needed the total amount of compensatory services, and how these should be provided. In contrast, the district, using their own experts, might argue that, based on Jack's exceptionality, his progress has been adequate and that he would not benefit from extra minutes. Perhaps the district might agree to some compensatory services, but only extra minutes during the six-week summer session, which would be grossly below the amount requested by Jack's mother. The adjudicator would have to decide which expert to believe, and what amount would serve Jack best.[185]

[185] *See* Parent v. Cty. Public Sch., #20-064/20-069, at *36–37 (June 23, 2020) https://www.doe.virginia.gov/special_ed/resolving_disputes/due_process/hearing_officer_decisions/2019-20/index.shtml (last accessed Mar. 16, 2022) (Wherein the hearing officer found that the parents' expert more qualified than the school's experts but noted that in the fourth circuit due deference is given to educators (citing Cty. Sch. Bd. Of Henrico Cty., Va. v. Z.P. ex rel.

There are benefits to the qualitative approach, including the fact that an adjudicator could award compensatory education services in excess of the total amount of deprivation. Moreover, the analysis utilized usually requires expert information so that the compensatory award will actually result in educational benefit to the child. This is important, because if the child has regressed significantly, or has experienced trauma because of the inappropriate placement or IEP, the child might need services in excess of the time of deprivation. However, the supporting evidence often required for the qualitative analysis is cost-prohibitive to low-income parents. Educational experts are expensive to obtain, and, depending on the district's geographic region, might be difficult to find. Moreover, the district may provide their own experts to counter the parents' request for relief, leaving the adjudicator to craft the remedy.[186]

Finally, adjudicators often use the quantitative method as a guide for crafting the award, especially when a child has only been deprived of a few hours of instruction.[187] This essentially lets LEAs that have committed gross long-term violations off the hook for the many hours that they failed to provide a child with FAPE, while awarding parents full recompense if their child attended an LEA that committed shorter in-time violations. Therefore, the qualitative method often fails both the LEAs and the child.

B. A Statutory Created Solution

Congress needs to codify compensatory education guidance within the IDEA as they did the tuition reimbursement set forth in *Burlington*. Codifying compensatory education not only provides parents with a framework of possible remedies, but it also puts LEAs on notice that failing to provide a FAPE could result in extensive and costly awards. One critical issue is that, even with codification, the remedy will probably not have a significant impact on the majority of students with disabilities. Today, low-income families, English learn-

R.P., I 399 F.3d 298, 313 (4th Cir. 2005)).

[186] "While I do have the authority to fashion a compensatory education award, I certainly do not have the expertise of an educator." Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt, 532 F. Supp. 2d at 84.

[187] *See supra* Section III.C.

BYU Education & Law Journal, Vol. 2022, Iss. 1 [2022], Art. 3

ers, and minority students are faced with many educational disparities; but their ability to file due process complaint against the school is limited by access to justice issues, such as finding and retaining an attorney or knowing when their rights have been violated. Furthermore, administrative hearings can involve expert and attorney's fees, which is another financial hurdle for families.[188] Codification can be an important first step in supporting children with disabilities.

When an LEA denies a child a FAPE, it should be required to make up those lost minutes. By analogy, if schools must make up days during the school year to comply with total days/hours in the school year then, we should afford the same protections to children with disabilities. Just as wealthy parents get a full tuition reimbursement for FAPE denials, less affluent parents should get a full-time reimbursement that is uniquely crafted to place the child in the same position, but for the deprivation. The hearing officer or court is given the power to decide and craft the remedy. Therefore, in making up for lost minutes and days due to a denial of FAPE, the award could provide for a hybrid method of the quantitative and qualitative approaches.

1. Quantitative Baseline

Utilizing a quantitative approach that focuses on the amount of deprivation provides a clear standard for hearing officers to start from when crafting an award. As the court noted in *Nesbit*, "[a] compensatory award constructed with the aid of a formula is not per se invalid."[189] Furthermore, it appears that ALJs are more willing to provide a one-to-one ratio when the compensatory education award is rather limited in time.[190] The reason schools do not want this type of remedy is because this could require them to provide services for extended periods at great cost. However, the two-year statute of limitation provides a newly created barrier that makes it highly unlikely that courts will award years of compensatory education, as they did in *Draper*.[191] Therefore, prolonged awards that contemplate years of

[188] Seligmann & Zirkel, supra note 176, at 301.

[189] *Nesbitt,* 532 F.Supp.2d at 123.

[190] *See supra* Section II.C.ii.

[191] In fact, some states have limited this time even farther. *See LA 1 year stat. of lim.*

https://scholarsarchive.byu.edu/byu_elj/vol2022/iss1/3

services are no longer at issue and should not be a limiting factor in adopting this quantitative base for compensatory awards. Moreover, more current trends in cases appear to address only partial denials of FAPE, where the school fails to provide a certain service;[192] or, in the case of COVID-19 closures, perhaps related services that do not lend themselves to on-line distance learning.

Using the COVID-19 cases as case studies in *Brookings Sch. Dist*., instead of concluding that the lack of minutes was irrelevant since progress had been made, the ALJ should have reviewed the possibility that by providing the full number of minutes the student would have met the annual IEP goals. If that was true, then compensatory education services should have been provided to place him in the same position that he would have been prior to the FAPE denial. The ALJ could have asked whether the student made the same rate of progress as he had pre-COVID, which would reveal whether the distance learning was actually adequate. Furthermore, by providing the full amount of minutes that the child was deprived, it is more likely the compensatory education services will allow for the child to meet the IEP goals and objectives, which should have been individually tailored to the child's needs. This type of analysis would align with *Endrew F.*, which requires the progress made be appropriate, considering the child's disability and potential.

2. A Qualitative Cap

A one-to-one remedy could be crafted, with a clause that allowed for schools to stop the compensatory education services when the student meets the IEP goals. This would incentivize the school to provide appropriate services quickly and efficiently. If a student begins meeting the goals that were in place for the past school year, an IEP meeting could be held. If the IEP team is in agreement, the compensatory education services could be stopped. This would essentially create a remedy that provides two paths for the school: give the required amount of minutes to be completed by a date set by the ALJ, or

OTHERS

[192] Orange Unified Sch. Dist. v. C.K., 59 IDELR ¶ 74, No. SACV 11-1253JVS, 2012 WL 2478389, at *11–14 (C.D. Cal. June 4, 2012); Woods v. Northport Pub. Sch., Nos. 11-1493, 11-1567, 2012 WL 2612776, at *9 (6th Cir. July 5, 2012)

BYU Education & Law Journal, Vol. 2022, Iss. 1 [2022], Art. 3

give the required amount of minutes until the goals are met. In essence, this would balance the qualitative and quantitative approaches.

The argument against this method is that hearing officers are supposed to make the decision.[193] There is precedent and law stating that the ALJ does not have the power to subrogate his power and allow the IEP team to create the remedy.[194] But these cases are not analogous, because in those instances the IEP team was essentially crafting the compensatory education services based on a new evaluation for the IEP.[195] In contrast, this type of compensatory education award is analogous to the remedy crafted in the Eleventh, Ninth, Sixth, and Fourth Circuit Courts of Appeals.[196] In *Draper*, the student was awarded compensatory education at a private school for five years or until he graduated, whichever came first.[197] Likewise, in the Sixth Circuit, the court upheld a compensatory education award that provided for two years of services missed, and allowed for a committee to determine when the award would be fulfilled.[198] A quantitative, one-to-one approach in setting the total amount of compensatory education services would be appropriate when coupled with a qualitative approach that allows for the services to come to an end, once the IEP goals have been met or the minutes have been recouped, whichever comes first.

When there has not been a drastic regression, courts and hearing officers can be more creative in crafting their award. Every child

[193] 20 U.S.C. § 1415(f)(3)(E)(i).

[194] *See Id*; *see also* Reid ex rel. Reid v. Dist. of Columbia, 401 F.3d 516, 526 (D.C. Cir. 2005); Bd. of Educ. of Fayette Cty., Ky. v. L.M., 478 F.3d 307, 318 (6th Cir. 2007); M.S. ex rel. J.S. v. Utah Schs. for Deaf and Blind, 822 F.3d 1128, 1136 (10th Cir. 2016).

[195] *Id.*

[196] Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1283–84 (11th Cir. 2008); Hawaii, Dept. of Educ. v. Zachary B. ex rel. Jennifer B., No. CIV. 08-00499JMSLEK, 2009 WL 1585816, at *10 (D. Haw. June 5, 2009) (crafting an award that allowed for fifteen months of one-to-one tutoring for one day each week that was overseen by an independent tutor); Bd. of Educ. of Fayette Cty., Ky, 478 F.3d at 318; Hogan v. Fairfax Cty. Sch. Bd., 645 F. Supp. 2d 554, 576 (E.D. Va. 2009) (finding that the services could be completed in a manner that was mutually agreed upon by both parties).

[197] *Draper*, 518 F.3d at 1283–84 ("The district court awarded Draper full services at the Cottage School without the $15,000 cap and extended the time frame of the remedy to 2011 or when Draper receives a high school diploma, whichever comes first.").

[198] *Bd. of Educ. of Fayette Cty., Ky*, 478 F.3d at 318.

https://scholarsarchive.byu.edu/byu_elj/vol2022/iss1/3

is different and requires a unique IEP. To align with *Endrew F.*, the special education and related services need to be reasonably calculated to provide academic benefit. In the same way, compensatory education services should align with this goal, with the added objective of compensating the student. Other scholars have called for using the total amount of hours deprived as a "yard stick" that then can be supplemented by educational records and experts.[199] This information should be utilized, but is not the only key to ensuring that the remedy is uniquely tailored.

For example, the court not only crafts the amount of compensatory services, but also has the authority to craft what and how the services will be provided.[200] This crafting would include the "kinds of services . . . to be provided and funded by the district . . . the timing and furnishings of the services, and deal with who will provide them, or who will control the choice of the provider."[201] Likewise, in cases where the child has regressed, more hours might be necessary; which is why this proposal argues that the amount deprived be the minimum amount of services provided (and it is well within the ALJ's power to increase that amount if necessary). Conversely, the total amount can be reduced because of parental interferences, the time for the school district to remedy the issue, and absences of the student.[202] Therefore, the hearing officer will continue to retain the power to create an individualized determination for the student.

Potential language for the codification could mirror the tuition reimbursement and outline the limitations of this award. Such language might include the following:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency or if the public agency has failed to meet their child find requirement, successfully demonstrates that the public agency has denied or not made available to the child a free and appropriate public education in a timely manner, a court or a hearing officer may require the agency to

[199] Seligmann & Zirkel, *supra* note 176, at 311.

[200] *Id.*

[201] *Id.*

[202] *See supra* Section II.B.i.

> award compensatory education services in order to place the child in the same position but for the deprivation. Calculation of this time should be guided by the total time of deprivation taking into consideration the following: the reasonable time it would take for the public agency to remedy the denial; the absences of the child; parental interference; and regression of the child. These factors could reduce or enhance the total award. Finally, a court or a hearing officer may require the public agency in collaboration with the parents or in the alternative an independent expert to terminate the compensatory education award once the child has completed the goals contained in an appropriate individual education plan.

C. Potential Challenges of this Approach

This change is necessary because it is often difficult to prove how much compensatory education is sufficient to place the child in the same position he would have been but for the deprivation. The guidance that this Article proposes relies on the fact that the IEP teams, which includes the parents and child, will be working cooperatively to ensure students with disabilities are making continued progress. Considering the reason a parent has to file for due process is because the LEA refused or failed to provide a FAPE, not every LEA can be trusted to ensure students with disabilities are provided a FAPE; let alone the compensatory education services for its denial. However, this is rectified by having the adjudicator order an outside entity or provider to make the appropriate decision if there is evidence of animosity between the school and parent.

Moreover, courts in the qualitative circuits often rely on the idea that "formula-based award may in some circumstances be acceptable if it represents an individually-tailored approach to meet the student's unique prospective needs, as opposed to a backwards-looking calculation of educational units denied to a student."[203] Using the

[203] Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt, 532 F. Supp. 2d 121, 123 (D.D.C. 2008); *see* Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 534 F. Supp. 2d 109, 117 (D.D.C. 2008), modified in part, 555 F. Supp. 2d 130 (D.D.C. 2008).

amount of deprivation as the starting point is obviously "backwards-looking." However, this is remedied by the unique tailoring of the "what" and "how" portion of the award. Moreover, backwards-looking calculations are not inherently wrong. Tuition reimbursement is obviously backwards looking in finding the total amount of payment that should be awarded. Therefore, less affluent families should not be required to meet a higher standard of proving how much services their child needs through new evaluations or the hiring of expensive experts.

CONCLUSION

While previous compensatory education claims were limited to schools who had failed to comply with a single student's IEP due to internal reasons, which included lack of personnel, absences, or even bad-faith efforts by the school; there exists a potential for widespread denial of a FAPE for the many special education students throughout the nation, due to the recent COVID-related school closures. Likewise, prior compensatory education awards were vastly varied and judicially created, which is why there needs to be a clarification, such that school districts, ALJs, and hearing officers can be better prepared in the future.

Notably, this article does not address certain issues that could affect the construction of compensatory education services by a court. These include the fact that distance learning often requires parents to sit with their child and be a teacher; this is not a FAPE, it is homeschooling. Alternatively, courts will have to decide whether a child is owed services when a parent declined the distance-learning plan that a good faith district attempted to implement. These issues are important, but are directed at the liability part of FAPE denial, while this article is solely focused on the remedy.

This Article proposes a balance of the quantitative and qualitative methods currently employed throughout the circuit courts. A one-to-one ratio of the time missed when the child has not made adequate progress is essential to placing the student in the same position they would have been but for the FAPE violation. Moreover, a clause can be added to this type of award, to the effect that, once the student has met the goals of the IEP, the compensatory education services can be stopped. This clause allows for the remedy to be individualized, but

BYU Education & Law Journal, Vol. 2022, Iss. 1 [2022], Art. 3

also gives the hearing officer a starting point in the crafting of compensatory education. The court can also individually tailor the remedy, based on a variety of factors, such as whether the student is at a risk of regression and whether the goals lend themselves to in-person or distance learning. Consequently, the guidance by OSEP around ESY services[204] lend credence to the view that compensatory services can be provided in the same manner, to make up for the lost minutes and services. Schools can look to periods of vacation, weekends, or after school to make up for these lost minutes. As the most prevalent remedy for families with children with disabilities, this statutory remedy needs to be formulated to ensure that students with special needs are provided a free and appropriate education under the IDEA.

[204] *See supra* Section II.C.i.

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