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Adjudicative Remedies for Denials of FAPE Under the IDEA

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By Perry A. Zirkel*

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Litigation under the Individuals with Disabilities Education Act (IDEA)[1] has been the major growth area in the case law specific to K-12 education.[2] The bulk of the litigation under the IDEA concerns the Act's central pillar,[3] the obligation of school districts to provide a "free appropriate public education" (FAPE)[4] to students with disabilities,[5] via an individualized education program (IEP).[6] A notable segment of this frequent litigation is the overlapping

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[1] 20 U.S.C.A. §§ 1400 *et seq*. (West 2012). For the related regulations, see 34 C.F.R. §§ 300.1 *et seq*. (2012). Initially enacted in 1975 as funding legislation under the broad title of Education of the Handicapped Act and the specific part called the Education for All Handicapped Children's Act, this law has undergone major amendments during the reauthorizations in 1986, 1990, 1997, and 2004. *See, e.g.*, DIXIE S. HUEFNER & CYNTHIA M. HERR, NAVIGATING SPECIAL EDUCATION LAW AND POLICY 43–49 (2012).

[2] *See, e.g.*, Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Update*, 265 EDUC. L. REP. 1 (2011).

[3] For this metaphor to characterize FAPE, *see, e.g.*, Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1312 (10th Cir. 2008) ("The FAPE concept is the central pillar of the IDEA statutory structure."); *cf.* Petit v. U.S. Dep't of Educ., 675 F.3d 769, 772 (D.C. Cir. 2012) ("The cornerstone of the Act is . . . that schools provide children with a '[FAPE]'"); M.A. v. State-Operated Sch. Dist., 344 F.3d 335, 338 (3d Cir. 2005) ("The cornerstone . . . under the IDEA is the substantive right of disabled children to a '[FAPE]'").

[4] 20 U.S.C.A. §§ 1401(9), 1412(a)(1) (West 2012).

[5] *See, e.g.*, Perry A. Zirkel, *Case Law under the IDEA*, in IDEA: A HANDY DESK REFERENCE TO THE LAW, REGULATIONS AND INDICATORS 669 (2012). The issue typology of this annotated outline corresponds generally to the overall classifications in special education law texts and topical indexes, but each one represents notable variations of these overall themes depending on purpose, level, and judgment. This source separates the category of FAPE from that of remedies, i.e., tuition reimbursement and compensatory education, while expressly acknowledging their integral overlap. In this compilation of IDEA case law, the FAPE classification alone accounts for the majority of the decisions, and these other two overlapping categories add to this majority.

[6] 20 U.S.C.A. §§ 1401(14), 1414(d) (West 2012). Because the IEP is the operational vehicle for FAPE, courts often characterize it with the same metaphors. *See, e.g.*, White *ex rel.* White v. Ascension Parish Sch. Bd., 343 F.3d 373, 378 (5th Cir. 2003) ("The cornerstone of the IDEA is the IEP."); Hines v. Tullahoma City Sch. Sys., Nos. 97–5103, 97–5104, 156 F.3d 1229, 1998 WL 393814, at *1 (6th Cir. June 15, 1998) ("The IEP is the cornerstone of the Act.").

categories for the principal remedies for denials of this FAPE obligation[7]—tuition reimbursement[8] and compensatory education.[9] Additionally, because the IDEA provides a comprehensive system of administrative adjudication via impartial hearing officers (IHOs) and, in states that have selected the statutory option of a second tier, review officers (ROs),[10] the body of pertinent case law extends to IHO and RO decisions.[11]

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[7] Zirkel, *supra* note 5, at 677–709. For an early article providing an overview of the basic IDEA remedies, with emphasis on the judicial level, see Allan Osborne, *Remedies for a School District's Failure to Provide Services under IDEA*, 112 EDUC. L. REP. 1 (1996).

[8] 20 U.S.C. § 1412(a)(10)(C)(ii) (2006); 34 C.F.R. § 300.148(c) (2012); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 (1985). For an empirical analysis of the tuition reimbursement case law, see Thomas Mayes & Perry A. Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350 (2001). For the comprehensive criteria and illustrative case law, see Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 EDUC. L. REP. 785 (2012). In short, the steps in this multi-part analysis are: (1) timely parental notice, (2) FAPE of the district's proposed IEP, (3) appropriateness of the parental placement, and (4) other equities beyond timely notice. *Id*.

[9] The statute does not expressly mention compensatory education, but the case law has clearly established it under the Act's grant of broad equitable authority to adjudicators. *See, e.g.*, Perry A. Zirkel, *Compensatory Education: An Annotated Update of the Law*, 251 EDUC. L. REP. 501 (2010). For the analogy-based relationship of compensatory education with tuition reimbursement, see Perry 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). For the prevailing two approaches for determining the appropriate amount of this remedy, which are generally referred to under the rubrics of "quantitative" and "qualitative," see Perry A. Zirkel, *Two Competing Approaches for Calculating Compensatory Education under the IDEA*, 257 EDUC. L. REP. 550 (2010).

[10] 20 U.S.C. § 1415(f)–(j) (2006); 34 C.F.R. §§ 300.507–300.518 (2012). The number of states that have opted for a second tier has gradually dwindled to approximately ten. Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3, 5 (2010).

[11] In addition to the state education agency websites that make these decisions available, a national sampling, akin to the reporter series for federal and state court decisions generally and in specialized subject areas, is available in the INDIVIDUALS WITH DISABILITIES EDUCATION LAW REPORT (IDELR) and in LRP Publications' broader electronic database, *Special Ed Connection*.® For the overall picture of the pertinent case law, see Perry A. Zirkel & Amanda C. Machin, *The Special*

Under the landmark decision for FAPE, *Board of Education v. Rowley*,[12] the Supreme Court established a two-part test for determining whether a school district met this central obligation under the IDEA: 1) "has the [district] complied with the procedures set forth in the Act?," and 2) "is the [IEP] . . . reasonably calculated to enable the child to receive educational benefits?"[13] In interpreting Congressional intent as emphasizing the first of these two sides, the *Rowley* majority seemed to suggest strictness with regard to procedural compliance[14] and a relatively relaxed substantive standard.[15] In the hundreds of FAPE decisions after *Rowley*, the lower courts confirmed and continued the relatively low substantive standard for FAPE despite contrary scholarly commentary based on the successive amendments to the Act.[16] The *Rowley* lower court progeny also developed a relaxed interpretation of its procedural side,

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Education Case Law "Iceberg": An Initial Exploration of the Underside, 41 J.L. & EDUC. 483 (2012). In contrast, the coverage of this article does not extend to the alternate and distinguishable enforcement avenue under the IDEA, the state complaint resolution process. *See, e.g.*, Perry A. Zirkel & Brooke L. McGuire, *A Roadmap to Legal Dispute Resolution for Parents of Students with Disabilities*, 23 J. SPECIAL EDUC. LEADERSHIP 100 (2010) (differentiating the administrative from the adjudicatory routes of dispute resolution under the IDEA as well as under Section 504). The litigation concerning this other enforcement avenue is limited and covered elsewhere. *See* Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process*, 237 EDUC. L. REP. 565 (2011) (canvassing the various primary available legal sources, such as IDEA regulations and U.S. Department of Education policy interpretations, specific to the state complaint resolution process).

[12] 458 U.S. 176 (1982).

[13] *Id.* at 206–07.

[14] *See, e.g.*, *id.* at 206 ("We think that congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction 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.").

[15] This relaxed view is evident in (1) the Court's equating the Act's procedural emphasis with access and its sketchy substantive standard with a "basic floor of opportunity," *id.* at 200–01, and (2) the Court's concluding emphasis on deference to governmental education authorities, *id.* at 208–09.

[16] *See, e.g.*, Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed Rowley and Raised the Substantive Standard for "Free Appropriate Public Education?"*, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 397 (2008).

amounting to another two-part test that connects the two sides: (1) did the district violate one or more procedural requirements of the Act, and, if so, (2) did the violation(s) result in loss of educational benefit to the child?[17]

In the 2004 amendments to the IDEA, Congress codified this procedural standard, with a possible per se exception for "significantly imped[ing] the parent's opportunity to participate in the decision-making process regarding the provision of a [FAPE] . . . to the parent's child."[18] Finally, the courts have also established another type of denial of FAPE[19]—insufficient implementation of the IEP.[20]

The legal literature to date concerning the remedies for denials of FAPE is largely limited.[21] In the only article specifically and

[17] *See, e.g.*, Ridley Sch. Dist. v. M.R., 680 F.3d 260 (3d Cir. 2012); K.E. *ex rel.* K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795 (8th Cir. 2011); L.M. *ex rel.* Sam M. v. Capistrano Unified Sch. Dist., 556 F.3d 900 (9th Cir. 2009); A.C. *ex rel.* M.C. v. Bd. of Educ., 553 F.3d 165 (2d Cir. 2009); Sytsema *ex rel.* Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306 (10th Cir. 2008); Hjortness *ex rel.* Hjortness v. Neenah Joint Sch. Dist., 507 F.3d 1060 (7th Cir. 2007); Nack *ex rel.* Nack v. Orange City Sch. Dist., 454 F.3d 604 (6th Cir. 2006); L.T. *ex rel.* N.B. v. Warwick Sch. Comm., 361 F.3d 80 (1st Cir. 2004); Adam J. *ex rel.* Robert J. v. Keller Indep. Sch. Dist., 328 F.3d 804 (5th Cir. 2003); DiBuo *ex rel.* DiBuo v. Bd. of Educ., 309 F.3d 184 (4th Cir. 2002); Sch. Bd. v. K.C., 285 F.3d 977 (11th Cir. 2002).

[18] 20 U.S.C. § 1415(f)(3)(E)(II) (2006); 34 C.F.R. § 300.513(a)(2) (2012).

[19] Alternatively, this type may be regarded as one of two subsets on the substantive side of FAPE—formulation and implementation.

[20] *See, e.g.*, Woods v. Northport Pub. Sch., 487 F. App'x 968 (6th Cir. 2012); Sumter Cnty. Sch. Dist. 17 v. Heffernan *ex rel.* TH, 642 F.3d 478 (4th Cir. 2011); Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 (9th Cir. 2007); Melissa S. *ex rel.* Karen S. v. Sch. Dist., 183 F. App'x 184 (3d Cir. 2006); L.C. v. Utah State Bd. of Educ., 125 F. App'x 252 (10th Cir. 2005); Alex R. *ex rel.* Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. #221, 375 F.3d 603 (7th Cir. 2004).

[21] Aside from the few specialized articles (*supra* notes 7–9), the bulk of the scholarly commentary addresses IDEA remedies only incidentally. *See, e.g.*, Elisa Hyman, Dean Hill Rivkin, & Steven A. Rosenbaum, *How IDEA Fails Families without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U.J. GENDER SOC. POL'Y & L. 107 (2011) (arguing for various reforms in the private and public enforcement of the IDEA, including statutory codification of the compensatory education remedy); Eloise Pasachof, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413 (2011) (advocating greater public enforcement of the IDEA); Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415 (2011) (deconstructing three procedural

comprehensively addressing IDEA remedies,[22] Zirkel demarcated the development of the Act's broad adjudicatory authorization for "such relief as the court determines is appropriate."[23] More specifically, canvassing the case law, agency policy interpretations, and related legal sources, he identified the major forms of injunctive relief available to IHOs/ROs[24] and courts for denials of FAPE,[25] including: (1) tuition reimbursement; (2) compensatory education; (3) prospective revisions of the IEP; (4) prospective placement; and (5) evaluations.[26] In tracing the boundaries for this remedial authority, the Zirkel article also recited the prevailing judicial view that

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principles for decision-making under the IDEA); Michael Rebell, *Special Education Inclusion and the Courts*, 25 J.L. & EDUC. 523 (1996) (proposing a "community engagement dialogic" model for resolving major educational controversies, such as inclusion under the IDEA). The student law review articles tend to be specific to a particular IDEA remedy and relatively superficial. *See, e.g.*, Katie Harrison, Note, *Direct Tuition Payments under the Individuals with Disabilities Education Act*, 25 J. CIV. RTS. ECON. DEV. 873 (2011) (advocating remedy of direct, as alternative to reimbursed, tuition payment); T. Daris Isbell, Note, *Making Up for Lost Educational Opportunities: Distinguishing between Compensatory Education and Additional Services As Remedies under the IDEA*, 76 BROOK. L. REV. 1717 (2011) (confusing a New York review officer decision's term of "additional services" as a recognized and recommended remedy distinct from compensatory education); Amy D. Quinn, Comment, *Obtaining Tuition Reimbursement for Children with Special Needs*, 80 UMKC L. REV. 1211 (2012) (recommending a purportedly useful template of four factors for deciding tuition reimbursement cases, which do not square with the statute, regulations, or case law).

[22] 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).

[23] 20 U.S.C. § 1415(i)(2)(C)(iii) (2006); 34 C.F.R. § 300.516(c)(3) (2012).

[24] The pertinent legal authorities treat the remedial authority of IHOs/ROs as derived from and largely commensurate with the remedial authority of the courts. Zirkel, *supra* note 22, at 8 n.29.

[25] The denial of FAPE amounts to the basic form of remedy, which is declaratory relief. Other remedies are specific to IDEA obligations that are generally separable from FAPE denials. *See, e.g.*, Perry A. Zirkel, *Independent Educational Evaluations at District Expense under the Individuals with Disabilities Education Act*, 38 J.L. & EDUC. 223 (2009).

[26] Zirkel, *supra* note 22, at 15–24. Other, more creative and controversial remedies—sometimes included under the rubric of compensatory education—are ordering training of district personnel or district hiring of consultants. *Id.* at 28–32.

monetary damages are not available under the IDEA.[27] Finally, the typology for the present analysis identifies prospective services as a separate remedy, although the Zirkel article treated it as ancillary or subsidiary to IEP revisions and particular placements.[28]

In the absence of any published data on the remedies that IHOs/ROs and courts determine after finding a denial of FAPE, the purpose of this study is to provide a systematic analysis of the pertinent case law. The specific questions are:

(1) What is the relative frequency of the various types of FAPE violations?
(2) What is the relative frequency of the various IDEA remedies?[29]
(3) For the most frequent remedies, does the distribution differ markedly between IHO/RO and court decisions?[30]
(4) Do certain states have a particular propensity for the most frequent remedies?[31]
(5) What has been the adjudicative disposition, or outcomes, of these predominant remedies?[32]

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[27] *Id*. at 5 (citing, *e.g.*, A.W. v. Jersey City Pub. Sch., 486 F.3d 791 (3d Cir. 2007); Diaz-Fonseca v. Puerto Rico, 451 F.3d 13 (1st Cir. 2006); Ortega v. Bibb Cnty. Sch. Dist., 397 F.3d 1321 (11th Cir. 2005); Polera v. Bd. of Educ., 288 F.3d 478 (2d Cir. 2002); Padilla v. Sch. Dist. No. 1, 233 F.3d 1268 (10th Cir. 2000); Thompson *ex rel.* Buckhanon v. Bd. of Special Sch. Dist. No. 1, 144 F.3d 574 (8th Cir. 1998); Sellers v. Sch. Bd., 141 F.3d 524 (4th Cir. 1998); Charlie F. *ex rel.* Neil F. v. Bd. of Educ., 98 F.3d 989 (7th Cir. 1996)).

[28] Prospective services may be viewed as a more limited version and, thus, subsidiary part of 1) what should have been in the IEP or what was in the IEP but not implemented, or 2) what the child should receive as a placement as the result of a denial of FAPE. However, the line between prospective and retrospective is far from a bright one, especially given the blurry boundaries for compensatory education. *See, e.g.*, Mr. I v. Maine Sch. Admin. Unit No. 55, 480 F.3d 1, 26 (1st Cir. 2007) (fusing and confusing compensatory education with purely prospective revisions to the IEP).

[29] "Frequency" in this context is limited to instances where the remedy being at issue, i.e., addressed by the IHO/RO or court, in the wake of a denial of FAPE. Thus, the count does not include instances where the IHO/RO or court opinion mentioned or discussed the remedy but did not rule on it.

[30] *Id*.

[31] *Id.*

[32] Thus, here the conversion is from the remedy being at issue to its outcome,

(6) Does any other, more qualitative[33] trend emerge as notable?

I. METHOD

Because it provides the broadest national sampling of IHO/RO and court case law under the IDEA, *Special Ed Connection*®[34] served as the database for this study.[35] The resulting sample selection consisted of two steps. The first step was to screen all of the decisions from January 1, 2000[36] to December 20, 2012[37] listed under the following overlapping headings in the topical index: FAPE Generally – 200.030; Procedural Violations as Denial – 200.035; Reasonably Calculated to Provide FAPE – 200.040; Calculation of Educational Benefit – 200.015; and Right to FAPE – 200.050.[38] The purpose of the initial review was to sift out the various cited decisions where the HO/RO or court concluded that the defendant district[39] did not violate its FAPE obligations[40] or otherwise did not

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i.e., whether the IHO/RO or court granted, denied, or disposed of it otherwise in its final order.

[33] In this context, "qualitative" is simply in contrast to "quantitative," although recognizing the ultimate overlap of these two research approaches.

[34] *See supra* note 11.

[35] For the resulting citations provided *infra*, "IDELR" refers to the decisions available in the hard-copy reporter series, whereas "LRP" refers to those decisions available only in the electronic database. Moreover, following customary use, citations to IHO/RO decisions are designated by "SEA," because state education agencies are responsible for providing the aforementioned (*supra* text accompanying note 10) one- or two-tier system for administrative adjudications under the IDEA.

[36] The selection of this starting date provided for the most recent period of at least a decade marked by the turn of the century.

[37] The ending date was the time of the data collection. Thus, some of the cases decided within the last few months of 2012 were not included in the sample due to the time lag in publishing decisions. This limited incompleteness warranted a projected figure for the final year in the frequency chart of Figure 1.

[38] Although the overall topical heading "Free Appropriate Public Education (FAPE)" included other subheadings, an exploratory sampling of each one revealed that the cases where the IHO/RO or court found a denial of FAPE were already included in the comprehensive coverage of the selected subheadings.

[39] Although the usage consistently herein follows the customary plaintiff-parent and defendant-district typology for IDEA cases, this user-friendly characterization obscures nuances of adjudicative level, possible parent-child differences (e.g., Winkelman v. Parma Sch. Dist., 550 U.S. 516 (2007)), and the

find a denial of FAPE[41] under the IDEA.[42] The second step was carefully reading and coding each of the remaining FAPE-denial decisions in terms of two key variables.[43] One variable was the type of FAPE denial, using the following four categories:[44]

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occasional case in this study's sample where the district filed for the impartial hearing.

[40] The incidental finding—without specifically tallying the exact numbers—in screening the decisions under these topical headings was that the FAPE decisions in favor of districts clearly outnumbered those in favor of the parents. This trend comports with that of a more systematic sampling of IDEA decisions. Zirkel, *supra* note 5, at 677–709.

[41] In some cases, FAPE overlaps with "child find," the obligation to evaluate a child reasonably suspected as qualifying for an evaluation and/or eligibility under the IDEA, including compliance with the regulatory criteria for its timing and scope. *See, e.g.*, Perry A. Zirkel, *The Law of Evaluations under the IDEA: An Annotated Update*, EDUC. L. REP. (forthcoming 2013). Thus, the screening included determining which cases to exclude as not fitting within this FAPE overlap.

[42] As a threshold matter, decisions under Section 504 or other legal bases were excluded. *See, e.g.*, Nixon v. Greenup Cnty. Sch. Dist., 890 F. Supp. 2d 753 (E.D. Ky. 2012); Wiles v. Dep't of Educ., 555 F. Supp. 2d 1143 (D. Haw. 2008); Fox Chapel Area Sch. Dist., 59 IDELR ¶ 208 (Pa. SEA 2012). Second, cases that were specific to FAPE but decided under the IDEA's complaint resolution process were excluded. *See, e.g.*, Student with a Disability, 109 LRP 13190 (Mont. SEA 2009); Student with a Disability, 45 IDELR ¶ 293 (Haw. SEA 2006); Shakopee Indep. Sch. Dist. No. 720, 45 IDELR ¶ 171 (Minn. SEA 2005). Third, decisions that were specific to FAPE under the IDEA but inconclusive were excluded. *See, e.g.*, D.F. *ex rel.* N.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595 (2d Cir. 2005) (remanded to district court for reconsideration); R.S. v. Montgomery Twp. Bd. of Educ., 59 IDELR ¶ 47 (D.N.J. 2012); Banks *ex rel.* D.B. v. District of Columbia, 720 F. Supp. 2d 83 (D.D.C. 2010); Hunter v. District of Columbia, 51 IDELR ¶ 34 (D.D.C. 2008) (remanding to the IHO for final determination). Finally, the exclusions also extended the various decisions under the IDEA limited to technical adjudicative issues rather than the merits of FAPE. *See, e.g.*, K.C. v. Bd. of Educ., 48 IDELR ¶ 6 (D. Md. 2007) (additional evidence); A.H. v. State of New Jersey Dep't of Educ., 46 IDELR ¶ 252 (D.N.J. 2006) (exhaustion); Bd. of Educ., 46 IDELR ¶ 173 (N.Y. SEA 2003) (statute of limitations); Woodland Sch. Dist. 50, 36 IDELR ¶ 115 (Ill. SEA 2002) (mootness).

[43] At this step, the relatively few cases that had more than one decision specific to FAPE and its remedy, such as an affirmance, modification, or reversal upon appeal, were limited to the final decision on the merits. For example, the report for the IHO's decision in *McKinney Independent School District*, 54 IDELR ¶ 33 (Tex. 2010) cross-referenced subsequent judicial decisions in the same case; thus, the coding was limited to the court's affirmance in *S.F. v. McKinney Independent School District*, 58 IDELR ¶ 157 (E.D. Tex. 2012), *magistrate's report adopted*, 59

(1) Procedural;
(2) Substantive;
(3) Implementation; and
(4) Combination.[45]

The other variable was the type of remedy at issue and ruled upon in the case, i.e., where the parent sought one or more of the following forms of relief as an order from the IHO/RO or court.[46] More specifically, the typology of IDEA remedies for coding in this study was follows:[47]

- Tuition and related reimbursement[48]

IDELR ¶ 261 (E.D. Tex. 2012). Similarly excluded were decisions solely concerning attorneys' fees, which is not only a separable issue but also exclusive to the court segment of the cases. Finally, where the IHO/RO or court opinion addressed various issues, the coding was limited to the rulings specific to the FAPE-denial and its remedy.

[44] The coding also included a catchall "not ascertainable" category for the relatively few cases where the IHO/RO or court opinion did not specify, either explicitly or implicitly, the basis for the FAPE denial.

[45] In these cases, the denial of FAPE was premised on separable procedural and either substantive-formulation or substantive-implementation grounds (i.e., violations of each side of the two-part *Rowley* test, *supra* text accompanying note 13, or in combination with the implementation standard, *supra* text accompanying note 20).

[46] "At issue" here is purposely broad, referring to all FAPE-denial cases where the IHO/RO or court expressly made a determination of the remedy, which may have been to grant, deny, partially grant and partially deny, or remand (for either further proceedings or to the IEP team) it.

[47] All of these remedies are in addition to the basic declaratory relief that the district has denied the child FAPE. Moreover, the first three of them tend to be more retrospective, whereas the remaining three are more prospective, although these chronological orientations are overlapping rather than mutually exclusive.

[48] "Tuition and related reimbursement" is used herein for two reasons—one as a general reminder and the other as a special consideration. First, per the model in Zirkel, *supra* note 8, this remedy, which stems from the Supreme Court's decisions in *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985), and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), is generally understood to extend broadly to various expenses beyond or in lieu of tuition, such as tutoring, related services, or assistive technology. Second, the issue of reimbursement or payment for independent educational evaluations (IEEs) posed a special consideration here. More specifically, the blurry boundary between these

- Compensatory education;[49]
- Money damages;[50]
- Prospective IEP revisions;
- Prospective services;[51] and
- Evaluation.[52]

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related remedies resulted in a special coding resolution. The broad category of "tuition and related reimbursement" extended here to include the four IHO decisions that treated the IEE issue as inseparably part of the FAPE denial. *See, e.g.*, Monrovia Unified Sch. Dist., 108 LRP 10494 (Cal. SEA 2008); Chicago Pub. Sch., 44 IDELR ¶ 294 (Ill. SEA 2005). However, the coding excluded IEE reimbursement or payment rulings where this relief was based on the parallel but separable multi-part test, which is premised on the appropriateness of the evaluation rather than the appropriateness of the IEP. For this separate test and case law, see, e.g., Zirkel *supra* note 25; Perry A. Zirkel, *Independent Educational Evaluation Reimbursement: A Checklist*, 231 EDUC. L. REP. 21 (2008).

[49] The boundary for this remedy is also blurry, perhaps because it is still evolving and has yet to receive Supreme Court or congressional clarification. For purposes of coding, the coverage was broad, including cases where the IHO/RO or court ordered some other relief, such as prospective placement, under the express or at least implicit treatment as compensatory education. *See, e.g.*, Pickens Cnty. Sch. Dist., 110 LRP 2301 (Ga. SEA 2009) (ordering residential placement expressly as compensatory education); Tyler Indep. Sch. Dist, 60 IDELR ¶ 59 (Tex. SEA 2012) (ordering, without labeling it as compensatory education, continued private placement for a prescribed period in addition to tuition reimbursement where parent requested both compensatory education and tuition reimbursement).

[50] Although unavailable in most jurisdictions now, this remedy was included as a category in the data collection for the sake of completeness, especially given that the precedents accumulated largely during this almost 13-year period. *See supra* note 27. However, given its minimal frequency, it became part of the Miscellaneous Other category in the reporting of the results. *See infra* note 64.

[51] *See supra* note 26 and accompanying text. "Services" in this context is broad, extending to personnel, such as an aide, and equipment, such as assistive technology devices. *See, e.g.*, Boston Pub. Sch., 59 IDELR ¶ 178 (Mass. SEA 2012). This category overlapped with compensatory education, which made it difficult to distinguish the two, especially in cases where the written opinion did not refer expressly to compensatory education. For example, New York review officer decisions have blurred these two types of remedies under the term "added services." *See, e.g.*, Student with a Disability, 50 IDELR ¶ 120 (N.Y. SEA 2008).

[52] Similar to the exclusion or coding of IEE reimbursement, "evaluation" was here reserved for decisions where the IHO/RO or court found a denial of FAPE and ordered this remedy as part of the relief directly for this denial, not for some other, separable reason. *See, e.g.*, K.I. v. Montgomery Pub. Sch., 805 F. Supp. 2d 1283, 57 IDELR ¶ 93 (M.D. Ala. 2011) (ordering reevaluation for new IEP); Boston Pub.

The resulting sample[53] consisted of 224 decisions. Of these decisions, 140 (63%) were at the IHO or RO level, with the remaining 84 (38%) at the court level.[54] Figure 1 shows the frequency of these decisions per year, which approximates the rising trajectory of special education and FAPE case law more generally.[55]

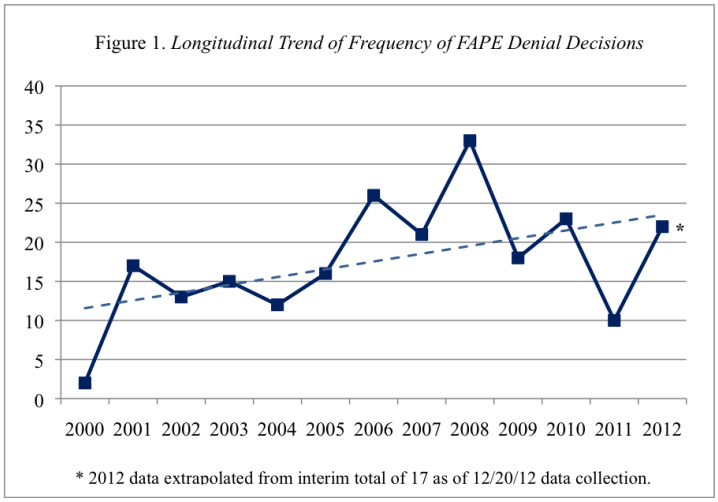
Sch., 59 IDELR ¶ 178 (Mass. SEA 2012) (ordering evaluation to determine new IEP, including whether the child needed the prospective service of a 1:1 aide); Roswell Indep. Sch. Dist., 36 IDELR ¶ 19 (N.M. SEA 2001) (ordering evaluation to determine not only IEP but also compensatory education). In a few of these cases, typically premised on the IDEA's child find obligation, the explicit finding of a denial of FAPE was only marginal. *See, e.g.*, Hawkins v. District of Columbia, 49 IDELR ¶ 213 (D.D.C. 2008) (finding denial of FAPE in upholding IHO's order for an evaluation to determine eligibility).

[53] The reference to "sample" is based on the understanding that the population consists of a larger number of decisions that either escape this rather broad net of topical index categories or, inevitably, does not appear in this database. *See* Zirkel & Machin, *supra* note 11, at 508–09. Although the size of the sample serves to mitigate this limitation, representativeness remains an issue. *See, e.g.*, Anastasia D'Angelo, J. Gary Lutz, & Perry A. Zirkel, *Are Published IDEA Hearing Officer Decisions Representative?* 14 J. DISABILITY POL'Y STUD. 241 (2004).

[54] Rounding of decimals more than .5% accounts here and elsewhere in this study for sums that are slightly more or less than 100%.

[55] *See, e.g.*, Zirkel & Johnson, *supra* note 2, at 5–6 (special education court decisions); Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731 (2002) (special education court and IHO/RO decisions); Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. SPECIAL EDUC. LEADERSHIP 22 (2008) (special education IHO/RO decisions); Zirkel, *supra* note 5, at 677–709 (FAPE court decisions).

Figure 1.



The states where these cases most frequently arose were: (1) New York—thirty-five (16%); (2) California—thirty-two (14%); (3) Hawaii—twenty-two (10%); (4) Pennsylvania—nineteen (8%); (5) New Jersey—thirteen (6%); (6) Texas—eleven (5%); and (7) Alaska—ten (4%),[56] again approximating the pattern for IDEA and FAPE cases more generally.[57]

II. RESULTS

The distribution of the FAPE violations for the 224 decisions was, in order of frequency, as follows:

(1) Substantive—ninety-eight (44%);
(2) Procedural—eighty-two (37%);[58]

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[56] Thus, these seven states accounted for 63% of the 224 decisions.

[57] *See supra* note 55 and accompanying text. The major exceptions were the District of Columbia, which only accounted for eight (4%) of the cases in this sample but is one of the top two jurisdictions for the IDEA and FAPE cases more generally, and Alaska, which is in the lower group of jurisdictions for these cases more generally.

[58] Aligned with the recent codification (20 U.S.C. § 1415(f)(3)(E) (2006) and 34 C.F.R. § 300.513(a)(2) (2012)), the most common procedural violation was denial of a meaningful opportunity for parental participation. *See, e.g.*, D.B. v.

(3) Combination—twenty-seven (12%);[59]
(4) Implementation—nine (4%); and
(5) Not ascertainable—eight (4%)[60]

Thus, substantive and procedural violations respectively predominated, with insufficient implementation being the basis in relatively few cases and with the particular basis for the denial of FAPE being unclear in a similarly low proportion of the cases.

The distribution of the 294 "remedial rulings,"[61] in order of frequency of each type, is presented in Table 1. Because some of the decisions had more than one remedy at issue,[62] the proportional frequencies varied in relation to the total number of remedial rulings and decisions, respectively.[63]

Gloucester Twp. Sch. Dist., No. 10–4630, 2012 WL 2930226 (3d Cir. July 19, 2012); Dep't of Educ., 55 IDELR ¶ 300 (Haw. SEA 2010); Acton-Agua Dulce Unified Sch. Dist., 36 IDELR ¶ 36 (Cal. SEA 2001).

[59] Of these twenty-seven cases, twenty-three were based on the combination of procedural and substantive-formulation grounds, and the remaining four were based on the combination of procedural and substantive-implementation grounds.

[60] In some of these cases, the basis was the overlapping issue of child find, but without any indication of whether the adjudicator considered the denial of FAPE as procedural or substantive. *See, e.g.*, Scott v. District of Columbia, 45 IDELR ¶ 160 (D.D.C. 2006). The other cases in this limited category included decisions where the district conceded the denial of FAPE, *e.g.*, N.R. v. Dep't of Educ., 52 IDELR ¶ 92 (S.D.N.Y. 2009), or the adjudicator did not include sufficient information to make this classification, *e.g.*, San Dieguito Union High Sch. Dist. v. Guray-Jacobs, 44 IDELR ¶ 189 (S.D. Cal. 2005).

[61] This term is used here to differentiate the ruling in the decision for each type of remedy at issue. For the potential significant difference among various units of analysis, *see, e.g.*, Perry A. Zirkel & Caitlin A. Lyons, *Restraining the Use of Restraints for Students with Disabilities: An Empirical Analysis of the Case Law*, 10 CONN. PUB. INTEREST L.J. 323, 337 (2011). Customizing the differentiated model to the specific purposes of this analysis, the units are: 1) "decision," which here is the same as the case; 2) "remedial ruling," which here refers to the frequency of each type of remedy at issue in the decision (*see supra* note 29 and text accompanying note 46); and 3) "outcome," which refers to the adjudicator's disposition of the remedy at issue (*see infra* text accompanying notes 72–81).

[62] The respective totals of 294 and 224 resulted in an average of 1.31 remedial rulings per decision.

[63] The second column in Table 1 presents raw frequencies, whereas the third and fourth columns present the proportional frequencies in terms of the respective frames of reference. Moreover, the figures in the final column add up to more than 100% due to the multiple remedies at issue in some of the decisions.

Table 1. Frequency of Types of Remedies

Type of Remedy	Frequency	Proportion of All Rulings (n=294)	Proportion of All Decisions (n=224)
Tuition and Related Reimbursement	n = 105	36%	47%
Compensatory Education	n = 88	30%	39%
Prospective IEP Revisions	n = 42	14%	19%
Prospective Services	n = 24	8%	11%
Prospective Placement	n = 22	7%	10%
Evaluation	n = 8	3%	4%
Miscellaneous Other[64]	n = 5	2%	2%

Table 1 reveals that the most frequent, or predominant, remedies are (1) tuition and reimbursement and (2) compensatory education. More specifically, tuition reimbursement accounted for almost half of all the decisions and more than a third of all the remedial rulings, while compensatory education accounted for an additional 39% and 30% of the decisions and rulings, respectively. The frequency of the other types of remedies was at a markedly lower level.

For the two predominant remedies of tuition and related reimbursement and compensatory education, Table 2 presents the relative frequencies of rulings in the two successive adjudicative

[64] For the decisions in this catchall category, see D.B. v. Gloucester Twp. Sch. Dist., No. 10–4630, 2012 WL 2930226 (3d Cir. July 19, 2012) (denying availability of money damages under the IDEA); Anchorage Sch. Dist. v. M.P., 45 IDELR ¶ 253 (Alaska Super. Ct. 2006) (not specifying a remedy beyond declaratory relief); Tempe Union High Sch. Dist., 42 IDELR ¶ 223 (Ariz. SEA 2005) (upholding order for the district to re-do the manifestation determination review); Warwick Sch. Comm., 36 IDELR ¶ 179 (R.I. SEA 2002); Klein Indep. Sch. Dist., 34 IDELR ¶ 140 (Tex. SEA 2000) (ordering reinstatement of the student).

forums under the IDEA. Because some of the decisions only addressed other types of remedies, the percentages do not add up to 100.[65] Moreover, because some of the decisions addressed more than one of these two remedies, the cells in each column are not mutually exclusive.[66]

Table 2. Proportion of Predominant Remedies by Adjudicative Forum

Adjudicative Forum	Tuition and Related Reimbursement	Compensatory Education
Court Decisions (n=84)	52% (n=44)	39% (n=33)
IHO/RO Decisions (n=140)	44% (n=61)	39% (n=55)

This table shows that the courts face tuition and related reimbursement more frequently than do IHOs/ROs,[67] but these two forums do not differ in their relative frequency of compensatory education.[68]

For these two predominant remedies, Table 3 presents the relative proportions for each of the seven most frequent states.[69]

[65] The percentages here represent the number of remedial rulings for each of these two types divided by the number of decisions in the respective forums, thus corresponding for comparison purposes to the final column of Table 1.

[66] This lack of independence precluded the use of inferential statistics (e.g., chi square analysis) for comparison of the two forums.

[67] This notable difference upon "eye-balled" examination is not necessarily generalizable in terms of statistical significance.

[68] The aforementioned (*supra* note 42) exclusion of the few IHO/RO decisions that were subject to an IDELR-published judicial appeal, thus limiting the sample to final decisions, serves as another cautionary consideration in this comparison.

[69] *See supra* note 56 and accompanying text.

Table 3. Proportion of Predominant Remedies by State[70]

Most Frequent States	Tuition and Related Reimbursement (45% of Decisions)	Compensatory Education (39% of Decisions)
New York (n=35)	63% (n=22)	23% (n=8)
California (n=32)	38% (n=12)	41% (n=13)
Hawaii (n=22)	77% (n=17)	18% (n=4)
Pennsylvania (n=19)	32% (n=6)	89% (n=17)
New Jersey (n=13)	69% (n=9)	8% (n=1)
Texas (n=11)	36% (n=4)	55% (n=6)
Alaska (n=10)	30% (n=3)	20% (n=2)

Upon comparing proportions for the two types of remedies to those for the total sample of decisions, Hawaii, New Jersey, and New York appear to have a particular propensity for tuition and related reimbursement; while Pennsylvania and, to a lesser extent, Texas have a propensity for compensatory education.[71]

Whereas the foregoing analyses were based on the remedy being at issue, the next table presents the distribution of outcomes, or dispositions, for these two most frequent remedies—i.e., whether the IHO/RO or court (1) granted the request fully, (2) granted it partially, (3) denied it altogether, or (4) disposed of it inconclusively.[72]

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[70] The percentages for the two remedies columns in this table are based on the number of rulings per type of remedy in each state as the numerator, and the respective total number of remedial rulings for the state as the denominator.

[71] This conclusion is purposely qualified in terms of "appears" because the comparisons are not subject to inferential statistical analysis, see *supra* note 66, and the cell sizes are limited—particularly for the last few states. Conversely, it appears that the frequency was disproportionately low in Alaska for tuition reimbursement, and in Hawaii, New York, and Alaska for compensatory education.

[72] For the meaning of inconclusive in this context, see *infra* note 78.

Table 4. Disposition of Predominant Remedies

Remedy	Granted in Full	Granted in Part[73]	Denied	Inconclusive[74]
Tuition and Related Reimbursement[75] (n=105)	72 (69%)	16 (15%)	11 (10%)	6 (6%)
Compensatory Education[76] (n=88)	52 (59%)	15 (17%)	8 (9%)	13 (15%)

Table 4 reveals that the pattern is similar for both remedies. More specifically, the plaintiff-parents were fully successful in more or less than two-thirds of the decisions, partially successful in approximately one-sixth of the decisions, and entirely unsuccessful in approximately one-tenth of the decisions upon the denial of FAPE. [77] First, the higher full-success rate for tuition reimbursement

[73] This outcome category included a few limited compensatory education awards that were inferably only partial.

[74] For compensatory education, this outcome category consisted of two ultimately separable groupings: (a) those decisions reserved for further adjudicative proceedings (e.g., Long v. District of Columbia, 780 F. Supp. 2d 49 (D.D.C. 2011) (remanding to IHO)) to determine whether the plaintiff-parent was entitled to compensatory education, and (b) those decisions delegated to the non-adjudicative mechanisms (e.g., J.T. v. Dep't of Educ., 112 LRP 28283 (D. Haw. May 31, 2012) (ordering jointly paid IEE); Bd. of Educ. of Cent. Syosset Sch. Dist., 101 LRP 699 (N.Y. SEA 2001) (remanding to IEP team to determine the amount of compensatory education)). For tuition reimbursement, the category included the occasional remand to apply one of the requisite steps to determine entitlement. *See, e.g.*, M.S. v. Fairfax County Sch. Bd., 553 F.3d 315 (4th Cir. 2009); Mr. and Mrs. M. *ex rel*. K.M. v. Ridgefield Bd. of Educ., 47 IDELR ¶ 258 (D. Conn. 2007).

[75] This category includes reimbursement for not only tuition in its narrow sense but also related services, tutoring, and the relatively few IEE-at-public-expense decisions. *See supra* note 48.

[76] Similarly broad in scope, this category included rulings where the order was in the form of other relief (e.g., prospective placement) that was reasonably inferably intended as compensatory education. *See supra* note 49.

[77] Without the inconclusive rulings, the proportions are even closer to each other for the remaining three outcomes; for each of these two remedies, the proportions are as follows:

- Tuition and related reimbursement: 72% 16% 11%
- Compensatory education: 70% 20% 9%

corresponded to the higher proportion of inconclusive decisions for compensatory education.[78] Second, in several of these cases, the fully or partially successful ruling for tuition reimbursement, or compensatory education, was in a decision that provided for contrary other rulings regarding FAPE issues and their remedies, thus providing mixed outcomes overall and mitigating the meaning of success.[79] Third, the denials reflect not only the specific application of the equities,[80] but also non-automatic equation of denial of FAPE with retrospective relief.[81]

Finally, in response to the final question of the study,[82] two qualitative observations stand out. First is the notable lack, especially but not exclusively in the decisions at the IHO/RO level, of careful treatment in the remedies section of the written opinions of these cases. In clear contrast with the factual findings and legal conclusions with regard to denial of FAPE, the analysis of what relief the parent is entitled to in terms of type and amount is in several cases limited to a brief order. With the exception of tuition reimbursement, systematic legal analysis, with applicable citations, is more often than not absent.[83] Second and as an interrelated matter, in

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[78] Specifically, the difference between the two remedies was 9% for each of these outcome categories.

[79] *See, e.g.*, R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167 (2d Cir. 2012); Larson v. Indep. Sch. Dist., No. 361, 40 IDELR ¶ 231 (D. Minn. 2004); Anchorage Sch. Dist. v. D.S., 688 F. Supp. 2d 883 (D. Alaska 2009); Morgan Hill Unified Sch. Dist., 110 LRP 24090 (Cal. SEA 2010); Bridgewater-Raynham Reg'l Sch. Dist., 49 IDELR ¶ 88 (Mass. SEA 2007).

[80] *See, e.g.*, Dep't of Educ. v. M.F., 840 F. Supp. 2d 1214 (D. Haw. 2011) (remanding to determine based on enumerated equities).

[81] *See, e.g.*, Garcia v. Bd. of Educ., 520 F.3d 1116 (10th Cir. 2008) (assuming, without deciding, that the authorities denied the child of FAPE but denying equitable relief—in this case, compensatory education—in light of the student's truancy and, thus, lack of benefit).

[82] *See supra* note 33 and accompanying text.

[83] *See, e.g.*, Waukee Cmty. Sch. Dist., 48 IDELR ¶ 26 (Iowa SEA 2007), *aff'd sub nom.* Waukee Cmty. Sch. Dist. v. Douglas L., 51 IDELR ¶ 15 (S.D. Iowa 2008) (ending in cryptic order to provide extended school year as compensatory education for extensive and detailed denial of FAPE affirmed upon judicial appeal without any analysis of the remedial issue); Oktibbeha Cnty. Sch. Dist., 37 IDELR ¶ 57 (Miss. SEA 2002) (ordering compensatory education during summer for full year denial of FAPE without explanation and citation); Rancocas Valley Reg'l Bd. of Educ., 41 IDELR ¶ 46 (N.J. SEA 2004) (awarding unspecified amount of

cases where there was no unilateral placement, the limitation of the remedy to prospective relief was notable in the absence of any consideration of compensatory education.[84]

III. DISCUSSION

Given its importance to not only the parent and child but also the district in terms of both justice and cost, the remedy obviously merits careful attention in the written opinions of IHOs/ROs and courts under the IDEA. This limited study is merely exploratory, intended to stimulate more systematic quantitative and qualitative analysis of the remedial issue of not only FAPE but other issues under the IDEA, such as child find, eligibility, and least restrictive environment.[85]

The first finding, which merely served as a transition to the analysis of remedies,[86] was that FAPE violations were largely, in order of frequency, (1) substantive, (2) procedural, or (3) the combination of these two types,[87] which the *Rowley* Court originally differentiated.[88] Implementation is a more recent and infrequent issue, likely because it is more obvious and, thus, subject to resolution short of a final adjudicative decision, such as via settlement. The predominance of substantive violations may seem at odds with the procedural primacy of *Rowley*, but appears to be

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compensatory education for identified period of denial of FAPE prior to unilateral placement); Tyler Indep. Sch. Dist., 60 IDELR ¶ 259 (Tex. SEA 2012) (ordering continuing placement at private school without explaining whether this prospective component is compensatory education and how the IHO calculated it in relation to the denial of FAPE).

[84] Of the 119 decisions where tuition reimbursement was not at issue, almost half did not consider compensatory, or retrospective, relief.

[85] The corresponding study of remedies for claims under Section 504 and the ADA, which are partially on behalf of students also covered by the IDEA and which also extend to students only eligible under the broader definition of disability under Section 504 and the ADA, also merits attention. Although not widely understood, the adjudicative avenue for parents under Section 504 extends to the IHO mechanism. *See, e.g.*, Perry A. Zirkel, *The Public Schools' Obligation for Impartial Hearings under Section 504*, 22 WIDENER L.J. 135 (2012).

[86] In light of its limitations, this exploratory study did not extend to addressing whether the frequency or outcomes of remedies differed according to the type of FAPE violation.

[87] *See supra* notes 58–60 and accompanying text.

[88] *See supra* notes 12–15 and accompanying text.

explainable in terms of the post-*Rowley* hybridization of the two types[89] and ultimate overlap between them.[90]

The second finding was that the most frequent remedies for FAPE violations were (1) tuition reimbursement[91] (47% of the decisions) and (2) compensatory education (39% of the decisions).[92] The first-place predominance of tuition reimbursement in these FAPE-denial cases is not surprising in light of the relatively longstanding and systematic criteria for this remedy, which includes denial of FAPE as a key criterion[93] and the high-stakes nature of this remedy.[94] Similarly, the lesser predominance of compensatory

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[89] *See supra* notes 17–18 and accompanying text.

[90] Akin to the mixed question of fact and law, which denial of FAPE ultimately is, procedural and substantive are far from mutually exclusive in the world of special education. For example, the lack or insufficiency of measurable goals, a transition plan, and—at least where specified in corollary state special education laws—a functional behavioral analysis or behavior intervention plan are not merely procedural in terms of specified IEP ingredients but also substantive in terms of reasonable calculation of educational benefit.

[91] For economy of expression, the Discussion uses "tuition reimbursement," which is the customary label for this remedy, to represent what the earlier sections of the Article refer to—as a reminder of the breadth and imprecision of its actual scope—as "tuition and related reimbursement."

[92] *See supra* Table 1.

[93] 20 U.S.C. § 1412(a)(10)(C)(ii) (2006). This codification was put in place by the 1997 Amendments of the IDEA, which in turn were attributable to the successive Supreme Court decisions in *School Committee of Burlington v. Department of Education of the Commonwealth of Massachusetts*, 471 U.S. 359 (1985), and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993). For a flow-chart-like canvassing of the criteria, see Zirkel, *supra* note 8.

[94] Although some of these cases concerned lesser expenses, such as tutoring, tuition at a rate of $90,000 for a year for a day placement and much more for a residential placement are not difficult to find. *See, e.g.*, Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E. *ex rel.* Roxanne B., 702 F.3d 1227, 1239 n.6 (10th Cir. 2012) (noting total cost of $9,800 per month for residential placement); R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 180 (2d Cir. 2012) (noting tuition of $90,000 per year for day placement); C.L. *ex rel.* H.M. v. N.Y.C. Dep't of Educ., 60 IDELR ¶ 138 (S.D.N.Y. 2013) (noting annual tuition of $125k for day placement). At the outer extreme, a federal district court decision reported that as a result of an IHO decision, Hawaii spent approximately $250,000 per year for each of two children with autism, which inferably included private residential placement for each child. Mark H. v. Lemahieu, 372 F. Supp. 2d 591, 595 (D. Haw. 2005), *rev'd*, 513 F.3d 922 (9th Cir. 2008). The resulting protracted litigation reportedly resulted in a $4.4 million settlement. Mary Vorsino, *State to Pay 4.4 Million in Landmark*

education is in line with (1) its lack of recognition in the IDEA,[95] (2) its relatively recent and less completely crystallized state in case law,[96] and (3) its ready amenability in the wake of a FAPE-denial when the parent has not unilaterally placed the child.[97] Conversely, the variety of other forms of relief fits with the broad equitable authorization under the IDEA[98] and the prospective implications of a denial of FAPE.[99]

The third finding is that courts address tuition reimbursement more frequently than IHOs/ROs do but that these two adjudicative forums do not differ for the frequency of compensatory education claims.[100] The higher frequency for tuition reimbursement may be due, at least in part, to the more immediate and direct high stakes nature of this remedy, causing the increased likelihood of judicial appeal of the IHO/RO ruling; more specifically, a tuition reimbursement order is directly for a prompt lump-sum payment of what may well be a relatively high amount,[101] thus being of major concern for both the parent and the district. In contrast, compensatory education—although quite flexible and varied in form[102]—is often in the form of services to be delivered over a

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Settlement, HONOLULU STAR ADVERTISER (Aug. 29, 2012), http://www.staradvertiser.com/s?action=login&f=y&id=167809065.

[95] The legislation does not specifically mention this remedy, and the regulations do so only via passing reference to "compensatory services" for the alternate avenue of the complaint resolution process. 34 C.F.R. §§ 300.151(b)(1), 300.153(c) (2012).

[96] *See supra* note 9.

[97] First, unlike tuition reimbursement, compensatory education does not require a second prerequisite hurdle in terms of the appropriateness of the parent's placement since there is none. Second, in the absence of a unilateral placement, compensatory education would appear to be the default remedy in terms of retrospective relief.

[98] *See supra* note 23 and accompanying text.

[99] When an IHO/RO or court concluded that the district has not provided FAPE in the requisite specific terms of procedural, substantive, and/or implementation violations, the district has the basis and incentive for correcting the problem in the future to avoid further noncompliance and its costly consequences. Even in cases where the sole remedial issue is tuition reimbursement or compensatory education, which are retrospective, the prospective effect is implicit.

[100] *See supra* notes 67–68 and accompanying text.

[101] *See supra* notes 91 and 94.

[102] *See* Zirkel, *supra* note 9, at 508–09.

relatively indefinite or protracted period.[103]

The fourth finding is that the states of Hawaii, New Jersey, and New York appear to have a particular propensity for tuition and related reimbursement, while Pennsylvania and, to a lesser extent, Texas, have a particular propensity for compensatory education.[104] Part of the tuition reimbursement propensity among these states may well be a reflection of their high special education litigation rates.[105] Another possible contributing factor is systemic dysfunction in terms of providing appropriate special education services in the state as a whole[106] or in population centers in these states.[107] For compensatory education, the likely reasons for the particular

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[103] *See, e.g.*, Bell v. Bd. of Educ., 52 IDELR ¶ 161 (D.N.M. 2008) (ordering tutoring and other educational assistance of fifteen hours per week for fifteen months); Bakersfield City Sch. Dist., 51 IDELR ¶ 142 (Cal. SEA 2008) (ordering one hour of social skills training per week for 12 months); Elizabethtown Area Sch. Dist., 50 IDELR ¶ 24 (Pa. 2008) (affirming compensatory education award of 720 hours presumably during student's remaining period of eligibility).

[104] *See supra* note 71 and accompanying text.

[105] Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. SPECIAL EDUC. LEADERSHIP 21, 31 (2008) (finding that the states with the highest number of IDEA hearings in relation to their special education enrollments were New York, New Jersey, and Hawaii).

[106] *See, e.g.*, Mark H. v. Lemahieu, 513 F.3d 922, 925 (9th Cir. 2008) (characterizing Hawaii, including a 1994 consent decree, as having "long struggled to provide adequate services to special needs students in compliance with state and federal law").

[107] *See, e.g.*, Amanda M. Fairbanks, *Tug of War Over Costs to Educate the Autistic*, N.Y. TIMES (April 18, 2009), http://www.nytimes.com/2009/04/19/education/19autism.html?_r=0 (reporting that cost of special education students' private school tuition to New York City's school district increased from $57.6 million in 2007 to $88.9 million in 2008); Pam Belleck, *Public Pays for the Learning-Disabled to Attend Private Schools*, N.Y. TIMES (Oct. 27, 1996), http://www.nytimes.com/1996/10/27/nyregion/public-pays-for-the-learning-disabled-to-attend-private-schools.html?pagewanted=all&src=pm (reporting that increasing number of parents in New York City are bringing and winning tuition reimbursement claims, reflecting in and contributing to the school system's weaknesses). Conversely, the high availability and use of private schools for special education placement may be a contributing factor in New Jersey. *See, e.g., Data Tables for OSEP State Reported Data – Table B3-2 (2011)*, INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) DATA, https://www.ideadata.org/arc_toc13.asp#partbLRE (last visited Mar. 28, 2013) (showing that New Jersey as the state with the highest percentage of parental private placements).

propensity in certain states is more difficult to divine, but it may be due in part to the relaxed jurisdictional standards for compensatory education.[108] However, these findings and their explanations are only tentative, because the analysis was limited to the seven most frequent states for these remedies, and the cell sizes for the lower half of them (e.g., Texas) were quite small.[109]

The fifth finding is that the parents were fully successful in the clear majority of the rulings for both of these remedies, with the difference in favor of a higher proportion for tuition reimbursement matched by the higher percentage of inconclusive rulings for compensatory education.[110] As a moderating threshold consideration, because the remedy is a consequential component of the overall issue of FAPE, these outcomes results are skewed.[111] More specifically, due to the integral overlap of these two remedies and denial of FAPE, the majority in favor of parents for tuition reimbursement or compensatory education is actually a minority in favor of parents in terms of their overall claim. Viewed alternatively, because denial of FAPE is an essential element of the test for tuition reimbursement or compensatory education,[112] the outcomes of the

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[108] *Compare* M.C. *ex rel.* J.C. v. Central Reg'l Sch. Dist., 81 F.3d 389, 396 (3d Cir. 1996) (requiring only a more than *de minimis* denial of FAPE), *with* Mrs. C. v. Wheaton, 916 F.2d 69, 75 (2d Cir. 1990) (requiring a gross denial of FAPE). Other factors must also be significant and interacting, because (1) in contrast with Pennsylvania's relatively high proportion of compensatory education rulings, New Jersey, the other Third Circuit decision in this analysis, had a relatively low proportion of such rulings, and (2) the standard in New York has become more unsettled and relaxed during the period of this study, *see e.g.*, P. *ex rel.* Mr. P v. Newington Bd. of Educ., 512 F. Supp. 2d 89, 112 (D. Conn. 2007), *aff'd*, 546 F.3d 111 (2d Cir. 2008) (interpreting the gross denial standard to apply only in cases where the student is beyond age twenty-one).

[109] Additionally, a more comprehensive and intensive follow-up study would allow for examining the frequency and outcomes of the other types of remedies, which may have an interactive effect with tuition reimbursement and compensatory education.

[110] *See supra* notes 77–78 and accompanying text.

[111] These interpretations are tentative, depending on the intervening consideration of the typology of issues (*supra* note 5) and the units of analysis (*supra* note 61).

[112] Although the multi-part of decisional framework of tuition reimbursement more obviously includes denial of FAPE, the analogous and more direct analysis for compensatory education encompasses the same foundational ingredient. *See*

cases where parents sought either remedy are different and less favorable to the notable extent that the ruling is in favor of districts in the clear majority of the higher number of cases classified under FAPE.[113] Given this restriction, the majority proportion in favor of parents for both remedies is not surprising, especially in light of the relatively relaxed standard for the second appropriateness step for tuition reimbursement[114] and the aforementioned[115] absence of any corresponding prerequisite for compensatory education. Similarly, the notable minority of partially granted/partially denied requests for tuition reimbursement and compensatory education, which approximates one-sixth of the rulings for each remedy, fits with their clearly equitable nature.[116] Finally, the lower parent-favorable proportion for compensatory education rulings, as compared with tuition reimbursement, is not surprising given its higher proportion of inconclusive rulings, i.e., where the adjudicator delegates the determination to further proceedings or processes.[117]

The final findings, in the form of qualitative observations, were that in the cases for the remedies other than tuition reimbursement 1) the written treatment was often far from thorough, and 2) the exclusive use of purely prospective remedies was more frequent than expected.[118] These interrelated observations suggest the need for

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supra notes 8–9.

[113] *See supra* note 40. The number of FAPE cases is sufficiently higher to infer that the overall majority is in favor of districts, but the specific proportions would require tabulating a combination of the FAPE with the tuition reimbursement and compensatory education categories, which is not available in the literature to date.

[114] Per the multi-part test outlined, *supra* note 8, this step refers to the parents' unilateral, as contrasted with the district's proposed, placement. For the comparatively relaxed standard, see, e.g., Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); *see also* 34 C.F.R. § 300.148(c) (2012).

[115] *See supra* note 97.

[116] This equitable nature is based not only on the overall broad remedial authorization in the IDEA (*supra* note 23 and accompanying text) but also the express equities elements in the Supreme Court's and Congress's tuition reimbursement analysis (*supra* note 8) and the judicial recognition of compensatory education as an analogous remedy (*supra* note 9).

[117] *See supra* note 78.

[118] *See supra* notes 83–84 and accompanying text.

improvement.[119] For example, when the aforementioned[120] delegation of compensatory education was to IEP teams, the adjudicator often ignored the relatively strong case law authority against doing so.[121] Similarly, the failure of these IDEA adjudicators, particularly the IHOs/ROs, to identify and apply the case law concerning the standards for compensatory education more generally[122] and the boundaries for the their remedies, such as prospective placement,[123] is in stark contrast to the review norm of a "thorough and careful" opinion.[124] Yet, the limits of improvement

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[119] Other remedial issues warrant systematic study and careful consideration among scholars and adjudicators. For example, a leading consultant-trainer has suggested that the prospective order of the IHO/RO, upon finding a denial of FAPE, should specify what the new IEP must include to rectify its identified deficiencies. For this purpose, he recommended that the IHO during the prehearing process have the parties clarify the remedy issue and forewarn them of the need for an evidentiary record as its basis. Interview with Lynwood Beekman, Director, Special Education Solutions, in Albany, N.Y. (Nov. 2, 2013). For an analogous suggestion, another leading expert on IDEA dispute resolution included in his proposal for a binding arbitration alternative the recommendation that the decision be in the form of a good IEP. S. James Rosenfeld, *It's Time for An Alternative Dispute Resolution Procedure*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 361, 374 (2012).

[120] See *supra* text accompanying note 117.

[121] Bd. of Educ. v. L.M., 478 F.3d 307, 317–18 (6th Cir. 2007); Reid *ex rel.* Reid v. District of Columbia, 401 F.3d 516, 527 (D.C. Cir. 2005) (ruling, based on the impartiality and finality requirements, that IHOs/ROs may not delegate to the IEP the decision to discontinue or terminate the compensatory education award). This case law might be distinguishable as either being specific to jurisdictions that follow the qualitative approach or as being limited to termination or reduction, as per T.G. v. Midland Sch. Dist. 7, 848 F. Supp. 2d 902 (C.D. Ill. 2012), although the original rationale in *Reid* would seem to exceed such attempted boundaries. *Cf.* Anchorage Sch. Dist. v. D.S., 688 F. Supp. 2d 883 (D. Alaska 2009) (reversing the part of the IHO's order delegating approval authority to private provider for new IEP); Slack v. Del. Dep't of Educ., 826 F. Supp. 115, 121–22 (D. Del. 1993) (ruling that decision that left the resolution to "a mechanism for evaluating the effectiveness of whatever private placement is utilized" violated the finality requirement). In any event, such careful consideration is largely missing in the cases in this study's sample.

[122] *See supra* note 9.

[123] *See* Zirkel, *supra* note 22, at 10 (citing Davis v. District of Columbia Bd. of Educ., 530 F. Supp. 1209, 1215 (D.D.C. 1982).

[124] *See, e.g.*, M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217, 241 (2d Cir. 2012); Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1047 (9th Cir. 2012). For a more

are not only systemic but also structural. More specifically, IHOs/ROs in many states face systemic limits in terms of either compensation or specialization,[125] and they face a challenging time limit.[126] For courts, the presence of congestion and the lack of specialization are obvious. Structurally, both IHOs/ROs and courts are largely reactive mechanisms, which are largely dependent on the parties' action and which have limitations on raising issues or ordering relief *sua sponte*.[127] The lack of attorneys with special expertise in IDEA cases in many parts of the country[128] and the expanded permissibility of *pro se* representation by parents[129] contribute to the less than complete and optimal use of compensatory education.

IV. CONCLUSION

For the parties in a FAPE case, if the adjudicator determines that the district has violated the applicable standards for denial, the most significant part of the decision is the explanation and expression of the remedy. For the parent, it represents closure in terms of equitable justice that provides appropriate relief not only prospectively but also

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detailed view of the norms for IHO/RO decision-making, see Perry A. Zirkel, *"Appropriate" Decisions under the Individuals with Disabilities Education Act*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 242 (2013). For the case law setting for the standards specific to compensatory education awards, see *id.* at 259 nn.75–76.

[125] Although there is an occasional exception, the part-time IHOs tend to have limited compensation, and the full-time IHOs/ROs tend to have such varied and broad jurisdiction that counters specialization in IDEA issues. *See, e.g.,* Zirkel & Scala, *supra* note 10, at 6.

[126] 34 C.F.R. § 300.515 (2012) (45 days for IHO and 30 days for RO except for specific extensions in response to party request).

[127] *See* Zirkel, *supra* note 22, at 11–14. The identified case law is specific to IHOs/ROs but also at least inferably applies to courts based on their institutional structure.

[128] *See, e.g.,* Perry A. Zirkel, *Lay Advocates and Parent Experts Under the IDEA*, 217 EDUC. L. REP. 19, 21–23 (2007); Kay Seven & Perry A. Zirkel, *In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow* 9 GEO. J. POVERTY L. & POL'Y 193, 219–203 (2002).

[129] Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007).

retrospectively.[130] For the district, it represents the corresponding consequences in terms of both equity and expense. Yet the systematic investigation and improvement of the remedial orders at both adjudicative levels under the IDEA, with special but not sole attention to the evolving efficacy of IHOs/ROs,[131] have yet to receive adequate attention. This exploratory study is intended to stimulate more thorough and thoughtful efforts in this direction.

[130] Although implementation of the order is obviously in the future, the denial was in the past (possibly, depending on the circumstances since the initial filing, continuing to the present). Thus, the use of "prospectively" and "retrospectively" in this context respectively refer to fixing the child's IEP for the period subsequent to the order and compensating the child for the period previous to the order.

[131] 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).