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Article: The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update

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**LEXISNEXIS SUMMARY:**

... The cornerstone for resolving disputes between parents and districts as to eligibility, FAPE, and other issues under the IDEA, is an impartial administrative adjudication conducted by a hearing/review officer (H/RO). ... District of Columbia Board of Education, the court ruled that when the child is still in the district's placement, hearing officers do not have the authority to issue declaratory relief, much less injunctive relief specific to the appropriateness of the parent's proposed alternative placement. ... Given the focus here on the scope of H/RO remedial authority, it suffices to identify the following sample of possible, but unsettled, boundaries for the courts and, by inference, H/ROs with regard to compensatory education awards: (1) after graduation, (2) during stay-put after age 21, (3) for denying opportunity for meaningful parental participation, (4) concurrent with tuition reimbursement, and (5) for postsecondary education. ... Although the case arose in the context of state regulations for gifted students, which differ in part from the IDEA, the court in subsequent remedy related decisions imported this ruling to the IDEA context. ... In contrast, a review officer in New Mexico recently ruled that under that state's law, a hearing officer does not even have the authority to recommend that a court sanction noncompliant parents by requiring them to pay the district's attorneys' fees.

**TEXT:**

[\*2]

## Introduction

This article provides an update of a comprehensive review that the published five years ago, which synthesized the various sources of law specific to the remedial authority of hearing/review officers (H/ROs) under the Individuals with Disabilities Education Act (IDEA).<sup>n1</sup> The publisher of the Administrative Law Review, which contained the original version, provided permission for the updated publication here.

The IDEA is a funding act that dates back to 1975.<sup>n2</sup> The primary purpose of the IDEA is to provide a free appropriate public education (FAPE) to each child with a disability<sup>n3</sup> in the least restrictive environment (LRE).<sup>n4</sup> The vehicle for determining and delivering FAPE in the LRE is an individualized education program (IEP).<sup>n5</sup>

The cornerstone for resolving disputes between parents and [\*3] districts as to eligibility, FAPE, and other issues under the IDEA, is an impartial administrative adjudication conducted by a hearing/review officer (H/RO).<sup>n6</sup> The IDEA gives states the choice of having a one-tiered system, consisting solely of an impartial due process hearing, or a two-tiered system, which includes an additional officer level review.<sup>n7</sup> Subsequent to exhausting this administrative adjudication, the aggrieved party has the right to judicial review in state or federal court.<sup>n8</sup> The IDEA accords judges the authority to award attorneys' fees in specified circumstances<sup>n9</sup> and, without further specification, requires them to grant "such relief as the court determines is appropriate."<sup>n10</sup> The IDEA and its regulations,<sup>n11</sup> however, are largely silent about the remedial authority of the impartial H/ROs.<sup>n12</sup>

**[\*4]** In the expansive litigation under the IDEA, <sup>n13</sup> courts have exercised various traditional forms of relief, primarily in the form of the injunction-based, specialized equitable remedies of tuition reimbursement <sup>n14</sup> and compensatory education. <sup>n15</sup> In contrast, the **[\*5]** courts are divided as to whether the IDEA, with or without § 1983, <sup>n16</sup> allows for the legal remedy of money damages. <sup>n17</sup> But what have the **[\*6]** courts and other sources of legal authority delineated as the boundaries for H/ROs' remedial authority?

The purpose of this Article is to provide an updated demarcation of the legal basis and boundaries of H/ROs' remedial authority under the IDEA and correlative state special education laws. <sup>n18</sup> The sources for this synthesis are pertinent court decisions, published H/RO decisions, and interpretations of the Department of Education's Office of Special Education Programs (OSEP) to date. <sup>n19</sup> The scope of this Article, however, does not extend to the related issues of the deference accorded to <sup>n20</sup> or by <sup>n21</sup> H/ROs under the IDEA; H/ROs' **[\*7]** impartiality <sup>n22</sup> or, to the extent that it does not directly intertwine with remedial authority, <sup>n23</sup> H/ROs' jurisdiction <sup>n24</sup> under the IDEA; the statute of limitations for filing for a first-or second-tier administrative proceeding under the IDEA; <sup>n25</sup> or hearing officers' remedial authority under § 504. <sup>n26</sup> Moreover, the boundaries of this **[\*8]** Article are limited to the scope of the H/ROs' remedial authority, not to the standards they use to reach remedies. <sup>n27</sup> Finally, this Article only addresses H/ROs' remedial authority as a result of, not during, <sup>n28</sup> the prehearing and hearing process.

To a large extent, the pertinent legal authorities treat the remedial authority of H/ROs as derived from and largely commensurate with the remedial authority of the courts. <sup>n29</sup> The following Parts of this Article delineate the specific boundaries of this derived remedial authority in special education cases with respect to each of the major categories of relief - declaratory, injunctive, and monetary - in this **[\*9]** order of approximately ascending strength. When the applicable source - court, H/RO, or OSEP - addresses multiple forms of relief, I categorize the decision as the strongest relief except when there is separate treatment of each remedy.

#### I. H/RO Authority to Issue Declaratory Relief

It is undisputed that an H/RO has authority to determine (1) whether a student is covered under one or more of the eligibility classifications of the IDEA, <sup>n30</sup> (2) whether a district's evaluation and/or the parents' independent educational evaluation (IEE) is appropriate, <sup>n31</sup> and (3) whether a student's program and placement are appropriate. <sup>n32</sup> Thus far, the legal limitations on an H/RO's authority to issue declaratory relief with respect to these questions have been scant. Courts have, however, restricted H/ROs' authority to issue declaratory relief with respect to the following issues.

First, accompanying its even more puzzling general proscription, <sup>n33</sup> a federal district court in the District of Columbia appears to have limited an H/RO's ability to address a parent's **[\*10]** proposed placement when the child is still in the district's placement, as distinguished from a tuition reimbursement case in which the parent has unilaterally placed their child in a private placement. Specifically, in *Davis v. District of Columbia Board of Education*, the court ruled that when the child is still in the district's placement, hearing officers do not have the authority to issue declaratory relief, much less injunctive relief specific to the appropriateness of the parent's proposed alternative placement. <sup>n34</sup> According to this court, in said context, an H/RO is limited to declaring whether the placement that the district has offered is appropriate. <sup>n35</sup> If the H/RO's determination is that said placement is inappropriate, the *Davis* interpretation requires the hearing officer to remand the issue to the IEP team to develop an appropriate placement. <sup>n36</sup> In rejecting the plaintiff-parent's reliance on an OSEP policy letter that adopted a contrary interpretation, <sup>n37</sup> however, the court relied on a consent decree that is specific to the District of Columbia. <sup>n38</sup>

Perhaps due to the early date <sup>n39</sup> and the limiting legal context <sup>n40</sup> of *Davis*, most H/ROs - and courts <sup>n41</sup> - have ignored the *Davis* ruling. **[\*11]** Rather, most H/ROs have routinely considered the appropriateness of a parental proposal in which the H/ROs declare that the district's placement is inappropriate. <sup>n42</sup>

A second and more generally accepted limitation is that H/ROs typically decline to declare which side is the prevailing party, <sup>n43</sup> except where state law requires H/ROs to include this determination for purposes of awarding attorneys' fees. <sup>n44</sup> One example of such a jurisdiction is California, which requires the hearing officer to make this explicit determination on an issue-by-issue basis. <sup>n45</sup>

The third limitation is more indirect and generic in terms of whether an H/RO may use declaratory or other relief to decide an issue *sua sponte*. In the only published decision on point, Pennsylvania's intermediate appellate court answered this question in **[\*12]** the negative. <sup>n46</sup> The limited exception, according to that court's interpretation of the IDEA's administering agency, is that an H/RO has the authority to decide the child's pendent, or "stay-put," placement under the IDEA, <sup>n47</sup> without either party raising the issue, which in this context may amount to declaratory relief. <sup>n48</sup> Yet, on occasion, H/ROs exercise such authority without clear consideration of this boundary and its exception. For example,

a review officer in New York decided that a plaintiff-child was not eligible for special education even though the parties had stipulated at the hearing that the child was eligible and, thus, it was not an issue on appeal to the review officer.<sup>n49</sup>

Finally, a state law may disallow particular prospective placements, which is binding on H/ROs and - according to a recent ruling - courts.<sup>n50</sup>

## II. H/RO Authority to Issue Injunctive Relief

Although there is no bright line distinction between declaratory and injunctive relief in this context,<sup>n51</sup> the boundaries of H/ROs' [\*13] injunctive authority have been the subject of more extensive debate than the boundaries of H/ROs' declaratory relief. As a threshold matter, the Pennsylvania courts have applied the same relatively relaxed sua sponte limitation, which these courts established for declaratory relief, to H/ROs' injunctive authority.<sup>n52</sup> Other jurisdictions have applied this same limitation<sup>n53</sup> with similar far from strict latitude.<sup>n54</sup> The rest of this Part organizes the applicable rulings in terms of the subject of the injunctive relief, ranging from evaluations to attorneys' fees.

Another general limitation on the H/RO's remedial authority, [\*14] typically in the form of injunctive relief, is when the defendant district has already fully rectified the deficiency.<sup>n55</sup> For example, in a New York case, the review officer overturned the hearing officer's order to evaluate the student for specific learning disability in math where the parties had agreed to the math evaluation and the district had completed it.<sup>n56</sup> Although based on mootness at the judicial review level, a federal district court decision in the District of Columbia adds further support by granting the district's motion for summary judgment because as a result of the hearing officer's decision, the district provided all of the relief to which the parent was entitled.<sup>n57</sup>

### A. Ordering Evaluations

First, the IDEA expressly provides H/ROs with the authority to override lack of parental consent for initial evaluations and reevaluations except where disallowed by state law.<sup>n58</sup> There are many examples of such H/RO orders, which can also be seen as declaratory relief.<sup>n59</sup>

[\*15] A Pennsylvania court decision demarcates two applicable boundaries to H/ROs' injunctive authority with regard to evaluations.<sup>n60</sup> This decision, though not officially published, concerns gifted students under state law. Nevertheless, it is available in *Individuals with Disabilities Education Law Report (IDELR)*, and Pennsylvania's intermediate appellate court has treated its gifted students cases without notable distinction from its IDEA cases.<sup>n61</sup> First, relying on its aforementioned<sup>n62</sup> decision with regard to declaratory relief under the IDEA, this Pennsylvania court invalidated the H/RO's order for the district to conduct a reevaluation because neither party had raised this issue.<sup>n63</sup> Second, the Pennsylvania court alternatively reasoned that the review officer panel erred as a matter of law in ordering a reevaluation because the court had concluded that the district's reevaluation was appropriate.<sup>n64</sup>

### B. Overriding Refusal of Parental Consent for Services

Prior to the most recent reauthorization of the IDEA, H/ROs' authority to override a refusal of parental consent and thus effectively order the provision of special education services to the child was subject to controversy.<sup>n65</sup> Congress has made clear, however, that [\*16] H/ROs and courts do not have such authority with regard to initial placement.<sup>n66</sup>

### C. Ordering IEP Revisions

It is not unusual for an H/RO to order revisions in a child's IEP.<sup>n67</sup> When the basis for a revision order was a defensible determination that the IEP was inappropriate, such relief arguably is within an H/RO's discretion, unless the relief is deemed to preempt the IEP team's responsibility.<sup>n68</sup> However, a decision by Florida's intermediate appellate court invalidated an H/RO's order for a district [\*17] to add specified services to the IEP that were at issue when there was no such determination.<sup>n69</sup> Reasoning that the H/RO had concluded that the IEP was appropriate, the court ruled that the order to add services to the IEP was beyond the H/RO's authority.<sup>n70</sup> Similarly, a federal district court overruled an H/RO's order to revise the student's behavior intervention plan after concluding that the IEP, including the BIP, met the applicable standards for FAPE, although the court's reversal and reasoning were not particularly clear and broad-based.<sup>n71</sup> Another federal court avoided this problem by interpreting the hearing officer's order, in the wake of a decision that the IEP provided FAPE in the LRE, as merely confirming the IEP team's authority to proceed to make its proposed modifications, subject to the parent's right to challenge them.<sup>n72</sup> An added problem with orders to revise the IEP in cases where the H/RO deems the placement or program appropriate is that such orders may well trigger the issue of the

IDEA's fee-shifting provision.<sup>n73</sup> Yet, H/ROs sometimes order such revisions, presumably ignorant of such limitations.<sup>n74</sup>

**[\*18]**

D. Ordering a Particular Student Placement

Reflecting the overlap between declaratory and injunctive relief, the foregoing discussion about the boundaries for H/ROs' authority to declare in favor of a particular placement also applies to their authority to order such a placement.<sup>n75</sup>

E. Awarding Tuition Reimbursement

Whether viewed as tied to program or placement, the two forms of relief most specifically associated with the IDEA are tuition reimbursement and compensatory education services.

Tuition reimbursement, used generically to refer to reimbursement for various expenses in addition to or alternative to tuition, such as transportation and other related services, is a well-established remedy under the IDEA. In a pair of decisions,<sup>n76</sup> the Supreme Court established what most authorities view as a three-part test: (1) whether the district's proposed placement is appropriate; (2) if not, whether the parents' unilateral placement is appropriate; and (3) if so, equitable considerations.<sup>n77</sup> In establishing this set of **[\*19]** criteria, the Court made clear that it based this tuition reimbursement remedy on the IDEA authorization for appropriate judicial relief<sup>n78</sup> and that said relief was distinguishable from money damages.<sup>n79</sup> In its subsequent codification of this case law via the 1997 reauthorization of the IDEA,<sup>n80</sup> Congress made clear that the authority to award tuition reimbursement extends to H/ROs.<sup>n81</sup>

Before and after the 1997 amendments to the IDEA, H/ROs have routinely applied the relevant three-part test without any other particular boundary.<sup>n82</sup> In the only notable - but temporary - judicial limitation, the Third Circuit - in a case that arose before the 1997 amendments - negated an H/RO's equitable reduction of the reimbursement amount.<sup>n83</sup> The court declared that unreasonable parental conduct was not a relevant factor, but the court acknowledged that Congress had included it in the applicable **[\*20]** calculus for cases arising after 1997.<sup>n84</sup> In a recent case, a federal district court illustrated that H/ROs authority under the current IDEA to reduce tuition reimbursement is based on equitable balancing.<sup>n85</sup> Even more recently, another federal district court held that - upon finding the rest of the three-part test met - ordering direct retroactive payment to the private school, where the parents had not paid the tuition based on their lack of financial resources, was within the IHO's equitable authority under the IDEA even though it is not literally "reimbursement."<sup>n86</sup>

Another published decision that demarcated a specifically pertinent limitation on tuition reimbursement as a remedy was a review officer decision under the IDEA jurisdiction of the Department of Defense Domestic Dependent Elementary and Secondary Schools (DDESS). More specifically, the review officer ruled that (1) hearing officers' remedial orders are entitled to the general rebuttable presumption of good faith deference,<sup>n87</sup> and (2) the reimbursable expenses must be reasonable and do not include the "normal expenses of raising a child."<sup>n88</sup> The case was the subject of multiple judicial appeals, but these appeals focused on other issues.<sup>n89</sup>

**[\*21]** Representing even more limiting authority, a hearing officer in Kansas ruled that tuition reimbursement was not available for a gifted student based on a district's failure to implement the student's IEP.<sup>n90</sup> The hearing officer's reasoning and invocation of cited authorities were not clear or cogent,<sup>n91</sup> but the decision is not necessarily limited to gifted students because Kansas's special education law is the same, in relevant part, for students with disabilities.<sup>n92</sup>

Finally, in a recent unpublished decision, the Third Circuit Court of Appeals ruled that tuition reimbursement is not available as a remedy for a district's delay for more than one year in processing a parent's request for an IDEA impartial hearing where the ultimate determination was that the district had provided the child with FAPE.<sup>n93</sup> The reasoning was that the purpose of this form of relief is to remediate denials of FAPE not to punish districts.<sup>n94</sup>

F. Awarding Compensatory Education

Compensatory education, like tuition reimbursement, is a specialized form of injunctive remedy. The courts have established compensatory education as an available equitable remedy under the IDEA via an analogy, albeit an incomplete one,<sup>n95</sup> to tuition **[\*22]** reimbursement.<sup>n96</sup> Although the Third Circuit initially commented, by way of dicta, that H/ROs do not have the authority to award compensatory education,<sup>n97</sup> the IDEA administering agency<sup>n98</sup> and the courts<sup>n99</sup> have established that H/ROs do have such authority under the IDEA.<sup>n100</sup> Previous sources have comprehensively

canvassed the standards for, and other issues specific to, the award of compensatory education.<sup>n101</sup> The foundational element, as the Third Circuit, recently [\*23] reinforced,<sup>n102</sup> is the denial of FAPE.<sup>n103</sup>

Given the focus here on the scope of H/RO remedial authority, it suffices to identify the following sample of possible, but unsettled, boundaries<sup>n104</sup> for the courts and, by inference, H/ROs with regard to compensatory education awards: (1) after graduation,<sup>n105</sup> (2) during stay-put after age 21,<sup>n106</sup> (3) for denying opportunity for meaningful parental participation,<sup>n107</sup> (4) concurrent with tuition reimbursement,<sup>n108</sup> and (5) for postsecondary education.<sup>n109</sup> More [\*24] settled is the limitation that the award may not be either open-ended or in excess of "what is required for compliance with the student's IEP."<sup>n110</sup> Similarly settled, and as would apply to any injunctive relief, an H/RO's compensatory education order must not be either sua sponte,<sup>n111</sup> or so vague as to be unenforceable.<sup>n112</sup> Finally, H/ROs have differed widely, but courts have not yet addressed various other scope issues, such as whether an H/RO may retain jurisdiction for implementation<sup>n113</sup> and, if not, to whom an H/RO should instead delegate the implementation of the award.<sup>n114</sup> Nevertheless, as a [\*25] general matter courts have agreed that H/ROs have rather wide equitable discretion in their calculus for compensatory education.<sup>n115</sup>

#### G. Changing Student Grades or Records

H/ROs occasionally face an issue of student records, and their decisions are usually knee-jerk disclaimers without careful research or reasoning.<sup>n116</sup> In one of the few pertinent published decisions, a [\*26] Virginia review officer concluded that H/ROs do not have jurisdiction and thus do not have remedial authority to change the grades of an IDEA student.<sup>n117</sup> The review officer reasoned that the Family Educational Rights and Privacy Act (FERPA) provides a procedure and forum for addressing such matters,<sup>n118</sup> a rather unconvincing rationale.<sup>n119</sup>

H/ROs' injunctive authority with regard to student records has similarly been subject to very few published decisions. For example, a hearing panel in Missouri cursorily concluded that it lacked authority to expunge student records.<sup>n120</sup> In doing so, the panel relied solely on the fact that it was a panel of limited jurisdiction.<sup>n121</sup>

Releasing records is a different remedy from expunging them. In a New Mexico decision, the review officer concluded that H/ROs lack authority under the IDEA to override parents' refusal to release the child's medical records.<sup>n122</sup> Citing two published H/RO decisions from other states, the review officer relied on the reasoning that such matters were exclusively within the jurisdiction of FERPA, which is not necessarily persuasive.<sup>n123</sup> In any event, the review officer also [\*27] agreed with dicta in the cited decisions and characterized those decisions as "consistently deploring the refusal of such releases and expressing concern over the results of failures to share relevant information with school personnel."<sup>n124</sup>

#### H. Ordering a Student's Promotion or Graduation

Not addressing the remedial authority of H/ROs with regard to promotion and graduation, the IDEA's administering agency offered the adjacent interpretation that, while standards for promotion and retention are a state and local function, "the IDEA does not prevent a State or local education agency from assigning this decisionmaking responsibility to the IEP team."<sup>n125</sup> But in the absence of such state law delegation, increasing authority seems to suggest that H/ROs face limits in ordering such relief.<sup>n126</sup> For example, a Massachusetts hearing officer avoided deciding whether H/ROs lack authority to order promotions, concluding that waiving the district's summer credit policy was not appropriate for the particular student.<sup>n127</sup> More strongly, Pennsylvania's intermediate court concluded that the state law's delegation of graduation authority to school districts preempted an H/RO from accelerating the graduation of a gifted student.<sup>n128</sup> [\*28] Although the factual circumstances correlate more closely to gifted students than to those with disabilities,<sup>n129</sup> the court did not specifically limit its decision to gifted students.<sup>n130</sup>

Similarly, an H/RO has limited authority to order a school district to allow a child with disabilities to participate in graduation where either the child has not completed graduation requirements<sup>n131</sup> or the denial did not violate applicable special education regulations or the child's IEP.<sup>n132</sup>

#### I. Ordering Training of District Personnel

On occasion H/ROs order training of specified school district personnel without examining whether H/ROs have authority to provide such relief.<sup>n133</sup> In one of many examples,<sup>n134</sup> a Connecticut [\*29] hearing officer ordered that a student's IEP be revised to require that all of the student's teachers receive training as to the student's disability, behavior intervention plan, and required services and accommodations.<sup>n135</sup> The hearing officer also ordered the training and selection of an aide for the student.<sup>n136</sup>

The limited pertinent court decisions subject such orders to question. Specifically, Pennsylvania's intermediate appellate court has ruled that H/ROs lack the authority to order a district to arrange for training of its employees as a remedy for denial of FAPE because state law delegates staff development to districts.<sup>n137</sup> Although the case arose in the context of state regulations for gifted students, which differ in part from the IDEA,<sup>n138</sup> the court in subsequent remedy related decisions imported this ruling to the IDEA context.<sup>n139</sup> Nevertheless, the Pennsylvania court's preemption rationale is subject to dispute in cases controlled by the federal IDEA, as compared to state special education laws that are not deemed to be incorporated into federal standards. Thus far, the additional authority is itself inconclusive,<sup>n140</sup> although that concerning the analogous or overlapping next form of relief provides further guidance.

**[\*30]**

#### J. Ordering Districts to Hire Consultants

On occasion, H/ROs order districts to hire an outside expert as part of the remedy for denial of FAPE.<sup>n141</sup> Yet, H/ROs have not reflected general cognizance of the increasing case law that points to boundaries in issuing such consultant remedies.

In the first case to impose a boundary, a DDESS review officer reversed such an order as "impermissible micro management," and thus "ultra vires and a clear abuse of discretion."<sup>n142</sup> Although grounded in the statutory prerogatives of the education agency, the ruling is limited for several reasons: (1) DDESS represents a special context; (2) the hearing officer's order included various other forms of nonreimbursement relief, which the review officer's opinion covered only cryptically; and (3) the subsequent judicial appeals focused on other issues.<sup>n143</sup>

Second, in dicta in a case concerning the appropriateness of an IEP, the Seventh Circuit commented on a hearing officer's "extensive relief, including, among other things, the appointment of private **[\*31]** consultants who would essentially manage and deliver [the student's] public education."<sup>n144</sup> Regarding this relief as supporting the lower court's conclusion that the hearing officer did not provide due deference to the school personnel's IEP judgments, the Seventh Circuit characterized the hearing officer's remedies as "extreme measures that obviously went beyond remedying [the student's] situation."<sup>n145</sup> The degree to which this proportionality limitation applied to the ordered consultants is unclear because the court cited another of the hearing officer's remedies as illustrative of the hearing officer's overreaching - the order that the district provide disability awareness and sensitivity training for every student in the district.<sup>n146</sup> A federal district court's subsequent reversal of a hearing officer's order for neutral facilitator for all future meetings was similarly inconclusive due to the open-endedness of the hearing officer's order and the express limitation to the "particular facts" of case.<sup>n147</sup>

In the third and most significant development to date, Pennsylvania's intermediate appellate court concluded that an H/RO's order that a district hire an outside expert to facilitate the development of a new IEP for the plaintiff-student was ultra vires in light of (1) the regulatory delegation of IEP team membership to the school district, (2) the limited scope of the violation, and (3) the regulatory limitations on IEP team composition.<sup>n148</sup> The same court **[\*32]** has interchangeably applied this limitation in the gifted student and IDEA contexts, but it left the limitation's specific scope unclear in the IDEA context, explicitly ruling only that an H/RO lacked authority to order the district to engage outside experts for students with disabilities "without supporting evidence in the record."<sup>n149</sup> Finally, the same Pennsylvania court also applied its sua sponte limitation to invalidate an H/RO order to hire an outside expert.<sup>n150</sup>

The more recent decisions have largely ignored or at least partially countered such limitations. For example, a federal district court in Kentucky initially upheld a review officer's order to arrange for the student's private psychologist to attend the IEP meeting, at district expense, to help the team devise and monitor a plan for providing the student with two years of compensatory education.<sup>n151</sup> The court concluded that the requirement of the psychologist's attendance was equitable in this particular case, inasmuch as the review officer delegated the tailoring of the compensatory education to the team rather than ordering a specific number of hours. The court did not mention the Pennsylvania decisions, probably because the school district's argument did not extend beyond the requirements of the IDEA to the possible limitations of state law. After the Sixth Circuit reversed on other grounds,<sup>n152</sup> the district court delegated to the equitable discretion of the review officer to determine whether to require paid attendance of the student's private psychologist or an independent literacy expert as part of its compensatory education award.<sup>n153</sup>

Similarly, the both the Second Circuit and a federal district court recently upheld H/RO orders for inclusion consultants under the **[\*33]** rubric of compensatory education.<sup>n154</sup> Arguably, the focus on compensatory education in the context of the LRE is particularly amenable to a consultant remedy as compared to a pure FAPE case, but these courts did not limit the H/ROs equitable authority to such situations.

Most recently, while supporting the H/RO's equitable authority to order the district to hire an independent consultant with appropriate credentials at a reasonable rate of pay, the federal district court of Massachusetts ruled that the hearing officer in this case abused his discretion to require the district to hire the parents' experts for this purpose.<sup>n155</sup>

#### K. Issuing Enforcement Orders

H/ROs' enforcement authority has been tested for two overlapping subjects - private settlements and H/ROs' prior decisions.<sup>n156</sup> Some H/ROs order the enforcement of private settlement agreements,<sup>n157</sup> while other H/ROs interpret the courts' [\*34] authority as exclusive in this area.<sup>n158</sup> There is at least limited judicial support for H/ROs' authority to enforce private settlement agreements.<sup>n159</sup> In the lead case, *D.R. v. East Brunswick Board of Education*,<sup>n160</sup> the Third Circuit ruled that such agreements are, as a matter of public policy, enforceable as binding contracts.<sup>n161</sup> But the Third Circuit did not address the issue of whether H/ROs have authority to enforce the agreements.<sup>n162</sup> More recently, the federal district court in Connecticut relied on the D.R. public policy rationale in ruling that H/ROs have the authority to enforce private settlement agreements.<sup>n163</sup> Some of the subsequent case law supports with this view.<sup>n164</sup> Yet, other courts have concluded that enforcement of such [\*35] an agreement constitutes a breach of contract claim and therefore falls exclusively within judicial jurisdiction.<sup>n165</sup> Finally, OSEP has taken the position that since the IDEA does not address this matter, states may adopt their own rules regarding an H/RO's authority to enforce FAPE settlements that do not result from mediation or resolution meetings, so long as those rules are not limited to IDEA disputes.<sup>n166</sup>

As a related but separate matter, limited case law suggests that hearing officers have the authority to provide consent decree status to a settlement for purposes of attorneys' fees, but only upon proper order.<sup>n167</sup>

For enforcement of prior H/RO decisions, typically arising when a school district has allegedly failed to implement the prior H/RO's order, the prevailing view is that the appropriate forums are the state complaint resolution process<sup>n168</sup> and, alternatively, the courts,<sup>n169</sup> rather [\*36] than the H/RO process.<sup>n170</sup>

#### L. Issuing Disciplinary Sanctions

The authority of hearing officers to issue disciplinary sanctions against either party or the party's legal counsel is a controversial question. Pointing out that the IDEA requires each state education agency (SEA) to ensure that H/ROs have the authority to grant the relief necessary for dispute resolution, the IDEA's administering agency has opined that the answer to this question is a matter of state law.<sup>n171</sup> In a Michigan case, a hearing officer ordered parents' counsel to pay a district's costs (amounting to \$ 306) based on the parents' counsel's "unexcusable failure to communicate with the District's counsel in a timely fashion."<sup>n172</sup> Questionably assuming that such authority was automatically derivative, the hearing officer cited a case in which a court exercised such authority under the Federal Rules of Civil Procedure.<sup>n173</sup> In a Texas case, a hearing officer dismissed a case with prejudice, concluding that a parent and the parent's attorney had engaged in "sanctionable conduct" by filing and dismissing the same special education due process request on four separate occasions as a means to manipulate the hearing settings and abuse the hearing process.<sup>n174</sup>

The review officer and court decisions concerning H/ROs' [\*37] authority to order financial or other sanctions against parties or their attorneys are scant and somewhat surprising. In Indiana, which is a two-tier state, a review officer upheld a hearing officer's authority to issue a financial sanction of \$ 500 for "sham objections" and egregious delays.<sup>n175</sup> While clarifying that the sanction applied to the parents' attorney, the review officer found the requisite authority in state law.<sup>n176</sup> Citing this Indiana decision, a hearing officer in Minnesota, which is a one-tier state where administrative law judges serve as hearing officers, ordered a parent's attorney to pay \$ 2,000 to the school district as a disciplinary sanction "for pursuing a [summary judgment] motion without sufficient factual or legal basis."<sup>n177</sup> The Minnesota hearing officer reasoned that his statutory responsibility to conduct hearings and the state's equivalent of Rule 11 of the Federal Rules of Civil Procedure implicitly supported his authority to issue sanctions.<sup>n178</sup> Significantly albeit separately, the federal district court in Minnesota subsequently upheld such sanctioning authority when a hearing officer ordered another parent's attorney to pay \$ 2,432 as a sanction for filing a frivolous fourth hearing request.<sup>n179</sup> The court concluded that the hearing officer's authority to issue sanctions for frivolous hearing conduct was encompassed within the state regulation that granted hearing officers the authority to "do the additional things necessary to comply" with said regulations.<sup>n180</sup>

In contrast, a review officer in New Mexico recently ruled that under that state's law, a hearing officer does not even have the authority to recommend that a court sanction noncompliant parents by requiring them to pay the district's attorneys' fees.<sup>n181</sup> However, in dicta, the review officer noted that the 2004 amendments to the IDEA, which did not apply in this case, provided courts with the [\*38] authority to award attorneys' fees to districts in certain circum-

stances.<sup>n182</sup> The review officer also commented, rather ambiguously, that "under current law, administrative officers and courts are permitted to take into account Parents' lack of cooperation with the District in determining whether Parents are entitled to fees should they prevail in a due process proceeding ... ." <sup>n183</sup>

Straddling the fence, an Ohio appeals court concluded that H/ROs are entitled to "implied powers similar to those of a court," but that the review officer's dismissal of the parents' case with prejudice, based on their failure to comply with the order to submit the child's medical and psychological records, was too harsh a sanction.<sup>n184</sup> Similarly, the federal district court in New Jersey recently reversed a hearing officer's dismissal based on a pro se parent's lack of compliance with state filing requirements, concluding that a lesser form of dismissal would be a more appropriate remedy.<sup>n185</sup>

### M. Issuing Other Injunctive Relief

H/ROs have issued a rather remarkable range of other injunctions that have not been tested by subsequent review. Examples include (1) an Arkansas hearing officer's order that a school principal have no further contact with a student;<sup>n186</sup> (2) another Arkansas hearing officer's order that parents reimburse a district for the cost of an inexcusably cancelled evaluation appointment;<sup>n187</sup> (3) a California hearing officer's order that parents, who had joint custody but disagreed about their child's education, obtain a family court ruling as to which parent had final educational decisionmaking authority;<sup>n188</sup> [\*39] and (4) a Pennsylvania review panel's decision ordering a district to provide a parent counseling and training.<sup>n189</sup>

Conversely, some H/RO decisions that have denied injunctive authority are similarly open to question.<sup>n190</sup> For example, a Pennsylvania review panel ruled that it lacked authority to order an extended school day.<sup>n191</sup> It is unclear, however, how to distinguish such relief from an extended school year, which is within the range of IDEA entitlements.<sup>n192</sup> Similarly, a Michigan hearing officer summarily ruled that she did not have authority to order accommodations on a college entrance examination; although she did not provide a direct rationale, her ruling is only supportable to the extent that the student's graduation was bona fide.<sup>n193</sup> In a more marginal example, a Massachusetts hearing officer renounced authority to require a student to attend school after the student had reached the state-mandated maximum age, limiting the remedy to a declaration that the district offered the student FAPE and a strong recommendation that the student and the parent discontinue the student's nonattendance.<sup>n194</sup>

[\*40] Other open questions concern an H/RO's authority to order a SEA to take action. The IDEA's administering agency has opined that such authority depends on state law, but it added that authority may be implicated in certain circumstances by the SEA's general supervisory authority under IDEA.<sup>n195</sup> Finally, the 2004 IDEA reauthorization directly addressed H/ROs' injunctive authority in tandem with limiting H/ROs' finding of denial of FAPE based on procedural violations. Specifically, after identifying the three limited situations for such a finding, the amended IDEA provides: "Nothing in this [limitation provision] shall be construed to preclude a hearing officer from ordering a local education agency to comply with procedural requirements ... ." <sup>n196</sup> Thus, while limiting the H/RO's decisionmaking authority, the amendments constitute the first time that the IDEA expressly recognizes the remedial authority of H/ROs.

Thus far, very few court decisions have limited HROs' authority to issue other injunctive relief. In one, Pennsylvania's intermediate, appellate court ruled that an H/RO lacks authority to require the district to provide the parent with a translated transcript, concluding that the hearing officer policy manual does not have the force of regulations, i.e., law.<sup>n197</sup> In a second such case, a federal district court reversed a hearing officer's order that effectively replaced the IEP team with the private company that implemented the child's home-based program, concluding that this arrangement would constitute a potential conflict of interest and was contrary to the district's responsibility.<sup>n198</sup>

### III. Other Relief

#### A. Awarding Attorneys' Fees

Although the IDEA expressly grants courts the authority to award [\*41] attorneys' fees,<sup>n199</sup> courts have construed the accompanying statutory silence as implying that H/ROs do not have concomitant authority.<sup>n200</sup> In the commentary accompanying the IDEA regulations, the administering agency has added a potential exception - in which state law so specifies.<sup>n201</sup> In the absence of such state law,<sup>n202</sup> H/ROs have consistently followed the judicial interpretation that attorneys' fees are within the court's exclusive domain.<sup>n203</sup> The 2004 IDEA amendment that provides for awards of attorneys' fees to prevailing state or local education agencies in limited circumstances does so expressly within the same discretionary authority of courts.<sup>n204</sup>



Nevertheless, as an incidental intersection, an H/RO's remedy may have an effect on whether a court determines that a parent is entitled to attorneys' fees. For example, an H/RO recently upheld a district's proposed placement of a child but concluded that the IEP was not sufficiently specific with regard to mainstreaming opportunities at said placement and ordered the IEP team to meet to revise the IEP.<sup>n205</sup> The Seventh Circuit ruled that the parent had only [\*42] attained de minimis success and, thus, did not meet the prevailing party requirement for attorneys' fees under the IDEA.<sup>n206</sup> As another variation of this intersection, H/ROs may have the authority upon proper order to provide consent decree status to a settlement for purposes of attorneys' fees.<sup>n207</sup>

#### B. Awarding Money Damages

Although a minority of courts have taken the view that money damages are available under the IDEA,<sup>n208</sup> it is generally accepted that this form of relief is not within H/ROs' authority.<sup>n209</sup>

#### C. Making Strong Recommendations for District Action

A final category of marginal limitations is that H/ROs may only make strong recommendations that the defendant-district take certain action in the wake of an H/RO's decision in the district's favor.<sup>n210</sup> Given the appearance of forceful authority of H/ROs, such dicta are questionable from a purist point of view,<sup>n211</sup> though some courts have appeared to endorse this directive guidance.<sup>n212</sup>

[\*43]

#### Conclusion

With the exception of money damages and attorneys' fees, H/ROs are generally not cognizant or consistent with regard to the boundaries of their remedial authority. The language of the IDEA and its regulations are not particularly helpful in this regard, but a growing body of published administrative and case law provides useful and enforceable demarcations that warrant careful consideration by H/ROs and other interested individuals. The addition of qualifications for H/ROs in the IDEA reauthorization - concerning H/ROs' knowledge and ability to understand special education law, to conduct hearings, and to "render and write decisions"<sup>n213</sup> - appears to reinforce the need for H/ROs to be aware of and to act in conformance with the limits on their remedial powers. The codification of the applicable authority, including the boundaries for H/ROs, merits not only the attention of Congress - which has neglected this important area of policy-making as a foundation for state variation - but also customized elaboration in state special education statutes and regulations.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure  
Judicial Officers  
Hearing Officers  
Education Law  
Discrimination  
Individuals With Disabilities Education Act  
General Overview  
Public Health & Welfare Law  
Social Services  
Disabled & Elderly Persons  
Education & Training  
Individuals With Disabilities Education Act

#### FOOTNOTES:

n1. Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act*, 58 *Admin. L. Rev.* 401 (2006).

n2. See 20 U.S.C. §§ 1400-1487 (2009). The Individuals with Disabilities Education Act (IDEA) was originally named the Education for All Handicapped Children Act (the Act). § 1400(c)(2). Congress reauthorized the Act several times, with successive refinements. The 1990 reauthorization included the name change to the IDEA. For a comprehensive comparison of the 1986 reauthorization, § 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990, see Perry A. Zirkel, *A Comparison of the IDEA and Section 504/ADA*, 178 *Educ. L. Rep.* 629 (2003). The implementing regulations for the IDEA are at 34 C.F.R. pt. 300 (2009). The most recent reauthorization, signed by President Bush on December 3, 2004, went into effect, in relevant part, on July 1, 2005. With limited exceptions, see *infra* note 12, the reauthorization did not materially change the statutory provisions that provide the basis for the analysis in this Article.

## 31 J. Nat'l Ass'n L. Jud. 1, \*

n3. See 20 U.S.C. § 1400(d)(1)(A) (setting forth six purposes of the IDEA). A free appropriate public education (FAPE) consists of special education and related services designed to address the needs of the individual eligible child. § 1401(8); see also 34 C.F.R. § 300.17(c) (2009) (specifying that FAPE means services that "include preschool, elementary school, or secondary school education").

n4. See 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114-.117 (requiring that children with disabilities be educated, within a broad continuum of placements, with nondisabled children to the maximum extent appropriate).

n5. 20 U.S.C. §§1401(11), 1414(d); see also 34 C.F.R. §§300.22, 300.320-.321 (2009) (defining an individualized educational program (IEP) team and delineating the content of an IEP).

n6. See 20 U.S.C. § 1415(b)(6); see also 34 C.F.R. § 300.507(a) (providing the procedures for instituting an impartial due process hearing). The other dispute resolution mechanism, which is purely administrative and without judicial review, is the state complaint resolution process. §§300.151-.153; see generally Perry A. Zirkel, Legal Boundaries for the IDEA Complaint Resolution Process, 237 Educ. L. Rep. 565 (2008). Mediation is also available as an adjunct to the hearing/review officer process. § 300.506.

n7. 20 U.S.C. § 1415(f)-(g); see also 34 C.F.R. §§300.514(b), 300.516 (indicating situations in which appeal or civil action may be available). A gradually decreased number of states (currently, 10) have a second, review-officer tier, with the remaining 34 states opting for a one-tier, state-level hearing officer system. Perry A. Zirkel & Gina Scala, Due Process Hearing Systems under the IDEA: A State-by-State Survey, 21 J. Disability Pol'y Stud. 3 (2010). This survey also revealed a gradual trend toward full-time ALJs at the first tier. Id.

n8. 20 U.S.C. § 1415(i)(2); see also 34 C.F.R. § 300.516(a) (stating that a party may bring a claim in a "district court of the United States without regard to the amount in controversy").

n9. 20 U.S.C. § 1415(i)(3); see also 34 C.F.R. § 300.517 (requiring that the fees be reasonable).

n10. 20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3). For a recent analysis of the boundaries for a court's remedial authority under the IDEA, see *Garcia v. Bd. of Educ.*, 520 F.3d 1116 (10th Cir. 2008).

n11. In contrast to the silence regarding hearing/review officers (H/ROs), the regulations explicitly provide the state complaint process, which is the alternate administrative dispute resolution mechanism, with express remedies, including expense reimbursement and compensatory education. 34 C.F.R. §§300.141(b)(1).

n12. There are limited exceptions. The first is an injunction, analogous to the judicial authority construed in *Honig v. Doe*, 484 U.S. 305, 328 (1988), to change the placement of the child on an interim basis in narrowly specified, danger-based disciplinary circumstances. 20 U.S.C. § 1415(k)(2). In contrast with the provision allocating to the IEP team the determination of the other interim placements, 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.531, the hearing officer's authority for *Honig*-type situations appears to be injunctive, rather than merely declaratory, relief. The 2004 IDEA reauthorization deleted the criteria for such interim placements, suggesting that the hearing officer is not limited to the district proposal. 20 U.S.C. § 1415(k)(3)(B)(ii). A second limited exception is the declaratory or injunctive authority, unless inconsistent with state law, to override a refusal of parental consent to an initial evaluation or re-evaluation. 20 U.S.C. § 1414(a)(1)(C)(ii); 34 C.F.R. § 300.300(a)(3)(i), 300.300(c)(2)(ii). With regard to initial services, however, the 2004 IDEA reauthorization codified the administering agency's interpretation that hearing officers lack such overriding authority for parental refusals of consent. 20 U.S.C. § 1414(a)(1)(D); see also Letter to Manasevit, 41 IDELR P 36, at 201 (OSEP 2003); Letter to Gagliardi, 36 IDELR P 267, at 1161 (OSERS 2001); Letter to Cox, 36 IDELR P 66, at 282 (OSEP 2001) (noting that the U.S. Department of Education's Office of Special Education Programs (OSEP) interpreted the IDEA as permitting the overriding of parental refusal only with regard to evaluations). Third and most significantly, the IDEA specifically grants not only judges, but also hearing officers the authority to issue tuition reimbursement; however, in odd partial contradiction, the IDEA limits the equitable step to "a judicial finding of unreasonableness." 20 U.S.C. §§1412(a)(10)(C)(ii) and 1412(a)(10)(C)(iii)(III) (emphasis added); see also 34 C.F.R. § 300.148(d)(3) (implementing the reimbursement limitation). In its recent ruling regarding tuition reimbursement, the Supreme Court incidentally rejected the defendant-district's argument that asserted that the broad remedial authority expressly granted to courts (*supra* note 10 and accompanying text) contradicted this specific remedial authority granted to hearing officers. *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2494 n.11 (2009). Finally, in limiting the hearing officer's authority to find

a denial of FAPE on circumscribed, basically prejudicial procedural violations, the 2004 IDEA reauthorization expressly recognized a hearing officer's authority to order a district to comply with the Act's pertinent procedural requirements. 20 U.S.C. § 1415(f)(e)(E)); see also 34 C.F.R. §§300.148(c) and 300.148(d)(3) (mirroring this provision).

n13. See Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 *Educ. L. Rep.* 731 (2002) (tracing trends in special education case law at the administrative level and published court decisions).

n14. See Thomas A. Mayes & Perry A. Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 *Remedial & Special Educ.* 350 (2001) (analyzing case law in reference to the Burlington-Carter test for tuition reimbursement).

n15. See Perry A. Zirkel, *Compensatory Education Services: An Annotated Update of the law*, 251 *Educ. L. Rep.* 501 (2010) (canvassing the case law concerning compensatory education); see also Perry A. Zirkel, *Two Competing Approaches for Calculating Compensatory Education under the IDEA*, 257 *Educ. L. Rep.* 550 (2010) (explaining the case law concerning the quantitative and qualitative approaches to calculate compensatory education); Perry A. Zirkel, *Compensatory Education Under the Individuals with Disabilities Act*, 110 *Penn. St. L. Rev.* 181 (2006) (arguing for more consistency between analogous approaches for compensatory education and tuition reimbursement).

n16. See *infra* note 169 (explaining that the appropriate avenue to enforce an H/RO order is in court via a § 1983 action). For related articles, see, for example, Terry Jean Seligmann, A Diller, A Dollar: Section 1983 Damage Claims in Special Education Lawsuits, 36 *Ga. L. Rev.* 405 (2001); Ralph D. Mawdsley, A Section 1983 Cause of Action Under IDEA? Measuring the Effect of *Gonzaga University v. Doe*, 170 *Educ. L. Rep.* 425 (2002).

n17. Compare *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791 (3d Cir. 2007) (reversing the Third Circuit's position, which had previously permitted compensatory damages under the IDEA via § 1983), *Diaz-Fonseca v. Commonwealth of Puerto Rico*, 451 F.3d 13 (1st Cir. 2006) (interpreting the IDEA as not providing money damages), *Ortega v. Bibb County Sch. Dist.*, 397 F.3d 1321 (11th Cir. 2005) (rejecting the availability of tort-like relief under IDEA as inconsistent with its purpose as a social-welfare mechanism to provide appropriate educational services), *Polera v. Bd. of Educ.*, 288 F.3d 478 (2d Cir. 2002) (discussing the situation in which awarding money damages is the only way to compensate for the grievance from the situation in which the injured party failed to timely pursue effective remedies), *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268 (10th Cir. 2000) (opining that, even if damages are available under the IDEA, they should be awarded in a judicial forum and not in an administrative hearing), *Thompson v. Bd. of Special Sch. Dist. No. 1*, 144 F.3d 574 (8th Cir. 1998) (denying compensatory damages because neither general nor punitive damages are available under the IDEA), *Sellers v. Sch. Bd.*, 141 F.3d 524 (4th Cir. 1998) (rejecting the argument that compensatory and punitive damages should be awarded because the violation of IDEA amounted to educational malpractice), and *Charlie F. v. Bd. of Educ.*, 98 F.3d 989 (7th Cir. 1996) (rejecting money damages as inconsistent with the IDEA's structure of elaborate provision for educational services), with *Goleta Union Elementary Sch. Dist. v. Ordway*, 248 F. Supp. 2d 936, 939 (C.D. Cal. 2002) (deducing congressional intent to provide a plaintiff with recovery under § 1983 for violations of the IDEA), *Zearley v. Ackerman*, 116 F. Supp. 2d 109, 114 (D.D.C. 2000) (joining the Third Circuit's previous position that there is an implied right of action for monetary damages for § 1983 claims premised on IDEA violations), and *L.C. v. Utah State Bd. of Educ.*, 57 F. Supp. 2d 1214 (D. Utah 1999) (granting money damages under the IDEA, as well as under § 1983, for violation of due process rights provided under the IDEA). The case law is limited and similarly split with regard to punitive damages. Compare *T.B. v. Upper Dublin Sch. Dist.*, 40 IDELR P 67, at 265 (E.D. Pa. 2003) (analogizing the funding conditions of the IDEA to a contract and noting that punitive damages are not available in breach of contract cases), and *Appleton Area Sch. Dist. v. Benson*, 32 IDELR P 91, at 284 (E.D. Wis. 2000) (finding that punitive damages are not available under IDEA), with *Irene B. v. Phila. Acad. Charter Sch.*, 38 IDELR P 183, at 738 (E.D. Pa. 2003) (allowing a claim for punitive damages against an individual), and *Woods v. N.J. Dep't of Educ.*, 796 F. Supp. 767, 776 (D.N.J. 1992) (quoting 20 U.S.C. § 1415(e)(2) and citing *Burlington Sch. Comm. v. Mass. Dep't of Educ.*, 471 U.S. 359 (1985)) (holding that the IDEA authorized punitive damages, based on the language that the court may "grant such relief as [it] determines is appropriate").

n18. The scope of this Article does not extend to the remedial authority of H/ROs under § 504 of the Rehabilitation Act. For one of the rare examples of applicable authority, see *Albuquerque Pub. Sch.*, 38 IDELR P 235, at 941 (N.M. SEA 2002).

n19. The primary publication for H/RO decisions (designated in the citations as "SEA" inasmuch as the state education agency is responsible for the H/RO system) and Department of Education's Office of Special Education Programs (OSEP) interpretations is the *Individuals with Disabilities Education Law Report (IDELR)* and its predecessor, the *Education of the Handicapped Law Report (EHLR)*. The representativeness of the IDELR's sampling of H/RO decisions is subject to question. See Anastasia D'Angelo, Gary Lutz & Perry A. Zirkel, *Are Published IDEA Hearing Officer Decisions Representative?*, 14 *J. Disability Pol'y Stud.* 241 (2004) (examining previous hearing officer de-

cisions under IDEA to determine whether they were representative of the outcomes and frequency of published and unpublished opinions). For the extent of authority of OSEP letters, see Perry Zirkel, *Do OSEP Policy Letters Have Legal Weight?* 171 *Educ. L. Rep.* 391 (2002).

n20. See James Newcomer & Perry A. Zirkel, *An Analysis of the Judicial Outcomes of Special Education Cases*, 65 *Exceptional Child*. 469 (1999) (tracking court cases concerning special education disputes under the administrative and judicial venues).

n21. In general, H/ROs and courts defer to school districts in staff and methodology selection cases. See, e.g., Perry Zirkel, *Know Legal Boundaries with Student Evaluation Provisions*, 17 *The Special Educator* 3 (2002); Perry Zirkel, *Do School Districts Typically Win Methodology Cases*, 13 *Special Educator* 11 (1997); Tara Skibitsky Levinson & Perry Zirkel, *Parents vs. Districts in Selecting the Psychologist: Who Wins?*, 30 *Communique* 10 (2001) (available from the Nat'l Ass'n of Sch. Psychologists).

n22. See Peter J. Maher & Perry A. Zirkel, *Impartiality of Hearing and Review Officers under the Individuals with Disabilities Education Act*, 83 *N. Dakota L. Rev.* 109 (2007) (updating the Drager & Zirkel article via a checklist format); Elaine A. Drager & Perry A. Zirkel, *Impartiality Under the Individuals with Disabilities Education Act*, 86 *Educ. L. Rep.* 11 (1993) (synthesizing legal boundaries of impartiality under the IDEA).

n23. See, e.g., *Indep. Sch. Dist. No. 432 v. J.H.*, 8 *F. Supp. 2d* 1166 (D. Minn. 1998) (invalidating a hearing officer order for lack of jurisdiction); *Bd. of Educ. of Ellenville Cent. Sch. Dist.*, 28 *IDELR* 337, 340 (N.Y. SEA 1998) (upholding by review officer of a hearing officer's determination of retained jurisdiction to implement his own injunction). Jurisdiction and remedial authority are overlapping rather than mutually exclusive topics. Thus, the boundary for is inevitably blurry as to which legal authority to include herein.

n24. For cases dealing with jurisdiction of H/ROs, see for example *Va. Office of Prot. & Advocacy v. Virginia*, 262 *F. Supp. 2d* 648 (E.D. Va. 2003); *P.N. v. Greco*, 282 *F. Supp. 2d* 221 (D.N.J. 2003); *Gary S. v. Manchester Sch. Dist.*, 241 *F. Supp. 2d* 111 (D.N.H. 2003); *Bd. of Educ. of Averill Park Cent. Sch. Dist.*, 27 *IDELR* 996, 999 (N.Y. SEA 1998); cf. *Bd. of Educ. v. Johnson*, 534 *F. Supp. 2d* 231 (D. Del. 2008) (ruling that H/ROs lack remedial authority to order services to parentally placed private school students beyond district's limited IDEA's obligations to such students).

n25. For application of the statute of limitations that the 2004 amendments expressly included in the IDEA for the first time, see, e.g., *Steven I. v. Cent. Bucks Sch. Dist.*, 618 *F.3d* 411 (3d Cir. 2010) (holding that the IDEA's two-year statute of limitations applies to claims pre-dating passage of the IDEA); *D.C. v. Klein Indep. Sch. Dist.*, 711 *F. Supp. 2d* 793 (S.D. Tex. 2010) (applying the different statute of limitations that the IDEA allows under state law). For a synthesis of this topic prior to the 2004 amendments, see Perry A. Zirkel & Peter J. Maher, *The Statute of Limitations Under the Individuals with Disabilities Act*, 175 *Educ. L. Rep.* 1 (2003) (surveying cases in which courts or H/ROs have established statutes of limitations under the IDEA via the borrowing analogy).

n26. To date, there is negligible authority specific to this subject. For a comprehensive source that includes hearing officer decisions under § 504, see Perry A. Zirkel, § 504, the ADA, and the Schools (2d ed. 2000).

n27. For sources that do explore these issues, see Mayes & Zirkel, *supra* note 14; Perry A. Zirkel, *Compensatory Education Services Under the IDEA: An Annotated Update*, 190 *Educ. L. Rep.* 745 (2004).

n28. See, e.g., 34 C.F.R. §§300.512(a)(3) and 300.512(b)(1) (2009) (enforcing a five-day rule for evidence, including evaluations); § 300.502(d) (ordering an independent educational evaluation "as part of the hearing"); *S.T. ex rel. S.F. v. Sch. Bd. of Seminole County*, 783 *So. 2d* 1232 (Fla. Dist. Ct. App. 2001) (concerning authority to order discovery).

n29. See, e.g., *Cocores v. Portsmouth*, 779 *F. Supp.* 203, 205 (D.N.H. 1991) (quoting *S-1 v. Spangler*, 650 *F. Supp.* 1427, 1431 (M.D.N.C. 1986), vacated as moot, 832 *F.2d* 294 (4th Cir. 1987)) ("It seems incongruous that Congress intended the reviewing court to maintain greater authority to order relief than the hearing officer ..."); *Ivan P. v. Westport Bd. of Educ.*, 865 *F. Supp.* 74, 80 (D. Conn. 1994); cf. *Hesling v. Avon Grove Sch. Dist.*, 428 *F. Supp. 2d* 262, 273 (E.D. Pa. 2006) (commenting that "the case law is clear that various forms of equitable re-

lief, including the issuance of a declaratory judgment, can be obtained through the IDEA's administrative proceedings"). Among IDEA H/ROs, the leading, perhaps only, exception to this broad derivative view is the state of Florida, where some of the hearing officers have interpreted Florida law, including its constitution and case law, as precluding their remedial authority with regard to tuition reimbursement and compensatory education. E-mail from John VanLaningham, Administrative Law Judge, Florida Office of Administrative Hearings, to Perry A. Zirkel, Professor, Lehigh University, Oct. 2, 2010 11:47:30 (on file with the author). The Eleventh Circuit avoided determining whether hearing officers may have less remedial authority than courts with regard to tuition reimbursement, concluding that the issue was not justiciable in the absence of a hearing officer's finding that the parent met the criteria for this remedy. *L.M.P. v. Florida Dep't of Educ.*, 345 F. App'x 248 (11th Cir. 2009). The Supreme Court's recent clarification, in *Forest Grove*, that reinforces the remedial authority of H/ROs (supra note 12) and Florida's recent legislation that seems to provide a reminder of federal preemption ( Fla. Stat. § 1003.571(1) (2009) (requiring the state board of education to comply with the IDEA) may mitigate or eliminate this state-specific restrictive remedial interpretation.

n30. 34 C.F.R § 300.507(a)(1). For the eligibility classifications, see *id.* § 300.8(c).

n31. 34 C.F.R. § 300.507(a)(1). For short and comprehensive syntheses, respectively, of the IEE reimbursement remedy, which is injunctive relief that included this determination at the threshold step, see Perry A. Zirkel, *Independent Educational Evaluations at District Expense under the Individuals with Disabilities Education Act*, 38 J.L. & Educ. 323 (2009); Perry A. Zirkel, *Independent Educational Evaluation Reimbursements: A Checklist*, 231 Educ. L. Rep. 21 (2008). For the regulations specific to IEEs, see § 300.502. For the separable IHO authority to issue an injunction for an IEE during the hearing, see *supra* note 28.

n32. 34 C.F.R. § 300.507(a)(1). For the FAPE and placement regulations, see §§300.17, .104, .115-.116. On occasion, the H/RO waffles on the yes-no issue of appropriateness. See *Lampeter Strasburg Sch. Dist.*, 43 IDELR P 17, at 58 (Pa. SEA 2005) ("The IEP is appropriate for what it is ... . But it is wholly lacking ... . It is not necessarily inappropriate, but it is only marginally appropriate.").

n33. *S.G. v. Dist. of Columbia*, 498 F. Supp. 2d 304, 313 (D.D.C. 2007) (ruling that the IDEA does not provide for declaratory relief). The court cited its earlier decision in *Kaseman v. District of Columbia*, 329 F. Supp. 2d 20, 32 (D.D.C. 2004), which indeed included this pronouncement but only in cryptic application to a requested injunction for an unripe controversy, thus inferably referring to the general unavailability of advisory opinions).

n34. 530 F. Supp. 1209, 1215 (D.D.C. 1982).

n35. *Id.* at 1211.

n36. The court added that the hearing officer "may, and indeed, should" make a recommendation for an appropriate program or placement. *Id.* at 1212.

n37. Letter to Eig, EHLR 211:174 (OSEP 1980) ("Where 'appropriate' placement is at issue, the hearing officer's scope of authority includes deciding what placement would be appropriate for that child."). In contrast, the Department of Education's Office for Civil Rights (OCR) recognized the local limitation of the Mills consent decree in reaching a less broad, but perhaps intermediate, interpretation. *Dist. of Columbia Pub. Sch.*, EHLR 257:208 (OCR 1981).

n38. *Davis*, 530 F. Supp. at 1212-13.

n39. For example, this decision pre-dated the Supreme Court's landmark FAPE decision in *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

n40. See *supra* notes 37-38 and accompanying text.

n41. Indeed, in a recent case the same court not only declared, but also ordered the parents' proposed placement, albeit under the rubric of compensatory education. *Diatta v. Dist. of Columbia*, 319 F. Supp. 2d 57 (D.D.C. 2004). In doing so, the court ruled that the hearing officer's denial of the education program requested by the parent constituted an abdication of his authority. *Id.* at 65; see also *Manchester Sch. Dist. v. Christopher B.*, 807 F. Supp. 860 (D.N.H. 1992) (ordering the district to implement the parents' proposed placement). For an early exception to the modern trend, see *Hendry County Sch. Bd. v. Kujawski*, 408 So. 2d 566 (Fla. Dist. Ct. App. 1986), which overruled the hearing officer's sua sponte order of parents' proposed placement and limited the hearing officer's authority to merely recommend a different placement if he finds the district's proposal inappropriate. Citing another D.C. decision after *Davis* that presumably sanctions injunctive authority, a pair of respected commentators concluded the following: "The better view appears to be that the hearing officer is not limited to accepting or rejecting the placement proposed by the [district] and may consider placements proposed by the parents." Thomas Guernsey & Kathe Klare, *Special Education Law* 160 (2001) (citing *Diamond v. McKenzie*, 602 F. Supp. 632 (D.D.C. 1985)).

n42. See, e.g., *Grossmont Union High Sch. Dist.*, 44 IDELR P 147, at 787 (Cal. SEA 2005); *Vincennes Cmty. Sch.*, 22 IDELR 840, 841 (Ind. SEA 1995); *Douglas Pub. Sch.*, 56 IDELR P 28, at 145 (Mass. SEA 2010); *Taunton Pub. Sch.* 27 IDELR 108, 109 (Mass. SEA 1997); *Mountain Lakes Bd. of Educ.*, 21 IDELR 962, 962 (N.J. SEA 1994); *Foxborough Pub. Sch.*, 21 IDELR 1204, 1206 (Mass. SEA 1994) (ordering placements that were very similar to parents' proposal); *Maine Sch. Admin. Dist. No. 3*, 22 IDELR 1083, 1084 (Me. SEA 1995) (ordering interagency arrangement for residential placement per parents' position).

n43. See *Rockport Pub. Sch.*, 36 IDELR P 27, at 100 (Mass. SEA 2002) (finding it "inappropriate ... to issue an order with respect to ... prevailing party status"). But see *Seattle Sch. Dist.*, 34 IDELR P 196, at 760 (Wash. SEA 2001) (holding that the District denied the student a FAPE and requiring the District to reimburse the parents for any costs incurred for the student's tuition at a private school).

n44. Another less frequent exception is where a court expressly delegates this determination to the H/RO. See *Burlington Sch. Comm.*, 20 IDELR 1103, 1106 (Vt. SEA 1994) (holding that prevailing parents are entitled to attorneys' fees). For the related but separate issue of attorneys' sanctions, which are a form of injunctive relief, see *infra* notes 175-80 and accompanying text.

n45. See *Clovis Unified Sch. Dist.*, 36 IDELR P 201, at 890 (Cal. SEA 2001) (citing Cal. Educ. Code § 56507(d)).

n46. *Mifflin County Sch. Dist. v. Special Educ. Due Process Appeals Bd.*, 800 A.2d 1010 (Pa. Commw. Ct. 2002); cf. *Saki v. State of Hawaii*, 50 IDELR P 103 (D. Hawaii 2008) (applying the limitation in terms of jurisdiction rather than remedies). In distinguishing previous Pennsylvania cases, the Mifflin court provided a rather relaxed boundary to sua sponte considerations. *Id.* at 1014 (distinguishing *Stroudsburg Area Sch. Dist. v. Jared M.*, 712 A.2d 807 (Pa. Commw. Ct. 1998) and *Millersburg Area Sch. Dist. v. Lynda T.*, 707 A.2d 572 (Pa. Commw. Ct. 1998)). The same court applied this reasoning to injunctive relief. See *infra* note 52 and accompanying text.

n47. 20 U.S.C. § 1415(j) (2009); 34 C.F.R. § 300.518 (2009).

n48. Letter to Armstrong, 28 IDELR 303, 304 (OSEP 1997). However, as a New York review officer decision illustrated, a hearing officer may not issue a stay-put ruling after issuing their final decision. *Bd. of Educ. of Lindenhurst Union Free Sch. Dist.*, 48 IDELR P 54 (N.Y. SEA 2007).

n49. See *Lansingburgh Sch. Dist.*, EHLR 508:122 (N.Y. SEA 1986).

n50. *Struble v. Fallbrook Union High Sch.* 56 IDELR P 4 (S.D. Cal. 2011).

n51. H/ROs in some jurisdictions - for example, Pennsylvania - use the term "order" generically as the caption for the remedies section of their written opinions. As another example of the blurred boundary, an H/RO's declaratory determination that the district's or the parent's proposed program or placement is appropriate in effect amounts to an order to effectuate said program or placement. For more of these forms of relief, see *supra* note 12.

n52. See, e.g., *Mars Area Sch. Dist. v. Laurie L.*, 827 A.2d 1249, 1257-58 (Pa. Commw. Ct. 2003) (disallowing a reviewing officer's evaluation of issues that a hearing officer did not address); *Susquehanna Twp. Sch. Dist. v. Frances J.*, 823 A.2d 249, 252 (Pa. Commw. Ct. 2003) (concluding that a hearing officer's failure to identify a particular issue did not preclude a review officer from addressing, where the parent had raised, it). The federal courts in the same jurisdiction have done likewise. See, e.g., *Neshaminy Sch. Dist. v. Karla B.*, 26 IDELR 827, 830 (E.D. Pa. 1997) (concluding that a review panel lacked authority to consider an issue not before the hearing officer).

n53. See, e.g., *Slack v. Del. Dep't of Educ.*, 826 F. Supp. 115, 123 (D. Del. 1993); *Hiller v. Bd. of Educ.*, 674 F. Supp. 73 (N.D.N.Y. 1987) (forbidding reviewing panels from deciding issues not raised by the parties); *Sch. Bd. of Martin County v. A.S.*, 727 So. 2d 1071, 1075 (Fla. Ct. App. 1999) (invalidating an H/RO's sua sponte order for additional speech therapy, citing *Hendry County Sch. Bd. v. Kujawski*, 498 So. 2d 566 (Fla. Ct. App. 1986)); *Bd. of Educ. of City Sch. Dist. of New York*, 31 IDELR P 18, at 55 (N.Y. SEA 1998) (vacating a hearing officer decision to the extent it addressed an issue not raised by the parties); *Hyde Park Cent. Sch. Dist.*, 29 IDELR 658, 662 (N.Y. SEA 1998); *Bd. of Educ. of City Sch. Dist. of New York*, 23 IDELR 744, 747 (N.Y. SEA 1995); *Fairfax County Pub. Sch.*, 21 IDELR 1214, 1218 (Va. SEA 1995); *Crandon Sch. Dist.*, 17 EHRLR 718 (Wis. SEA 1991) (finding that a hearing officer lacked authority to consider issues not pertaining to the hearing).

n54. See, e.g., *Dist. of Columbia v. Doe*, 611 F.3d 888, 898 (D.D. Cir. 2010) (holding that hearing officer's order to reduce student's suspension was within his authority based on FAPE even after determining the student's misconduct was not a manifestation of his disability); *J.S. v. N. Colonie Cent. Sch. Dist.*, 586 F. Supp. 2d 74 (N.D.N.Y. 2008) (regarding transition services as implicit within FAPE issue); *Lago Vista Unified Sch. Dist.*, 50 IDELR P 104 (W.D. Tex. 2008) (reversing tuition reimbursement, although also citing alternative grounds); *Dep't of Educ. v. E.B.*, 45 IDELR P 249 (D. Hawaii 2006) (ducking sua sponte issue); *Hyde Park Cent. Sch. Dist. v. Peter C.*, 21 IDELR 354, 354-55 (S.D.N.Y. 1994) (holding that the state review officer did not act beyond his authority by ordering independent evaluations paid for by the school district). As in various other areas of remedial boundaries, the treatment overlaps with subject matter jurisdiction.

n55. For the obverse, see *In re Student with a Disability*, 44 IDELR P 115 (N.M. SEA 2005) (reversing hearing officer's denial of summary judgment to district that, in the motion, offered all of the relief that the parents requested).

n56. *Crown Point Cent. Sch. Dist.*, 46 IDELR P 269 (N.Y. SEA 2007). At the time of the hearing, the parties were awaiting the results, but there was no evidence of undue delay. The review officer's mootness reasoning for the related issue of the effect of the lack of the evaluation on the previous pertinent period, however, was not cogent as a general matter. A remedy is not necessarily futile and, thus, moot just because the annual IEP has expired.

n57. *Green v. Dist. of Columbia*, 45 IDELR P 240 (D.D.C. 2006).

n58. *Hyde Park Cent. Sch. Dist.*, 21 IDELR at 354-55; see *supra* note 12. The only other pertinent express authorization is for ordering an IEE, but that authorization applies during the hearing. See *supra* note 28; see also *Conrad Weiser Area Sch. Dist.*, 27 IDELR 100, 102 (Pa. SEA 1997). For a review officer decision that interpreted the H/RO's injunctive authority for an IEE during the hearing not to be subject to a sua sponte limitation, see *Bd. of Educ. of Hyde Park Cent. Sch. Dist.*, 29 IDELR 658, 662 (N.Y. SEA 1998). For a court decision that held that this H/RO authority does not extend to evaluations in unaccredited and unapproved placements absent clearer necessity, see *Manchester-Essex Reg'l Sch. Comm. v. Bureau of Special Educ. Appeals*, 490 F. Supp. 2d 49 (D. Mass. 2007).

n59. See, e.g., *Altoona Area Sch. Dist.*, 22 IDELR 1069, 1069 (Pa. SEA 1995); *Houston Indep. Sch. Dist.*, 36 IDELR P 286, at 1240 (Tex. SEA 2002); *Cayuga Indep. Sch. Dist.*, 22 IDELR 815, 816 (Tex. SEA 1995) (permitting school districts to request an order overriding parental lack of consent).

n60. *Hempfield Sch. Dist. v. Tyler M.*, 38 IDELR P 68, at 281 (Pa. Commw. Ct. 2003).

n61. See *infra* notes 128-30 and accompanying text. For examples of such interchangeable treatment with regard to the statute of limitations, which is adjacent to or overlapping with remedial authority, see *Carlynton Sch. Dist.*, 815 A.2d 666 (Pa. Commw. Ct. 2003) and *Montour Sch. Dist. v. S.T.*, 805 A.2d 29 (Pa. Commw. Ct. 2002). For an example of differentiation with regard to compensatory education, see *Brownsville Area Sch. Dist. v. Student X*, 729 A.2d 198 (Pa. Commw. Ct. 1999).

n62. See *Mifflin County Sch. Dist. v. Special Educ. Due Process Appeals Bd.*, 800 A.2d 1010 (Pa. Commw. Ct. 2002) and text accompanying note 43.

n63. *Hempfield Sch. Dist. v. Tyler M.*, 38 IDELR P 68, at 281.

n64. *Id.*

n65. Compare *Galena Indep. Sch. Dist.*, 41 IDELR P 221, at 896 (Tex. SEA 2004), and *Galveston Indep. Sch. Dist.*, 36 IDELR P 281, at 1206 (Tex. SEA 2002) (overriding parental lack of consent), with *Letter to Manasevit*, 41 IDELR P 36, at 201 (OSEP 2003) (asserting that Congress had a clear intent for parents to have the final say as to whether children enroll in special education), and *Letter to Cox*, 36 IDELR P 66, at 282-83 (OSEP 2001). In some states, the administering agency used its funding authority to cause a change in state law to codify its position. See, e.g., 22 Pa. Code § 14.162(c) (2006).

n66. 20 U.S.C. § 1414(a)(1)(D)). This limitation appears in the form of a prohibition against the school district providing services "by utilizing the procedures described in" the adjudicative dispute resolution provisions of the IDEA. *Id.* Conversely, this amendment to the IDEA further indirectly limits the remedial authority of H/ROs and courts by immunizing the school district against a resulting claim for denial of FAPE and by excusing the district from its obligation to convene an IEP meeting and develop an IEP. *Id.*

n67. See, e.g., *Anaheim Union High Sch. Dist.*, 34 IDELR P 192, at 735 (Cal. SEA 2001); *Oxnard Union Sch. Dist.*, 30 IDELR 920, 923 (Cal. SEA 1999); *Hillsborough County Sch. Bd.*, 21 IDELR 191, 200 (Fla. SEA 1994); *Clarion-Goldfield Cmty. Sch. Dist.*, 22 IDELR 267, 267 (Iowa SEA 1994); *Somerville Pub. Sch.*, 22 IDELR 764, 765 (Mass. SEA 1995); *Brunswick Sch. Dep't*, 22 IDELR 1004, 1004 (Me. SEA 1995); *Lewiston Sch. Dep't*, 21 IDELR 1150, 1151 (Me. SEA 1994); *Indep. Sch. Dist. No. 283*, 22 IDELR 47, 47 (Minn. SEA 1994); *Bd. of Educ. of Whitesboro Cent. Sch. Dist.*, 21 IDELR 895, 895 (N.Y. SEA 1994); *Pennsbury Sch. Dist.*, 22 IDELR 823, 823 (Pa. SEA 1995).

n68. See, e.g., *Parents of Danielle v. Massachusetts Dep't of Educ.*, 430 F. Supp. 2d 3 (D. Mass. 2006); *Utica Cmty. Sch.*, 18 IDELR 980, 980-81 (Mich. SEA 1991); *In re Child with Disabilities*, 18 IDELR 1135, 1135 (Mo. SEA 1991); *Bensalem Twp. Sch. Dist.*, 17 EHLR 90 (Pa. SEA 1990); cf. *Greenville County Sch. Dist.*, 47 IDELR P 55 (S.C. SEA 2006) (viewing the H/RO's revision as harmless error). An alternate limitation is when an H/RO orders a future change in placement not at issue and, thus, in effect *sua sponte*. See, e.g., *Wilkes-Barre Area Sch. Dist.*, 32 IDELR P 17, at 39 (Pa. SEA 2003); cf. *Bd. of Educ. of City Sch. Dist. of New York*, 21 IDELR 265, 265 (N.Y. SEA 1994) (dealing with future IEPs). Nevertheless, Congress expressly recognized and preserved H/ROs' authority to order compliance with applicable requirements upon finding procedural violations, thus including but not limited to procedural deficiencies in IEPs. 20 U.S.C. § 1415(f)(3)(E)).

n69. *Sch. Bd. of Martin County v. A.S.*, 727 So. 2d 1071 (Fla. Dist. Ct. App. 1999).

n70. Citing a previous Davis-based decision, the court referred to *sua sponte* grounds, but its rationale can also be seen as *functus officio*, that is, that, by resolving the issue of appropriateness, the H/RO lacked authority to order any relief. *Id.* at 1074-75.



n71. *Lake Travis Indep. Sch. Dist. v. M.L.*, 50 IDELR P 105 (W.D. Tex. 2007).

n72. *L. v. N. Haven Bd. of Educ.*, 624 F. Supp. 2d 163 (D. Conn. 2009); cf. *Dist. of Columbia v. Doe*, 611 F.3d 888, 898 (D.D. Cir. 2010) (holding that hearing officer's order to reduce student's suspension was within his authority even after determining the student's misconduct was not a manifestation of his disability because he found that the longer suspension would be a denial of FAPE).

n73. See, e.g., *Linda T. ex rel. William A. v. Rice Lake Area Sch. Dist.*, 417 F.3d 704 (7th Cir. 2005) (ruling that parent was not the prevailing party for purpose of attorneys' fees where the ordered revisions were de minimis in comparison to the primary issue of placement, which the district won).

n74. For examples of instances in which H/ROs ignored limitations on their authority to add services to the IEP, see *In re Student with a Disability*, 48 IDELR P 146 (N.M. SEA 2007); *Huntsville City Bd. of Educ.*, 22 IDELR 931 (Ala. SEA 1995); *Ipswich Pub. Sch. Dist.*, 44 IDELR P 113, at 556 (Mass. SEA 2005); *W. Springfield Pub. Sch.*, 42 IDELR P 22, at 95 (Mass. SEA 2004); *Portland Sch. Dep't*, 21 IDELR 1209 (Me. SEA 1995); *Worcester Pub. Sch.*, 43 IDELR P 213, at 986 (Mass. SEA 2005); *Bd. of Educ. of Portage Pub. Sch.*, 25 IDELR 372 (Mich. SEA 1996); *Bd. of Educ. of the City Sch. Dist. of the New York*, 21 IDELR 472 (N.Y. SEA 1994); *Philadelphia Sch. Dist.*, 22 IDELR 825 (Pa. SEA 1995); *Philadelphia Sch. Dist.*, 21 IDELR 1193 (Pa. SEA 1994); *Radnor Twp. Sch. Dist.*, 21 IDELR 878 (Pa. SEA 1994); *Houston Indep. Sch. Dist.*, 21 IDELR 208 (Tex. SEA 1994); *Pasadena Indep. Sch. Dist.*, 21 IDELR 482 (Tex. SEA 1994); *Granite Sch. Dist.*, 22 IDELR 405 (Utah SEA 1995); *Loudon County Pub. Sch.*, 22 IDELR 833 (Va. SEA 1995); cf. *Taunton Pub. Sch.*, 54 IDELR P 36 (Mass. SEA 2010) (ordered non-party re-evaluation after determining that the child's program and placement were appropriate). For an unusual example of the obverse, an Illinois hearing officer included in her orders, upon upholding the appropriateness of the district's proposed placement that, "if the guardian chooses to 'home school' this child, it shall be considered as a truancy and reported to appropriate authorities as such." *Bd. of Educ. of Harlem Consol. Sch. Dist. No. 122*, 44 IDELR P 18, at 75 (Ill. SEA 2005). The exception is for the limited circumstance of hearing officer Honig-type injunctions. See *supra* note 12.

n75. See *supra* notes 33-42 and accompanying text.

n76. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985).

n77. E.g., *Mayes & Zirkel*, *supra* note 14, at 351. Although not foreclosing the possibility of tuition reimbursement without a denial of FAPE, the Third Circuit recently rejected such a residuum for an extended delay in the adjudicatory approval of the appropriateness of an IEP. *C.W. v. Rose Tree Media Sch. Dist.*, 395 F. App'x 824 (3d Cir 2010).

n78. *Burlington Sch. Comm.*, 471 U.S. at 369. Although the Court focused on judicial remedial authority, other sources interpreted the authority as extending to H/ROs. See, e.g., *Letter to Van Buiten*, EHLR 211:429A (OSEP 1987) (citing *S-1 v. Spangler*, 650 F. Supp. 1427 (M.D.N.C. 1986)).

n79. *Burlington Sch. Comm.*, 471 U.S. at 370-71 ("Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance ...").

n80. This codification arguably preserves the uncodified residuum of *Burlington-Carter*. See, e.g., 64 Fed. Reg. 12,603 (Mar. 12, 1999). The Supreme Court provided support for this view in *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2494 n.11 (2009) (relying on *Burlington-Carter* to reject defendant district's argument regarding purported conflict between remedial authority provisions of IDEA). In any event, this decision filled a gap not clearly addressed by either the legislation nor *Burlington* and *Carter*, ruling that lack of previous enrollment in the district's special education program is one of several equitable factors for, rather than automatic preclusion of, tuition reimbursement.

n81. 20 U.S.C. § 1412 (a)(10)(C)(ii) (2009); 34 C.F.R. § 300.148(c) (2009). However, in an apparent glitch, Congress limited one of its equitable considerations to a "judicial" finding of parental unreasonableness. 20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 148(c). A recent de-

cision interpreted this language as nonrestrictive in light of the overall Congressional delegation of tuition reimbursement determinations to IH/ROs and courts. *Hogan v. Fairfax County Sch. Bd.*, 645 F. Supp. 2d 554 (E.D. Va. 2009).

n82. See, e.g., *Mayes & Zirkel*, *supra* note 14.

n83. *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 86 & n.3 (3d Cir. 1999).

n84. *Id.*

n85. *Hogan v. Fairfax County Sch. Bd.*, 645 F. Supp. 2d 554 (E.D. Va. 2009).

n86. *Mr. A. v. New York City Dep't of Educ.*, 2011 WL 321137 (S.D.N.Y. Feb. 1, 2011).

n87. In contrast to this first part of this review officer's decision, the Ninth Circuit recently ruled that the standard of judicial review of an IHO's tuition reimbursement decision is *de novo*. *Ashland Sch. Dist. v. Parents of Student E.H.*, 587 F.3d 1175 (9th Cir. 2009). For a recent decision where the court upheld the IHO's tuition reimbursement rulings under what appeared to be *de novo* review, see *Ka.D. v. Solana Beach School District*, 254 IDELR P 310 (E.D. Cal. 2010).

n88. In *re Student with a Disability*, 30 IDELR 408, 416-18 (DDESS 1998). The review officer also reversed the hearing officer's decision with regard to other injunctive relief, which is separately addressed *infra* notes 142-43 and accompanying text. In contrast, a state appellate court's limitation on the reimbursement remedy in the IDEA's complaint resolution process would not appear to apply to the multi-step standards for H/ROs. Specially, a Minnesota appeals court reversed the state's corrective action of partial tuition (here tutoring) reimbursement because it had only an equivocal, not direct, nexus to the IDEA deficiency, or FAPE violation. *Indep. Sch. Dist. No. 192 v. Minnesota Dep't of Educ.*, 742 N.W.2d 713 (Minn. Ct. App. 2007)

n89. *G. v. Fort Bragg Dependent Schs.*, 324 F.3d 240 (4th Cir. 2003), 343 F.3d 295 (4th Cir. 2003).

n90. *Unified Sch. Dist. 259 Wichita Pub. Sch.*, 39 IDELR P 82, at 1504 (Kan. SEA 2003).

n91. For example, the hearing officer refers to various forms of hostility, but a failure to provide FAPE, whether as a matter of formulation or implementation, certainly suffices for the primary step of the Burlington-Carter analysis. Similarly, the hearing officer makes the analogy to punitive damages, but the cited authority, which are IDEA cases, merely distinguish tuition reimbursement from money damages.

n92. See, e.g., Perry A. Zirkel, *State Laws for Gifted Education: An Overview of the Legislation and Regulations*, 27 *Roeper Rev.* 228, 229 (2005) ("Kansas ... has laws [for gifted students] that approach the strength and specificity of the primary federal legislation for students with disabilities.").

n93. *C.W v. Rose Tree Media Sch. Dist.*, 395 F. App'x 824 (3d Cir. 2010).

n94. The court's ruling and reasoning for the parent's alternative claim for compensatory education was the same. *Id.*

n95. One distinction is that tuition reimbursement requires the parents to prove the appropriateness of their chosen program. Another is that tuition reimbursement, except for the equitable limitations, is essentially an all-or-nothing choice, whereas compensatory education is amenable to careful tailoring. Thus far, neither the courts nor H/ROs have recognized these distinctions in their analyses. To the contrary, the Third Circuit's differential treatment, to whatever extent that it remains differential, lacks an explicit rationale. See *supra* notes 83-84 and accompanying text. *M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996). For a suggested approach that is defensibly consistent, see Zirkel 2006, *supra* note 15. Quere whether *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007), in which the Supreme Court concluded that parents have independent enforceable rights under the IDEA, supports or counters the purported distinction between tuition reimbursement as the parent's right and compensatory education as the student's right?

n96. See, e.g., *Lester H. v. Gilhool*, 916 F.2d 865, 872-73 (3d Cir. 1990); *Miener v. Missouri*, 800 F.2d 749, 754 (8th Cir. 1986) (concluding that Congress gave courts the power to grant a compensatory remedy).

n97. *Lester H.*, 916 F.2d at 869.

n98. See, e.g., *Letter to Anonymous*, 21 IDELR 1061 (OSEP 1994) (advising that a SEA and a hearing officer may require compensatory education); *Letter to Kohn*, 17 EHLR 522 (OSEP 1991).

n99. See, e.g., *Diatta v. District of Columbia*, 319 F. Supp. 2d 57 (D.D.C. 2004); *Harris v. District of Columbia*, 19 IDELR 105, 107-08 (D.D.C. 1992); *Cocores v. Portsmouth Sch. Dist.*, 779 F. Supp. 203 (D.N.H. 1991); *Big Beaver Area Sch. Dist. v. Jackson*, 615 A.2d 910 (Pa. Commw. Ct. 1992) (finding that the hearing officer had authority to grant compensatory education); cf. *Bd. of Educ. v. Munoz*, 772 N.Y.S.2d 275 (App. Div. 2005) (holding that New York state law requires that the state department of education's decision regarding an H/RO's order of temporary relief be final).

n100. For a curious decision in which the court avoided the issue but evidenced obvious confusion as to the difference between compensatory education and a prospective placement order, see *Manchester Sch. Dist. v. Christopher B.*, 807 F. Supp. 860 (D.N.H. 1992).

n101. Zirkel, *supra* notes 15 and 27; Perry A. Zirkel & M. Kay Hennessey, *Compensatory Educational Services in Special Education Cases: An Update*, 150 *Educ. L. Rep.* 311 (2001); Perry A. Zirkel, *Compensatory Educational Services in Special Education Cases*, 67 *Educ. L. Rep.* 881 (1991); see also James Schwellenbach, *Mixed Messages: An Analysis of the Conflicting Standards Used by the United States Circuit Courts of Appeals when Awarding Compensatory Education for a Violation of the Individuals with Disabilities Education Act*, 53 *Me. L. Rev.* 245 (2001).

n102. *C.W. v. Rose Tree Media Sch. Dist.*, 395 F. App'x 824 (3d Cir. 2010) (concluding that "the purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a free appropriate public education, but to compensate students with disabilities who have not received an appropriate education").

n103. Zirkel 2010, *supra* note 15, at 503-04 nn.23-26 and accompanying text. The minority view is that the denial must be gross. *Id.* at 504 n.25.

n104. Each of these issues is subject to split and relatively limited authority.

n105. Zirkel 2010, *supra* note 15, at 503 n.18; Zirkel, *supra* note 27, at 746 n.30.

n106. Zirkel, *supra* note 27, at 748 n.17. In contrast, the availability of compensatory education after age 21 for violations before age 21 is relatively settled. *Id.* at 748 n.16; Zirkel 2010, *supra* note 15, at 502 n.15. For a recent example, see *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712 (3d Cir. 2010) (upholding compensatory education, in the unusual form of an IEP, after age 21 for denial of FAPE before age 21).

n107. See, e.g., *D.B. v. Gloucester Twp. Sch. Dist.*, 751 F. Supp. 2d 764 (D.N.J. 2010).

n108. Zirkel 2010, *supra* note 15, at 508 nn.53-54; Zirkel, *supra* note 27, at 755 nn.67-68. A variation of this issue is when the two forms of relief are not awarded for the same period, instead being successive or alternative. For example, the Third Circuit recently ruled that compensatory education is not available for a unilaterally placed child, i.e., as an alternative to tuition reimbursement where the parent proves a denial of FAPE but loses at one of the subsequent steps. *P.P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727 (3d Cir. 2009). In a case earlier in the year, the same court had rejected compensatory education where the district had made good faith efforts to provide FAPE, leaving ambiguous whether such alternative relief would be available. *Mary T. v. Sch. Dist. of Philadelphia*, 575 F.3d 235 (2009). In a more recent and unpublished decision, the same court rejected compensatory education, as an alternative to tuition reimbursement, where the district flagrantly delayed in processing the request for an impartial hearing but the ultimate determination was that the district's IEP was appropriate. *C.W. v. Rose Tree Media Sch. Dist.*, 395 F. App'x 824 (3d Cir. 2010). On the other hand, contributing to the confusion, the Eleventh Circuit affirmed a decision that include the H/RO's unchallenged choice of remedy, which was prospective tuition reimbursement as a form of compensatory education. *Draper v. Atlanta Sch. Sys.*, 518 F.3d 1275 (11th Cir. 2008).

n109. Zirkel 2010, *supra* note 15, at 508 n.52; Zirkel, *supra* note 27, at 754 n.66.

n110. *Susquehanna Twp. Sch. Dist. v. Frances J.*, 823 A.2d 249, 257 (Pa. Commw. Ct. 2003).

n111. See, e.g., *Neshaminy Sch. Dist. v. Karla B.*, 26 IDELR 827 (E.D. Pa. 1997) (granting a motion for summary judgment because the issue of compensatory education was withdrawn from the hearing officer's consideration). Yet, H/ROs continue to transgress this limit, even on occasion in Pennsylvania. See *Lampeter Strasburg School District*, 43 IDELR P 17, at 51 (Pa. SEA 2005); *In re Student with a Disability*, 42 IDELR P 224, at 1195 (Pa. SEA 2005) (providing the most recent examples).

n112. See Zirkel, *supra* note 27, at 756 n.78 (noting that vague awards cause implementation problems); cf. *Streck v. Bd. of Educ.*, 280 F. App'x 66 (2d Cir. 2008) (finding lack of evidentiary basis).

n113. Zirkel 2010, *supra* note 15, at 508 n.58; Zirkel, *supra* note 27, at 755 n.72.

n114. Zirkel 2010, *supra* note 15, at 508 n.60; Zirkel, *supra* note 27, at 755 nn.73-75. A recent federal appeals court decision ruled that an H/RO may not delegate remedial authority for formulating the amount of compensatory education to the IEP team, which includes at least one district employee, in light of the IDEA prohibition that the H/RO may not be a district employee. *Reid v. District of Columbia*, 401 F.3d 516, 526 (D.C. Cir. 2005); see also *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307 (6th Cir. 2007), cert. denied, 532 U.S. 1042 (2007). The prevailing judicial view, however, even in the D.C. Circuit, is that the IEP team is the appropriate forum for resolving the implementation issues of the compensatory education award. See, e.g., *Simms v. District of Columbia*, 404 F. Supp. 2d 45 (D.D.C. 2005); *Blackman v. District of Columbia*, 374 F. Supp. 2d 168 (D.D.C. 2005); *Melvin v. Town of Bolton Sch. Dist.*, 20 IDELR 1189 (D. Vt. 1993), aff'd mem., 100 F.3d 944 (2d Cir. 1996); *State of Conn. Unified Dist. No. 1 v. State Dep't of Educ.*, 699 A.2d 1077 (Conn. Super. Ct. 1997); cf. *Struble v. Fallbrook Union High Sch.*, 56 IDELR P 4 (S.D. Cal. 2011) (upholding remand to IEP team to devise, not reduce or discontinue, the award). A related question is whether the H/RO must or may order such implementation via an escrow fund. Zirkel 2010, *supra* note 15, at 509 n.62; Zirkel, *supra* note 27, at 756 n.77. For recent examples, see *Streck v. Bd. of Educ.*, 642 F. Supp. 2d 105 (N.D.N.Y. 2009), modified, 408 F. App'x 411 (2d Cir. 2010) (ordering escrow account for \$ 37,778 for prescribed compensatory reading services for student now at postsecondary institution); *Matanuska-Susitna Borough Sch. Dist. v. D.Y.*, 54 IDELR P 52 (D. Alaska 2010) (upholding, after supplemental briefing under qualitative approach, \$ 50k compensatory education fund equivalent to approximately 300 hours of speech therapist services plus roughly 208 hours of aide services, at the respective rates of \$ 125 and \$ 60 per hour, or 2.7 hours of speech services and 1.9 hours of aide services per week for 3 school years); cf. *Millay v. Surry Sch. Dep't*, 56 IDELR P 162 (D. Me. 2011) (rejecting trust fund under the circumstances).

n115. See, e.g., *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489 (9th Cir. 1994) (holding that compensatory education is an equitable remedy and only to be awarded when appropriate). However, there is some authority that the basis for calculation must be the student's changed needs rather than the student's needs at the time of the denial. See, e.g., *Conn. Unified Sch. Dist. v. State Dep't of Educ.*, 699 A.2d 1077, 1090 (Conn. Super. Ct. 1997) (deciding that the compensatory education program, while unorthodox, is appropriate). Moreover, a federal appeals court recently overturned an H/RO's "cookie cutter" approach, requiring instead a customized calculation qualitatively based on "specific educational deficits resulting from [the child's] loss of FAPE." *Reid*, 401 F.3d at 523, 526; see also *Branham v. District of Columbia*, 427 F.3d 7, 9 (D.C. Cir. 2005) (emphasizing the need for an inquiry that is "qualitative, fact-intensive, and above all, tailored to the unique needs of the disabled student"); cf. *D.H. v. Manheim Twp. Sch. Dist.*, 45 IDELR P 38 (E.D. Pa. 2005) (based on "only those needs of the student[] that directly flow from his diagnosed SLD"). In a recent district court decision in the wake of *Reid* and *Branham*, the judge expressed a general preference for H/ROs to make this needs-based determination, subject to judicial review. *Thomas v. District of Columbia*, 407 F. Supp. 2d 102 (D.D.C. 2005). For a more complete canvassing of the case law concerning the qualitative approach, which present procedural and evidentiary complications for H/ROs, see *Zirkel, Competing Approaches*, supra note 15. For the possible need under the qualitative approach for a bifurcated approach at the IHO level based on the analogy to additional evidence upon judicial review, see *Gill v. Dist. of Columbia*, 751 F. Supp. 2d 104 (D.D.C. 2010); *Banks v. Dist. of Columbia*, 720 F. Supp. 2d 83 (D.D.C. 2010).

n116. See, e.g., *Bourne Pub. Sch.*, 37 IDELR P 261, at 1144 (Mass. SEA 2002) (denying jurisdiction with the only explanation being, without any cited support, that "this is not a claim for which there is available relief under the IDEA").

n117. *Fairfax County Pub. Sch.*, 38 IDELR P 275, at 1097 (Va. SEA 2003).

n118. 20 U.S.C. § 1232g (2009).

n119. The express provisions in the IDEA for student records and the broad-based scope of the IDEA's adjudicative dispute resolution mechanism arguably suggest overlapping, rather than mutually exclusive, jurisdiction between the IDEA and the Family Education Rights and Privacy Act (FERPA), at least when the records issue relates to the identification, evaluation, or placement of the child. See, e.g., 34 C.F.R. §§300.613-621 (2009) (providing an SEA with broad authority to ensure the requirements of the IDEA are met); § 507(a) (allowing for parental due process rights). When the H/RO has jurisdiction, remedial authority within the otherwise prescribed boundaries should follow.

n120. *Nw. R-1 Sch. Dist.*, 40 IDELR P 221, at 923 (Mo. SEA 2004). The panel contributed to the questionableness of its conclusion by responding to the parents' request for tuition reimbursement merely as follows: "[We] may not place the student in a parochial school or award money damages ... ." *Id.* at 923.

n121. *Id.*

n122. *In re Student with a Disability*, 40 IDELR P 119, at 485 (N.M. SEA 2003).

n123. *Id.* In addition to the arguable concurrent jurisdiction of the FERPA office and H/ROs (see supra note 119), it is not at all clear how FERPA covers a student's medical record where the parents have not released it to the school.

n124. *In re Student with a Disability*, 40 IDELR P 119, at 490.

n125. *Letter to Davis-Wellington*, 40 IDELR P 182, at 748 (OSEP 2003). For the related question concerning the failure to provide IEP-specified accommodations for graduation and other district- or state-wide testing, OSEP suggested that the controlling criterion is whether the failure has resulted in a denial of FAPE and that the proper remedy (although not ascribed specifically to an H/RO) is to provide the student with the opportunity to retake the assessment with appropriate accommodations. *Id.*

n126. In contrast, some H/RO decisions have prudentially avoided such determinations, thus avoiding the necessity and opportunity for judicial guidance. See, e.g., *Arlington Cent. Sch. Dist.*, 28 IDELR 1130 (N.Y. SEA 1998) (finding that the transition assistance afforded a disabled student was sufficient and graduating the student was proper); cf. *Conejo Valley Unified Sch. Dist.*, 29 IDELR 779 (Cal. SEA 1998) (postponing a determination by treating the issue as remedial rather than jurisdictional and, thus, warranting factual development).

n127. *Boston Pub. Sch.*, 24 IDELR 985, 988 (Mass. SEA 1996). The hearing officer thus found it unnecessary to determine whether she had "the authority to order credits which would in effect promote" the student. *Id.* at 989 n.4.

n128. *Saucon Valley Sch. Dist. v. Robert O.*, 785 A.2d 1069 (Pa. Commw. Ct. 2001).

n129. For example, the court observed that the student needed acceleration, while reasoning that it was "counter-intuitive to consider that [the student's] progress was accelerated by completing fewer credits, albeit faster, than his matriculation peers." *Id.* at 1079.

n130. Specifically, the court relied on its IDEA-related *Woodland Hills* decision; see *infra* note 131 for its preemption rationale. *Id.* at 1078. Nevertheless, the court limited the scope of its ruling by expressly not considering the question of whether the state's review officer panel has "authority to grant credit for pre-high school courses, which could then satisfy the requirements of graduation." *Id.* at 1079 n.20.

n131. *Woodland Hills Sch. Dist. v. S.F.*, 747 A.2d 433, 434 (Pa. Commw. Ct. 2000).

n132. *Clovis Unified Sch. Dist.*, 33 IDELR P 146, at 493-94 (Cal. SEA 2000).

n133. See, e.g., *Montgomery County Bd. of Educ.*, 43 IDELR P 234, at 1095 (Ala. SEA 2005) (ordering training for teachers and administrators on developing IEPs based on individual student needs when the student moves to homebound school from regular school); *Portland Pub. Sch. Dist.*, 44 IDELR P 143, at 745 (Or. SEA 2005) (requiring training for staff involved in implementing an IEP); *In re Student with a Disability*, 42 IDELR P 224 (Pa. SEA 2005) (upholding without objection order to train school's special education personnel in specified behavior-related areas); cf. *Sanford Sch. Comm. v. Mr. & Mrs. L.*, 34 IDELR P 262, at 972-73 (D. Me. 2001) (identifying that the H/RO ordered training of an additional therapist, but the issue on appeal was the compensatory education part of the order). For an example of an H/RO decision enforcing the limitation on ordering training, see *Cumberland Valley Sch. Dist.*, 42 IDELR P 79, at 374 (Pa. SEA 2004), which found an order of training to be an error of law.

n134. See *San Diego Unified Sch. Dist.*, 42 IDELR P 249, at 1370 (Cal. SEA 2005) (requiring training of specific staff members regarding certain medical conditions and requirements of special education law); *Chicago Pub. Sch.*, 22 IDELR 1008, 1011 (Ill. SEA 1995) (ordering training regarding students with Attention-Deficit/Hyperactivity Disorder and on developing and implementing IEPs).

n135. *Greenwich Bd. of Educ.*, 40 IDELR P 223, at 929 (Ct. SEA 2003).

n136. *Id.*

n137. *Saucon Valley Sch. Dist. v. Robert O.*, 785 A.2d 1069 (Pa. Commw. Ct. 2001).

n138. See, e.g., *id.* at 1075 n.10 (noting the distinction federal law draws between gifted and special education).

n139. See *infra* note 148 and accompanying text (discussing the propriety of an H/RO ordering the hiring of an outside expert).

n140. *Chattahoochee County Bd. of Educ.*, EHLR 508:215 (Ga. SEA 1987) (ruling that hearing officer lacks authority to order specific training of personnel); cf. *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist.*, 375 F.3d 603, 613 (7th Cir. 2004) (dicta criticizing IHO for imposing training and other relief that went beyond remedying the individual child's situation). But cf. *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025 (9th Cir. 2006) (upholding compensatory education in the form of staff training); *Peter G. v. Chicago Pub. Sch. Dist. No. 299*, 38 IDELR P 94 (N.D. Ill. 2003) (upholding implementation of hearing officer's training order without directly determining whether it was *ultra vires*, especially in the wake of the hearing officer's rejection of parent's FAPE challenge).

n141. See, e.g., *Decatur County Cmty. Sch. Corp.*, 45 IDELR P 294 (Ind. SEA) (ordering the district to retain a consultant with specified skills to develop an FBA and BIP for the student); *Waukee Cmty. Sch. Dist.*, 48 IDELR P 26 (Iowa SEA 2007) (ordering the district to obtain assistance from an outside consultant with specified expertise); *In re Student with a Disability*, 48 IDELR P 146 (N.M. SEA 2007) (ordering state-approved IEP facilitator of parent's choice for next IEP meeting for "profound" but nonprejudicial procedural violation); *Worcester Pub. Sch.*, 43 IDELR P 213, at 987-89 (Mass. SEA 2005) (finding that the case warranted an outside consultant to determine the expertise required for the student's therapist); *Bd. of Educ. of Portage Pub. Sch.*, 25 IDELR 372, 375, 377 (Mich. SEA 1996) (assigning two consultants); *Evolution Acad. Charter Sch.*, 42 IDELR P 219, at 1151 (Tex. SEA 2004) (ordering the school to hire an independent expert trained in developing IEPs); *Neshaminy Sch. Dist.*, 29 IDELR 493, 496 (Pa. SEA 1998) (requiring a behavior specialist); cf. *W. Springfield Pub. Sch.*, 42 IDELR P 22, at 98 (Mass. SEA 2004) (assigning an on-site case manager). Contrast these cases with the situation in which a district failed to provide sufficient consultant services under the child's IEP. See, e.g., *Troy Sch. Dist. v. Boutsikaris*, 250 F. Supp. 2d 720 (E.D. Mich. 2003) (upholding the review officer's remedy of compensatory education).

n142. *In re Student with a Disability*, 30 IDELR 408, 418 (DDESS 1998).

n143. See, e.g., *G. v. Fort Bragg Dependent Sch.*, 324 F.3d 240 (4th Cir. 2003) (contrasting a federal FAPE standard with North Carolina's standard), amended by 343 F.3d 295 (4th Cir. 2003).

n144. *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist.*, 375 F.3d 603, 610 (7th Cir. 2004). In an earlier bench decision for another case in the same jurisdiction, the district court arguably approved the IHO's consultant order by concluding that "the only point that I think the IHO might have gone too far in specifically ordering [the consultant] without regard to her hourly rate." *Bd. of Educ. of New Trier Twp. High Sch. Dist. v. Ill. State Bd. of Educ.*, 28 IDELR 1175 (N.D. Ill. 1998).

n145. *Id.* at 614.

n146. *Id.*

n147. *Pachl v. Seagren*, 373 F. Supp. 2d 969, 978 (D. Minn. 2005).

n148. *Saucon Valley Sch. Dist. v. Robert O.*, 785 A.2d 1069 (Pa. Commw. Ct. 2001). The court was not clear or convincing with regard to the scope of its rationale. For example, after pointing out that the violation was the district's ejection of the parents from the IEP team, the court reasoned: "Although the [H/RO] may have the implicit authority to remedy non-compliance with the special education regulations, it does not have the authority to impose requirements in addition to those in the regulations." *Id.* at 1078. The conclusion about additional requirements does not seem to square with the court's recognition that the regulations set minimum, not maximum, requirements for IEP team membership. *Id.*

n149. *Mifflin County Sch. Dist. v. Special Educ. Due Process Appeals Bd.*, 800 A.2d 1010, 1015 (Pa. Commw. Ct. 2002); see *Wilkes-Barre Area Sch. Dist.*, 32 IDELR P 17, at 40-41 (Pa. SEA 1999) (demonstrating subsequent application of this limitation).

n150. *Mars Area Sch. Dist. v. Laurie L.*, 827 A.2d 1249, 1257-58 (Pa. Commw. Ct. 2003).

n151. *Bd. of Educ. of Fayette County v. L.M.*, 45 IDELR P 95 (E.D. Ky. 2006).

n152. *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307 (6th Cir. 2007), cert. denied, 532 U.S. 1042 (2007).

n153. *Bd. of Educ. of Fayette County v. L.M.*, 49 IDELR P 97 (E.D. Ky. 2008).

n154. *P. v. Newington Bd. of Educ.*, 546 F.3d 111 (2d Cir 2008); *Matanuska-Susitna Borough Sch. Dist. v. D.Y.*, 54 IDELR P 52 (D. Alaska 2010).

n155. *Dracut Sch. Comm. v. Bureau of Special Educ. Appeals*, 737 F. Supp. 2d 35 (D. Mass. 2010). But cf. *Meza v. Bd. of Educ.*, 56 IDELR P 167 (D.N.M. 2011) (unlawful delegation IEP team authority to consultants).

n156. For an analysis of the issue of IDEA settlements generally, see Mark C. Weber, *Settling Individuals with Disabilities Education Act Cases: Making Up Is Hard to Do*, 43 Loy. L.A. L. Rev. 641 (2010). For the specific related issue of whether H/ROs have the authority to determine whether parties' private settlement agreements are enforceable, which would fit here under declaratory relief, see *Plymouth-Canton Cmty. Sch. v. K.C.*, 40 IDELR P 178, at 736-37 (E.D. Mich. 2003), in which the court upheld the validity of the agreement and expressed no difficulty with the hearing officer having reached this same conclusion. For the more remotely related matter of whether hearing officers have jurisdiction to resume the hearing process and issue resulting relief after the parties settled the matter during the hearing, see *Indep. Sch. Dist. No. 432 v. J.H.*, 8 F. Supp. 2d 1166 (D. Minn. 1998). Finally, as a result of the Supreme Court's decision in *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598 (2001), hearing officers increasingly face the issue of whether they can and should affirm a private settlement agreement. See, e.g., *Rockport Pub. Sch.*, 36 IDELR P 27, at 98-99 (Mass. SEA 2002) (recognizing that a hearing officer has no authority to award attorneys' fees).

n157. See, e.g., *Ysleta Indep. Sch. Dist.*, 32 IDELR P 23, at 60-61 (Tex. SEA 1999) (holding that the petitioner's only remedy lies in enforcing the settlement agreement).

n158. See, e.g., *Agawam Pub. Sch.*, 36 IDELR P 226, at 989-91 (Mass. SEA 2002) (noting that a Third Circuit opinion regarding the enforceability of a settlement agreement is limited to the purview of a "court"). The hearing officer in this case alternatively reasoned that the First Circuit was more likely to follow the dissenting opinion in *D.R.*, which favored the interest in assessing and vindicating individual rights over the interest in a speedy and efficient dispute resolution. The hearing officer cited various supporting First Circuit cases. *Id.* at 991 n.6 (citing *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990); *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411 (1st Cir. 1985); *Dep't of Educ. v. Brookline Sch. Comm.* 772 F.2d 910 (1st Cir. 1983)).

n159. See *infra* notes 163-64 and accompanying text.

n160. 109 F.3d 896 (3d Cir. 1997); cf. *Reid v. Sch. Dist. of Philadelphia*, 41 IDELR P 268, at 1138 (E.D. Pa. 2004) (finding successful § 1983 action to enforce private settlement agreement).



n161. 109 F.3d at 898.

n162. *Id.* at 900.

n163. *Mr. J. v. Bd. of Educ.*, 32 IDELR P 202, at 656 (D. Conn. 2000).

n164. *State ex. rel. St. Joseph Sch. v. Missouri Dep't of Elementary & Secondary Educ.*, 307 S.W.3d 209 (Mo. Ct. App. 2010); *Neosho R-V Sch. Dist. v. McGee*, 979 S.W.2d 537 (Mo. Ct. App. 1998) (ruling that H/RO had jurisdiction to decide whether settlement agreement existed and, if so, whether either party failed to comply with it); cf. *T.G. v. Palm Springs Unified Sch. Dist.*, 304 F. App'x 548 (9th Cir. 2009) (requiring exhaustion); *J.M.C. v. Louisiana Bd. of Elementary & Secondary Educ.*, 584 F. Supp. 2d 894 (M.D. Ala. 2008) (requiring exhaustion when settlement agreement not made during mediation or resolution session). In a decision that tangentially addressed H/RO authority in this area, a federal district court ruled that FAPE, rather than the contempt standard, applies to determine whether either party breached a settlement agreement. *E.D. v. Enter. City Bd. of Educ.*, 273 F. Supp. 2d 1252, 1259 (M.D. Ala. 2003). The connection is that the issue arose, in the court's description, "where a hearing officer dismisses a request for a due process hearing and issues an order adopting a settlement agreement." *Id.*

n165. *H.C. v. Pierrepoint Cent. Sch. Dist.*, 341 F. App'x 687 (2d Cir. 2009); *Sch. Bd. of Lee County v. M.C.*, 35 IDELR P 273, at 1121 (Fla. Dist. Ct. App. 2001); cf. *L.M. v. Lower Merion Sch. Dist.*, 55 IDELR P 275 (E.D. Pa. 2011) (ruling that federal courts lack jurisdiction to enforce settlement agreements reached outside the IDEA's mediation and resolution-session process).

n166. *Letter to Shaw*, 50 IDELR P 207 (OSEP 2007). The agency added that such situations trigger each state's complaint resolution process the extent that the complaint alleges that the failure to provide the services or placement called for in a settlement agreement constitutes a denial of FAPE, *Id.*

n167. Compare *A.R. v. New York City Dep't of Educ.*, 407 F.3d 65, 77 (2d Cir. 2005) (ordering attorneys' fees because the plaintiff-appellees received court-ordered consent decrees and there was a material alteration of the legal relationship such that they were "prevailing parties" under the IDEA), with *Maria C. v. Sch. Dist. of Philadelphia*, 43 IDELR P 243, at 1169-70 (3d Cir. 2005) (refusing to order attorneys' fees because there was no material alteration of the legal relationship of the parties).

n168. See, e.g., *Wyner v. Manhattan Beach Unified Sch. Dist.*, 223 F.3d 1026, 1028-29 (9th Cir. 2000); *Bd. of Educ. of Wappingers Cent. Sch. Dist.*, 47 IDELR P 115 (N.Y. SEA 2006); *Crown Point Cent. Sch. Dist.*, 46 IDELR P 269 (N.Y. SEA 2006); *Newtown Bd. of Educ.*, 41 IDELR P 201, at 827 (Conn. SEA 2004). But cf. *Lake Travis Indep. Sch. Dist. v. M.L.*, 50 IDELR P 105 (W.D. Tex. 2007) (allowing H/RO enforcement based on state law). However, parents need not exhaust the state's complaint resolution process before seeking judicial enforcement of an H/RO order. *Porter v. Bd. of Trustees*, 307 F.3d 1064, 1074 (9th Cir. 2002).

n169. The prevailing view is that the appropriate, if not exclusive, avenue to enforce an H/RO decision is via a § 1983 action in court. See, e.g., *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 279 (3d Cir. 1996); *Dominique L. v. Bd. of Educ. of City of Chicago*, 56 IDELR P 65 (N.D. Ill. 2011); *L.J. v. Audubon Bd. of Educ.*, 47 IDELR P 100 (D.N.J. 2006); cf. *Reid v. Sch. Dist. of Philadelphia*, 41 IDELR P 268, at 1138 (E.D. Pa. 2004) (enforcing a compensatory education remedy under settlement agreement through § 1983 action). However, this avenue may be only open to parents, not districts. See, e.g., *Metro. Sch. Dist. v. Buskirk*, 950 F. Supp. 899, 903 (S.D. Ind. 1997).

n170. For the related issue of whether an H/RO has the jurisdiction to reopen the case upon the request of either party for enforcement purposes, see *Bd. of Educ. of Ellenville Cent. Sch. Dist.*, 28 IDELR 337 (N.Y. SEA 1998).

n171. *Letter to Armstrong*, 28 IDELR 303 (OSEP 1997) (stating that the remedies that H/ROs must have available to them are a matter of state law).

- n172. Bd. of Educ. of Hillsdale Cmty. Sch., 32 IDELR P 162, at 511 (Mich. SEA 1999).
- n173. Cypress-Fairbanks Indep. Sch. Dist., 23 IDELR 1041 (S.D. Tex. 1995), aff'd with reduced amount, 118 F.3d 245 (5th Cir. 1997).
- n174. Ingram Indep. Sch. Dist., 43 IDELR P 124, at 553 (Tex. SEA 2004).
- n175. Indianapolis Pub. Sch., 21 IDELR 423, 426 (Ind. SEA 1994).
- n176. Id.
- n177. Dist. City 1 & Dist. City 2 Pub. Sch., 24 IDELR 1081 (Minn. SEA 1996).
- n178. Id. at 1086.
- n179. Moubry v. Indep. Sch. Dist. No. 696, 32 IDELR P 90, at 283 (D. Minn. 2000); see also K.S. v. Fremont Unified Sch. Dist., 545 F. Supp. 2d 995 (N.D. Cal. 2008) (upholding a hearing officer's sanctions against parent's attorney).
- n180. Moubry, 32 IDELR at 284.
- n181. Las Cruces Pub. Sch., 44 IDELR P 205, at 1073 (N.M. SEA 2005).
- n182. Id. at 1070.
- n183. Id. at 1073. The review officer cited the IDEA regulation for attorneys' fees, which accords courts, not H/ROs, such authority. Id.
- n184. Stancourt v. Worthington City Sch. Dist., 841 N.E.2d 812, 830-31 (Ohio Ct. App. 2005).
- n185. D.A. v. Haworth Bd. of Educ., 53 IDELR P 125 (D.N.J. 2009).
- n186. Watson Chapel Sch. Dist., 35 IDELR P 288, at 1175 (Ark. SEA 2001). The specific scope of the contact was with regard to discipline.
- n187. Williford Sch. Dist., 29 IDELR 298, at 30 (Ark. SEA 1998).

n188. Capistrano Unified Sch. Dist., 32 IDELR P 53, at 151-52 (Cal. SEA 1999). This remedy was arguably during the hearing and, if so, beyond the scope of this Article.

n189. Jim Thorpe Area Sch. Dist., 29 IDELR 320 (Pa. SEA 1998). But cf. Wilkes-Barre Area Sch. Dist., 32 IDELR P 17, at 40-41 (Pa. SEA 1999) (requiring parental consent before the District could provide parent training and counseling).

n190. Others, however, appear to be not only pragmatically, but also legally sound. See, e.g., Marlin Indep. Sch. Dist., 29 IDELR 285, 289 (Tex. SEA 1998) (disclaiming H/RO authority to discipline or terminate school personnel or to guarantee district employment for the parents); Ludington Area Sch., 20 IDELR 211, 212 (Mich. SEA 1993) (renouncing H/RO authority regarding the appointment of one aide over another qualified individual).

n191. Abington Sch. Dist., 41 IDELR P 49, at 233-34 (Pa. SEA 2003).

n192. See, e.g., 20 U.S.C. § 1412(a)(1) (2009); 34 C.F.R. § 300.106 (2009). A possible distinction, which was not clearly discussed in the panel's opinion, is whether the particular student met the applicable standard, which appears to be necessity rather than appropriateness. See, e.g., Philadelphia Sch. Dist., 41 IDELR P 223, at 906 (Pa. SEA 2004).

n193. Fenton Area Pub. Sch., 44 IDELR P 293, at 1492 (Mich. SEA 2005). The IDEA regulations would appear to cover such accommodations under its IEP transition, if not testing provisions. 34 C.F.R. §§300.347(a)(5), 300.347(b) (2009). Nevertheless, the hearing officer's ultimate conclusion was that the child was not eligible, thus making her ruling merely dicta. 44 IDELR P 293, at 1499.

n194. Tewksbury Pub. Sch., 43 IDELR P 148, at 656 (Mass. SEA 2005). This case is problematic because of the general complexity and confusion with regard to transfer of rights. See generally, Deborah Rebore & Perry Zirkel, Transfer of Rights Under the Individuals With Disabilities Education Act: Adulthood With Ability or Disability?, 2000 BYU Educ. & L.J. 33.

n195. Letter to Armstrong, 28 IDELR 303 (OSEP 1997).

n196. 20 U.S.C. § 1415(f)(3)(F).

n197. Bethlehem Area Sch. Dist. v. Zhou, 976 A.2d 1284 (Pa. Commw. Ct. 2009).

n198. Anchorage Sch. Dist. v. D.S., 688 F. Supp. 2d 883 (D. Alaska 2010).

n199. 20 U.S.C. § 1415(i)(3)(B) (2009); 34 C.F.R. § 300.517 (2009). Oddly, the legislation explicitly includes the hearing officer in the accompanying prohibition for timely offers of settlement. 20 U.S.C. § 1415(i)(3)(D)(i)(III). For the accompanying regulation, which repeats this language, see 34 C.F.R. § 300.517(c)(2)(C).

n200. See, e.g., Mr. B. v. E. Granby Bd. of Educ., 201 F. App'x 834 (2d Cir. 2006); Wagner v. Logansport Cmty. Sch. Corp., 990 F. Supp. 1099 (N.D. Ind. 1997); Mathern v. Campbell County Children's Ctr., 674 F. Supp. 816, 818 (D. Wyo. 1987).

n201. Attachment I, Fed. Reg. 12,615 (Mar. 12, 1999).

n202. Although related, the determination of the prevailing party is a separate matter. See supra notes 43-45 and accompanying text. Moreover, an H/RO's issuance of a settlement order, akin to a consent decree, may have significant effect on prevailing status for attorneys' fees. See, e.g., *A.R. ex rel. R.V. v. New York City Dep't of Educ.*, 407 F.3d 65 (2d Cir. 2005).

n203. See, e.g., *Paradise Valley Unified Sch. Dist.*, 23 IDELR 287, 289 (Ariz. SEA 1995); *San Diego Unified Sch. Dist.*, 29 IDELR 998, 1004 (Cal. SEA 1998); *New Haven Bd. of Educ.*, 20 IDELR 42, 46 (Conn. SEA 1993); *Sch. E. Chicago.*, 31 IDELR P 45, at 174 (Ind. SEA 1998); *In re Student with a Disability*, 44 IDELR P 115, at 584 (N.M. SEA 2005); *Yankton Sch. Dist.*, 21 IDELR 772, 774 (S.D. SEA 1994); *Klein Indep. Sch. Dist.*, 29 IDELR 670, 677 (Tex. SEA 1998); *Seattle Sch. Dist.*, 29 IDELR 843, 848 (Wash. SEA 1999) (finding the H/RO did not have authority to award attorneys' fees).

n204. 20 U.S.C. § 1415(i)(3)(B)).

n205. *Linda T. v. Rice Lake Area Sch. Dist.*, 417 F.3d 704, 705, 709 (7th Cir. 2005); *E.S. v. Skidmore Tynan Indep. Sch. Dist.*, 47 IDELR P 40 (S.D. Tex. 2006) (unrequested relief).

n206. *Linda T.*, 417 F.3d at 709.

n207. Compare *A.R. v. New York City Dep't of Educ.*, 407 F.3d 65 (2d Cir. 2005), with *Maria C. v. Sch. Dist. of Philadelphia*, 43 IDELR P 243, at 1170 (3d Cir. 2005); cf. *Sanford v. Sylvania City Sch. Bd.*, 380 F. Supp. 2d 903 (N.D. Ohio 2005).

n208. See supra note 17 and accompanying text.

n209. See, e.g., *W.B. v. Matula*, 67 F.3d 484, 493 (3d Cir. 1995); *Baldwin County Bd. of Educ.*, 39 IDELR P 57, at 1383 (Ala. SEA 2003); *Tucson Unified Sch. Dist.*, 28 IDELR 1037 (Ariz. SEA 1998); *Bridgeport Bd. of Educ.*, 28 IDELR 1043 (Conn. SEA 1998); *Fenton Area Pub. Sch.*, 44 IDELR P 293, at 1499 (Mich. SEA 2005); *Marlin Indep. Sch. Dist.*, 29 IDELR 285 (Tex. SEA 1998); *Seattle Sch Dist.*, 29 IDELR 843 (Wash. SEA 1999) (holding that an H/RO does not have authority to order compensatory damages); cf. *Cinnaminson Twp. Bd. of Educ.*, 26 IDELR 1378 (N.J. SEA 1997) (same with regard to punitive damages).

n210. See, e.g., *Farmington Pub. Sch.*, 36 IDELR P 109, at 473 (Mich. SEA 2001).

n211. See supra notes 69-70 and accompanying text.

n212. See supra note 36; see also *Forer v. Warrior Run Sch. Dist.*, 21 IDELR 450, 452 (Pa. Commw. Ct. 1994).

n213. 20 U.S.C. § 1415(f)(3)(A)).