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## Safeguarding Procedures Under the IDEA: Restoring the Balance in the Adjudication of FAPE

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**Safeguarding Procedures Under the IDEA:  
Restoring the Balance in the Adjudication of FAPE**

**By Perry A. Zirkel\* © 2020**

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Initiated as funding legislation in 1975 and amended periodical reauthorizations,<sup>1</sup> the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> provides a detailed framework of procedural requirements focused on the obligation of providing a “free appropriate public education” (FAPE)<sup>3</sup> to each student with a disability.<sup>4</sup> These procedural requirements include, for example, the FAPE delivery vehicle of an individualized education program (IEP),<sup>5</sup> the administrative adjudicatory dispute resolution mechanism of an impartial due process hearing,<sup>6</sup> and specialized notices for various stages of this process.<sup>7</sup>

In the landmark case *Board of Education v. Rowley* in 1982,<sup>8</sup> the Supreme Court concluded that FAPE has two prongs—procedural compliance and a less specific substantive standard.<sup>9</sup> In the succeeding decades, the courts have gradually eroded the procedural dimension to the point of near distinction by giving preemptive effect to the substantive dimension.<sup>10</sup>

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<sup>1</sup> The successive reauthorizations included the 1986 amendments, Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99 § 457, 100 Stat. 1145 (1986) (amended 1990), which included attorneys’ fees for prevailing parents; the 1990 amendments, Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101 § 476, 104 Stat. 1103 (1990) (amended 1991), which provided, *inter alia*, the IDEA as the new name for the original Education of the Handicapped Act; the 1997 amendments, Individuals with Disabilities Act Amendments of 1997, Pub. L. No. 105 § 17, 111 Stat. 37 (1997) (amended 2004), which included major provisions for discipline of students with disabilities; and the most recent 2004 amendments, Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108, § 446, 118 Stat. 2647 (2004), which included fine-tuning several provisions of the Act. For historical perspectives, see Edward W. Martin, Reed Martin, & Donna L. Terman, *The Legislative and Litigation History of Special Education*, 6 FUTURE OF CHILD. 25 (1996); Mitchell Yell, David Rogers, & Elisabeth Lodge Rogers, *The Legal History of Special Education*, 19 REMEDIAL & SPECIAL EDUC. 219 (1998).

<sup>2</sup> 20 U.S.C. §§ 1400–19 (2017).

<sup>3</sup> 20 U.S.C. § 1401(9) (2017). *E.g.*, *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1312 (10th Cir. 2008) (characterized FAPE as “the central pillar of the IDEA statutory structure”).

<sup>4</sup> 20 U.S.C. §§ 1401(3), 1412(a)(1)(A) (2017).

<sup>5</sup> 20 U.S.C. §§ 1401(14), 1414(d) (2017). *E.g.*, *Honig v. Doe*, 484 U.S. 305, 311 (1988) (characterizing the IEP as “the primary vehicle” of the IDEA).

<sup>6</sup> 20 U.S.C. § 1415(f)–(i) (2017).

<sup>7</sup> 20 U.S.C. § 1415(c)–(d) (2017).

<sup>8</sup> *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley (Rowley)*, 458 U.S. 176 (1982).

<sup>9</sup> *Id.* at 182, 187–91.

<sup>10</sup> *See M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cty*, 303 F.3d 523, 533 (4th Cir. 2002) (“When such a procedural defect exists, we are obliged to assess whether it resulted in the loss of an educational opportunity for the disabled

The article's purpose is to stimulate IDEA adjudicators, starting with the specialized and significant level of impartial hearing officers,<sup>11</sup> and to restore the enforceable meaning of the procedural requirements of the IDEA. Doing so will provide a more coherent balance with not only the substantive dimension, but also the other decisional dispute resolution mechanisms of the Act.<sup>12</sup> Part I provides an overview of the procedural structure of the IDEA and the Supreme Court's framework interpretation.<sup>13</sup> Part II traces the subsequent interpretation of the procedural dimension of FAPE, culminating in the codification of the two-part test in the latest IDEA amendments.<sup>14</sup> Part III proposes an adjudicative approach for enforcing the procedural dimension of FAPE.<sup>15</sup>

### I. PROCEDURAL DIMENSIONS OF FAPE

The IDEA regulation's requirements supplement the IDEA legislation,<sup>16</sup> which consists of approximately fifty pages specific to public schools.<sup>17</sup> The detailed procedural provisions extend from the state to the local level.<sup>18</sup> In an analysis of part of the procedural

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child"); Sch. Bd. of Collier Cty. v. K.C. *ex rel.* SWC, 285 F.3d 977, 982 (11th Cir. 2002) (reciting the test for a "procedurally defective IEP" as whether it "failed to provide [the child] with any educational benefit"); T.S. v. Indep. Sch. Dist. No. 54, 265 F.3d 1090, 1093 n.2 (10th Cir. 2001) ("If there has been no substantive deprivation, procedural defects do not amount to a denial of FAPE").

<sup>11</sup> *E.g.*, *Burilovich v. Bd. of Educ. of Lincoln Consol. Sch.*, 208 F.3d 560, 566–67 (6th Cir. 2000) (recognizing the specialized expertise of IDEA hearing officers as compared to the federal judiciary); Perry A. Zirkel & Cathy Skidmore, *Judicial Appeal of Due Process Hearing Rulings: The Extent and Direction of Decisional Change*, 29 J. DISABILITY POL'Y STUD. 22 (2017) (finding that in almost three quarters of the cases the final court decision upheld the hearing officer's rulings with slight or no change).

<sup>12</sup> *E.g.*, Perry A. Zirkel, *A Comparison of the IDEA's Dispute Resolution Processes—Complaint Procedures and Impartial Hearings: An Update*, 369 EDUC. L. REP. 550 (2019) (providing a detailed comparison of the administrative adjudicative mechanism of the IDEA, the impartial hearing, with its corresponding administrative investigative avenue, the complaint procedures mechanism under 34 C.F.R. §§ 300.151–300.15 (2018)); Perry A. Zirkel, *The Two Decisional Processes under the Individuals with Disabilities Education Act: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 169 (2017) (*An Empirical Comparison*) (providing a comparative analysis of the frequency and outcomes of issue rulings under the impartial hearing and complaint procedures avenues of the IDEA).

<sup>13</sup> *See infra* Part I.

<sup>14</sup> *See infra* Part II.

<sup>15</sup> *See infra* Part II.

<sup>16</sup> 34 C.F.R. §§ 300.1(a)–(d) (2018).

<sup>17</sup> 20 U.S.C §§ 1400–1419 (2017). These sections are Part B, which applies to eligible children ages three to twenty-one, but the statute is even longer in its entirety, extending to 20 U.S.C. § 1482 (2017).

<sup>18</sup> 34 C.F.R. § 300.1(c) (2018) (stating "[t]o assist States, localities, educational agencies, and Federal agencies to provide for the education of all children with disabilities").

dimension of the IDEA at the local level,<sup>19</sup> Zirkel and Hetrick identified at least four major and various miscellaneous school district requirements for each of these core FAPE categories: (1) IEP components, (2) IEP team, and (3) IEP development, revision, and effectuation.<sup>20</sup>

The Supreme Court in its aforementioned<sup>21</sup> landmark *Rowley* decision recognized the separable importance of the Act's procedural framework in delineating the meaning of FAPE under the IDEA.<sup>22</sup> Specifically, the Court placed at least equal emphasis on procedural compliance as substantive quality in its foundational reasoning:

When the elaborate and highly specific procedural safeguards . . . are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures . . . as it did upon the measurement of the resulting IEP against a substantive standard. We . . . [infer] 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.<sup>23</sup>

The Court reasoned that the detailed procedural provisions would open the door to the requisite education<sup>24</sup> and interpreted the Act's vague FAPE definition to provide only a rather low floor once inside.<sup>25</sup> As a result, the Court divined a two-pronged standard, with apparent primacy and stringency on the first dimension. Specifically, to determine compliance with the standard, the Court set forth these adjudicative questions: “[f]irst, has the State complied with the procedures set forth in the Act? And second, is the individualized

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<sup>19</sup> This compilation did not extend to the procedural requirements at the school district level for child find (34 C.F.R. § 300.111 (2018)) and eligibility (34 C.F.R. §§ 300.306–300.311 (2018)); least restrictive environment (34 C.F.R. §§ 300.114–300.116 (2018)); parental consent (34 C.F.R. §§ 300.300 (2018)); discipline (34 C.F.R. §§ 300.530–300.536 (2018)); parentally placed private school children (34 C.F.R. §§ 300.131–300.140 (2018)); interagency cooperation (34 C.F.R. § 300.154 (2018)); the dispute resolution processes (34 C.F.R. §§ 300.151–300.153; 300.506–300.515 (2018)) and remedies (34 C.F.R. § 300.148 (2018)).

<sup>20</sup> Perry A. Zirkel & Allyse Hetrick, *Which Procedural Parts of the IDEA Are the Most Judicially Vulnerable?* 83 EXCEPTIONAL CHILD. 219, 224 (2017).

<sup>21</sup> *Rowley*, 458 U.S. at 205–08.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* 205–06.

<sup>24</sup> *Id.* at 192. “[T]he intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.” *Id.*

<sup>25</sup> *Id.* at 201. “[T]he ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Id.*

educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?"<sup>26</sup>

## II. THE SUBSEQUENT INTERPRETATION OF THE PROCEDURAL DIMENSION

The post-*Rowley* interpretations of the procedural prong extended both vertically in chronological phases and horizontally in subject matter scope.<sup>27</sup> The phases were before and after the 2004 IDEA amendments<sup>28</sup> whereas the scope started with the core meaning of FAPE and extended to the full range of procedural issues, including child find.<sup>29</sup>

### A. Pre-2004 Judicial Interpretations

Rather than strict application, the *Rowley* progeny gradually developed a harmless error approach to procedural FAPE largely culminating in the application of the relatively relaxed substantive standard.<sup>30</sup> Initially, a few jurisdictions stopped at the determination of whether the school district violated one or more of the procedural requirements of the IDEA, thus amounting to a per se approach.<sup>31</sup> Eventually, however, the prevailing approach added a second step for cases in which the court determined that there was a violation.<sup>32</sup> In the majority of these *Rowley* progeny cases, the question for the second step was whether the procedural violation resulted in a substantive loss to the student,<sup>33</sup> thus having the effect of *Rowley*'s

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<sup>26</sup> *Id.* at 206–07.

<sup>27</sup> See generally Perry A. Zirkel, *Is it Time for Elevating the Standard for FAPE under IDEA?*, 79 EXCEPTIONAL CHILD 497 (2013) (*Elevating the Standard for FAPE*); Stacy Inman & Darren Bogie, *Child Find How to Find the Children Before the Parents Find You*, SCH. LEGAL SERV. 1 (2015), <http://schoolslegalservice.org/wp-content/uploads/sites/15/2016/02/B-Child-Find-SLI.pdf>.

<sup>28</sup> See generally *Elevating the Standard for FAPE*, *supra* note 27.

<sup>29</sup> *E.g.*, Bd. of Educ. of Fayette Cty. v. L.M., 478 F.3d 307, 313 (6th Cir. 2007); D.K. *ex rel.* Stephen K. v. Abington Sch. Dist., 696 F.3d 233, 249 (3d Cir 2012).

<sup>30</sup> Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 215, 237 (2013).

<sup>31</sup> *E.g.*, Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. LEG. 415, 435–37 (2011) (canvassing the initial chaotic variety of approaches but, via a case study of the Fourth Circuit, showing the movement from the per se to the majority approach of requiring a substantive loss to the student as the second step).

<sup>32</sup> See *id.*

<sup>33</sup> *E.g.*, *MM ex rel. DM*, 303 F.3d at 533 (“When such a procedural defect exists, we are obliged to assess whether it resulted in the loss of an educational opportunity for the disabled child”); *Sch. Bd. of Collier Cty.*, 285 F.3d at 982 (reciting the test for a “procedurally defective IEP” as whether it “failed to provide

second prong swallowing its first, procedural prong.<sup>34</sup> In a minority of the cases, the courts applied the alternative step two of a loss to the student's parents.<sup>35</sup>

### B. IDEA 2004 Codification

Although the specific contours of the second step were consistent in this substantial body of post-*Rowley* procedural FAPE case law,<sup>36</sup> the 2004 IDEA amendments adopted the two-step harmless error approach as follows:

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a . . . [FAPE] only if the procedural inadequacies—(I) impeded the child's right to a . . . [FAPE]; (II) significantly impeded the parent's opportunity to participate in the decision-making [*sic*] process regarding the provision of a . . . [FAPE] to the parents' child; or (III) caused a deprivation of educational benefits.<sup>37</sup>

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[the child] with any educational benefit"); *T.S.*, 265 F.3d at 1093 n.2 ("If there has been no substantive deprivation, procedural defects do not amount to a denial of FAPE").

<sup>34</sup> See *Rowley*, 458 U.S. at 206–07 and accompanying text for two-pronged test.

<sup>35</sup> *E.g.*, *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 812 (5th Cir. 2003) ("[whether the] procedural deficiency resulted in a loss of educational opportunity or infringed his parents' opportunity to participate in the IEP process"); *W.G. ex rel. R.G. v. Bd. of Tr. of Target Range Sch. Dist.*, 960 F.2d 1479, 1484 (9th Cir. 1992) ("procedural inadequacies that result in the loss of educational opportunity . . . or seriously infringe the parents' opportunity to participate in the IEP formulation process). Although courts have similarly not been clear or consistent in differentiating substantive and procedural rights, it would appear that this parental right is mixed but ultimately substantive. *E.g.*, *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 533 (2007) ("We conclude IDEA grants parents independent, enforceable rights. These rights, which are not limited to certain procedural and reimbursement-related matters, encompass the entitlement to a free appropriate public education for the parents' child").

<sup>36</sup> *E.g.*, Romberg, *supra* note 31, at 429–30 (concluding, under the rubric of "judicial chaos," that the *Rowley* progeny "often referred to the Supreme Court's insistence on the primary importance of the IDEA's procedural protections, but were at a loss when attempting to figure out what those protections actually meant"); Perry A. Zirkel, *Parental Participation: The Paramount Procedural Requirement under the IDEA?*, 15 CONN. PUB. INT. L. J. 1, 5–11 (2016) (*Parental Participation*) (using the wavering line of Ninth Circuit decisions illustrates the lack of clarity and consistency).

<sup>37</sup> 20 U.S.C. § 1415(f)(3)(E)(ii) (2017). Because the first prong appears to serve only as a general introduction, the second and third prongs amount to the alternative requisite losses to the child or the parents.

As Romberg observed, an adjudicative interpretation of this codification as making the procedural protections of the Act superfluous would be “misguided.”<sup>38</sup> But, what has been the prevailing adjudicative treatment and what should it be?

### C. Post-2004 Judicial Interpretation

Illustrating the effect of this IDEA 2004 provision, a systematic analysis of a representative sample of the IEP related procedural FAPE court decisions revealed that most of these claims were unsuccessful.<sup>39</sup> More specifically, upon the courts’ application of the two-step test, the outcome was conclusively in the plaintiffs’ favor in only 18% of the claims.<sup>40</sup> Even though the parents asserted an average of two procedural violations per case, they fared almost as poorly upon reanalyzing the case outcomes on a best-for-plaintiff basis.<sup>41</sup> Similarly, a procedural claims analysis of parental participation at steps one and two from 2007 to 2015 found that the plaintiffs fared poorly and in almost half of the cases the court failed to cite the applicable statutory standard.<sup>42</sup>

Although special education experts regard the IEP’s specialized components as proactive and substantive,<sup>43</sup> findings suggest that many courts consider them procedural and, thus, subject to the relaxed two-step analysis.<sup>44</sup> For example, an analysis of the judicial rulings specific to transition services, which the IDEA requires for bridging to post-secondary education or employment,<sup>45</sup> found that the outcomes were largely in favor of districts, often based on the two-

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<sup>38</sup> Romberg, *supra* note 31, at 440–41. However, his assertion that the previous scholarly commentary adopted this interpretation seems to be an overstatement.

<sup>39</sup> Zirkel & Hetrick, *supra* note 20, at 225–26.

<sup>40</sup> *Id.* at 225.

<sup>41</sup> Specifically, on a case-by-case rather than claim-by-claim basis, courts ruled conclusively in favor of the plaintiff-parents in 25% of the cases, with an additional 4% being inconclusive (i.e., subject to further proceedings). *Id.* at 226.

<sup>42</sup> *Parental Participation*, *supra* note 36, at 19–20. If hearing officers and courts more robustly applied this alternative statutory standard for the requisite loss for denial of FAPE, the need for the proposed solution would not be so acutely broad-based.

<sup>43</sup> See generally Julie J. Weatherly, IEP Disasters: Common Procedural and Substantive Mistakes to Avoid, Nebraska/Kansas Regional Special Education Conference (Nov. 7, 2008) in Julie J. Weatherly, *IEP Disasters: Common Procedural and Substantive Mistakes to Avoid*, THERASHARE 1, 14, 19 (2008), <http://www.therashare.net/files/KSDEIEPDisasters.pdf> (characterizing measurable goals and transition services as substantive).

<sup>44</sup> E.g., *M.C. ex rel. M.N. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1194–1201 (9th Cir. 2017); see also *Elevating the Standard for FAPE*, *supra* note 27, at 500.

<sup>45</sup> 20 U.S.C. § 1414(d)(1)(A)(I)(VIII) (2017).



step procedural approach.<sup>46</sup> Under this approach, most courts applied step two globally to the IEP rather than specifically to the transition component, eviscerating the statutory compliance specifications for transition services.<sup>47</sup> A more dramatic example is the judiciary's treatment of the IDEA's seemingly proactive provisions and corollary state special education laws for functional behavioral assessments (FBAs) and behavior intervention plans (BIPs).<sup>48</sup> Successive empirical analyses revealed an increasingly pro-district skew in FBA and BIP rulings, with the two-step approach being predominant.<sup>49</sup> In the most recent six-year period, the judicial outcomes favored the districts 7:1, and the rulings in New York, which has the strongest FBA-BIP law, were not significantly more parent favorable.<sup>50</sup>

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<sup>46</sup> Perry A. Zirkel, *An Analysis of the Judicial Rulings for Transition Services under the IDEA*, 41 CAREER DEV. & TRANSITION FOR EXCEPTIONAL INDIVIDUALS 136 (2018). The overall outcomes ratio of the rulings was 3:1 in favor of districts, with this pro-district skew particularly pronounced for the federal appellate courts and in the most recent segment of the sixteen-year period. *Id.* at 141.

<sup>47</sup> *Id.* at 141–42 (citing also the limited exception of *Gibson v. Forest Hills Sch. Dist. Bd. of Educ.*, 655 F. App'x 423 (6th Cir. 2016)).

<sup>48</sup> 20 U.S.C. § 1414(d)(3)(B)(I) (2017) (implicit special consideration in the IEP); 20 U.S.C. § 1415(k)(1)(D)(ii); 20 U.S.C. § 1415(k)(1)(F)(i) (explicit requirement for disciplinary changes in placement). For the corollary state laws, see Perry A. Zirkel, *State Laws for Functional Behavioral Assessments and Behavior Intervention Plans: An Update*, 45 COMMUNIQUÉ 4 (Nov. 2016); Perry Zirkel, *State Special Education Laws for Functional Behavioral Assessments and Behavior Intervention Plans*, 36 BEHAV. DISORDERS 262 (2011).

<sup>49</sup> Perry A. Zirkel, *An Update of Judicial Rulings Specific to FBAs or BIPs under the IDEA and Corollary State Laws*, 51 J. SPECIAL EDUC. 50 (2017) (*Judicial Rulings Specific to FBAs or BIPs*); Perry A. Zirkel, *Case Law for Functional Behavioral Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U. L. REV. 133 (2011).

<sup>50</sup> *Judicial Rulings Specific to FBAs or BIPs*, *supra* note 49, at 53–54.

Moreover, courts extended this largely fatal two-step approach to the fuller gamut of procedural claims,<sup>51</sup> even to violations of the procedural requirements for impartial hearing decisions.<sup>52</sup> The most glaring examples are child find<sup>53</sup> claims because they are at the root of the entire identification and FAPE process, being directly before a child's eligibility determination.<sup>54</sup> A growing line of court decisions have concluded that if a district violates its child find obligation but the record lacks an ultimate determination that the child is eligible under the Act, the parent is without any remedy, effectively including<sup>55</sup> attorneys' fees.<sup>56</sup>

This adjudicative conclusion eviscerates the child find duty in the

<sup>51</sup> See *supra* note 19 for the fuller range beyond the IEP process.

<sup>52</sup> *E.g.*, Pangerl v. Peoria Unified Sch. Dist., 780 F. App'x 505, 507 (9th Cir. 2019); J.D. *ex rel.* J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69–70 (2d Cir. 2000); Heather S. *ex rel.* Kathy S. v. Wisconsin, 125 F.3d 1045, 1059–60 (7th Cir. 1997); Amman v. Stow Sch. Sys., 982 F.2d 644, 653 (1st Cir. 1993).

<sup>53</sup> Courts have interpreted the IDEA's child find provision, 20 U.S.C. § 1412(a)(3) (2017), as referring to school districts' ongoing affirmative obligation to evaluate a child after reasonably suspecting that the child may be eligible under the Act. *E.g.*, W.A. *ex rel.* W.E. v. Hendrick Hudson Cent. Sch. Dist., 927 F.3d 126 (2d Cir. 2019); Krawietz v. Galveston Indep. Sch. Dist., 900 F.3d 673 (5th Cir. 2018); Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 322 (2018); M.G. v. Williamson Cty. Sch., 720 F. App'x 280 (6th Cir. 2018); D.K. v. Abington Sch. Dist., 696 F.3d 233 (3d Cir. 2012). For illustrative overviews, see Perry A. Zirkel, *An Adjudicative Checklist for Child Find and Eligibility under the IDEA*, 357 EDUC. L. REP. 30 (2018); Perry A. Zirkel, "Child Find": *The Lore v. the Law*, 307 EDUC. L. REP. 574 (2014).

<sup>54</sup> Moreover, child find is not the only area of the IDEA's procedural requirements that is beyond the technical scope of the child's eligibility. Other examples include the disciplinary protections for "students not yet eligible for special education" what is commonly referred to as the "response to intervention" (RTI) provision for identification of students with learning disabilities and the requirements for evaluations more generally. 20 U.S.C. § 1415(k)(5) (2017); 20 U.S.C. § 1414(b)(6)(B) (2017); 20 U.S.C. § 1414(a)–(c) (2017).

<sup>55</sup> Technically, attorneys' fees are not a remedy. *Awards of Attorney's Fees by Federal Courts and Federal Agencies*, CONG. RES. SERV. 1, 1 (Oct. 22, 2009), [https://www.everycrsreport.com/files/20091022\\_94-970\\_5ca462bf2eacfb4f483fcf98bd90d9e7313257af.pdf](https://www.everycrsreport.com/files/20091022_94-970_5ca462bf2eacfb4f483fcf98bd90d9e7313257af.pdf). However, the IDEA's fee shifting provisions are essential to effective litigation, especially but not at all exclusively for poor parents and for students in states with limited availability of specialized counsel. *E.g.*, Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 451–54 (2012) (pointing out the significant role and expense of attorneys in the IDEA context); NAT'L COUNCIL ON DISABILITY, BACK TO SCH. ON CIVIL RIGHTS (2000), <http://www.ncd.gov/publications/2000/Jan252000> (proposing publicly funded IDEA attorneys).

<sup>56</sup> *E.g.*, Burnett v. San Mateo Foster City Sch. Dist., 739 F. App'x 870, 872 (9th Cir. 2018); T.B. v. Prince George's Cty. Bd. of Educ., 897 F.3d 566, 578 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1307 (2019); Durbrow v. Cobb Cty. Sch. Dist., 887 F.3d 1182, 1196 (11th Cir. 2018); D.G. v. Flour Bluff Indep. Sch. Dist., 481 F. App'x 887, 893 (5th Cir. 2012); D.S. *ex rel.* Z.S. v. Neptune Twp. Bd. of Educ., 264 F. App'x 186, 189–90 (3d Cir. 2008); T.W. *ex rel.* K.J. v. Leander Indep. Sch.

various cases where the district has reasonable suspicion of the child's eligibility and does not conduct a timely evaluation,<sup>57</sup> but the parents fail to prove that the child was eligible.<sup>58</sup> Both of these contingencies present significant problems in ultimately adjudicating eligibility. The first challenge is based on changes in the child during the interim that may affect eligibility,<sup>59</sup> particularly because the hearing process and judicial appeals prolong the interim period from six months to two-years.<sup>60</sup> The second contingency increases the possibility of eligibility changes due to the time-consuming process of IDEA adjudication.<sup>61</sup> It also can serve as an incentive reinforcing districts' failure to fulfill their evaluation obligation, for the following reasons in addition to the usual parental difficulties of litigating against their school district.<sup>62</sup> Under

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Dist., 74 IDELR ¶ 12 (W.D. Tex. 2019); D.F. *ex rel.* Evans v. Sacramento Unified Sch. Dist., 63 IDELR ¶ 164 (E.D. Cal. 2014); *cf.* J.G. v. Oakland Unified Sch. Dist., 2014 WL 12576617 at \*1 (N.D. Cal. Sept. 19, 2014); E.M. *ex rel.* E.M. v. Pajaro Valley Unified Sch. Dist., 53 IDELR ¶ 41 (N.D. Cal. 2008), *rev'd in part on other grounds*, 652 F.3d 999 (9th Cir. 2011) (default rationale). Indeed, in some cases even if the child was eligible, the child find violation has resulted in no remedy. *E.g.*, J.N. v. Jefferson Cty. Sch. Dist., 75 IDELR ¶ 153 (N.D. Ala. 2019) (parent did not provide preponderant proof that the erroneous finding of ineligibility amounted to a denial of FAPE in light of the general intervention services that led to the child find violation).

<sup>57</sup> For the successive reasonable suspicion and reasonable period, timely evaluation, or dimensions of child find, see *supra* note 53.

<sup>58</sup> Although most of these cases are in the wake of an untimely evaluation, others arise after the lack of a district eligibility evaluation. *E.g.*, T.W. *ex rel.* K.J. v. Leander Indep. Sch. Dist., 74 IDELR ¶ 12 (W.D. Tex. 2019).

<sup>59</sup> *Cf.* D.K. *ex rel.* Stephen K. v. Abington Sch. Dist., 696 F.3d 233, 251 (3d Cir. 2012) ("The mere fact that a subsequent evaluation of [the child] yielded a different result—*i.e.*, he was found [eligible] in November 2007 but did not qualify in April 2006—does not necessarily render the earlier testing inadequate").

<sup>60</sup> First, the filing for the hearing may be for up to two years after the parents have reason to know of the child find violation. *E.g.*, G.L. v. Ligonier Valley Sch. Auth., 802 F.3d 601 (3d Cir. 2015) (applying the IDEA statute of limitations to a child find claim). Second, the majority of impartial hearings are not adjudicated within the seventy-five day timeline of the IDEA regulations, which allow for extensions upon the request of either party. *E.g.*, CADRE, *Dispute Resolution Summary for U.S. and Outlying Areas 2008–09 to 2017–18*, <https://www.cadeworks.org/sites/default/files/resources/2017-18%20DR%20Data%20Summary%20-%20U.S.%20and%20Outlying%20Areas.pdf> (last visited Feb. 19, 2020) (reporting that 27% of hearings were adjudicated within the regulatory timeline for 2017 to 2018). Third, for the hearing officer decisions that are appealed, the period until the final decision often extends to subsequent grades in the student's school career. *E.g.*, Perry A. Zirkel, *Autism Litigation under the IDEA*, 24 J. SPECIAL EDUC. LEADERSHIP 92, 94 (2011) (finding average of 2.8 years from time of filing for hearing until final court decision for a seventeen-year sample of autism cases).

<sup>61</sup> See *supra* notes 59–60.

<sup>62</sup> In general education, to litigate on behalf of their child against the child's school, parents face daunting problems that are not only economic in terms of access to and affordability of sufficiently specialized attorneys, but also emotional

the IDEA, (1) parents shoulder the burden of persuasion at due process hearings<sup>63</sup> with the exception of the few jurisdictions where state law provides otherwise,<sup>64</sup> and (2) even if they prevail, parents are not entitled to expert witness fees.<sup>65</sup>

Yet since the latest IDEA amendments, courts have maintained the substantive standard of FAPE, which is more generally the basis of the eviscerating effect of step two, at a district friendly level without dramatic change despite three successive developments.<sup>66</sup> The first two were the general purpose and peer-reviewed research (PRR) provisions of the 2004 amendments of the IDEA,<sup>67</sup> which made no significant difference in lower court outcomes despite notable advocacy in scholarly commentary.<sup>68</sup> More recently and dramatically, the Supreme Court's *Endrew F. v. Douglas County School District RE-*

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in terms of the adversarial participation in and consequences of the adjudicative process. These general problems are all the more difficult for parents of children in special education in relation to attorney specialization and student vulnerability. See Kristen Taketa, *Families Endure Costly Legal Fights Trying to Get the Right Special Education Services*, L.A. TIMES (Oct. 6, 2019), <https://www.latimes.com/california/story/2019-10-06/legal-fights-families-special-education-services>.

<sup>63</sup> *Schaffer ex rel. Schaeffer v. Weast*, 546 U.S. 49, 62 (2005) (ruling that the burden of persuasion in an impartial hearing under the IDEA is on the challenging party, i.e., the one seeking relief). In procedural violation cases, the challenging party is the parent. See *id.*

<sup>64</sup> Only a handful of state laws—Delaware, Nevada, New Jersey, New York, with Connecticut leaving the matter to the discretion of the hearing officer—place the burden of persuasion on the school district. Perry A. Zirkel, *State Laws for Due Process Hearings under the Individuals with Disabilities Education Act*, 38 J. NAT'L ASS'N ADMIN. L. JUDICIARY 3, 31 n.93 (2018). Moreover, the Supreme Court left open the question of whether its ruling preempts the aforementioned state laws that provide otherwise. *Schaffer ex rel. Schaeffer*, 546 U.S. at 61–62.

<sup>65</sup> *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 292 (2006).

<sup>66</sup> See *Endrew F. ex rel. Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 997 (2017); *Rowley*, 458 U.S. at 206–07.

<sup>67</sup> 20 U.S.C. §§ 1400(d) (2017) (emphasizing, *inter alia*, “educational results”) and 1414(d)(1)(A)(III) (2017) (requiring the IEP provisions for special education and related services to be “based on peer-reviewed research to the extent practicable”).

<sup>68</sup> *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 396 (2008) (tracing commentators' proposals and the courts' interpretation of the purpose and PRR provisions of IDEA 2004). Although the relevant judicial interpretations of the purpose language ended in the first few years after the 2004 amendments, the continuing line of cases interpreting PRR have remained in the districts' favor. *E.g.*, *Albright v. Mountain Home Sch. Dist.*, 926 F.3d 942 (8th Cir. 2019); *E.M. v. Lewisville Indep. Sch. Dist.*, 763 F. App'x 361 (5th Cir. 2019); *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260 (3d Cir. 2012); *Joshua A. v. Rocklin Unified Sch. Dist.*, 319 F. App'x 692 (9th Cir. 2009).

*I*<sup>69</sup> revisited and refined the substantive prong in *Rowley*.<sup>70</sup> Yet the reformulation of “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”<sup>71</sup> has not significantly changed the judicial outcomes in the many subsequent lower court cases.<sup>72</sup>

#### D. Alternate Forum Interpretation

This two-step approach, which reduces procedural violations largely to technical and unenforced issues in the adjudicative arena, is in clear contrast with the prevailing approach in the alternative decisional dispute resolution avenue under the IDEA.<sup>73</sup> In most states, the complaint procedures avenue, which is an investigative rather than adjudicative process, takes a strict one-step approach.<sup>74</sup> Thus, in comparison to the adjudicative arena, this forum meaningfully enforces compliance with the procedural requirements of the IDEA.

### III. THE REMEDIAL SOLUTION

Although hearing officers, review officers, and courts have almost entirely ignored the solution to their effective evisceration of the procedural requirements of the Act, it is explicitly in tandem with the codification of the two-step test.<sup>75</sup> Specifically, the same

<sup>69</sup> *Andrew F. ex rel. Andrew F.*, 137 S. Ct. at 991–93.

<sup>70</sup> *Rowley*, 458 U.S. at 206–07.

<sup>71</sup> *Andrew F. ex rel. Andrew F.*, 137 S. Ct. at 999–1001.

<sup>72</sup> Perry A. Zirkel, *The Aftermath of Andrew F.: An Outcomes Analysis Two Years Later*, 363 EDUC. L. REP. 1, 4 (2019) (finding that only five of the seventy-five judicial applications of the new substantive standard under *Andrew F.* resulted in a change from a ruling in favor of the district to a ruling in favor of the parent).

<sup>73</sup> See Perry A. Zirkel, *The Complaint Procedures Avenue of the IDEA: Has the Road Less Traveled By Made All The Difference?*, 30 J. OF SPECIAL EDUC. & LEADERSHIP 88, 88 (2017).

<sup>74</sup> *E.g.*, *An Empirical Comparison*, *supra* note 12, at 183 (finding that parents’ success rate was twice as high for procedural FAPE claims in the complaints procedures than the impartial hearing venue, with even more dramatic disparities in the success rate for child find, evaluation, notice, and discipline claims).

<sup>75</sup> Romberg proposed a much more theoretical structural approach based on the principles of contracts, collaboration, and individualization and that meshed with the three subparts of the aforementioned. Romberg, *supra* note 31, at 449–66; 20 U.S.C. § 1415(f)(3)(E)(ii) (2017). However, his approach ignored the accompanying statutory solution and the remedy of prospective procedural correction. *Infra* notes 76–77 and accompanying text. Moreover, his approach has not gained any judicial traction, with citations limited to the peripheral use of distinguishing between procedural and substantive FAPE. *R.S. ex rel. Soltes v. Bd. of Dir. of Woods Charter Sch. Co.*, 73 IDELR ¶ 252 (M.D.N.C. 2019); *Beckwith v. District of Columbia*, 208 F. Supp. 3d 34, 45 (D.D.C. 2016); *J.T. ex rel. A.T. v. Dumont*, 58 IDELR ¶ 229 (D.N.J. 2012) (referring to the two-step approach for procedural FAPE).

aforementioned<sup>76</sup> codification of the two-step test ends its elucidation of step two with the following caveat: “Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.”<sup>77</sup>

Thus, in light of their broad equitable authority under the IDEA,<sup>78</sup> hearing officers could and should issue prospective injunctive relief to rectify the procedural violation or violations. Such relief may include, for example, ordering the revision of pertinent policies or procedures, training the child’s violating staff members, or a corrective procedural redo.<sup>79</sup> The two relevant subsets of child find cases<sup>80</sup> serve as effective examples. Under this statutorily authorized solution, those child find cases lacking any evaluation should typically result in an order for an evaluation.<sup>81</sup> Those with delayed but defensible determination of ineligibility could result in an order for child find training for the violating staff members or for a revision in the district’s child find procedures.<sup>82</sup> The general purpose, as any equitable relief, is to be justly tailored to the scope and nature of the violation.<sup>83</sup> The more specific purpose in these cases is to restore the procedural dimension of the Act to a more balanced and effective position aligned with the statute’s overall structure<sup>84</sup> and specific language.<sup>85</sup>

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<sup>76</sup> 20 U.S.C. § 1415(f)(3)(E)(ii) (2017).

<sup>77</sup> *Id.* Recently, the administering agency for the IDEA added indirect support via this guidance: “The SEA, pursuant to its general supervisory responsibility . . . must ensure that a hearing officer’s decision is implemented in a timely manner, unless either party appeals the decision. This is true even if the hearing officer’s decision includes only actions to ensure procedural violations do not recur and no child-specific action is ordered.” Letter to Zirkel, 74 IDELR ¶ 171 (OSEP 2019).

<sup>78</sup> Letter to Kohn, 17 IDELR 522 (OSEP 1991) (“based upon the facts and circumstances of each individual case, an impartial hearing officer has the authority to grant any relief he/she deems necessary”); *see generally* Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: The Latest Update*, 37 J. NAT’L ASS’N ADMIN. L. JUDICIARY 505 (2018). The exception is for the awarding of attorneys’ fees. *Id.* at 555–56.

<sup>79</sup> *Id.* at 536–54. The alternatives of policy or training orders must be equitably specific to the scope of the case. *E.g.*, J.N. *ex rel.* M.N. v. Jefferson Cty. Bd. of Educ., 75 IDELR ¶ 153 (N.D. Ala. 2019) (denying requested district-wide training order in the absence of evidence of systemic child-find violations).

<sup>80</sup> *Supra* note 58.

<sup>81</sup> *E.g.*, Student with a Disability, 63 IDELR ¶ 205 (Utah SEA 2014).

<sup>82</sup> *E.g.*, District of Columbia Pub. Sch., 120 LRP 184 (D.C. SEA 2019).

<sup>83</sup> *E.g.*, Branham v. District of Columbia, 427 F.3d 7, 9 (D.C. Cir. 2005) (emphasizing the need for an inquiry that is “above all, tailored to the unique needs of the disabled student”).

<sup>84</sup> *Rowley*, 458 U.S. at 205–06.

<sup>85</sup> *Supra* note 77 and accompanying text.

To date, the use of this corrective remedial authority has been relatively rare and largely limited to the hearing officer level.<sup>86</sup> The even more limited judicial authority supports this approach. For example, in *Dawn G. v. Mabank Independent School District*<sup>87</sup> the court rejected the school district's contention that the hearing officer's prospective procedural remedies were *ultra vires* after ruling that the district met the substantive standard for FAPE.<sup>88</sup> Observing that the hearing officer did not comply with some procedural requirements, the court cited the aforementioned<sup>89</sup> IDEA provision in upholding the hearing officer's orders.<sup>90</sup>

Other examples do not cite the statutory solution, but provide at least secondary support in the child find context. First, presenting a mixed example, another federal court upheld a hearing officer's order for a new evaluation as a result of a child find violation.<sup>91</sup> The district appealed, contending that its child find violation amounted to harmless error due to its determination that the child was not eligible.<sup>92</sup> The court rejected this claim for mixed reasons.<sup>93</sup> In part, the substantive loss to the student remained in question because, in agreeing with the hearing officer that the district's evaluation was not sufficiently comprehensive, the court reasoned that the result "may mean" that the child was eligible.<sup>94</sup> However, in an overlapping part, the child find

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<sup>86</sup> *E.g.*, Phila. Sch. Dist., 118 LRP 19611 (Pa. SEA Feb. 9, 2018) (finding no substantial denial of FAPE but ordering correction of procedural defects of IEP); Boston Pub. Sch., 69 IDELR ¶ 25 (Mass. SEA 2016) (finding de minimis denial of FAPE to date but ordering specified completion of evaluation and contingent IEP team consideration of compensatory education); Red Lion Area Sch. Dist., 115 LRP 12726 (Pa. SEA Mar. 9, 2015) (finding no substantive denial of FAPE but issuing various orders to correct procedural violations); Mabank Indep. Sch. Dist., 113 LRP 2115 (Tex. SEA Sept. 12, 2012); D.C. Pub. Sch., 111 LRP 20046 (D.C. SEA Aug. 20, 2010) (finding no substantial denial of FAPE but ordering district to issue prior written notice to parent); *cf.* District of Columbia, 117 LRP 21233 (D.C. SEA 2017); Highlands Cty. Sch. Bd., 115 LRP 27365 (Fla. SEA 2015); Walker Cty. Bd. of Educ., 111 LRP 48174 (Ala. SEA 2011); Student with a Disability, 109 LRP 17648 (Va. SEA 2008a); Fulton Cty. Sch. Dist., 49 IDELR ¶ 30 (Ga. SEA 2007) (ordering a new manifestation determination as a result of procedural violations in the first manifestation determination).

<sup>87</sup> *Dawn G. ex rel. D.B. v. Mabank Indep. Sch. Dist.*, 63 IDELR ¶ 63 (N.D. Tex. 2014).

<sup>88</sup> *Dawn G. ex rel. D.B.*, 63 IDELR ¶ 63 (N.D. Tex. 2014).

<sup>89</sup> *Supra* note 77 and accompanying text.

<sup>90</sup> *Dawn G. ex rel. D.B.*, 63 IDELR ¶ 63 (N.D. Tex. 2014).

<sup>91</sup> *Indep. Sch. Dist. No. 413 v. H.M.J. ex rel. A.J.*, 123 F. Supp. 3d 1100, 1108 (D. Minn. 2019).

<sup>92</sup> *Indep. Sch. Dist. No. 413*, 123 F. Supp. 3d at 1111.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1111; *cf.* *Hoover City Bd. of Educ. v. Leventry ex rel. K.M.*, 75 IDELR ¶ 32 (N.D. Ala. 2019); *Wimbish v. D.C.*, 381 F. Supp. 3d 22, 36–38 (D.D.C. 2019) (illustrating remedy of an order for evaluation in the context of an eligibility determination was open to question in light of a defective evaluation).

violation resulted in deprivation of meaningful parental participation.<sup>95</sup>

In the second example, the Alaska Supreme Court addressed a child find violation in the unusual situation in which the district found the child ineligible, but the parents withdrew this issue from the appeal.<sup>96</sup> The court reasoned that “a school district’s duty to [timely] evaluate children for eligibility under the IDEA is not dependent upon the ultimate determination that the child is ‘disabled.’”<sup>97</sup> Based on this reasoning, the court upheld the hearing officer’s order for reimbursement of the independent educational evaluation (IEE).<sup>98</sup> However, limiting the remedy in the absence of a substantive denial of FAPE, the court reversed the hearing officer’s other reimbursement order, which was for the private tutoring expenses that the parents had incurred.<sup>99</sup>

A final, more peripheral example arose within the specialized context of the IDEA’s requirement for a manifestation determination upon a disciplinary change in placement.<sup>100</sup> A federal district court in Pennsylvania upheld a hearing officer’s order to conduct another manifestation determination review based on “significant procedural flaws” in its first review.<sup>101</sup>

This proposed approach has the added advantage of closing the gap between the hearing officer and complaint procedures avenues of decisional dispute resolution,<sup>102</sup> thus mitigating forum shopping and

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<sup>95</sup> *Indep. Sch. Dist. No. 413*, 123 F. Supp. 3d at 1112. Whether this parental prong argument applies more generally in response to child find harmless error cases depends at least in part as to whether the underlying rationale is lack of eligibility generally or lack of FAPE specifically. *Id.* In any event, the proposed solution of a prospective procedural remedy tailored to the violation remains applicable to the cases otherwise lacking any remedy at all. *Id.*

<sup>96</sup> *J.P. ex rel. P.P. v. Anchorage Sch. Dist.*, 260 P.3d 285, 286 (Alaska 2011).

<sup>97</sup> *Id.* at 293.

<sup>98</sup> Although in comparison to most cases of IEEs at public expense, this prospective remedy is unusual, the court pointed to the “unique circumstances” of the case, specifically the district’s use of the parents’ IEE “and the inadequacy of alternative remedies.” *Id.* at 294–95.

<sup>99</sup> *Id.* at 292–93.

<sup>100</sup> *Supra* note 48.

<sup>101</sup> *Bristol Twp. Sch. Dist. v. Z.B. ex rel. K.B.*, 67 IDELR ¶ 9 (E.D. Pa. 2016). However, this case is only partially supportive due to the fuzzy boundary between procedural and substantive violations, as evidenced in the tandem order for compensatory education. *Id.*

<sup>102</sup> The reason for the disparity is the prevailing one-step approach to procedural FAPE in the complaint procedures forum. *Supra* note 74 and accompanying text. Interestingly, in the pertinent provision of the IDEA Congress noted the interconnection of the two decision dispute resolution avenues with regard to procedural issues. 20 U.S.C. § 1415(f)(F) (2017) (clarifying that the prescribed adjudicatory treatment of procedural FAPE does not affect the complaint procedures alternative). Another potential gap-closing activity is whatever extent that state education agencies implement the OSEP guidance to enforce technical, or step one only violations identified in either complaint procedures or due process hearing decisions. *E.g.*, Letter to Copenhaver, 53 IDELR ¶ 165 (OSEP 2008).



deferral issues.<sup>103</sup> It also closes the gap between the procedural orientation of state education department compliance supervision<sup>104</sup> and local education professional development.<sup>105</sup> In doing so, it provides enforceable meaning to the “elaborate and highly specific procedural safeguards” that are the backbone of the Act and for which compliance is at least as important as the substantive dimension.<sup>106</sup> If indeed the legal emphasis instead should be on substantive outcomes,<sup>107</sup> Congress should amend the Act accordingly to intentionally degrade the procedural dimension. Unless and until Congress evinces such intent, adjudicators should follow the overall structure of the Act and fulfill their specific authority for prospective procedural remedies.

This adjudicative approach not only corrects the violation for the child, but also triggers the potential for the recovery of attorneys’ fees that the parents expended in proving this violation.<sup>108</sup> The entitlement and the amount of attorneys’ fees are not automatic, with the court having discretion within a rather carefully balanced set of criteria in the Act.<sup>109</sup> Thus, the relatively limited pertinent case law is divided depending on the circumstances.<sup>110</sup>

Finally, hearing officers, in light of their pivotal position in the IDEA’s adjudicative system,<sup>111</sup> are potentially the leaders in moving

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<sup>103</sup> E.g., Perry A. Zirkel, *Questionable Initiation of Both Decisional Dispute Resolution Processes under the IDEA: Proposed Regulatory Interpretations*, 49 J. L. & EDUC. 99 (2020) (discussing problems in the agency’s policy interpretations of the interconnection of these two decisional avenues).

<sup>104</sup> E.g., 20 U.S.C. §§ 1412(a), 1415(a) (2017) (specifying compliance requirements for state eligibility generally and procedural safeguards specifically).

<sup>105</sup> See generally BARBARA D. BATEMAN & MARY ANN LINDEN, *BETTER IEP’S: HOW TO DEVELOP LEGALLY CORRECT AND EDUCATIONALLY USEFUL PROGRAMS* (2012); BARBARA D. BATEMAN & CYNTHIA M. HERR, *WRITING MEASURABLE IEP GOALS AND OBJECTIVES* (2006) (illustrating prevailing emphasis on adhering to the procedural specifications of the IDEA for IEP content and process).

<sup>106</sup> See *Rowley*, 458 U.S. at 205–06.

<sup>107</sup> E.g., *Elevating the Standard for FAPE*, *supra* note 27 (advocating statutory raising of the substantive standard in response to the corresponding erosion of the procedural dimension).

<sup>108</sup> Given the significant role and expense of attorneys’ fees under the IDEA (*supra* note 55), this added factor adds to the balance-restoring nature of the proposed solution by reinforcing the districts’ incentive for procedural compliance and the parents’ sense of vindicating utility rather than frustrating futility.

<sup>109</sup> 20 U.S.C. §§ 1415(i)(3) (2017).

<sup>110</sup> Compare *Sykes v. D.C.*, 870 F. Supp. 2d 86, 91–92 (D.D.C. 2012) (awarding attorneys’ fees), with *Dawn G. ex rel. D.B. v. Mabank Indep. Sch. Dist.*, 63 IDELR ¶ 63 (N.D. Tex. 2014) (declining to award attorneys’ fees). For a court that awarded partial attorneys’ fees within a more comprehensive consideration of the equitable relief based on the particular circumstances, including the relief that the parents’ sought, see *M.A. v. Torrington Bd. of Educ.*, 980 F. Supp. 2d 245 (D. Conn. 2013), *further proceedings*, 980 F. Supp. 2d 279 (D. Conn. 2014).

<sup>111</sup> *Supra* note 11 and accompanying text.

the case law in this restorative, rebalancing direction.<sup>112</sup> Primarily<sup>113</sup> because this proposal represents a change in their modus operandi at the remedial stage,<sup>114</sup> they are likely to be resistant to implement it.<sup>115</sup> Some may indirectly blame the parent, pointing to the requirement for the filing party to specify the requested remedy in the complaint.<sup>116</sup> However, the counterbalancing considerations are: (1) this requirement is conditional,<sup>117</sup> meaning the parent likely did not know it was an available remedy;<sup>118</sup> (2) “the IDEA does not necessarily limit the relief a due process hearing officer can award to the relief a party proposes at a given stage of the administrative process[;]”<sup>119</sup> and (3) a formulaic catch-all<sup>120</sup> consistent with the hearing officer’s remedial authority would seem to be a superfluous solution.<sup>121</sup> Consequently, the cost-

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<sup>112</sup> Interestingly, the procedural-substantive distinction may also affect the degree of deference due for hearing officer decisions. *E.g.*, Daniel W. Morton-Bentley, *The Rowley Enigma: How Much Weight Is Due to IDEA Administrative Proceedings in Federal Court?*, 36 J. NAT’L ASS’N ADMIN. L. JUDICIARY 428, 462-67 (2016) (proposing judicial deference to substantive, not procedural, findings of hearing officers).

<sup>113</sup> An overlapping contributing factor is the tight regulatory timeline for completion of the process via issuance of a written decision for both regular and expedited hearings. 34 C.F.R. § 300.515(c) (2018); 34 C.F.R. § 300.532(c) (2018). In my many years of experience as an IDEA review officer and as an IDEA hearing officer trainer, I have found that the remedies stage of decision writing is often given insufficient equitable care and creativity due to exhaustion in and of this prescribed process.

<sup>114</sup> Not only do hearing officers typically provide no remedy for procedural violations that do not survive step two, but also more generally they only rarely order purely prospective procedural relief. *Supra* note 86 and accompanying text; *e.g.*, Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE*, 33 J. NAT’L ASS’N ADMIN. L. JUDICIARY 214 (2013) (*Adjudicative Remedies for Denials of FAPE*) (finding that only 5% of 224 hearing officer cases that granted remedies in FAPE cases was an order for evaluation or another action beyond the substantive content of the IEP).

<sup>115</sup> *Adjudicative Remedies for Denials of FAPE*, *supra* note 114.

<sup>116</sup> 34 C.F.R. § 300.508(b)(6) (2018) (requiring the complaint to contain “the proposed resolution of the problem to the extent known and available at the time”).

<sup>117</sup> *Id.*

<sup>118</sup> The likely lack of the requisite knowledge of this remedy is not at all limited to pro se parents. Specialized legal counsel is lacking in many locations. *E.g.*, Kay Hennessey Seven & Perry A. Zirkel, *In the Matter of Arons: Construction of the IDEA’s Lay Advocate Provision Too Narrow?*, 9 GEORGETOWN J. POVERTY L. & POL’Y 193, 217–19 (2002) (finding notable insufficiency of parent attorneys in national survey).

<sup>119</sup> *E.g.*, *Albuquerque Pub. Sch. v. Sledge*, 74 IDELR ¶ 290 (D.N.M. 2019).

<sup>120</sup> *E.g.*, *Dawn G. ex rel. D.B.*, 63 IDELR ¶ 63 (N.D. Tex. 2014) (reciting parent’s culminating request for “any [other] relief that the Hearing Officer . . . deem[] appropriate”).

<sup>121</sup> *E.g.*, Letter to Kohn, 17 IDELR 522 (OSEP 1991) (stating the agency’s position that “an impartial hearing officer has the authority to grant any relief he [or] she deems necessary”). This authority is derived from the reviewing court’s express and broad equitable authority to “grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(1)(C) (2017).

benefit balance weighs in favor of hearing officers' actively fulfilling their broad remedial authority to restore the meaning of the procedural dimension of the IDEA to an equitably enforced level.