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Adjudication under the Individuals with Disabilities Education Act: Explicitly Plentiful Rights but Inequitably Paltry Remedies

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Adjudication under the Individuals with Disabilities Education Act: Explicitly Plentiful Rights but Inequitably Paltry Remedies

PERRY A. ZIRKEL

This Article proposes an invigoration in the exercise of the broad equitable authority of hearing officers under the Individuals with Disabilities Act. Providing a higher priority on, and an affirmative presumption for, remedying violations of the Act is in the interest of all parties, extending from the individual child to the child's parents, the school district, the broader stakeholders, and the systemic improvements that is the statutory purpose. The task is not an easy one, especially given the rather tight timeline for completion of hearing officer proceedings, but it is doable with well-tailored creativity and efficiency. As the contents of the Article also explain and illustrate, the benefits of truly "doing equity" are worth this paradigm shift of prevailing practice.

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Adjudication under the Individuals with Disabilities Education Act: Explicitly Plentiful Rights but Inequitably Paltry Remedies

PERRY A. ZIRKEL*

INTRODUCTION

Originating in the mid-1970s and amended in periodic reauthorizations, the Individuals with Disabilities Education Act (IDEA) specifies a whole host of requirements for state and local education agencies focused on providing each individual eligible child with a free appropriate public education (FAPE).¹ The vehicle for the formulation and implementation of FAPE is the individualized education program (IEP).² The range of requirements under the IDEA that amount to rights of children with disabilities and their parents starts with child find, which is the ongoing obligation to provide a timely eligibility evaluation for each child reasonably suspected of eligibility,³ and extends through eligibility, FAPE, and other issue categories to remedies.⁴

One of the primary purposes of the IDEA is “to ensure that the rights of children with disabilities and parents of such children are protected.”⁵ The result has been the distinct legalization of a major segment of the public

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¹ 20 U.S.C. §§ 1400 *et seq.* The definition of FAPE includes, at its core, “special education and related services.” 20 U.S.C. § 1401(9). For the IDEA’s detailed set of regulations, see 34 C.F.R. §§ 300.1 *et seq.* (2021).

² 20 U.S.C. §§ 1401(9)(D), 1401(14).

³ 20 U.S.C. § 1412(a)(3). Although partially elaborated in the regulations, 34 C.F.R. § 300.111, the reasonable suspicion and other components of child find are primarily within an extensive body of case law that not only interprets but also fills gaps in the IDEA. *See, e.g.*, Perry A. Zirkel, *An Adjudicative Checklist for Child Find and Eligibility Under the IDEA*, 357 EDUC. L. REP. 30 (2018) (synthesizing the case law into a flowchart-like framework of criteria for adjudicators); Perry A. Zirkel, “*Child Find*: *The Lore v. The Law*,” 307 EDUC. L. REP. 574 (2014) (comparing the case law with the corresponding practitioner perceptions). Child find overlaps with the separable issues of evaluation and eligibility, which each have procedural and substantive dimensions that have more specific foundations in the legislation and regulations. *See, e.g.*, 20 U.S.C. §§ 1414(a)–(c) (providing evaluation requirements); 34 C.F.R. §§ 300.304–300.311 (elaborating evaluation requirements); 20 U.S.C. § 1401(3) (defining “child with a disability”); 34 C.F.R. § 300.8 (elaborating eligibility criteria).

⁴ *See, e.g.*, Perry A. Zirkel, *An Updated Primer of Special Education Law*, 52 TEACHING EXCEPTIONAL CHILD. 261, 262–64 (2019) (summarizing the basic issue categories under the IDEA); Perry A. Zirkel, *Special Education Law: Illustrative Basics and Nuances of Key IDEA Components*, 38 TCHR. EDUC. & SPECIAL EDUC. 263, 263–65, 267–69 (2015) (canvassing the major sequential issue categories under the IDEA).

⁵ 20 U.S.C. § 1400(d)(1)(B).

school student population.⁶ The primary mechanism for private enforcement under the IDEA is a system of administrative adjudication that is anchored in a due process hearing⁷ and that culminates in judicial review.⁸ The results amount to an extensive body of case law under the IDEA at both the hearing officer and court levels.⁹

Quantitative analyses reveal that the outcomes at both of these adjudicative levels are skewed in favor of school districts. Although there are multiple, overlapping sources of variance,¹⁰ the overall balance approximates an almost 2:1 ratio in favor of districts.¹¹ Qualitative analyses

⁶ See, e.g., David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 LAW & CONTEMP. PROBS. 63, 63–67 (1985) (discussing the statutory application of the legal model in special education including administrative adjudication and the trade-offs of procedural formalism).

⁷ E.g., Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1422–23 (2011) (“The IDEA is unusual among education programs created under the framework of cooperative federalism in that it creates an individually enforceable right to services . . . [via] a formal state administrative process, called a due process hearing.”). For the requirements for due process hearings and the option of a second, review tier of administrative adjudication, see 20 U.S.C. §§ 1415(f)–(i)(1); 34 C.F.R. §§ 300.507–300.515. For an overview of the state systems for administrative adjudication under the IDEA, see Jennifer F. Connolly, Perry A. Zirkel & Thomas A. Mayes, *State Due Process Hearing Systems Under the IDEA: An Update*, 30 J. DISABILITY POL’Y STUD. 156, 156–61 (2019). For the first in a series of four articles on the corollary state laws for due process hearings, see 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 1, 4–5, 25–29 (2018). For the significance of this administrative adjudication mechanism, along with the state complaint process, for enforcement, see OFF. OF SPECIAL EDUC. AND REHAB. SERVS., OSEP QA 23-01, STATE GENERAL SUPERVISION RESPONSIBILITIES UNDER PARTS B AND C OF THE IDEA, at A-7 (July 24, 2023), <https://sites.ed.gov/idea/idea-files/guidance-on-state-general-supervision-responsibilities-under-parts-b-and-c-of-the-idea-july-24-2023/> (“Due process . . . hearing decisions . . . are an important source of compliance information . . .”).

⁸ For the aggrieved party’s right to file a civil action in federal court, see 20 U.S.C. §§ 1415(i)(2)–(3); 34 C.F.R. §§ 300.516–300.517. For an analysis of exhaustion under the IDEA, including its limited exceptions, see Lewis M. Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts’ Jurisdiction Under the Individuals with Disabilities Education Act: Lessons from the Case Law and Proposals for Congressional Action*, 29 J. NAT’L ASS’N ADMIN. L. JUDICIARY 349, 411–17, 422–23 (2009).

⁹ In recent years, both the hearing officer and court decisions under the IDEA have ascended to a relatively high, albeit uneven, plateau. See, e.g., Perry A. Zirkel & Gina L. Gullo, *Trends in Impartial Hearings Under the IDEA: A Comparative Update*, 376 EDUC. L. REP. 870, 872 (2020) (finding an unevenly high level during the latest available six-year period, which ended in 2017); Perry A. Zirkel & Benjamin H. Frisch, *Longitudinal Trends of Judicial Rulings in K–12 Education: The Latest Look*, 407 EDUC. L. REP. 409, 412–13 (2023) (finding an approximate leveling off in 2000–2019 after a dramatic upward trajectory during the three preceding decades).

¹⁰ The major variations include (a) the jurisdiction and level, including the “published” status of court decisions; (b) the unit of analysis, which ranges from the issue to the case; (c) the outcomes scale, which may or may not differentiate inconclusive rulings, such as interim decisions and denials of dismissal, and mixed rulings; (d) the scope of the subject matter, such as the inclusion or exclusion of technical adjudicative issues, such as stay-put and exhaustion; and (e) the specific time period. See, e.g., Perry A. Zirkel & Cathy A. Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions Under the IDEA: An Empirical Analysis*, 29 OHIO STATE J. DISP. RESOL. 525, 531–40 (2014) (reviewing previous outcomes analyses at the hearing officer and court levels).

¹¹ For outcomes analyses at the hearing officer level, see Perry A. Zirkel, *The Two Dispute Decisional Processes Under the Individuals with Disabilities Education Act: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 169, 179 (2017) (finding a 3:1 ratio in favor of districts in the issue category rulings in five active states for the period 2010–2016); Zirkel & Skidmore, *supra* note 10, at 555 (finding

suggest that the reasons for this skew include the imbalance of resources in favor of districts,¹² a continuing adjudicative deference to school authorities,¹³ and the erosion of procedural requirements in favor of a relatively relaxed substantive standard.¹⁴ The Supreme Court's rulings specific to the adjudication of IDEA cases have tilted the balance in favor of districts.¹⁵ Moreover, as various empirically-styled analyses have found, the Court's most recent decision concerning the substantive standard for FAPE has not significantly changed the outcomes distribution in favor of school districts.¹⁶

The purpose of this Article is to stimulate IDEA hearing officers to provide more affirmative and creative exercise of their broad equitable authority under the IDEA. More specifically, they should adopt a strong,

a more moderate majority in favor of districts for a national sampling of hearing and review officer decisions for the period 1978–2012). For the latest national outcomes analysis at the court level, see Zorka Karanxha & Perry A. Zirkel, *Trends in Special Education Case Law: Frequency and Outcomes of Published Court Decisions 1998–2012*, 27 J. SPECIAL EDUC. LEADERSHIP 55, 58 (2014) (finding an outcome ratio approaching 3:1 in favor of school districts for published court rulings nationally for the period 1998–2012). The pro-district skew is particularly pronounced for court rulings specific to procedural FAPE. See, e.g., Perry A. Zirkel & Allyse Hetrick, *Which Procedural Parts of the IEP Process Are the Most Judicially Vulnerable?*, 83 EXCEPTIONAL CHILD 219, 226 (2016) (finding an outcome ratio approximating 3:1 in favor of school districts for a national sampling of judicial rulings during 2005–2015 concerning the procedural requirements in the IEP process).

¹² See, 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, 425, 436 (2012) (identifying structural and economic imbalance, including "a judicial construction of 'free appropriate public education' that sets an exceedingly low bar for school districts; significant disparities in school districts' and parents' access to legal counsel" and "expertise asymmetry"); Elisa Hyman, Dean Hill Rivkin & Stephen 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, 122–23, 126–27 (2011) (discussing the inability of many parents to afford to pay for an Independent Education Evaluation (IEE) or private tuition and seek reimbursement from the school); Pasachoff, *supra* note 7, at 1437 (pointing out "information asymmetries" between parents and schools and also between wealthy and poor parents); Margaret M. Wakelin, Comment, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3 NW. J.L. & SOC. POL'Y 263, 274–77 (2008) (identifying barriers of awareness, expertise, social power, and availability/affordability of legal representation).

¹³ See, e.g., Perry A. Zirkel, *Is It Time for Elevating the Standard for FAPE Under IDEA?*, 79 EXCEPTIONAL CHILD 497, 501 (2013) (identifying examples of the expansion of the deference dicta in *Rowley*).

¹⁴ See, e.g., *id.* at 498–502 (tracing the evolution from the procedural emphasis of *Rowley*, the two-step harmless error approach in the *Rowley* progeny, and the codification of this approach in the 2004 amendments of the IDEA). See *infra* note 29 for this codification.

¹⁵ *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 291–92 (2006) (interpreting the fee shifting provision of the IDEA to not include the cost of expert witnesses, which parents tend to need to a much greater extent than districts do); *Schaffer v. Weast*, 546 U.S. 49, 49–50 (2005) (placing the burden of proof at due process hearings on the filing party, which in most cases is the parent).

¹⁶ See, e.g., John P. Connolly & Lewis M. Wasserman, *Has Andrew F. Improved the Chances of Proving a FAPE Violation Under the Individuals with Disabilities Education Act?*, 18 J. ARTICLES SUPPORT NULL HYPOTHESIS 51, 54, 57–58 (2021) (finding no evidence to support more favorable outcomes to parents following *Andrew F.*); Perry A. Zirkel, *The Aftermath of Andrew F.: An Outcomes Analysis Two Years Later*, 363 EDUC. L. REP. 1 (2019) (finding no material change in the substantive standard following *Andrew F.*); William Moran, Note, *The IDEA Demands More: A Review of FAPE Litigation After Andrew F.*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 495, 513–15 (2020) (finding that many courts minimize the impact of *Andrew F.* on the substantive standard for FAPE).

albeit rebuttable, presumption, of issuing an equitably tailored remedy upon finding either procedural or substantive violations of the IDEA. In light of the significant deference that courts accord to hearing officer decisions,¹⁷ such a movement to increase the issuance of remedial orders is likely to contribute to more balanced precedents that favor improved practices in special education. Part I of this Article reviews the remedial authority of hearing officers under the IDEA. Part II identifies the problematic trend of insufficient exercise of remedial authority at both the hearing officer and court levels. Part III proposes a more affirmative exercise of this authority, starting at the hearing officer level, and including supportive judicial rulings.

I. THE BROAD REMEDIAL AUTHORITY UNDER THE IDEA

The IDEA expressly requires, not just authorizes, courts to grant appropriate relief.¹⁸ As comprehensively canvassed elsewhere, IDEA hearing officers derivatively have remedial authority for a wide range of equitable relief.¹⁹ Figure 1 illustrates the range of these injunctive remedies, grouped according to their retroactive or purely prospective orientation.²⁰

Figure 1. Overview of Hearing Officer Remedies under the IDEA

<-----Retroactive	Purely Prospective----->
Tuition reimbursement	Declaratory relief
Compensatory education	IEP revisions
IEE reimbursement	Prospective placement
[Not money damages]	Other orders, including IEE at public expense or training
	[Not attorney's fees]

¹⁷ See, e.g., 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, 25 (2018) (finding a high degree of actual judicial deference to hearing officer decisions in terms of the extent and direction of net change upon appeal in a representative national sample of decisions).

¹⁸ 20 U.S.C. § 1415(i)(2)(C) (“In any action brought under this paragraph, the court . . . shall grant such relief as the court determines is appropriate”) (emphasis added). Given the nature of “appropriate” relief, courts have bounded discretion, within the purposes of the IDEA, to equitably tailor or decline the remedy. *E.g.*, *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116, 1129–31 (10th Cir. 2008) (finding “the district court’s decision fell well within the broad parameters of the discretion” that Congress gave it).

¹⁹ 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, 515, 519–21, 555, 557 (2017).

²⁰ The directional orientation is not mutually exclusive. Both of the polar groupings are implemented prospectively, but the retrospective remedies are focused on compensating for a substantive denial of FAPE.

A. Retrospective Remedies

On the retrospective side, the primary remedies are tuition reimbursement and compensatory education,²¹ although the IDEA's regulatory provision for an individual independent educational evaluation (IEE) at public expense may be either retroactive or prospective depending on whether the parent has already obtained it.²² Tuition reimbursement, as originated in two Supreme Court decisions and subsequently codified in the IDEA, amounts to a multi-step adjudicative analysis, including denial of FAPE.²³ Partially analogous to tuition reimbursement as a remedy for denial of FAPE,²⁴ compensatory education thus far lacks the unifying approach of Supreme Court jurisprudence or IDEA codification.²⁵ The bracketed item of money damages is generally not available under the IDEA.²⁶

²¹ See, e.g., Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 214, 228–29 (2013) (analyzing a broad sample of IDEA FAPE cases to find that tuition reimbursement and compensatory education are the first and second most frequent remedies, respectively).

²² 34 C.F.R. § 300.502. For a compilation of the judicial rulings and agency interpretations in applying this regulatory provision, see Perry A. Zirkel, *Independent Educational Evaluations at Public Expense under the IDEA: The Latest Update*, 402 EDUC. L. REP. 23, 23–24 (2022).

²³ 20 U.S.C. § 1412(a)(10)(C); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 7 (1993); *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369–70 (1985). For a third Supreme Court decision, which was limited to interpreting the IDEA codification as not excluding child find claims, see *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009). For a compilation of judicial rulings for the multiple steps—which can be differentiated into four steps (timely notice, appropriateness of district's proposed placement, appropriateness of parent's unilateral placement, and final equities) or conflated into the two central steps, with a final equities consideration—see Perry A. Zirkel, *A Step-by-Step Overview of Tuition Reimbursement under the IDEA*, 34 J. SPECIAL EDUC. LEADERSHIP 94 (2021) (providing a brief national overview); Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 EDUC. L. REP. 785 (2012) (providing more in-depth coverage specific to New York).

²⁴ See, e.g., Perry A. Zirkel, *Compensatory Education under the Individuals with Disabilities Education Act: The Third Circuit's Partially Mis-Leading Position*, 110 PENN. STATE L. REV. 879, 883–84 (2006) (citing the Third and Eighth Circuits' recognition of the derivation of compensatory education from tuition reimbursement).

²⁵ See, e.g., Perry A. Zirkel, *Compensatory Education: The Latest Annotated Update of the Law*, 376 EDUC. L. REP. 850 (2020) [hereinafter *Compensatory Education Latest Update*] (providing a compilation of lower court case law generally); Perry A. Zirkel, *The Competing Approaches for Calculating Compensatory Education under the IDEA: The Next Update*, 405 EDUC. L. REP. 621 (2022) [hereinafter *Competing Approaches*] (focusing on the qualitative, intermediate, and quantitative approaches for calculation). The quantitative approach is based on a direct hour-for-hour or day-for-day calculus. *E.g.*, *M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996). The qualitative approach is a more nuanced, fact-specific calculation aimed at placing the child in the same position he or she would have occupied but for the school district's denial of FAPE. *E.g.*, *Reid v. District of Columbia*, 401 F.3d 516, 518, 524 (D.C. Cir. 2005). Various courts have opted for a flexible intermediate determination. See, e.g., *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275 (11th Cir. 2008) (awarding compensatory education in the form of a prospective education placement); *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9th Cir. 1994) (finding no obligation to provide day-for-day compensation when determining appropriate relief).

²⁶ *E.g.*, *C.O. v. Portland Pub. Schs.*, 679 F.3d 1162 (9th Cir. 2012); *Chambers v. Sch. Dist. Of Phila.*, 587 F.3d 176, 185–86 (3d Cir. 2009); *Ortega v. Bibb Cnty. Sch. Dist.*, 397 F.3d 1321 (11th Cir. 2005); *Nieves-Márquez v. Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478 (2d Cir. 2002); *Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524 (4th Cir. 1998); *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist.*, 98 F.3d 989 (7th Cir. 1996); *Heidemann*

B. *Purely Prospective Remedies*

On the purely prospective side, beyond the specifically authorized hearing officer orders in the limited context of disciplinary changes in placement,²⁷ the remedies are not limited to orders to change the IEP or placement based on the substantive denial of FAPE. In light of the recognized design of the IDEA,²⁸ the applicable broad equitable remedial authority includes prospective orders to rectify procedural violations that, per the IDEA's required two-step hearing officer analysis,²⁹ did not result in the requisite substantive loss to the child or the parents.³⁰ Such purely prospective relief extends, for example, to orders for (a) prompt rectification of identified violations in the IEP; (b) IEEs at public expense that parents have not previously obtained;³¹ and (c) carefully tailored training or consultant services for child find and other violations.³² Conversely, the bracketed item of attorneys' fees, which is not strictly a remedy, is expressly reserved for the judicial level.³³

v. Rother, 84 F.3d 1021 (8th Cir. 1996); Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 980 F.2d 382 (6th Cir. 1992). The possible limited exceptions in the Second and Seventh Circuits via Section 1983 are of no import at the hearing officer level.

²⁷ 20 U.S.C. § 1415(k)(3)(B)(ii) (to return the child to the placement from which the child was removed or, based on a specified standard for dangerousness, to a forty-five-day interim alternative educational setting).

²⁸ In its landmark decision under the IDEA, the Supreme Court, in recognition of the Act's structural emphasis on procedural compliance, explained that "the statutory authorization to grant 'such relief as the court determines is appropriate' cannot be read without reference to the obligations, largely procedural in nature, which are imposed upon recipient States by Congress." Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982).

²⁹ For the two-step test for procedural FAPE that Congress codified in light of the lower court progeny after *Rowley*, see 20 U.S.C. § 1415(f)(3)(E)(ii) ("In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies . . . significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a [FAPE] to the parents' child; or . . . caused a deprivation of educational benefits [to the child].").

³⁰ For the accompanying hearing officer's authority for prospective rectifying orders, see *id.* § 1415(f)(3)(E)(iii) ("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.").

³¹ These IEE orders include not only those that parents have requested, *see supra* note 22 and accompanying text, but also those that are part of the hearing officer's sua sponte authority, *see infra* note 116 and accompanying text.

³² *See, e.g.,* Perry A. Zirkel, *Safeguarding Procedures under the IDEA: Restoring the Balance in the Adjudication of FAPE*, 39 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 13 (2020) ("[T]hose child find cases lacking any evaluation should typically result in an order for an evaluation. 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.").

³³ 20 U.S.C. § 1415(i)(3)(B) (providing courts with discretionary authority to award attorneys' fees to the parents if they are the prevailing party as well as, on much more limited circumstances, to a prevailing public agency). *See, e.g.,* Mr. B. v. E. Granby Bd. of Educ., 201 F. App'x 834, 837 (2d Cir. 2006) (communicating that "the award of attorneys' fees is a distinct court function"); Mathern v. Campbell Cnty. Child.'s Ctr., 674 F. Supp. 816, 818 (D. Wyo. 1987) (ruling that the courts' authority for attorneys' fees awards under the IDEA is exclusive to the courts). Although two state laws require the hearing officer's decision to include whether the parent was the prevailing party for each issue, none provide the hearing officer with the authority to award attorneys' fees. *See* Zirkel, *supra* note 19, at 555.

II. INSUFFICIENT EXERCISE OF THIS BROAD REMEDIAL AUTHORITY

Hearing officers generally devote insufficient priority to remedies upon finding one or more violations of the IDEA.³⁴ This lack of affirmative remedial action may be attributable in part to the tight timeline for issuing a decision under the IDEA,³⁵ which some courts have referred to as the “45-day rule.”³⁶ However, this reason is of limited weight when compared to other considerations, especially because the prevailing practice for the issuance of decisions is, on average, more than three times that period.³⁷

Similarly, hearing officers may ascribe their lack of relief for IDEA violations to the purported constraints imposed by the parent’s failure to specify requested remedies per the IDEA’s regulatory requirements.³⁸ However, as the agency that issued and administers these regulations explained, “the inclusion or omission of a proposed resolution should not be read to create a conflict with, or limitation upon, an impartial hearing officer’s authority and ability to formulate an appropriate equitable remedy.”³⁹ The IDEA’s administering agency is not alone in this interpretation.⁴⁰ Indeed, it is not clear how the rote inclusion of magic words, such as requesting “compensatory education or other relief that the hearing officer deems appropriate,” would change the hearing officer’s work in

³⁴ See, e.g., *Student with a Disability*, 118 LRP 13477 (N.M. SEA 2017) (finding three procedural violations, including one that was resulted in the requisite loss, but not providing any remedy at all); *District of Columbia Pub. Schs.*, 114 LRP 3985 (D.C. SEA 2013) (finding that the district engaged in predetermination, but not awarding any remedy despite predetermination equating to significantly impeding meaningful parental participation). Part of the problem is that hearing officers, following the lead of courts, typically stop in applying the analysis for retroactive remedies without considering the alternative of purely prospective orders to rectify identified procedural violations. See, e.g., *Dep’t of Educ., State of Haw.*, 114 LRP 12142, at *20 (Haw. SEA 2014) (failing to consider any alternative relief, despite finding that the proposed IEP was not appropriate but rejecting tuition reimbursement based on a subsequent step in the analysis applicable to that remedy).

³⁵ 34 C.F.R. § 300.515 (requiring the hearing officer to issue the decision within forty-five days of the completion of the resolution period in addition to any specific extensions granted at the request of either party).

³⁶ See, e.g., *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 69 (2d Cir. 2000); *C.P. v. N.J. Dep’t of Educ.*, 76 IDELR ¶ 214, at *5, No. 19-12807, 2020 WL 2611572, at *3 (D.N.J. 2020); *M.B. v. Arlington Cent. Sch. Dist.*, 36 IDELR ¶ 130, at *6, No. 99 CIV. 9973, 2002 WL 389151, at *7 (S.D.N.Y. 2002).

³⁷ See, e.g., *Diane M. Holben & Perry A. Zirkel, Due Process Hearings under the Individuals with Disabilities Education Act: Justice Delayed* . . . , 73 ADMIN. L. REV. 833, 853–54 (2021) (finding a national average of two hundred days for non-expedited decisions, which includes the approximate thirty-day period for the resolution session).

³⁸ 34 C.F.R. § 300.508(b)(6) (“The due process complaint . . . must include . . . [a] proposed resolution of the problem to the extent known and available to the party at the time.”).

³⁹ Letter to Zirkel, 81 IDELR ¶ 22, at *2 (OSEP 2022) (Apr. 15, 2022) (on file with author). Part of this interpretation rests on the conditional language of the regulation, 34 C.F.R. § 300.508(b)(6): “the extent known . . . to the [parent] at the time [of the complaint].”

⁴⁰ See, e.g., *Albuquerque Pub. Schs. v. Sledge*, 74 IDELR ¶ 290, at *18, No. 18-1029, 2019 WL 3755954, at *19 (D.N.M. 2019) (“[T]he 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.”); cf. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 605 (3d Cir. 2015) (“[The IDEA’s statute of limitations] neither imposes a pleading requirement nor in any respect alters the courts’ broad power under the IDEA to provide a complete remedy for the violation of a child’s right to a [FAPE].”).

determining equitable relief upon finding a substantive or procedural violation of the IDEA.⁴¹ The alternative to treating the absence of such language as automatically fatal, particularly in light of the limited availability and affordability of specialized parent-side attorneys, is the opposite of equitable.

A third reason is that some courts seem to have set an example for such parsimony based on either overreliance on the burden of proof⁴² or other clearly questionable rationales.⁴³ If burden of proof refers to the burden of persuasion, the Supreme Court pointed out that it only applies in the rare case that stands in evidentiary equipoise.⁴⁴ Instead, if the intended reference is to the burden of production, the remedy—in contrast with the alleged denial of FAPE—warrants the hearing officer’s affirmative facilitation.⁴⁵ As also explained in Part III, the other rationales should focus on the denial of FAPE, including the conduct of the parties, during the past period at issue, with the subsequent IEP being of no import except to the extent of the contours of the implementation order⁴⁶ or on purely prospective relief for procedural violations that do not result in denial of FAPE.⁴⁷

A. *Illustrative Case*

The major countervailing consideration is the clearly disadvantageous position of the parents in both the formative IEP decisional process⁴⁸ and the

⁴¹ Providing proper preparations via identifying the issue(s) and the potential remedies in the prehearing conference removes the essentiality of specifying the requested relief in the complaint.

⁴² See, e.g., JKG v. Wissahickon Sch. Dist., 78 IDELR ¶ 158, at *11–12, No. 19-cv-05276, 2021 WL 1122526, at *11 (E.D. Pa. 2021) (ruling that the parents failed to offer evidence to meet their burden of proof in challenging the hearing officer’s decision); R.Q. v. Tehachapi Unified Sch. Dist., No. 16-cv-01485, 2018 WL 10246466, at *17 (E.D. Cal. Feb. 8, 2018) (denying compensatory education based on the failure to demonstrate how being removed from school impacted the student’s abilities and how the compensatory services requested would make up for it); Gill v. District of Columbia, 770 F. Supp. 2d 112, 113, 118 (D.C. Cir. 2011) (denying compensatory education for denial of FAPE based on the parent’s failure to provide a sufficient expert or other evidence to support the specific extent of this requested relief); cf. P.P. v. Nw. Indep. Sch. Dist., 839 F. App’x 848, 857–58 (5th Cir. 2020) (upholding the district court’s denial of a remedy based on burden of proof, although it used more specific and only partially defensible grounds in the affirmance).

⁴³ See, e.g., Smith v. Cheyenne Mountain Sch. Dist. 72 IDELR ¶ 173, at *4–6, No. 17-cv-00022, 2018 WL 3744134, at *5 (D. Colo. 2018) (upholding denial of compensatory education based on regression-recoupment, which is the standard for extended school year eligibility, in contrast with either the period of the denial of FAPE, which is the quantitative approach, or the progress the student would have made had it not been for the denial of FAPE, which is the qualitative approach); Artichoker v. Todd Cnty. Sch. Dist., 69 IDELR ¶ 58, at *2–3, No. 15-CV-03021, 2016 WL 7489033 at *9–10 (D.S.D. 2016) (upholding the denial of compensatory education based on present progress with the IEP rather than the separable and controlling factor of the 3.5-month denial of FAPE).

⁴⁴ Schaffer v. Weast, 546 U.S. 49, 58 (2005).

⁴⁵ See *infra* notes 113–17 and accompanying text.

⁴⁶ See *infra* notes 123–24 and accompanying text.

⁴⁷ See *infra* notes 94–104 and accompanying text.

⁴⁸ The IDEA’s procedural process for determining eligibility and developing IEPs is supposed to provide full parental involvement as equal partners. See, e.g., Jefferson Cnty. Bd. of Educ. v. Bryan M., 706 F. App’x 510, 512 (11th Cir. 2017) (finding that the school district improperly determined a student’s

dispute-resolution decisional process under the IDEA.⁴⁹ The following case is a typical example of the power imbalance⁵⁰ which ultimately proceeded from the due process hearing stage to the appellate court stage.

At the first stage, the parent hired an attorney and filed for a hearing on behalf of her eighth-grade daughter. The specific issue was “whether the Board violated its ‘child find’ obligations and, if so, [what] the appropriate amount and type of compensatory education or other relief [would be].”⁵¹ The hearing officer ruled in favor of the parents on child find, concluding that the combination of a medical diagnosis of ADHD, related disruptive behaviors, and declining grades established the requisite finding of reasonable suspicion that is necessary to trigger a reasonably prompt eligibility evaluation.⁵² However, despite finding as a result of the lack of a timely evaluation, that the district did not provide the student with an IEP until March of eighth grade, the hearing officer ruled that “no award of compensatory education [or any other relief] is warranted.”⁵³ The hearing officer’s rationale was that the evidence was insufficient for “a precise award of compensatory education” to make the student whole.⁵⁴

Upon both parties’ appeal, the district court affirmed the child find ruling, with these specific refinements to the hearing officer’s reasonable suspicion analysis: (a) adding low standardized test scores as part of the constellation of contributing factors, (b) focusing on math as an area of need, and (c) identifying the triggering date of reasonable suspicion as the end of seventh grade.⁵⁵ The court also affirmed the hearing officer’s denial of relief with a more fine-grained analysis.⁵⁶ As to the remedy of compensatory education, the court found the hearing officer’s rationale flawed because it

placement without allowing the student’s parents to participate in the decision). Yet, the resulting framework for the denial of FAPE is only triggered upon “significant[]” deprivations of their opportunities for participation. 20 U.S.C. § 1415(f)(3)(E)(ii).

⁴⁹ See *supra* notes 11–16 and accompanying text.

⁵⁰ See *supra* note 12.

⁵¹ M.N. v. Jefferson Cnty. Bd. of Educ., No. 16-169 (Ala. SEA Dec. 10, 2018), https://www.alabamaachievers.org/wp-content/uploads/2021/07/16-169_MN_v_Jefferson_County_BOE_redacted.pdf. For the meaning of “child find” under the IDEA, see *supra* note 3 and accompanying text.

⁵² M.N., No. 16-169, at *11. Although not specifying the time of the triggering of reasonable suspicion, the hearing officer’s factual recitation also included successful informal teacher assistance in grade seven and unsuccessful formal Tier 1 and Tier 2 response-to-intervention (RTI) in grade eight. *Id.* at *7–8. See also *supra* note 7.

⁵³ M.N., No. 16-169, at *13.

⁵⁴ *Id.* at *12.

⁵⁵ J.N. v. Jefferson Cnty. Bd. of Educ., 421 F. Supp. 3d 1288, 1297 (N.D. Ala. 2019) (“[The child] had a history of low scores on standardized tests, and she struggled academically for more than a year, especially in math, before a teacher referred her for formal academic support or evaluation. . . . Although the teacher referred [the student] to the [RTI] program after the first quarter of her eighth grade year and referred her for a special education evaluation when [RTI] failed, nothing in the record suggests that the Board took any formal steps to provide [the child] with additional support in seventh grade or at the start of eighth grade, such as implementing the [RTI] program, despite [the child’s] demonstrated lack of progress in her seventh grade math class. . . . [T]he Board violated its child-find obligation by overlooking clear signs of disability by the end of [the child’s] seventh grade year.”). See also *supra* note 52.

⁵⁶ J.N. v. Jefferson Cnty. Bd. of Educ., 421 F. Supp. 3d at 1299–1301.

failed to consider whether the child find violation resulted in a denial of FAPE and failed to cite any authority to support the denial.⁵⁷ Instead, finding that eighth grade math was the primarily affected area, the court concluded: “[The parent] has not cited any evidence to suggest that the interventions the math teacher provided [to the child] were inappropriate or substantively different than interventions she should have provided pursuant to an IEP.”⁵⁸ Thus, conflating the remedy and the requisite underlying harm, the court summarized that “[the parent] has not shown by a preponderance of the evidence that the violation resulted in a denial of a FAPE to [the child], and she has not established that [the child] should receive compensatory education for the violation.”⁵⁹ Next, primarily relying on the parent’s failure to include this additional or alternative remedy in the due process complaint, the court rejected the parent’s request for an order directing the district to provide the teachers with training on child find.⁶⁰ Finally, the court denied the parent’s motion for attorneys’ fees, because the child find ruling did not change the parties’ legal relationship.⁶¹

The parent appealed the denial of compensatory education to the Eleventh Circuit, but the appellate court followed the district court’s conflated reasoning.⁶² On the FAPE side, the Eleventh Circuit concluded that at the second step of the procedural violation for child find, the parents failed to show any substantive difference between what the district provided to the child and what it subsequently required in the belated IEP.⁶³ Specifically for the previously targeted period of eighth grade, the court cursorily found that “the school activated [response to intervention] . . . [and the teacher provided] ‘extra help in class.’”⁶⁴ On the conflated relief side, the Eleventh Circuit further reasoned that “without any evidence of . . . what services she should have received, or what learning deficits she suffered as a result of not having an IEP, we cannot say that the district court abused its equitable authority by failing to craft its own compensatory plan.”⁶⁵ Finally, the court affirmed the denial of attorneys’ fees because the parent did not achieve any substantive benefit, whether it was the eventual IEP or the requested compensatory education as a result of the litigation.⁶⁶

⁵⁷ *Id.* at 1299.

⁵⁸ *Id.* at 1300.

⁵⁹ *Id.* at 1301.

⁶⁰ *Id.* at 1298. As secondary support, the court cited the parents’ failure to prove systemic child find violations. *Id.*

⁶¹ *Id.* at 1301.

⁶² *J.N. v. Jefferson Cnty. Bd. of Educ.*, 12 F.4th 1355, 1365 (11th Cir. 2021) (“Here, the district court was well within its ‘broad discretion and equitable authority’ when it concluded that [the parent] had not shown that the school board’s child-find violation resulted in educational deficits for [the child] that could be remediated with prospective compensatory relief.”).

⁶³ *Id.* at 1367.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1368.

⁶⁶ *Id.*

B. *Inequitable Effects*

As a result, after five years of litigation, which had started with a due process hearing that ruled in favor of the parent's child find claim and which included confirmation of that ruling in court,⁶⁷ the parent was left with no relief whatsoever despite undisputed evidence that the lack of a timely eligibility evaluation resulted in at least three months delay in her daughter having the benefit of an IEP.⁶⁸ In addition to the emotional and social costs of the ponderous adjudication process in facing off against the massive resources of a large school district attended by her children,⁶⁹ the parent was also left with no resulting recovery of her attorneys' fees, which were likely in the six-figure range.⁷⁰

The inevitable results of this case include a chilling effect on the primary mechanism for enforcement of the IDEA.⁷¹ The parent in this case is bound

⁶⁷ After the parent's filing in December 2016, the initial stage in this case was the hearing officer's original action dismissing the case on jurisdictional grounds in response to repeated school district motions and the federal court's reversal of that dismissal based on the plain language of the IDEA and a long line of case law. *J.N. v. Jefferson Cnty. Bd. of Educ.*, 72 IDELR ¶ 209, at *4–6, No. 17-cv-00448, 2018 WL 3956949, at *3 (N.D. Ala. 2018) (citing, inter alia, 20 U.S.C. § 1415(b)(6)(A), a Supreme Court decision, and Eleventh Circuit rulings).

⁶⁸ The undisputed triggering date was by the end of grade seven. *J.N. v. Jefferson Cnty. Bd. of Educ.*, 12 F.4th at 1368. The accompanying reasonable period to obtain consent would be by the start of grade eight. See, e.g., Perry A. Zirkel, *The Fifth Circuit's Latest Child Find Ruling: Fusion and Confusion*, 377 EDUC. L. REP. 464, 466–69, 471 (2020) (determining the reasonable time period based on the length of intervening period and the diligence of the school district in initiating an evaluation). Even with a deduction for the time to complete the evaluation and prepare the IEP, which is specific to the quantitative calculus for compensatory education (e.g., *M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996)), the remaining period would be from January to March of grade eight, which is when the district provided the IEP.

⁶⁹ The Jefferson County Schools is the second largest school district in Alabama, serving more than 35,000 students and having an annual revenue of close to \$400 million. U.S. NEWS, *Overview of Jefferson County Schools*, <https://www.usnews.com/education/k12/alabama/districts/jefferson-county-104111> (last visited Aug. 16, 2023).

⁷⁰ See, e.g., *Capistrano Unified Sch. Dist. v. S.W.*, 82 IDELR ¶ 127, at *1–2, No. 22-55295, 2023 WL 355419, at *1 (9th Cir. 2023) (upholding the reduction of an award to approximately \$200,000 in an IDEA case where the parents prevailed to a limited extent); *Williams v. Fulton Cnty. Sch. Dist.*, 717 F. App'x 913, 914, 918 (11th Cir. 2017) (upholding the reduction of award to \$283,000 in an IDEA case that was only at the hearing officer level); *Bellflower Unified Sch. Dist. v. Arnold*, 586 F. Supp. 3d 1010, 1019 (C.D. Cal. 2022) (awarding an attorneys' fees request of over \$76,000 in an IDEA case limited to the hearing officer level); *J.V.O. v. Fulton Cnty. Sch. Dist.*, No. 19-cv-01192, 2020 WL 10180672, at *7 (N.D. Ga. July 1, 2020) (awarding attorneys' fees of over \$157,000 for limited success in an IDEA case that was only at the hearing officer level); *Sch. Bd. of Lee Cnty. v. E.S.*, No. 06-cv-198-FtM-29, 2008 WL 4793655, at *6 (M.D. Fla. Nov. 3, 2008) (awarding attorneys' fees of over \$96,000 for an IDEA case that went to the federal district court level).

⁷¹ See Pasachoff, *supra* note 7, at 1423, 1431 (characterizing the institutional design of the IDEA as heavily relying on private enforcement, with the primary mechanism being adjudication starting with a due process hearing). This outcome also increased the disparity with the other individual enforcement mechanism of the IDEA—the state complaint process—for which corrective action is much more common for violations. See Zirkel, *supra* note 11, at 189 (finding a much higher proportion of purely prospective remedial relief for the state complaint process, as compared to impartial hearing mechanism, largely attributable to a compliance-oriented, one-step approach to procedural violations). This disparity contributes to less uniform and effective private enforcement, including forum-shopping and other tactics that “game” the system. See Perry A. Zirkel, *Questionable Initiation of Both Decisional Dispute*

to feel utter frustration with the process. After expending even more resources than the parent on litigation, due to the staff time required for assembling documentation and providing testimony in addition to the outside attorneys, the district succeeded despite its child find violation.⁷² The “success” not only avoided rectifying accountability for the violation but also served to discourage other parents in the district from seeking remedial vindication of their children’s IDEA rights. Moreover, rather than the collaborative partnership envisioned by the IDEA, the prolonged adversarial process engendered entrenched mutual distrust and alienation, with the remedial result extending this parental perception to the IDEA’s adjudicative process and reinforcing the district’s investment in winning-at-all-costs litigation strategy rather than improved educational practice.

The next part of this Article suggests much more equitable alternatives for not only the remedy in this case but also for the affirmative remedial action of hearing officers more generally. Unlike the problematic issues involved within child find,⁷³ the majority of IDEA cases directly concern the dimensions of FAPE—procedural, substantive, and implementation.⁷⁴

III. MORE EQUITABLE REMEDIAL ACTION

A. Remedial Alternative 1 for the Illustrative Case

For the above illustrative case, the hearing officer had two affirmative remedial alternatives. First, the hearing officer could have examined the underlying prerequisite of a FAPE denial for the remedy of compensatory

Resolution Processes under the IDEA: Proposed Regulatory Interpretations, 49 J.L. & EDUC. 99, 104 (2020) (analyzing two tactics that districts have used to game the two-forum system of IDEA private enforcement).

⁷² For another example of this district’s hardball litigation strategy to win regardless of the cost despite violating child find, see *C.A. v. Jefferson Cnty. Bd. of Educ.*, 74 IDELR ¶ 127, at *3–5, No. 19-cv-00291, 2019 WL 2103100, at *4 (N.D. Ala. 2019) (upholding a hearing officer’s dismissal of the parent’s child find claim, distinguishing the unchallenged determination of the child’s eligibility in *J.N.* and the unchallenged determination of the child’s ineligibility in this case).

⁷³ The particular difficulty with child find is that, although it is an integral component of the IDEA legislation, see *supra* note 3, it is the only one—along with the accompanying evaluation obligation—that is prior to and, thus, not necessarily requiring eligibility. As a result, for some determinations of a child find violation, the student is either belatedly determined ineligible under the IDEA or the eligibility issue is not resolved during the time frame of the case. See *supra* note 2.

⁷⁴ See, e.g., Perry A. Zirkel, *An Adjudicative Checklist of Criteria for the Four Dimensions of FAPE under the IDEA*, 346 EDUC. L. REP. 18 (2017) [hereinafter *Adjudicative Checklist*] (delineating the statutory and case law for the procedural, substantive, and both the retrospective and prospective implementation dimensions of FAPE). For failure-to-implement the most recent IEP, which is the retrospective and most common subcategory of the implementation dimension, see Perry A. Zirkel & Edward T. Bauer, *The Third Dimension of FAPE under the IDEA: IEP Implementation*, 36 J. NAT’L ASS’N ADMIN. L. JUDICIARY 409 (2016). The counterpart prospective dimension is whether the proposed location is capable of implementing the next IEP, for which the case law is still rather undeveloped. *Adjudicative Checklist*, *supra* note 74, at 20. See *infra* Part III.C.

education.⁷⁵ Doing so per the relevant two-step test,⁷⁶ the hearing officer could have concluded that the procedural violation of child find either: (a) resulted in a substantive loss to the student by not receiving special education months earlier, or (b) significantly impeded the parent's opportunity to participate in the decision-making process by not engaging her in the evaluation process, starting with consent, upon having reasonable suspicion at or near the end of seventh grade.

For the student loss, the school district's belated evaluation determined that the student was eligible for special education under both the IDEA classifications of specific learning disability (SLD) and other health impairment (OHI).⁷⁷ This undisputed determination that the student needed special education is distinct from the informal interventions that the child received as customary within general education.⁷⁸ Clearly, it is likely that the unsuccessful initial tiers of RTI and the rather routine extra help in class that the child received⁷⁹ did not meet the definitional criteria of special education.⁸⁰

Alternately, proceeding from a reverse-engineering direction, the hearing officer could have readily identified a substantive difference by examining the contents of the student's delayed IEP and comparing that to what the student received solely via general education during the preceding months in eighth grade. Although the successive decisions in the case did not include this information, the IEP, which was based on the dual classifications of SLD and OHI,⁸¹ likely included at least specially designed instruction in math from personnel certified in special education. It may have also included specially designed services linked to behavior improvement.⁸² As a confirming consideration, courts' compensatory education awards, regardless of the method of calculus, typically do not provide any credit, by

⁷⁵ The hearing officer's failure to undertake this examination led to the district court's determination that her decision was entitled to minimal deference. *J.N. v. Jefferson Cnty. Bd. of Educ.*, 421 F. Supp. 3d at 1299–1300.

⁷⁶ See *supra* note 29.

⁷⁷ *J.N. v. Jefferson Cnty. Bd. of Educ.*, 421 F. Supp. at 1294–95.

⁷⁸ See, e.g., *J.M. v. Summit City Bd. of Educ.*, 77 IDELR ¶ 224, at *10, No. 19-00159, 2020 WL 6281719, at *10 (D.N.J. 2020), *aff'd*, 39 F.4th 126, 141–42 (3d Cir. 2022) (ruling that the student was ineligible for special education because he was making progress with accommodations within general education); *K.W. v. Tuscaloosa Cnty. Sch. Sys.*, 73 IDELR ¶ 157, at *7, No. 17-cv-01243, 2018 WL 4539501, at *4 (N.D. Ala. 2018) (ruling that because the student was making progress while receiving interventions, such as one-on-one and small group time with the school's reading intervention specialist, he did not require special education services); *cf. L.J. v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 1005–06 (9th Cir. 2017) (ruling that interventions and services constitute a need for special education when (a) it went beyond the norm in special education and (b) combined with continuing difficulties in school established the need for special education).

⁷⁹ See *supra* text accompanying note 64.

⁸⁰ 34 C.F.R. § 300.39 (including adaptation in the content, methodology, or delivery of instruction to meet the unique needs of the child resulting from the child's disability classification).

⁸¹ See *supra* text accompanying note 77.

⁸² One of the triggering factors was the child's disruptive behavior. The IDEA requires the IEP team to provide special consideration for specific strategies and supports to address such behaviors. 34 C.F.R. § 300.324(a)(2).

way of deduction, for informal or formal interventions or services that the child received short of appropriate special education.⁸³

Whether via the direct or reverse-engineering route for the student loss, it is clear that the myopic focus on services ignores the overall structure of the IDEA, which primarily provides a panoply of procedural protections for the child, which include but are not at all limited to the specifically prescribed elements of the IEP.⁸⁴ Even if the services were not significantly different, ignoring the procedural design of the IDEA, which is integrally integrated with its broad grant of remedial authority, eviscerates the structure and significance of the Act.⁸⁵

For the parent loss, the hearing officer and the courts in the illustrative case did not address the argument, which the parent may not have raised, that child find significantly impeded the meaningful parental participation due to the lack of timely evaluation information.⁸⁶ Said information would have equipped the parent to know what the child's specific education needs were and whether the ongoing general education services sufficed in comparison to the those in the delayed IEP.

B. Remedial Alternative 2 for the Illustrative Case

The second preferable remedial alternative for the hearing officer in the illustrative case, even if she had defensibly determined the lack of a second-step substantive loss to the student or had found the corresponding loss to the parent, would have been to at least order purely prospective corrective action. For example, regardless of whether the parent's complaint specifically or generally requested appropriate equitable relief,⁸⁷ the hearing

⁸³ This judicial trend applies to compensatory education cases generally. *See, e.g., Compensatory Education Latest Update*, *supra* note 25, at 859. For examples in the specific child find context, see *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 1085 (8th Cir. 2020); *D.S. v. Bainbridge Island Sch. Dist.*, 78 IDELR ¶ 242, at *9, No. C20-5140, 2021 WL 1999612, at *8 (W.D. Wash. 2021); *Knox v. St. Louis City Sch. Dist.*, 76 IDELR ¶ 286, at *14, No. 18-CV-216, 2020 WL 3542286, at *14 (E.D. Mo. 2020).

⁸⁴ *See, e.g.*, 34 C.F.R. § 300.320 (specifying the required contents of an IEP). For other examples, see *id.* §§ 300.321–300.328 (describing the IEP process), 300.500–300.504 (describing the procedural safeguards prior to dispute resolution requirements).

⁸⁵ *See, e.g., Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 175, 206 (“[The IDEA represents] 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. . . . [T]he statutory authorization to grant ‘such relief as the court determines is appropriate’ cannot be read without reference to the obligations, largely procedural in nature, which are imposed upon recipient States by Congress.”).

⁸⁶ The second-step loss to parents, which is codified in the 2004 amendments of the IDEA, *see supra* note 29, and which aligns with the Supreme Court's conclusion that parents have independent, enforceable rights under the IDEA, *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 533 (2007), thus far has generally not received effective attention from parent advocates, hearing officers, and, ultimately, courts. *See generally* Perry A. Zirkel, *Parental Participation: The Paramount Procedural Requirement under the IDEA?*, 15 CONN. PUB. INT. L.J. 1 (2016) (analyzing case law involving parental participation violations).

⁸⁷ *See supra* notes 39–40 and accompanying text.

officer could have ordered training for the teachers and other personnel responsible for the child find violation in this case.⁸⁸ Ideally, the hearing officer could have included the remedial stage on the agenda of the prehearing conference, with due discussion and confirmed expectations of the scope and procedures for this contingency.⁸⁹

Under either alternative, the result—rather than reinforcing the imbalance in the initiation and outcomes of IDEA adjudication—provides the parent with at least some rectification, the district with at least some deterrence,⁹⁰ and the basis for reinforcing both of these effects via a potential attorneys' fees award.⁹¹

C. Remedial Alternatives in Other Cases

More generally, especially but not exclusively for cases beyond the problematic child find component of the IDEA,⁹² hearing officers' more

⁸⁸ See Zirkel, *supra* note 32. Also, unlike the summarily rejected prospective relief in the illustrative case, *supra* note 60 and accompanying text, this order would be equitably tailored to the scope of the violation. Finally, by adding reasonable and clear implementation specifications, such as the qualifications of the trainer and the deadline for the training, the hearing officer could facilitate not only effective enforcement accountability but also efficient resource utilization.

⁸⁹ Not all state special education laws require a prehearing conference, but none prohibit such a preparatory meeting designed for efficient and effective conduct and completion of the IDEA hearing process. See, e.g., Andrew M.I. Lee & Perry A. Zirkel, *State Laws for Due Process Hearings under the Individuals with Disabilities Education Act III: The Pre-Hearing Stage*, 40 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 18–19 (2021) (finding that some state laws expressly authorize prehearing conferences and other state laws have other case management provisions).

⁹⁰ District deterrence in this context is intended broadly to extend to private enforcement, see *supra* note 71, and, combined with the prospect of attorneys' fees, the incentive for settlements.

⁹¹ See, e.g., *Jefferson Cnty. Bd. of Educ. v. Bryan M.*, 706 F. App'x 510, 515–16 (11th Cir. 2017) (ruling that, despite mootness, the parents qualified for prevailing party status based on the hearing officer's purely prospective orders, which included remedial training); cf. *M.A. v. Torrington Bd. Of Educ.*, 980 F. Supp. 2d 279, 294 (D. Conn. 2014) (awarding attorneys' fees for child find violation despite a lack of eligibility or a remedy to the extent of the denial of a due process hearing). In some jurisdictions, prevailing party status, per the overall material relationship test, is directly keyed to obtaining a remedy. See, e.g., *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 677–78 (5th Cir. 2018) (ruling that the parent, despite not obtaining the primary requested relief, qualified as the prevailing party based on the hearing officer's prospective order for an IEP); *C.W. v. New Providence Bd. of Educ.*, 82 IDELR ¶ 129, No. 22-02907, 2023 WL 869395, at *2 (D.N.J. 2023) (applying the Third Circuit's two-step test of obtaining relief and a causal connection between the litigation and said relief); *D.F. v. Sacramento City Unified Sch. Dist.*, 63 IDELR ¶ 164, at *2–4, No. 13-1887, 2014 WL 2526811, at *2 (E.D. Cal. 2014) (applying the Ninth Circuit's relief-based prerequisite to procedural violations that resulted in no remedy).

⁹² For cases of child find violations that lack a definitive and defensible determination of eligibility, the affirmative approach is an order for a prompt evaluation. See Zirkel, *supra* note 32. For a recent example, see *Jacksonville N. Pulaski Sch. Dist. v. D.M.*, 78 IDELR ¶ 283, No. 20-CV-00256, 2021 WL 2043469 (E.D. Ark. 2021). Instead, the prevailing approach is to deny any relief and, as a result, any attorneys' fees. See, e.g., *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 F. App'x 887, 893–94 (5th Cir. 2012) (denying attorneys' fees after finding that there was no violation of the IDEA for not timely evaluating students who do not need special education). Similarly, for the more common cases of child find violations that result in an unchallenged or confirmed determination of ineligibility, instead of the recommended order for training of the violating staff, the prevailing approach is to deny any relief. See, 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 Cnty. Bd. of Educ.*, 897 F.3d 566, 578 (4th Cir. 2018); *Durbrow v. Cobb Cnty. Sch. Dist.*, 887

extensive and effective exercise of their broad remedial authority would mitigate the inequitable imbalance in the Act's signature adjudication process. The two primary but non-exclusive examples are purely prospective relief and compensatory education.⁹³

For procedural violations of FAPE that have not resulted in the requisite parental or student loss, hearing officers rarely issue rectifying orders despite their clear authority to do so and the potential benefits of this relief.⁹⁴ Although such purely prospective relief is not an equitably automatic or absolute obligation of adjudicators, its current paucity is on the opposite extreme.

Hearing officers have assiduously adhered to the harmless-error approach for procedural violations that the last IDEA amendments codified from the *Rowley* progeny.⁹⁵ However, they have just as consistently overlooked the counterbalancing Congressional confirmation of their authority to issue prospective orders to correct procedural violations that did not result in substantive loss.⁹⁶ Congress recognized the structural design of the IDEA in providing hearing officers with the authority to grant purely prospective relief upon finding purely procedural violations. Additionally, the administering agency has reinforced this approach.⁹⁷

In moving to a fuller and fairer balance, hearing officers should withhold relief for statutory violations only upon a valid basis in equity in light of the purposes of the IDEA.⁹⁸ One of these cardinal purposes of the IDEA is "to ensure that the rights of children with disabilities and parents of such children are protected."⁹⁹ First, for procedural violations that have not resulted in substantive loss to the child and for which the alternative of loss to the parent is not at issue, examples of the warranted relief include "ordering the revision of pertinent policies or procedures, training the child's

F.3d 1182, 1196 (11th Cir. 2018); *D.S. v. Neptune Twp. Bd. of Educ.*, 264 F. App'x 186, 189–90 (3d Cir. 2008). Yet, doing so undermines the force of this express statutory obligation, which obviously extends beyond eligibility. Indeed, for a subset of this obligation, which applies to disciplinary changes in placement for three specified "deemed to know" pre-evaluation situations, 20 U.S.C. § 1415(k)(5), the protections appear to extend, at least, to particular prospective hearing officer remedies. *Id.* § 1415(k)(3)(B)(ii). *See also* Letter to Zirkel, 74 IDELR ¶ 171 (OSEP 2019) (interpreting this authority as not precluding alternative or additional remedies).

⁹³ The remedies of tuition and other reimbursements are more obvious and fixed in their initiation and multi-step application. *See supra* notes 23–24.

⁹⁴ *E.g.*, Zirkel, *supra* note 32, at 12–13 (pointing out its rare use to date and the potential role of hearing officers to move the case law in a restorative, balancing direction for procedural violations).

⁹⁵ *See supra* note 29.

⁹⁶ *See supra* note 30 and accompanying text.

⁹⁷ *See, e.g.*, Letter to Zirkel, *supra* note 92, at 3 (interpreting states' responsibility under the IDEA as extending to enforce "[a] hearing officer's decision [that] includes only actions to ensure procedural violations do not recur").

⁹⁸ *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116, 1128–29 (10th Cir. 2008).

⁹⁹ 20 U.S.C. § 1400(d)(1)(B).

violating staff members, or [implementing] a corrective procedural redo.”¹⁰⁰ As another variation, the Fourth Circuit recently upheld a hearing officer’s purely prospective order to revise the IEP to remedy the school district’s procedural least restrictive environment violations as both within the applicable broad equitable authority and the nondelegation principle.¹⁰¹ Second, for procedural violations that result in the requisite loss to the parent but not the child, as too rarely illustrated in the cases to date,¹⁰² various equitably tailored purely prospective orders are fitting.¹⁰³

Third, for procedural violations that have resulted in the requisite loss to the child, pure substantive denials of FAPE, or material failures to implement the IEP, the remedy of compensatory education is malleable, thus readily allowing for tailoring to an equitable fit on a case-by-case basis.¹⁰⁴ Although the typical compensatory education award is (regardless of the

¹⁰⁰ Zirkel, *supra* note 32, at 13. For a specific example, see *El Dorado Sch. Dist.*, 81 IDELR ¶ 27 (Ark. SEA 2022) (ordering, upon reversing the district’s determination that a high school student was ineligible under the IDEA, the purely prospective relief of prompt development of an IEP, an IEP facilitator at all of the student’s future IEP meetings, and specified training for the high school’s special education staff).

¹⁰¹ *Bouabid v. Charlotte-Mecklenburg Schs. Bd. of Educ.*, 62 F.4th 851, 861 (4th Cir. 2023). For the nondelegation principal, which is not at all limited to qualitative compensatory education awards, see *infra* note 117 and accompanying text.

¹⁰² See, e.g., *D.B. v. Gloucester Twp. Sch. Dist.*, 489 F. App’x 564 (3d Cir. 2012) (upholding an order to formulate an IEP in compliance with applicable procedural requirements in the wake of an administrative law judge (ALJ) ruling of predetermination that significantly impeded the parents’ opportunity for participation); *A.W. v. Loudon Cnty. Sch. Dist.*, 81 IDELR ¶ 281, at *16–17, No. 20-CV-76, 2022 WL 4545609, at *13 (E.D. Tenn. Sept. 28, 2022) (upholding a hearing officer’s order “to provide adequate training to district and school personnel regarding [state] requirements for special-education teachers and to create a checklist of applicable [state] requirements to be reviewed and signed by personnel responsible for new hires” in response to the school’s procedural violation, which was the lack of a certified special education teacher, that resulted in loss to the parents, not their child); *Clark Cnty. Sch. Dist.*, 78 IDELR ¶ 86 (Nev. SEA 2020) (ordering the district to arrange for an IEP facilitator to assist the IEP team in improving the opportunity for parental participation in its reconsideration of a predetermined IEP that resulted in the requisite parental loss); *Knox v. St. Louis City Sch. Dist.*, 118 LRP 4657 (Mo. SEA 2018), *aff’d on other grounds sub nom.* *Knox v. St. Louis City Sch. Dist.*, 76 IDELR ¶ 286, No. 4:18-CV-216-PLC, 2020 WL 3542286 (E.D. Mo. 2020) (ordering the district to re-do an evaluation for OHI due to this procedural omission having denied the parental opportunity for meaningful participation).

¹⁰³ The corresponding codification of this independent parental right was part and parcel of the congressional contouring of the hearing officer’s remedial authority in deciding procedural FAPE claims. See *supra* notes 39–40 and accompanying text.

¹⁰⁴ For the malleable nature of compensatory education, consider this analogy:

Silly putty is an amazing and versatile substance. So is the availability of compensatory education as an equitable remedy for IDEA violations. Equity can be a slippery concept, but its great advantage is that it is flexible. Embracing this flexibility in crafting a compensatory education remedy, while endorsing guidelines and factors including the hours and services denied, the child’s progress or lack of it, and the history of behavior inconsistent with provision of effective compensatory education, can keep the remedy from becoming mechanical or brittle while providing a shape to contain it, and allow for more efficient prediction and resolution of FAPE disputes.

Terry Jean Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?*, 45 URB. LAW. 281, 312 (2013).

approach)¹⁰⁵ to order a fixed amount of services to the child independent of the new IEP, courts have extended this remedy in some circumstances to training of the child's teachers,¹⁰⁶ specified consultant services to district personnel,¹⁰⁷ prospective private placement,¹⁰⁸ and even reimbursement.¹⁰⁹ Moreover, for the quantitative approach, the record of the case already provides the basis for the award, which is the duration and pervasiveness of the denial of FAPE with adjustment for the balance of equities.¹¹⁰

Enlightening courts have provided a springboard for hearing officers' more extensive and effective use of this remedy, extending to alternatives to the quantitative approach.¹¹¹ In particular, Senior United States Circuit Court Judge David Tatel led the construction of three planks for this springboard.¹¹² One plank is the pivotal hearing officer role for IDEA remedies, which is only partially connected to the District of Columbia Circuit Court of Appeals' adoption of the qualitative approach for

¹⁰⁵ See *supra* note 25.

¹⁰⁶ See, e.g., *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1034 (9th Cir. 2006) (upholding a hearing officer's compensatory education award in the form of training for the student's teachers to be able to better meet his particular needs).

¹⁰⁷ See, e.g., *P. v. Newington Bd. of Educ.*, 546 F.3d 111, 123 (2d Cir. 2008) (upholding a hearing officer's compensatory education order for the school to hire a professional consultant on the issue of inclusion and that the consultant participate in the completion of a functional behavioral assessment).

¹⁰⁸ See, e.g., *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1286 (11th Cir. 2008) (ruling that a compensatory award of prospective placement in a private school is within the district court's broad discretion to award appropriate equitable relief); cf. *R.S. v. Bd. of Dirs. of Woods Charter Sch. Co.*, 73 IDELR ¶ 252, No. 16-cv-119, 2019 WL 1025930 (M.D.N.C. 2019), *aff'd mem.* *R.S. v. Bd. of Dirs. of Woods Charter Sch. Co.*, 806 F. App'x 229, 229–30 (4th Cir. 2020) (awarding direct funding for specified services).

¹⁰⁹ See, e.g., *Garden Acad. v. S.M.*, 78 IDELR ¶ 46, at *7–9, No. 19-20655, 2021 WL 308108, at *8 (D.N.J. 2019) (ordering the school to reimburse the parents for paying for in home services after the school unilaterally decided to stop providing home visits); *I.T. v. Dep't of Educ., Haw.*, 62 IDELR ¶ 178, at *4–9, No. 11-00676, 2013 WL 419016, at *6 (D. Haw. 2013), *aff'd sub nom.* *I. T. v. Dep't of Educ., Hawaii*, 700 F. App'x 596, 597–98 (9th Cir. 2017); *Reg'l Sch. Unit. 51 v. Doe*, 920 F. Supp. 2d 168, 207–08 (D. Me. 2013) (finding that a hearing officer properly awarded tuition reimbursement as compensation for denial of FAPE). However, ALJs should be careful in awarding tuition reimbursement under the rubric of compensatory education so as not to skip determining the appropriateness of the unilateral placement and addressing the various equitable considerations, including timely notice. As the Third Circuit has cautioned, these two remedies are “not interchangeable.” *P.P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 740 (3d Cir. 2009). Moreover, reimbursement may exceed the amount resulting from the quantitative calculation because it is a default alternative, thus not tailored to the specific extent of the denial of FAPE.

¹¹⁰ See *Competing Approaches*, *supra* note 25, at 624.

¹¹¹ For the various approaches, see *id.*

¹¹² Judge Tatel's insights are based, in part, on two background factors that fit with his judicial role and his special education awareness: (1) he is legally blind, and (2) he has successively served as the head education attorney for a prominent law firm and Director of the Office for Civil Rights, which administers Section 504 in the public schools. See, e.g., Ann E. Marimow, *Judge David Tatel's Lack of Eyesight Never Defined Him, But His Blindness Is Woven into the Culture of the Influential Appeals Court in D.C.*, WASH. POST (July 8, 2021, 6:00 AM), https://www.washingtonpost.com/local/legal-issues/dc-judge-david-tatel-career/2021/07/07/bf48778e-c486-11eb-8c18-fd53a628b992_story.html; National Academy of Education, *David Tatel*, <https://naeducation.org/our-members/david-tatel/> (last visited Aug. 18, 2023).

calculating compensatory education.¹¹³ The second plank, which is only associated with the qualitative approach to the extent that it requires more customized expert evidence, is the use of creative ways to fulfill, within the applicable timeline,¹¹⁴ this special adjudicative role. Examples of possible options include (1) a bifurcated hearing, party production of necessary evidence for arriving at a compensatory education award;¹¹⁵ (2) the hearing officer's sua sponte use of the discretionary authority to order an IEE at public expense for this purpose;¹¹⁶ or (3) dismissal without prejudice of this remedial issue, leaving the options of filing for a new hearing on this issue or settlement. The third plank, which is not at all specific to the qualitative approach, is the prohibition of delegating the determination of compensatory education to the IEP team.¹¹⁷

Due to judicial deference,¹¹⁸ hearing officers' use of this springboard for an elevated use of compensatory education for denials of FAPE may well foster development of a more settled precedent in the same equitable

¹¹³ See, e.g., *Reid v. District of Columbia*, 401 F.3d 516, 526 (D.C. Cir. 2005) (putting the burden on the adjudicator to provide both parties with "some opportunity to present evidence regarding [the child's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits"); *Henry v. District of Columbia*, 750 F. Supp. 2d 94, 98 (D.C. Cir. 2010) (distinguishing between the burden of proof for the denial of FAPE and the burden of proof for the remedy and remanding to the hearing officer to tailor, rather than deny, a compensatory education for an unchallenged denial of FAPE).

¹¹⁴ *Supra* notes 35–37 and accompanying text.

¹¹⁵ Cf. *Stanton v. District of Columbia*, 680 F. Supp. 2d 201, 207 (D.C. Cir. 2010) (rejecting a school districts's argument that because the plaintiff relied on evaluations that did not reveal the student's precise level of functioning, compensatory education should not be awarded); *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 532 F. Supp. 2d 121, 125 n.5 (D.C. Cir. 2008) ("provid[ing] the parties additional time to supplement the record").

¹¹⁶ See, e.g., *B.D. v. District of Columbia*, 817 F.3d 792, 800 (D.C. Cir. 2016) (allowing hearing officers to order evaluations if current evaluations are not sufficient for designing an appropriate compensatory education program); *Phillips v. District of Columbia*, No. 09-987, 2010 WL 11586717, at *1 (D.C. Cir. Dec. 21, 2010) (allowing hearing officers to order parties to provide additional information, including new evaluations, to help determine whether a proposed compensatory award is appropriate); *J.T. v. District of Columbia*, 496 F. Supp. 3d 190, 213 (D.C. Cir. 2020) (ordering an IEE to determine what progress the student would have made if FAPE had not been denied in order to determine compensatory education); *Lopez-Young v. District of Columbia*, 211 F. Supp. 3d 42, 56–57 (D.C. Cir. 2016) (determining that hearing officers have the authority to order additional assessments). See also *Butler v. District of Columbia*, 275 F. Supp. 3d 1, 6 (D.C. Cir. 2017) ("[T]he Hearing Officer must invite Plaintiff to submit additional evidence and/or order the necessary assessments to help him to fashion an award of compensatory education."). For courts in other jurisdictions that have adopted this affirmative approach, see *M.T. v. Arlington Cent. Sch. Dist.*, 82 IDELR ¶ 63, at *8, No. 22-CV-00437, 2022 WL 16857176, at *8 (S.D.N.Y. 2022); *Z.J. v. Bd. of Educ. of Chi. Dist. No. 299*, 344 F. Supp. 3d 988, 1003 (N.D. Ill. 2018).

¹¹⁷ *Reid*, 401 F.3d at 526 ("Under the statute [based on its express prohibition of district employees conducting due process hearings], the hearing officer may not delegate his authority to a group that includes an individual specifically barred from performing the hearing officer's functions [i.e., the district employee who is a mandated IEP team member]."). For an example of the extension of this principle to other remedies, see *M.S. v. Utah Schs. for the Deaf & Blind*, 822 F.3d 1128 (10th Cir. 2016).

¹¹⁸ An empirical analysis of a representative sample of IDEA cases revealed that more than two-thirds of them only had either a slight or no outcome change between the hearing officer level and the final court level. Zirkel & Skidmore, *supra* note 17.

direction at the courts' level.¹¹⁹ This remedy should not be automatic upon a denial of FAPE, but it should be akin to a rebuttable presumption.¹²⁰ Rather than focusing on the burden of persuasion, the hearing officer should obtain whatever information is needed, based on the applicable calculus of the jurisdiction, to make the child whole for the substantive loss. The particular circumstances, including the parties' conduct, may reduce or eliminate the award.¹²¹ However, rejecting this remedy in the wake of a denial of FAPE summarily based on the wording of the parents' complaint, their burden of proof, or such other grounds,¹²² is inequitable. The calculation of the compensatory education award must be based on the past denial of FAPE, independent of the provisions of, and student's progress under, the subsequent IEP.¹²³ The relevance of the upcoming IEP is in the specification for the delivery of the award, which must be beyond the scope and time of the services in the IEP and yet must be reasonable for the child's overall progress.¹²⁴

The same can be said in cases not focused, at least initially, on compensatory education for the more extensive use of hearing officers' broad remedial authority to effectuate the IDEA's priority on remedial

¹¹⁹ See, e.g., *M.T. v. Arlington Cent. Sch. Dist.*, 82 IDELR ¶ 63, at *8–9, No. 22-CV-00437, 2022 WL 16857176, at *8–9 (S.D.N.Y. 2022) (calling for deference to hearing officers who play a facilitating role in compensatory education determinations via “a thorough and careful equities analysis”); cf. *Somberg v. Utica Cmty. Schs.*, 908 F.3d 162, 173 (6th Cir. 2018) (reasoning that the hearing officer's denial of compensatory education is entitled to less, even if not considerably less, deference due to the lack of explanation).

¹²⁰ Cf. *Streck v. Bd. of Educ. of E. Greenbush Cent. Sch. Dist.*, 408 F. App'x 411, 415 (2d Cir. 2010) (“In enacting the IDEA, Congress did not intend to create a right without a remedy.”); *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9th Cir. 1994) (“It may be a rare case when compensatory education is not appropriate.”). In a decision that withheld relief in a relatively unusual situation, the Tenth Circuit pointed to the purposes of the IDEA as to determine whether there was a valid basis in equity for denying a remedy for a statutory violation. *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116, 1128–29 (10th Cir. 2008).

¹²¹ See, e.g., *T.B. v. San Diego Unified Sch. Dist.*, 56 IDELR ¶ 152, at *5, No. 08CV28, 2011 WL 1212711, at *5 (C.D. Cal. 2011) (equitable elimination); *Hogan v. Fairfax Cnty. Sch. Bd.*, 645 F. Supp. 2d 554, 575 (E.D. Va. 2009) (equitable reduction).

¹²² See *supra* note 38. For the additional commonly cited grounds of the IDEA's statute of limitations, consider the leading interpretation of *G.L. v. Ligonier Valley Sch. Auth.*, 802 F.3d 601, 620–21 (“[If the complaint] is timely filed, then, upon a finding of liability, the entire period of the violation should be remedied.”).

¹²³ See, e.g., *D.W. v. District of Columbia*, 561 F. Supp. 2d 56, 61 (D.C. Cir. 2008) (“[A] presently appropriate educational program does not abate the need for compensatory education.”). See also *D.F. v. Collingswood Borough Bd. of Educ.*, 694 F.3d 488, 498 (3d Cir. 2012) (rejecting the theory that compensatory education is subsumed within services in the new IEP); *V.W. v. New York City Dep't of Educ.*, 81 IDELR ¶ 194, at *6–7, No. 20-cv-2376, 2022 WL 37052, at *6 (S.D.N.Y. 2022), *aff'd sub nom.*; *H.C. v. New York City Dep't of Educ.*, 71 F.4th 120, 127–28 (2d Cir. 2023) (referring to the difference between the retrospective basis of compensatory education and the prospective nature of the IEP for the upcoming year).

¹²⁴ See, e.g., *L.T. v. Mansfield Twp. Sch. Dist.*, 52 IDELR ¶ 246, at *2–3, No. 04-1381, 2009 WL 1971329, at *2 (D.N.J. 2009) (approving, with a limited adjustment in the specified service providers, the compensatory education plan that was explicitly to be implemented “outside the normal school day and as replacement services outside IEP services determined by the IEP team”).

relief.¹²⁵ For a more creative and complete exercise of this equitable authority, hearing officers should consider the following examples of shifting the paradigm toward a more effective balance after finding violations of the IDEA's requirements. First, in unilateral placement cases, upon finding that the district's proposed placement was not appropriate but rejecting tuition reimbursement based on other steps in the applicable analysis, issuing an alternative remedy tailored to correcting the identified denial of FAPE.¹²⁶ Second, in denial of FAPE cases in which the parents did not unilaterally place the child and in which, after affirmative efforts, the hearing officer determines that compensatory education is not justified, prospectively ordering prompt correction of the violations. Third, for FAPE denials based on loss to the parents, not the child, ordering purely prospective relief specific to the parents in circumstances in which the hearing officer determines that compensatory education is not equitably warranted. Finally, for procedural violations that did not result in the second step loss to the student or parents, issuing purely prospective corrective relief.

The contours and practices of the IDEA hearing officer systems in each state and the litigation cultures of their stakeholders vary within the overall template of providing an equitable and efficient user-friendly system of adjudication. Yet, a hearing officer's creative and customized exercise of his or her broad remedial authority upon identified violations of the Act's applicable requirements, including but not limited to denials of FAPE, will provide more effective private enforcement. This enforcement will benefit not only the individual student with disabilities and the student's parents, but also the system more generally. Concomitant priority on providing the rationale and specifications for the remedy with sufficient clarity and specificity will maximize judicial endorsement¹²⁷ and minimize disputes about implementation and problems with enforcement.¹²⁸ Finally, at both the individual and institutional levels, one of the balancing consequences of more affirmative priority on remedies is providing the basis for the court's

¹²⁵ See, e.g., *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 245 (2009) (interpreting the IDEA's language for eligibility for tuition reimbursement broadly to provide for a "complete" remedy, including child find violations); *G.L. v. Ligonier Valley Sch. Dist.*, 802 F.3d at 626 (interpreting the IDEA's statute of limitations provisions to not limit the remedy to the period of timely filing).

¹²⁶ The alternative remedy could be compensatory education or purely prospective based on the grounds for inappropriateness and the equitable circumstances in the case.

¹²⁷ Zirkel & Skidmore, *supra* note 17.

¹²⁸ See, e.g., *Sch. Bd. of Osceola Cnty. v. M.L.*, 30 IDELR ¶ 655, at * 5–6 (M.D. Fla. 1999), *aff'd mem.*, 281 F.3d 1285 (11th Cir. 2001) (vacating ALJ compensatory education award that was "too vague to enforce"). The primary but not exclusive forum for enforcement of hearing officer orders is the state education agency, either through its general supervision duty or its state complaint mechanism. See, e.g., Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232, at B-29, C-26, <https://sites.ed.gov/idea/idea-files/osep-memo-and-qa-on-dispute-resolution/> (OSEP 2013) (U.S. Dep't of. Educ. Off. of Special Educ. & Rehab. Servs., Opinion Letter on Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act (Part B), at B-29, C-26 (July 23, 2013)).

discretionary exercise of the attorneys' fees provision of the IDEA, which includes determining whether the parents qualify for prevailing party status and, if so, the extent, if any, that they are entitled to attorney fees.¹²⁹

CONCLUSION

The historic principle that “where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded”¹³⁰ is an appropriate starting point rather than an absolute approach for adjudication under the IDEA. In light of the Act’s particularly accessible private right of action¹³¹ and its extensive reliance on procedures,¹³² hearing officers have the presumed expertise and the broad authority to do equity in an impartial and balanced resolution of the individual interests of the child and the school district.¹³³ An integral and relatively neglected part of this crucial responsibility should be for hearing officers to provide more extensive, creative, and affirmative exercise of their remedial authority upon determining that the district has invaded one or more of the child’s or parent’s rights under the IDEA.

¹²⁹ See *supra* notes 33, 70, 91, and accompanying text. See, e.g., *Individuals with Disabilities Education Act (IDEA): Attorney Fees and Costs*, 16B MCQUILLEN MUN. CORP. § 46.21 (2023). Conversely, for the parents who proceed pro se, which is often due to lack of affordable specialized attorneys in their geographic area and which also entails a significantly steeper slope for any success, a tangible remedy upon a preponderantly proven violation(s) of the IDEA provides at least some sense of justice rather than futility.

¹³⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163–65 (1803) (quoting Blackstone’s *Commentaries*); see also *Kendall v. United States*, 37 U.S. 524, 624 (1838) (referring to a right without a remedy as “a monstrous absurdity”). For the subsequent differentiating developments, see Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67 (2001).

¹³¹ See *supra* notes 7–8 and accompanying text.

¹³² See *supra* notes 7–8 and accompanying text.

¹³³ See, e.g., *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205–06 (1982) (interpreting the “elaborate and highly specific” procedural requirements of the Act as “demonstrat[ing] 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”).

¹³³ Equitably tailored remedies provide for enforcement of the individual’s rights under the IDEA, including vindication for the warranted use of the Act’s signature hearing officer process, with the balanced effect of accountability and deterrence, but not punishment, for district procedural as well as substantive violations.