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“Appropriate” Decisions Under the Individuals with Disabilities Education Act

By Perry A. Zirkel*

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The Individuals with Disabilities Education Act (IDEA)¹ continues to be an active area of litigation,² starting with the cornerstone mechanism of the “impartial due process hearing.”³ More specifically, the IDEA requires each state to have either a one-tier system conducted by impartial hearing officers (IHOs) or a two-tier system, which adds an impartial review officer level.⁴ In the approximately thirty-five years since the passage of the original version of this funding statute for special education, the gradual trend has been for a one-tier system composed of full-time IHOs, often within a state office of administrative law judges.⁵

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¹ 20 U.S.C.A. § 1400.1 *et seq.* (West 2012). For the corresponding regulations, see 34 C.F.R. § 300.1 *et seq.* (2012).

² Special education is the major growth segment within K-12 education litigation. *See, e.g.,* Perry A. Zirkel & Brent L. Johnson, *The “Explosion” in Education Litigation: An Update*, 265 EDUC. L. REP. 1 (2011). The IDEA expressly conditions the right to judicial review on exhaustion of the state’s administrative adjudication process. 20 U.S.C. § 1415(i)(2)(A) (2006). The courts have rather extensively applied this exhaustion provision. *See, e.g.,* Lewis Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Courts’ Jurisdiction Requirements under the Individuals with Disabilities Education Act*, 29 J. NAT’L ASS’N ADMIN. L. JUDICIARY 349 (2009). As a result, IDEA court decisions are only the upper part of an iceberg that has a broad base of hearing officer decisions at the base. For an empirical examination of this case law conception, see Perry A. Zirkel & Amanda Machin, *The Special Education Case Law “Iceberg”: An Initial Exploration of the Underside*, 41 J.L. & EDUC. 483 (2012).

³ 20 U.S.C. § 1415(f) (2006); 34 C.F.R. § 300.511 (2012). Approximately eight states account for eighty percent of the adjudicated hearings. *See, e.g.,* Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. SPECIAL EDUC. LEADERSHIP 22, 28 (2008).

⁴ 20 U.S.C. § 1415(g) (2006); 34 C.F.R. § 300.514 (2012).

⁵ Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL’Y STUD. 3 (2010). Currently, approximately forty-one states have a one-tier system, and thirty-three states have full-time IHOs. *Id.* at 5. For the larger trend of legalization of this process, see Perry A. Zirkel, Zorka Karanxha, & Anastasia D’Angelo, *Creeping Judicialization of Special Education Hearings: An Exploratory Study*, 27 J. NAT’L ASS’N ADMIN. L. JUDICIARY 27 (2007).

The jurisdiction of the IHOs includes the successive issues of eligibility, which the IDEA refers to under the overlapping terms of “identification, evaluation, or entitlement,” which the IDEA refers to as “placement” and “the provision of free appropriate public education” (FAPE).⁶ Overlapping with FAPE and documented in an individualized educational program (IEP),⁷ the placement must be in the least restrictive environment (LRE).⁸ The vast majority of cases concern FAPE,⁹ with the primary remedies for denial of FAPE being tuition reimbursement and compensatory education.¹⁰

The purpose of this brief article is to provide pointers for IHOs that facilitate defensible decisions in FAPE cases, which account for the bulk of their IDEA workload.¹¹ In light of the variance from state to state under the “cooperative federalism” structure of the IDEA,¹² the article uses New York, the leading state for IDEA hearings,¹³ as its example for jurisdictional customization. Thus, the cited basis consists of the statutory and regulatory provisions and the case law under not only the IDEA but also New York.¹⁴ Although the case

⁶ 20 U.S.C. § 1415(b)(6)(A) (2006); 34 C.F.R. § 300.507(a) (2012).

⁷ 20 U.S.C. § 1402(14) (2006); 34 C.F.R. § 300.22 (2012).

⁸ 20 U.S.C. § 1412(a)(5) (2006); 34 C.F.R. §§ 300.114–300.120 (2012).

⁹ See, e.g., PERRY A. ZIRKEL, *Case Law under the IDEA*, in *IDEA: A HANDY DESK REFERENCE TO THE LAW, REGULATIONS AND INDICATORS* (LexisNexis Pub., 2012).

¹⁰ See, e.g., Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT’L ASS’N ADMIN. L. JUDICIARY 1 (2011).

¹¹ For more general guidance, see generally PERRY A. ZIRKEL, *IMPARTIAL HEARINGS UNDER THE IDEA: LEGAL ISSUES AND ANSWERS* (2013), available at http://www.nasdse.org/LinkClick.aspx?fileticket=nTeBfmZi_Aw%3D&tabid=36.

¹² See, e.g., *Bay Shore Union Free Sch. Dist. v. Kain*, 485 F.3d 730, 733–34 (2d Cir. 2007); *Evans v. Evans*, 818 F. Supp. 1215, 1223 (N.D. Ind. 1993).

¹³ See, e.g., Zirkel & Gischlar, *supra* note 3, at 27–28. This accounting of adjudicated IDEA hearings does not include the District of Columbia, which has not only a special status but also the highest volume of such hearings. *Id.*

¹⁴ New York’s relevant special education legislation and regulations are included to the illustrative extent, in pertinent part, they add to the federal requirements. For a more comprehensive comparison, see generally NEW YORK STATE EDUC. DEP’T, *NEW YORK STATE LAW, REGULATIONS AND POLICY NOT REQUIRED BY FEDERAL LAW/REGULATION/POLICY* (2012), available at <http://www.p12.nysed.gov/specialed/idea/608analysischart-May2012.pdf> (last visited Mar. 24, 2013).

law emphasis is on published court decisions of the Second Circuit and New York federal district courts, unpublished court decisions from these courts and judicial rulings from other jurisdictions are added to fill in the gaps.¹⁵

The article consists of three successive parts. The first part provides observations and recommendations concerning the prevailing norms for the legal defensibility of the IHO’s written decision. The second part addresses the FAPE standards in terms of a three-step framework for decision-making. The final part canvasses the primary remedies—tuition reimbursement and compensatory education—other than prospective injunctive relief.

I. THE DECISIONAL NORMS

Corresponding to the similar posture of various other jurisdictions,¹⁶ the Second Circuit accords deference to the IHO where the written opinion is “thorough and careful.”¹⁷ Thus, the

¹⁵ Additionally, because New York is a two-tier state, a sampling of New York’s state review officer (SRO) decisions are included as additional gap-filling illustrations.

¹⁶ *See, e.g., J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431 (9th Cir. 2010); *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100 (4th Cir. 1991); *Kerkam v. Superintendent, D.C. Pub. Sch.*, 931 F.2d 84 (D.C. Cir. 1991).

¹⁷ *See, e.g., Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 196 (2d Cir. 2005); *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 129 (2d Cir. 1998); *see also M.H. v. N.Y.C. Dep’t of Educ.*, 685 F.3d 217, 244 (2d Cir. 2012) (“Determinations grounded in thorough and logical reasoning should be provided more deference than decisions that are not.”). Within this overall standard, the Second Circuit has established that substantive and methodology determinations are entitled to more judicial deference than procedural and non-methodology determinations. *M.H. v. N.Y.C. Dep’t of Educ.*, 685 F.3d 217, 244, 246 (2d Cir. 2012). Although in a two-tier state, such as New York, the SRO level receives primary judicial deference, the local IHO shares this deference, especially but not exclusively in methodology cases. *See, e.g., T.Y. ex rel. T.Y. v. N.Y.C. Dep’t of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009); *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 383 (2d Cir. 2003); *cf. Woods v. Northport Pub. Sch.*, 487 F. App’x 968 (6th Cir. 2012) (deference to IHO rather than district personnel where the two levels conflict). Moreover, in cases where the IHO meets the norm and the SRO does not, the IHO is entitled to presumptive correctness. *See, e.g., M.H. v. N.Y.C. Dep’t of Educ.*, 685 F.3d 217, 246, 248–49 (2d Cir. 2012); *Doyle v. Arlington Cnty. Sch. Dist.*, 953 F.2d 100, 105 (4th Cir. 1991). In the latest iteration of this issue, the Second Circuit declared: “a court must defer to the SRO’s decision on

following recommendations are offered as prophylactic guidance for IHOs in writing their decisions:

- 1) Use a clear and concise statement of the issues as the organizing framework.¹⁸
- 2) Provide specific support cited from the record¹⁹ for each of your factual findings.²⁰

matters requiring educational expertise unless it concludes that the decision was inadequately reasoned, in which case a better-reasoned IHO opinion may be considered instead.” *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 189 (2d Cir. 2012). Finally, although the focus for such deference is the IHO’s written opinion, the Ninth Circuit extended the “thorough and careful” to the IHO’s participation in the questioning of witnesses. *R.B. ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 942 (9th Cir. 2007).

¹⁸ *See, e.g., Options Pub. Charter Sch. v. Howe*, 512 F. Supp. 2d 55, 57 (D.D.C. 2007) (finding the IHO’s ambiguous statement of the issues as one of the sources for a remand); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 09-002 (2009) (affirmed IHO’s decision based in part on clearly identified issues). In setting forth the issues, the IHO may restate the version of either or both parties within reasonable limits. *See, e.g., J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431 (9th Cir. 2010); *Ford v. Long Beach Unified Sch. Dist.*, 291 F.3d 1086 (9th Cir. 2002); *M.M. v. Lafayette School District*, 58 IDELR ¶ 132 (N.D. Cal. 2012); *K.E. v. Indep. Sch. Dist. No. 15*, 54 IDELR ¶ 215 (D. Minn. 2010), *aff’d on other grounds*, 647 F.3d 795 (8th Cir. 2011). However, the IHO may not expand the scope of the issues *sua sponte*. *See, e.g., Student with a Disability*, 59 IDELR ¶ 150 (N.Y. SRO 2012).

¹⁹ N.Y. COMP. CODES R. & REGS. tit. 8 § 200.5(j)(5)(v) (“The decision shall reference the hearing record to support the findings of fact”). Courts’ deference to IHOs’ factual findings in IDEA cases is subject to general norms for decision-making. *See, e.g., D.B. v. Craven Cnty. Bd. of Educ.*, 32 IDELR ¶ 86 (4th Cir. 2000); *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100 (4th Cir. 1991). Thus, deference is strengthened by or conditioned on such cited support. *See, e.g., Ravenswood City Sch. Dist. v. J.S.*, 870 F. Supp. 2d 780 (N.D. Cal. 2012) (deference based on thorough and careful factual findings, including that IHO discussed qualifications of witnesses on which she chose to rely). Conversely, courts tend to overturn decisions without such careful support. *Compare S.G. v. Dist. of Columbia*, 498 F. Supp. 2d 304 (D.D.C. 2007) (arbitrary and capricious), *and R.S. v. Montgomery Twp. Bd. of Educ.*, 59 IDELR ¶ 47 (D.N.J. 2012) (contrary to preponderant proof), *and Stanton v. Dist. of Columbia*, 680 F. Supp. 2d 201 (D.D.C. 2010) (failure to include sufficient findings and reasoning for calculation of compensatory education), *and Options Pub. Charter Sch. v. Howe*, 512 F. Supp. 2d 55 (D.D.C. 2007) (entire lack of factual findings nullified IHO’s decision), *and Blount v. Lancaster-Lebanon Intermediate Unit*, 40 IDELR ¶ 62 (M.D. Pa. 2003) (fatal lack of “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”), *with J.P. v. Cnty. Sch.*

- Here is an example that a federal court provided in concluding the IHO fell fatally short of this expectation: “[T]he hearing officer refers to ‘[t]he credible testimony of Paris Adon’ and the ‘compelling[,]’ ‘logical and credible’ testimony of ‘Dr. [Cranford][,]’ [sic], but makes no findings with respect to the basis upon which she credited their testimony.”²¹
- a) Just as courts defer to IHOs based on presumed expertise and direct observation,²² in assessing the weight of testimony the courts consider the witness’s qualifications regarding the issue and familiarity with the child.²³
- b) In arriving at factual findings in a FAPE case, do not rely on testimony that supports modifications materially different from the contents of the IEP: “a deficient IEP may not be effectively rehabilitated or amended after the fact through

Bd., 516 F.3d 254 (4th Cir. 2008) (credibility-based determinations need not be detailed in light of the 45-day deadline). For examples at the SRO level, see NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 10-007, at 19 (2010) (overturning the IHO’s decision, noting that “the [IHO’s] 1 1/2 page decision is devoid of any specific cites to transcript pages, exhibit numbers, or to any legal authority”); *see also* NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 10-086, at 7 (2010); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 08-064, at 5 n.7 (2008). For the SRO’s deferential review standard for factual findings, *see, e.g.*, NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 11-146, at 12 (2011) (including Third Circuit’s approach in *Carlisle* for credibility-based findings).

²⁰ 34 C.F.R. § 300.513(a) (2012); N.Y. COMP. CODES R. & REGS. tit. 8 § 200.5(j)(4)(i).

²¹ *Options Pub. Charter Sch.*, 512 F. Supp. 2d at 57.

²² *See, e.g.*, *M.H. v. N.Y.C. Dep’t of Educ.*, 685 F.3d 217, 244 (2d Cir. 2012); *Woods v. Northport Pub. Sch.*, 487 F. App’x 968, 973–74 (6th Cir. 2012) (expertise); *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 554 (3d Cir. 2010); *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 104 (4th Cir. 1991) (observation).

²³ *See, e.g.*, *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 616 F.3d 632 (7th Cir. 2010); *cf. Sebastian M. v. King Phillip Reg’l Sch. Dist.*, 685 F.3d 79 (1st Cir. 2012) (due deference to IHO valuation of expert testimony). These same two factors apply to the parents’ witnesses; exclusive or arbitrary deference to the school personnel is contrary to the adjudicative mechanism of the IDEA and, thus, is a possible basis for reversal. *See, e.g.*, *K.S. ex rel. P.S. v. Fremont Unified Sch. Dist.*, 679 F. Supp. 2d 1046 (N.D. Cal. 2009), *aff’d*, 426 F. App’x 536 (9th Cir. 2011).

testimony regarding services that do not appear in the IEP.”²⁴

- 3) Similarly, legal conclusions should cite specific support in terms of the legal standards and their clear application to the pertinent factual findings.²⁵
 - For example, the same federal district court that identified the aforementioned²⁶ defective factual findings cited the IHO’s legal conclusions as fatally erroneous:
 - “it is **entirely conceivable** . . . that the mother’s participation in the IEP meetings should have alerted . . . [the school district] that more comprehensive evaluations were warranted[.]”²⁷
 - “it is **most probable** that the provision of a FAPE to this Petitioner might have required . . . [the district] . . . to file a due process hearing complaint once the mother insisted on a change of special education instruction hours.”²⁸
- 4) As a general matter, but particularly in close cases, it is good practice to make clear which party had the burden of persuasion.²⁹
 - The Supreme Court interpreted the IDEA as putting the burden of persuasion on the party raising the issue of

²⁴ R.E. v. N.Y.C. Dep’t of Educ., 694 F.3d 167, 185 (2d Cir. 2012).

²⁵ See, e.g., Marc M. v. Dep’t of Educ., 762 F. Supp. 2d 1235 (D. Haw. 2011); Joshua A. v. Rocklin Unified Sch. Dist., 49 IDELR ¶ 249 (E.D. Cal. 2008); Arlington Cnty. Sch. Bd. v. Smith, 230 F. Supp. 2d 704 (E.D. Va. 2002); cf. N.Y. COMP. CODES R. & REGS. tit. 8 § 200.5(j)(5)(v) (“[The IHO’s decision] shall set forth the reasons and the factual basis for the determination.”). *But cf.* S.A. v. Weast, No. 8:11-cv-01137-AW, 2012 WL 4480549 (D. Md. Sept. 26, 2012) (deference). The SRO applies an “independent” standard of review for the IHO’s legal conclusions. See, e.g., NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 11-45, at 16 (July 25, 2011). Citing this same “independent” phraseology in the IDEA (20 U.S.C. § 1415(g)(2) (2006)), courts have characterized this standard as “de novo.” See, e.g., M.W. v. N.Y.C. Dep’t of Educ., 869 F. Supp. 2d 320, 329 (E.D.N.Y. 2012).

²⁶ See *Options Pub. Charter Sch.*, 512 F. Supp. 2d at 57.

²⁷ *Id.* (quotation marks omitted).

²⁸ *Id.* (quotation marks omitted).

²⁹ See, e.g., Blount v. Lancaster-Lebanon Intermediate Unit, 40 IDELR ¶ 62 (E.D. Pa. 2003).

FAPE, which is usually the parent.³⁰ However, the Court sidestepped the issue of state laws that expressly address this issue.³¹

- In New York, the burden of proof—both in terms of production and persuasion—is on the district according to legislation that went into effect on Oct. 14, 2007.³²

³⁰ *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005). Lower courts in some jurisdictions have extended this burden to other IDEA issues. *See, e.g.*, *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384 (3d Cir. 2006) (LRE); *Antoine M. v. Chester Upland Sch. Dist.*, 420 F. Supp. 2d 396 (E.D. Pa. 2006) (eligibility).

³¹ More specifically, the Court commented:

[R]espondents and several States urge us to decide that States may, if they wish, override the default rule and put the burden always on the school district. Several States have laws or regulations purporting to do so, at least under some circumstances. *See, e.g.*, Minn. Stat. § 125A.091, subd. 16 (2004); Ala. Admin. Code Rule 290-8-9-.08(8)(c)(6) (Supp.2004); Alaska Admin. Code, tit. 4, § 52.550(e)(9) (2003); Del. Code Ann., Tit. 14, § 3140 (1999). Because no such law or regulation exists in Maryland [i.e., the state of this litigation], we need not decide this issue.

Schaffer, 546 U.S. at 61.

³² The legislation provides an express exception for the appropriateness of the parent’s unilateral placement in a tuition reimbursement case. N.Y. EDUC. LAW § 4404(1)(c) (McKinney 2013). For recognition of this change as of October 14, 2007, see *J.G. ex rel. N.G. v. Kiryas Joel Union Free Sch. Dist.*, 777 F. Supp. 2d 606, 641 n.29 (S.D.N.Y. 2011). In cases arising in the interim between *Schaffer* and the effective date of the New York law, the Second Circuit placed the burden of persuasion on the parent for both the appropriateness of the district’s and the parent’s unilateral placement. *T.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 252 (2d Cir. 2009); *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 112 (2d Cir. 2007). A recent federal district court decision placed the burden of persuasion on the parents, but the court apparently missed the New York law, (only citing *Schaffer* and these interim Second Circuit decisions) and the ruling amounted to dicta (because the court concluded that “were the burden placed on the [district], the outcome of the instant case would remain the same”). *M.W. ex rel. S.W. v. N.Y.C. Dep’t of Educ.*, 869 F. Supp. 2d 320, 336 (S.D.N.Y. 2012). In its most recent opinion, the Second Circuit acknowledged but declined to address the issue, observing the burden of persuasion only applies when the evidence is in equipoise. *M.H. v. N.Y.C. Dep’t of Educ.*, 685 F.3d 217, 225 n.3 (2d Cir. 2012); *cf. NEW*

- 5) Add any prefatory and closing material that state law requires or efficient practice warrants.
- For example, in New York the applicable regulations require including “a statement advising the parents and the board of education of the right of any party involved in the hearing to obtain a review of such a decision by the State review officer.”³³

II. FAPE STANDARDS

For FAPE cases, here is an illustrative, three-step framework that facilitates a thorough and careful analysis:³⁴

- 1) What are the individual needs of this particular eligible child?³⁵

YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 12-025, at 13 n.8 (2012) (noting that the evidence favored the party that prevailed rather than being in equipoise, thus rendering alleged misapplication of the burden of persuasion harmless); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 10-033, at 32 (2010); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 09-057, at 19 (2009) (noting that the evidence showed that the district failed to offer a FAPE regardless of which party bore the burden of proof); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 08-015, at 11 (2008) (noting conflicting statements in the IHO decision regarding which party bore the burden of persuasion). For burden of proof under in IDEA hearings more generally, see, e.g., Perry A. Zirkel, *Who Has the Burden of Persuasion in Impartial Hearings under the Individuals with Disabilities Education Act?* CONN. PUB. INT. L.J. (forthcoming).

³³ N.Y. COMP. CODES R. & REGS. tit. 8 § 200.5(j)(5)(v). For examples, see NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 09-096 (2009); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 07-011 (2007); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 03-086 (2003). For a related issue intersecting with the IDEA’s finality requirement, see NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 07-128 (2007) (overturning IHO “supplemental” decision after the final one, granting two thirty-day extensions to allow extra time for filing a petition with the SRO).

³⁴ Although its component steps are based on pertinent regulations and case law, the overall framework is merely one logical way of determining FAPE rather than being judicially created or mandated.

³⁵ See, e.g., 20 U.S.C. §§ 1414(b)(3)(B), 1414(b)(4), 1414(d)(1)(A) (2006); see also 34 C.F.R. §§ 300.304(c)(4) (evaluation “in all areas related to the suspected

- 2) Is the IEP substantively tailored to meet this child’s needs?³⁶
- a) More specifically, the standard is whether the IEP is “reasonably calculated to enable the child to receive educational benefits.”³⁷ In the Second Circuit, the key questions to be answered based on “objective evidence”³⁸ are as follows:
- Is the IEP “likely to produce progress, not regression”?
– and –

disability”), 300.301(c)(2)(ii) (evaluation to determine child’s individual needs), 300.320(a)(1) (IEP statement of child’s “present levels academic achievement and functional performance”), and 300.320 (a)(2)(i)(B) (IEP statement of measurable annual goals to “meet each of the child’s . . . needs that result from the child’s disability”). Although these various IDEA requirements may be regarded as procedural, they inevitably merge with the substantive standard for FAPE. *See infra* note 36 and accompanying text. For examples of denials of FAPE based on this threshold standard, see *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202 (9th Cir. 2008) (failure to evaluate child with speech impairment for reasonably suspected autism); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 12-027, at 13–15 (2012) (noting the district’s failure to sufficiently identify the child’s speech-language deficits); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 11-142, at 21–25 (2011); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 11-041, at 12–14 (2011); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 10-101, at 10–11 (2010).

³⁶ *See, e.g.*, *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982) (“The [FAPE] required by the Act is tailored to the unique needs of the child [with a disability] by means of an [IEP]”); *see also id.* at 188–89 (“educational instruction specially designed to meet the unique needs for the child [with a disability]”); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 10-050, at 14–15 (2010).

³⁷ *Rowley*, 458 U.S. at 207.

³⁸ “Objective evidence” for a mainstreamed child includes “passing grades and regular advancement.” *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (citing *Rowley*, 458 U.S. at 207 n.28). However, this evidence does not per se amount to FAPE. *See, e.g.*, *M.S. v. Bd. of Educ.*, 231 F.3d 96 (2d Cir. 2000). More generally, objective evidence includes grades and test scores. *See, e.g.*, *E.W.K. ex rel. B.K. v. Bd. of Educ.*, 884 F. Supp. 2d 39 (S.D.N.Y. 2012); *M.H. v. Monroe-Woodbury Cent. Sch. Dist.*, 296 F. App’x 126, 128 (2d Cir. 2008); *Grim v. Rhinebeck, Cent. Sch. Dist.*, 346 F.3d 377, 383 (2d Cir. 2003).

- Does the IEP provide the student with an opportunity greater than mere “trivial advancement?”³⁹
- b) The IEP melds the program and the placement, which refers to “the general educational program in which the handicapped child is placed.”⁴⁰
- c) Thus, LRE may well be an integral part of the substantive FAPE analysis, triggering identification and application of the applicable test.⁴¹

³⁹ E.S. *ex rel.* B.S. v. Katonah-Lewisboro Sch. Dist., 487 F. App’x 619, 621 (2d Cir. 2012); T.P. *ex rel.* S.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 254 (2d Cir. 2009) (citing *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 195 (2d Cir. 2005)); *Cerra*, 427 F.3d at 195 (citing *Walczak*, 142 F.3d at 130); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 08-038 (2008); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 06-044 (2006) (finding that the child’s IEP was likely to produce progress that was more than trivial).

⁴⁰ *Concerned Parents v. N.Y.C. Bd. of Educ.*, 629 F.2d 751, 756 (2d Cir. 1980). Citing *Concerned Parents*, the Second Circuit more recently explained that educational placement under the IDEA is “the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the ‘bricks and mortar’ of the specific school.” *T.Y. ex rel. T.Y. v. N.Y.C. Dep’t of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 10-070, at 13–15 (2010); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 07-049, at 10 (2007). Nevertheless, the site may well be relevant; the determination of whether the district’s placement or, in tuition reimbursement cases at the second appropriateness prong, the parent’s unilateral placement amounts to FAPE is often in the context of a particular school. *See, e.g.*, E.S. *ex rel.* B.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417 (S.D.N.Y. 2010), *aff’d*, 487 F. App’x 619 (2d Cir. 2012). For the related issue of identifying the service provider on the IEP, see *Questions and Answers on Individualized Education Program (IEP) Development, The State’s Model IEP Form and Related Documents*, NYSED, <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/answers-placement.htm> (last visited Mar. 24, 2013) (look at question and answer four).

⁴¹ *See, e.g.*, P. *ex rel.* Mr. and Mrs. P v. Newington Bd. of Educ., 546 F.3d 111 (2d Cir. 2008) (citing *Oberti v. Clementon Sch. Dist.*, 995 F.2d 1204 (3d Cir. 1993)); *see also* K.L.A. v. Windham Se. Supervisory Unit, 371 F. App’x 151 (2d Cir. 2010). For lower court applications of this test, *see, e.g.*, G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552 (S.D.N.Y. 2010); J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74 (N.D.N.Y. 2008); Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422 (W.D.N.Y. 2008). As clarified in NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 11-143 (2011), LRE refers to access to nondisabled peers, typically

- d) The Second Circuit recently joined the majority of other circuits in adopting the “snapshot” approach to determining substantive appropriateness, adding the exception of amendments made during the resolution period.⁴²
 - e) In any event, the substantive standard is clearly not whether the district’s IEP is best⁴³ or, in tuition reimbursement cases, whether it is better than the parent’s unilateral placement.⁴⁴
- 3) Did the district violate one or more of the various applicable procedural requirements of the IDEA?⁴⁵
- a) If so, was the violation the failure to “significantly impede[] the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents’ child?”⁴⁶

but not exclusively in general education, not to teacher-to-student ratios in special education.

⁴² R.E. v. N.Y.C. Dep’t of Educ., 694 F.3d 167 (2d Cir. 2012). For the position of the other circuits, see Perry A. Zirkel, *The “Snapshot” Standard under the IDEA*, 269 EDUC. L. REP. 455 (2011).

⁴³ See, e.g., Bd. of Educ. v. Rowley, 458 U.S. 176, 197 n.21 (1982); *Cerra*, 427 F.3d at 195; J.G. ex rel. N.G. v. Kiryas-Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 639 (S.D.N.Y. 2011).

⁴⁴ See, e.g., Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C. Cir. 1991).

⁴⁵ The IDEA prescribes detailed procedures for evaluations, including parental consent (20 U.S.C. § 1414(a)-(c) (2006); individualized education programs (*id.* § 1414(d), and various safeguards, including notices and the IHO process (*id.* § 1415)). In its landmark, FAPE decision, the Supreme Court recognized the procedural emphasis in the structure of the IDEA, concluding that “adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.” *Rowley*, 458 U.S. at 206.

⁴⁶ 20 U.S.C. § 1415(f)(3)(E)(ii) (2006); 34 C.F.R. § 300.513(a)(2)(ii) (2012). In general, the courts have not focused on this statutory language and have been slow in accepting its violation as a per se denial of FAPE. Compare *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 90 (2009) (prevailing two-step approach), with *J.T. v. Dep’t of Educ.*, 59 IDELR ¶ 4 (D. Haw. 2012); *Bd. of Educ. v. Schaefer*, 923 N.Y.S.2d 579 (N.Y. App. Div. 2011) (finding per se denial). Similarly, the SRO decisions have addressed this procedural violation on an ad hoc, not per se, basis. See, e.g., NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 12-055, at 13–14 (2012); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 12-048, at 7–8 (2012); NEW YORK STATE

- b) For other violations, was the result a loss of educational benefit?⁴⁷
- Incorporated state law standards⁴⁸ are included in this two-step analysis,⁴⁹ but with differentiated weight between functional behavioral assessments (serious violations requiring special scrutiny at the benefit step) and parent counseling/training (rarely, if absent alone, amounting to the requisite loss).⁵⁰
 - For example, a district's failure to specify the school site in the IEP is not, in relation to the IDEA's procedural requirement for the IEP to specify the "location" for the services,⁵¹ a per se denial of FAPE.⁵²

EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 11-100, at 18–19 (2011); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 11-031, at 11–12 (2011); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 10-070, at 12–13 (2010).

⁴⁷ 20 U.S.C. § 1415(f)(3)(E)(i), (iii) (2006); 34 C.F.R. § 300.513(a)(2)(i), (iii) (2012). For recent illustrative applications, compare *A.H. ex rel. J.H. v. Dep't of Educ.*, 394 F. App'x 718 (2d Cir. 2010); *T.P. ex rel. S.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247 (2d Cir. 2009) (holding no), *with R.E. v. N.Y.C. Dep't of Educ.*, 785 F. Supp. 2d 28 (S.D.N.Y. 2011) (holding yes). For examples applying this two-step test at the second tier, see NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 12-013, at 14 (2012); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 09-080, at 5–6 (2009); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 07-030, at 14 (2007).

⁴⁸ *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 8 § 200.1(w)(3)(i) (four areas of individual need); *id.* § 200.3(a)(1)(iv), (vii), (viii) (additional members of IEP team); *id.* § 200.4(b)(v) (functional behavioral assessment). *See, e.g.*, NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 11-049, at 13–15 (2011) (concluding that failure to follow multiple state procedures, including consideration of a functional behavioral assessment resulted in a denial of a FAPE).

⁴⁹ *See, e.g.*, *A.C. ex rel. M.C. v. Bd. of Educ.*, 553 F.3d 165, 172 (2d Cir. 2009); *M.W. ex rel. S.W. v. N.Y.C. Dep't of Educ.*, 869 F. Supp. 2d 320 (E.D.N.Y. 2012).

⁵⁰ *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167 (2d Cir. 2012).

⁵¹ 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (2006); 34 C.F.R. § 300.320(a)(7) (2012).

⁵² *See, e.g.*, *R.E.*, 694 F.3d 167, 191–92 (2d Cir. 2012) (concluding that “[district] may select the specific school without the advice of the parents so long as it conforms to the program offered in the IEP”); *T.Y. ex rel. T.Y. v. N.Y.C. Dep't of Educ.*, 584 F.3d 412, 420 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3277 (2010)

III. PRIMARY REMEDIES

The necessary foundation for an IHO remedy consists of 1) a ruling of an IDEA violation (e.g., denial of FAPE) based on a submitted issue, and 2) a reasonably specific evidentiary basis.⁵³ Although the remedial authority of IHOs is broad and equitable, extending across the full range of declaratory and injunctive relief, the two primary remedies for denials of FAPE, in addition to a prospective order to develop an appropriately revised IEP, are tuition reimbursement and compensatory education.⁵⁴

- 1) For tuition reimbursement, adhere to the flowchart-like multi-step test that is based on the IDEA and rather extensive case law.⁵⁵
 - a) The preliminary equities step concerns timely notice and evaluation request/availability.⁵⁶

(emphasizing that the ruling is “not . . . that school districts have carte blanche to assign a child to a school that cannot satisfy the IEP’s requirements. We simply hold that an IEP’s failure to identify a specific school location will not constitute a *per se* procedural violation of the IDEA”); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 10-070, at 13–15 (2010); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 07-034, at 13–14 (2007) (noting that the school site need not be identified on the IEP, but finding a denial of a FAPE because the district nevertheless failed to provide special education services in accordance with the IEP).

⁵³ See, e.g., *District of Columbia v. Pearson*, Civil Action No. 11-2043 (RC), 2013 WL 485666 (D.D.C. Feb 8, 2013).

⁵⁴ See Zirkel, *supra* note 10.

⁵⁵ The outline herein only provides a brief overview. For a detailed description of this multi-step test with supporting case citations illustratively customized to the New York jurisdiction, see Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 EDUC. L REP. 785 (2012).

⁵⁶ 20 U.S.C. § 1412(a)(10)(C)(iii)-(iv) (2006); 34 C.F.R. § 300.148(d)-(e) (2012). See, e.g., NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 11-103, at 6–9 (2011); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 11-015, at 17–19 (2011); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 10-087, at 22–24 (2010); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 10-099, at 24–25 (2010).

- b) The first appropriateness step concerns whether the district provided FAPE,⁵⁷ thus invoking the “FAPE Standards” section of this document.⁵⁸
- c) The second appropriateness step, which need not be addressed if the district provided FAPE, concerns whether the parent’s unilateral placement met the substantive standard⁵⁹ in a timely manner.⁶⁰
- The same “objective evidence” standard applies.⁶¹
 - LRE is a pertinent but not primary consideration at this step.⁶²

⁵⁷ 20 U.S.C. § 1412(a)(10)(C)(ii) (2006); 34 C.F.R. §§ 300.148(a), 300.148(c) (2012).

⁵⁸ See *supra* text accompanying notes 34–52. The limited exceptions or extensions include child find and eligibility cases. See, e.g., *Muller v. Comm. on Special Educ.*, 145 F.3d 95 (2d Cir. 1998); *Mr. and Mrs. N.C. v. Bedford Cent. Sch. Dist.*, 300 F. App’x 11 (2d Cir. 2008); *J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60 (2d Cir. 2000); *P.C. ex rel. K.C. v. Oceanside Union Free Sch. Dist.*, 818 F. Supp. 2d 516 (E.D.N.Y. 2011); *Maus v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282 (S.D.N.Y. 2010).

⁵⁹ The Supreme Court’s decision in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) largely eliminated the procedural standards.

⁶⁰ The codification in the IDEA regulations specified this procedural requirement and otherwise made clear that an IHO may find the unilateral placement was appropriate “even if it does not meet the State standards that apply to education provided by the SEA and LEAs.” 34 C.F.R. § 300.148(c) (2012). For the burden of proof at this stage, see *supra* note 32.

⁶¹ See, e.g., *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 364 (2d Cir. 2006) (citing *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998)); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 11-078 (2011); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 09-048 (2009); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 08-151 (2008); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 08-042 (2008); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 04-024 (2004); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 01-055 (2001).

⁶² See, e.g., *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105 (2d Cir. 2007); *M.S. ex rel. S.S. v. Bd. of Educ.*, 231 F.3d 96 (2d Cir. 2000); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 09-033, at 13 (2009). For examples of LRE contributing to the inappropriateness of the private placement, see *Schreiber v. E. Ramapo Cent. Sch. Dist.*, 700 F. Supp. 2d 529 (S.D.N.Y. 2010); *Pinn ex rel. Steven P. v. Harrison Cent. Sch. Dist.*, 473 F. Supp. 2d 477 (S.D.N.Y. 2007); NEW YORK STATE EDUCATION DEPARTMENT,

- The child’s progress at the private placement also is relevant,⁶³ but not necessarily determinative.⁶⁴
- d) The final equities step concerns whether, on balance,⁶⁵ the parents’ other actions were unreasonable.⁶⁶
 - For applying this step, consider the full balance of the equities.⁶⁷
 - After doing this equitable balancing, provide sufficient factual foundation in your written opinion to justify granting, reducing, or denying tuition reimbursement.⁶⁸
- 2) Where the parent has not unilaterally placed the child or at least has not sought tuition reimbursement,⁶⁹ consider ordering the alternative retrospective remedy compensatory education.⁷⁰

OFFICE OF STATE REVIEW, SRO DECISION NO. 08-151, at 12 (2008). On the other hand, for an example where LRE contributed to the appropriateness of the private placement, see *M.H. v. N.Y.C. Dep’t of Educ.*, 685 F.3d 217 (2d Cir. 2012).

⁶³ See, e.g., *Matrejek v. Brewster Cent. Sch. Dist.*, 293 F. App’x 20 (2d Cir. 2008); *Frank G. v. Bd. of Educ.*, 459 F.3d 356 (2d Cir. 2006). For the converse, where the lack of progress contributed to the conclusion that the private placement was inappropriate, see *Davis ex rel. C.R. v. Wappingers Cent. Sch. Dist.*, 772 F. Supp. 2d 500 (S.D.N.Y. 2011), *aff’d*, 431 F. App’x 12 (2d Cir. 2011).

⁶⁴ *Gagliardo*, 489 F.3d at 115 (explaining that benefits may not be targeted specifically to the child’s disability-related needs).

⁶⁵ See, e.g., *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 2d 635 (S.D.N.Y. 2011); *Gabel ex rel. L.G. v. Bd. of Educ. of Hyde Park Cent. Sch. Dist.*, 368 F. Supp. 2d 313 (S.D.N.Y. 2005).

⁶⁶ 20 U.S.C. § 1412(a)(10)(C)(iii)(III) (2006); 34 C.F.R. § 300.148(d)(3) (2012).

⁶⁷ See, e.g., *S.W. v. N.Y.C. Dep’t of Educ.*, 646 F. Supp. 2d 346 (S.D.N.Y. 2009); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 12-001, at 19–21 (2012); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 11-131, at 10–12 (2011); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 11-056, at 13–16 (2011).

⁶⁸ See, e.g., *Wolfe v. Taconic-Hills Cent. Sch. Dist.*, 167 F. Supp. 2d 530 (N.D.N.Y. 2001); see also *Carmel Cent. Sch. Dist. v. V.P. ex rel. G.P.*, 373 F. Supp. 2d 402 (S.D.N.Y. 2005), *aff’d mem.*, 192 F. App’x 62 (2d Cir. 2006); *Loren F. ex rel. Fisher v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309 (11th Cir. 2003).

⁶⁹ In the only published federal appellate case to date, the Third Circuit ruled that compensatory education is not available for a unilaterally placed private school student. *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727 (3d Cir. 2009).

- a) As the threshold, the majority of jurisdictions require a denial of FAPE, whereas in New York it is not well settled⁷¹ whether the denial must be gross as a general matter or only for denials of FAPE after age 21.⁷²
- b) An even more open question is whether the applicable approach for calculation in New York is quantitative or qualitative.⁷³
 - At least for the qualitative approach, you should not delegate to the IEP team your authority for calculating the

⁷⁰ For a synthesis of the pertinent case law on a national basis, *see, e.g.*, Perry A. Zirkel, *Compensatory Education under the IDEA: An Annotated Update of the Law*, 251 EDUC. L. REP. 501 (2010). For the relationship to tuition reimbursement and an analysis of the quantitative approach, *see* 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 (2006).

⁷¹ *See, e.g.*, *Student X v. N.Y.C. Dep't of Educ.*, 51 IDELR ¶ 122 (E.D.N.Y. 2008).

⁷² *Compare French v. New York State Dep't of Educ.*, 476 F. App'x 468, 470, 471 (2d Cir. 2011); *P. ex rel. Mr. and Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111 (2d Cir. 2008) (implying that this standard only applies after age 21), *with J.A. v. E. Ramapo Sch. Dist.*, 603 F. Supp. 2d 684 (S.D.N.Y. 2009) (suggesting that this standard applies generally). The state review officer's decisions that distinguished "added services" (for students who have not reached age 21 or graduation) from compensatory education indirectly have limited the gross violation cases to these ex-students. *See, e.g.*, NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 09-056 (2009) (noting a gross violation standard when the student had graduated); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 02-019 (2002). The courts have continued to use the term compensatory education generically without addressing the "added services" distinction and without decisively resolving the scope and standards for gross violations. *See, e.g.*, *Student X v. N.Y.C. Dep't of Educ.*, 51 IDELR ¶ 122 (E.D.N.Y. 2008).

⁷³ Without specifically addressing the question, the Second Circuit in *P. v. Newington Board of Education* arguably supported the qualitative approach by affirming the IHO's flexible form of compensatory education, with citations to decisions from other jurisdictions that use the qualitative approach. *See P. ex rel. Mr. and Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111 (2d Cir. 2008). Yet in a subsequent unpublished decision, the trial court applied a quantitative approach. *Student X v. N.Y.C. Dep't of Educ.*, 51 IDELR ¶ 122 (E.D.N.Y. 2008). For an explanatory comparison, with the applicable case law from other jurisdictions, between the quantitative and qualitative approaches, *see* Perry A. Zirkel, *The Two Competing Approaches for Calculating Compensatory Education Under the IDEA*, 257 EDUC. L. REP. 550 (2010).

- compensatory education award, such as whether or when to reduce or terminate it.⁷⁴
- c) In New York (which follows the majority approach), the equities, including the extent to which parental actions have been unreasonable, apply to compensatory education cases.⁷⁵
 - d) As with remedial relief under the IDEA more generally, IHOs should provide sufficient factual foundation for the basis and calculus of the compensatory education award.⁷⁶
 - e) Similarly applicable, more generally, make sure that the order for this relief is reasonably specific and clear; courts

⁷⁴ See, e.g., *Bd. of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307, 318 (6th Cir. 2007); *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 526 (D.C. Cir. 2005).

⁷⁵ See, e.g., *French ex rel. French v. N.Y. State Educ. Dep’t*, 476 F. App’x 468 (2d Cir. 2011); see also *Garcia v. Bd. of Educ.*, 520 F.3d 1116 (10th Cir. 2008); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 11-096, at 10, 19 (2011) (upholding the portion of an IHO decision that denied compensatory education services due to the parents’ failure to cooperate with the district).

⁷⁶ See, e.g., *Streck v. Bd. of Educ.*, 280 F. App’x 66 (2d Cir. 2008); *Walker v. District of Columbia*, 786 F. Supp. 2d 232 (D.D.C. 2011); *Stanton ex rel. K.T. v. District of Columbia*, 680 F. Supp. 2d 201 (D.D.C. 2010); *B.T. ex rel. Mary T. v. Dep’t of Educ.*, 676 F. Supp. 2d 982 (D. Haw. 2010); *Mr. and Mrs. C v. Maine Sch. Admin. Dist. No. 6*, 49 IDELR ¶ 36 (D. Me. 2007); *Dep’t of Educ. v. L.K.*, 46 IDELR ¶ 36 (D. Haw. July 10, 2006). *But cf.* *Cousins v. District of Columbia*, No. 011-172 (AK), 2012 WL 1439033 (D.D.C. Apr. 26, 2012); *G.D. ex rel. G.D. v. Wissahickon Sch. Dist.*, 832 F. Supp. 2d 455 (E.D. Pa. 2011); *T.G. ex rel. T.G. v. Midland Sch. Dist. 7*, 848 F. Supp. 2d 902 (N.D. Ill. 2012) (ruling that the calculus need not be exacting where reasonably justified). To avoid such problems, a federal court recently warned that “[the IHO decision] must provide a detailed explanation as to why or why not compensatory education is warranted and his reasons for developing a particular compensatory program.” *B.T. ex rel. Mary T. v. Dep’t of Educ.*, 676 F. Supp. 2d 982, 990. (D. Haw. 2009). For examples of second tier review, see NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 11-132, at 18-24 (2011) (denying a request to increase the quantity of compensatory or make-up services that the IHO awarded); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 03-075 (2003) (finding a miscalculation in the amount of services that the IHO awarded); see also NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 11-121, at 14-22 (2011); NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF STATE REVIEW, SRO DECISION NO. 10-057, at 8-9 (2010).

tend to overturn compensatory education awards that are too vague to be enforceable.⁷⁷

IV. CONCLUSION

Appropriate IHO decisions under the IDEA borrow from best practices in administrative adjudication more generally but also add the specialized features of the IDEA statutory and regulatory framework and the extensive case law. This outline of observations and recommendations focuses on these specialized additions, with due customization for the variance attributable to differences among (1) state special education laws in terms of their added requirements, and (2) judicial jurisdictions in terms of their particular interpretations.

⁷⁷ See, e.g., *Sch. Bd. of Osceola County v. M.L.*, 30 IDELR 655 (M.D. Fla. 1999).