

Compensatory Education and the IDEA

By Sandhya Gopal

The Individuals with Disabilities Education Act (IDEA) guarantees every child with a disability who needs special education a free appropriate public education (FAPE) that includes special education and related services.¹ In addition, IDEA provides the parents of children with disabilities a series of procedural protections to ensure their participation in educational decisions—including rights of appeal to state administrative agencies and state and federal courts.²

The Act contains detailed provisions for many of these substantive and procedural protections, but it is less specific about relief measures. For example, when a parent files suit for an IDEA violation in federal court, the act directs the court to consider the evidence and “grant such relief as the court determines is appropriate.”³ This imprecise statutory language gives the courts broad discretion to establish suitable remedies for violations. One commonly sought form of relief under IDEA is *compensatory education*, which requires a school board to provide a child with appropriate educational services to compensate for its past failure to provide a FAPE. Requested forms of compensatory education may include physical and occupational therapy, summer educational services, tutoring, and small group instruction.⁴ This article dis-

cusses the statutory and judicial background for compensatory education and the evolution of compensatory education as a remedy in the Fourth Circuit.

Background on IDEA

IDEA establishes certain basic entitlements for children with specified disabilities who are between the ages of three and twenty-one years old; if violated, these entitlements may give rise to an award of compensatory education. In its most recent, 1997, reauthorization, the act entitles such children to a free appropriate public education (including special education and related services) that

1. is provided at public expense under public supervision and direction;
2. meets the standards of the state’s educational agency;
3. includes preschool, elementary, and secondary school education; and
4. implements an individualized education program (IEP).⁵

The statute applies to children who require special education and related services because of mental retardation; autism; speech, hearing, visual, or orthopedic impairments; other health impairments; and certain learning disabilities.⁶ Under IDEA, state agencies are required to conduct a full evaluation, using a variety of assessment tools, to determine a child’s eligibility. Once a child is identified as eligible, the primary vehicle for providing a free appropriate public educa-

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1. See 20 U.S.C. § 1400(d) (2004).

2. *Id.* at § 1415(i) (2004).

3. *Id.* at § 1415(i)(2)(B)(iii) (2004).

4. See, e.g., Oktibbeha County School District, 37 Individuals with Disabilities Education Law Report 57 (hereinafter IDELR) (State Education Agency [hereinafter SEA] Miss. 2002); Thornton Fractional Township High Sch. Dist. #128, 36 IDELR 283 (SEA Ill. 2002); and San Juan Unified Sch. Dist., 36 IDELR 198 (SEA Calif. 2002).

5. 20 U.S.C. §§ 1400, 1401(8), 1412 (a)(1)(A) (2004).

6. *Id.* at § 1401(3)(A).

tion is the IEP: “a written statement for each child with a disability that is developed, reviewed, and revised” throughout the course of the child’s education in discussion between the child, parents, and educators.⁷ The IEP must include statements of the child’s current levels of performance, set measurable annual goals, specify the special education and related services that will be provided, and explain placements outside the regular classroom and how progress toward annual goals will be measured.

The statute also imposes an obligation on school boards to educate children with disabilities in the same classroom as children without disabilities to the “maximum extent appropriate.”⁸ In addition to providing children between three and twenty-one with special education and related services, IDEA assists states in providing early intervention services for infants and toddlers younger than three years of age.⁹

In *Hendrick Hudson Central School District v. Rowley*, the U.S. Supreme Court interpreted IDEA as providing a “basic floor of opportunity” for children with disabilities. The Court held that a free appropriate education is provided when a school district “provid[es] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” The court articulated a two-part test for determining whether a school board had met its obligation: “First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?”¹⁰ The Court also stated that courts should defer to the judgment of educational authorities and should not substitute their own judgment on matters of educational policy. Thus, *Rowley* provides a minimalist and deferential standard in assessing whether a FAPE has been provided.

As mentioned above, IDEA provides a number of procedural safeguards for children with disabilities and their parents. They include the opportunity for parents to examine all their child’s records; to participate in meetings regarding the identification, evaluation, and educational placement of their child; and to receive prior written notice if the school district intends to change (or refuses to change) their child’s placement. Parents are also entitled to seek administrative and judicial review of the school district’s placement decisions.¹¹ While some procedural violations are deemed harmless error and will not entitle a party to relief, most of IDEA’s proce-

dures require strict compliance.¹² The Fourth Circuit has awarded relief for procedural violations of IDEA only when a FAPE was not otherwise provided.¹³

Relief under IDEA

In early cases under IDEA’s predecessor, the Education of the Handicapped Act (EHA), circuit courts of appeals took varied positions on the appropriate forms of relief for failure to provide a FAPE. Some allowed only injunctive relief, some granted compensatory education broadly, and others granted compensatory education only in limited circumstances.¹⁴ Almost all appeals courts held that damages were not available under the act or were available only in limited circumstances.¹⁵

In 1984, in *Smith v. Robinson*, the Supreme Court considered whether attorney fees could be awarded in EHA proceedings.¹⁶ The act’s lack of provision for damages and attorney fees, the Court suggested, reflected Congress’s intent to maximize the financial resources provided for children under the statute. The Court declined, however, to address directly the issue of whether damages were an available remedy under EHA, an omission that led to even greater uncertainty about appropriate forms of relief.¹⁷

12. See *Heather S. v. Wisconsin*, 125 F.3d 1045 (7th Cir. 1997); *Amann v. Stow Sch. Sys.*, 982 F.2d 644 (1st Cir. 1992).

13. See *Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997); *Tice v. Botetourt County School Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990).

14. See *Miener v. Missouri*, 673 F.2d 969 (8th Cir. 1982), cert. denied 459 U.S. 909 (1982); *Tatro v. Texas*, 516 F. Supp. 968 (N.D. Tex. 1981); and *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981).

15. See *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981) and *Doe v. Brookline School Committee*, 722 F.2d 910 (1st Cir. 1983) (both rejecting damages as a general remedy for IDEA violations); *Monahan v. Nebraska*, 491 F. Supp. 1074, 1094 (D. Neb. 1980) (damages awards are appropriate to compensate parents for the cost of a child’s placement); *Hurry v. Jones*, 560 F. Supp. 500 (D. R.I. 1983) (awarding damages when school officials acted in bad faith in failing to recognize disabled student’s rights); *B. v. Board of Education*, 535 F. Supp. 1333, 1339-1340 (E.D. N.Y. 1982) (allowing tuition reimbursement as a form of damages).

16. 468 U.S. 992, 994 (1984).

17. *Id.* at 1020 n. 24. The statute does expressly allow courts to award attorney fees to parents “as part of the costs to parents of a child with a disability who is a prevailing party” [20 U.S.C. § 1415(i)(3)(B)]. In *Smith*, the Supreme Court also held that the EHA was the “exclusive avenue” through which parents could seek to have the EHA protections enforced and precluded suits based on identical facts under 42 U.S.C. § 1983 or § 504 of the Rehabilitation Act (1013). However, after the *Smith* decision, Congress amended EHA to allow parents alleging violations to bring suit under both the Constitution and § 504 of the Rehabilitation Act. See *Sellers v. School Board of the City of Manassas of Virginia*, 141 F.3d 524, 530 (4th Cir. 1998), cert. denied 525 U.S. 871 (1998). However, these amendments have received mixed interpretations about whether suits under § 1983 are allowed for IDEA violations and whether damages are available as a remedy. See *Sellers* at 531; *W.B. v. Matula*, 67 F.3d 484, 495 (3d Cir. 1995); James Schwellenbach, “Mixed Messages: An Analysis of the Conflicting Standards Used by the United States Circuit Courts of Appeals

7. *Id.* at § 1414(d).

8. *Id.* at § 1412 (a)(5)(A).

9. See generally 20 U.S.C. §§ 1431, 1432 (2004) (describing the policy behind and terms of early intervention services).

10. *Rowley*, 458 U.S. 176, 201, 203, 206–07 (1981).

11. See generally 20 U.S.C. § 1415(b) (describing procedural protections), § 1415(f), (i)(2) (2004).

One year later, in *Burlington*, the Supreme Court did offer some guidance on relief under EHA. A first grader in a Massachusetts public school was identified as having “specific learning disabilities” that qualified him for services under EHA.¹⁸ The student’s parents and the school board disagreed over the appropriate placement for the child, and his parents unilaterally enrolled him in a private school. Eventually the school board agreed to pay his expenses at the private school, but not for the year prior to the agreement. His parents sued the school board to recover the costs of private school tuition and transportation for that year.

The Court’s decision addressed two issues: (1) whether the EHA provision allowing the court to award appropriate relief “includes reimbursement to parents for private school tuition and related expenses”; and (2) whether the EHA “stay put” provision—requiring students to remain in their current educational placement during the pendency of administrative proceedings—“bars such reimbursement to parents who reject a proposed IEP and place [their] child in a private school without the consent of local school authorities?”¹⁹

The Court held that reimbursing parents for private school tuition and related expenses is appropriate relief within the meaning of the statute. The Court noted, first, that EHA allows for placement in private schools at public expense when the public schools cannot provide a FAPE. Moreover, because the public school’s proposed IEP was inappropriate and the private placement was appropriate, the parents indisputably could have obtained a “prospective injunction” requiring the school to implement an IEP placing the student at the private school.²⁰ And, as EHA’s lengthy administrative and judicial processes did not make prospective relief sufficient and timely, retrospective relief was a possible remedy. The Court stated:

A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, parents who disagree with a proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, which conscientious parents who have adequate

means and who are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by school officials. If that were the case, the child’s right to a *free* appropriate public education, the parents’ right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete . . . [and] Congress undoubtedly did not intend this result.²¹

While the award of reimbursement was significant, the Court’s refusal to characterize such reimbursement as a form of damages was even more significant. Reimbursement “merely requires the [school district] to belatedly pay expenses that it should have paid all along . . . had it developed a proper IEP.”²²

The *Burlington* Court also held that the parents’ unilateral placement of the student in private school without school officials’ consent did not bar them from reimbursement, because the school’s proposed IEP was inappropriate and the private placement was appropriate. However, the Court noted, if the school’s proposed IEP had been found appropriate, the parents would not have been reimbursed for the private school tuition. Finally, the Court stated that “equitable considerations are relevant” in determining what relief is appropriate under EHA, suggesting that the reimbursement of private school tuition is a remedy rooted in equity, not in the law of damages.²³

The *Burlington* decision is important to the discussion of compensatory education because it provides parents with the possibility of receiving more than just prospective injunctive relief when their child is denied a FAPE. The decision made it clear that courts could exercise their discretion to award retroactive relief and that such retroactive relief would be characterized as an equitable remedy, not a form of damages.

In 1993, in *Florence County (S.C.) School District Four v. Carter*, the Supreme Court revisited the issue of private tuition reimbursement—this time under IDEA.²⁴ *Carter* involved a learning disabled ninth grader who qualified for services under IDEA. While in the process of challenging the school’s proposed IEP, the parents placed their child in a private school. After the local educational officer and the state educational agency found the IEP adequate, the parents filed suit in federal court. They alleged that the school district failed to provide a FAPE for their child and sought reimbursement for tuition and the related costs of the private placement.

21. *Id.* at 370 (emphasis in original).

22. *Id.* at 370–71.

23. *Id.* at 374.

24. 510 U.S. 7 (1993).

When Awarding Compensatory Education for a Violation of the Individuals with Disabilities Act,” *Maine Law Review* 53 (2001): 245 (2001). Some courts have allowed damages as a remedy for IDEA violations sought pursuant to § 504 of the Rehabilitation Act only when the school district demonstrated “bad faith or gross misjudgment” in exercising its responsibilities under IDEA. See *Birmingham v. Omaha Sch. Dist.*, 220 F.3d 850 (8th Cir. 2000); *Walker v. District of Columbia*, 969 F. Supp. 794, 798 (D. D.C. 1997).

18. *School Comm. of the Town of Burlington v. Dept. of Educ. of the Commw. of Mass.*, 471 U.S. 359, 361 (1985).

19. *Id.* at 367.

20. *Id.* at 369, 370.

The district court held that the IEP was not adequate and awarded reimbursement for the parents, even though the private school the child attended was not on the state's approved list and the placement did not fully comply with IDEA requirements. The Fourth Circuit affirmed the award.²⁵

The Supreme Court addressed the issue of whether a court may properly order reimbursement for parents who withdraw their child from a public school that does not provide a FAPE and put the child in an unapproved private school that does not meet all IDEA's requirements. The Court held that reimbursement did not require state approval and complete compliance with IDEA by the private school, because the private placement provided an education that was otherwise appropriate under IDEA. The Court explained that IDEA standards for a FAPE do not apply to parental placements; otherwise, parents would not be able, as allowed in *Burlington*, to unilaterally place their child in a private setting when public schools fail to provide a FAPE.²⁶

The Court also held that reimbursement for private expenses was not barred by the private placement's failure to meet state educational standards. The Court reiterated that the statutory standards for a FAPE, including the requirement that it "meet the standards of the State educational agency," do not apply to parental placements. In addition, the Court noted the irony of requiring a private placement to conform to the state's standards when the private placement resulted from the state's own failure "to meet the child's needs in the first place."²⁷

In *Carter* the Court reiterated that parents cannot be reimbursed for a unilateral private placement if the school district offers the child a FAPE (i.e., an adequate IEP). The Court ruled that courts have discretionary power to grant equitable relief for IDEA violations, including the power to assess the reasonableness and appropriateness of private education costs.²⁸ Thus, the *Carter* decision affirmed many of *Burlington's* underlying principles.

In 1997 Congress amended IDEA and set out the circumstances under which parents can be reimbursed for placing a child with disabilities in a private school. Parents may be reimbursed for the cost of a private placement, even when the placement is made without the consent of school authorities, if a court or hearing officer finds that the school district did not make a FAPE "available to the child in a timely manner prior to [the private] enrollment."²⁹ However, the parents' reimbursement may be reduced or denied if

1. parents fail to inform the school district of their rejection of its IEP and their intention to enroll their child in private school,
2. prior to the child's removal from public school, the school district informs the parents of its intent to evaluate their child and the parents do not make the child available for evaluation, or
3. a judge determines that the parents acted unreasonably.³⁰

School districts are not required to reimburse parents for private placements when the district makes a FAPE available and the parents nonetheless place the child in a private facility.

Compensatory Education as a Remedy

In *Miener v. State of Missouri*, the Eighth Circuit built on the equitable principles in *Burlington* and expanded the scope of appropriate remedies under IDEA.³¹ The student in *Miener* was diagnosed with serious educational, emotional, and behavioral disorders stemming from a brain tumor, but the school district provided no special educational services for her. Her father enrolled the girl in a state-operated youth residential facility. The next year, at her father's request, the school district again evaluated the student and again failed to provide for special educational services. The student stayed at the state residential facility.

The student's father then sought administrative and judicial remedies pursuant to EHA for the school district's failure to provide services. Specifically, he wanted the school district to provide his daughter with "compensatory educational services as a remedy for [the school district's] denial of special education services" in the three years that she was at the residential facility.³² The district court's decision, which predated the Supreme Court's decision in *Burlington*, dismissed the compensatory education claim and found no implication that Congress intended to create a private right of action for damages.³³ The student appealed, and the Eighth Circuit, also deciding before *Burlington*, held that compensatory educational services were a form of damages and that EHA did not create a private cause of action for damages.³⁴ Therefore, the Eighth Circuit affirmed dismissal of the compensatory education claim. The court also stated that providing compensatory education as a form of relief would violate the state's sovereign immunity but found that the school district and its board were local government entities and so were not entitled

25. *Id.* at 11.

26. *Id.* at 13.

27. 20 U.S.C. § 1401(8)(B) (2004); *Carter*, 510 U.S. at 14.

28. *Carter*, 510 U.S. 15, 16.

29. 20 U.S.C. § 1412 (a)(10)(C)(ii) (2004).

30. *Id.*

31. *Miener*, 800 F.2d 749 (8th Cir. 1986).

32. *Id.* at 751, 752.

33. *Miener v. State of Missouri*, 498 F.Supp. 944, 949 (D.C. Mo. 1980).

34. *Miener v. State of Missouri*, 673 F.2d 969, 980 (8th Cir. 1982), *cert. denied*, 459 U.S. 909 (1982).

to Eleventh Amendment immunity. The court remanded the case to the district court to determine whether the student had stated a cause of action under 42 U.S.C. § 1983.³⁵

During this second phase of litigation, the Supreme Court decided *Burlington*. Thus, when the student again appealed to the Eighth Circuit after her claims under Section 1983 and Section 504 of the Rehabilitation Act were dismissed, the issue of compensatory education as a remedy under EHA was ripe for reconsideration.

In its second consideration of appropriate relief in *Miener*, the Eighth Circuit noted that *Burlington* “altered [the] understanding of what ‘damages’ includes in the context of the EHA.”³⁶ The court emphasized that reimbursing parents for the expenses of placing their child in a proper educational placement was not a form of damages but simply forced the school district to pay expenses it would have incurred if it had earlier complied with EHA. In this case, however, the student’s father was seeking not reimbursement for the cost of a private placement for his child but educational services to compensate for the district’s earlier failure to provide them. The school district argued that seeking compensatory educational services rather than reimbursement for past expenses distinguished this case from *Burlington*.

The court acknowledged the distinction but did not interpret *Burlington*’s holding so narrowly. It focused instead on language in *Burlington* stating that reimbursement for expenses incurred in the private placement was “necessary to secure the child’s right to a free appropriate education” under EHA. Moreover, the court did not believe that the child’s right to a free appropriate education should turn on the “parent’s ability to ‘front’” the private costs of the child’s education (as the parents in *Burlington* were able to do).³⁷ Therefore, providing compensatory educational services for a student who is denied a FAPE was consistent with *Burlington*, because the remedy simply required the provision of services to which the student was already entitled under EHA.

While the Eighth Circuit was the first circuit to award compensatory educational services as an appropriate form of relief under EHA or IDEA, other circuits quickly followed suit. In *Jefferson County Board of Education v. Breen*, the Eleventh Circuit awarded parents of a disabled child both compensatory education and reimbursement for the parents’ private placement expenses.³⁸ The student in *Breen* had mul-

iple psychological and physical problems resulting from a head injury in a car accident. Her parents initially placed her in a variety of hospital and private placements, but when she reached age sixteen, the parents sought to enroll her in the public school system. The school board suggested that the student be placed in a self-contained classroom in a district high school and attend regular classes part-time, a placement her mother accepted. While at the high school, however, the student attempted suicide and was hospitalized. At her doctor’s recommendation, she was placed at a private treatment center.

The mother then met with the school board to discuss a placement for her daughter. The board recommended placing the student in another district high school, a placement her mother rejected because she wanted her daughter to receive full-time residential services. The student’s mother then invoked the IDEA administrative processes to determine whether the school district had to pay for her daughter’s placement at the private facility. Both the hearing officer and a state administrative review officer held that a residential placement was necessary for the student to receive an appropriate education. The school board did not dispute this finding but filed suit to determine whether it was appropriate to place the student at a state mental hospital instead of the more expensive private facility.³⁹

The district court found that placement in the state mental hospital was inappropriate and ordered the school board to reimburse the student’s parents for the cost of the private facility. It also awarded the student two years of compensatory education beyond her twenty-first birthday.⁴⁰

The Eleventh Circuit affirmed the district court’s award of both reimbursement for private expenses and compensatory education. Citing *Burlington*, the court stated that since the private residential facility was the appropriate placement for the student, reimbursing the parents for their expenses was an appropriate remedy, because the school district should have borne those expenses all along. In addition, the court found the award of compensatory education “necessary to preserve a handicapped child’s right to a free education.” Awards of compensatory education “serve as a deterrent against states unnecessarily prolonging litigation in order to decrease their potential liability,” because students may still be eligible for compensatory education awards when they are no longer of eligible age under IDEA.⁴¹ *Breen* is one of the earliest cases to authorize compensatory education as a remedy under IDEA and to include education beyond a student’s twenty-first birthday.

35. 42 U.S.C. § 1983 (2004) provides a person with the right to take private civil action against individuals who deprive the person of his or her rights under the Constitution or federal law.

36. *Miener*, 800 F.2d 749, 753 (8th Cir. 1986).

37. *Id.*

38. *Breen*, 853 F.2d 853 (11th Cir. 1988); see also *Pihl v. Massachusetts Dept. of Educ.*, 9 F.3d 184, 188–90 (1st Cir. 1993), *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402, 407 (6th Cir. 1991), *Lester H. v. Gilhool*, 916 F.2d 865, 872–73 (3d Cir. 1990) (all relying on *Burlington* to allow award of compensatory educational services to remedy past deprivations under IDEA).

39. *Breen*, 853 F.2d at 855.

40. *Id.*

41. *Id.* at 857, 858.

In *Pihl v. Massachusetts Department of Education*, the First Circuit also held that compensatory education may be awarded to students older than twenty-one, but its rationale was more detailed than the *Breen* court's. The school district in *Pihl*, citing the Supreme Court decision in *Honig v. Doe*, argued that because the plaintiff-student was beyond the age of twenty-one, he was no longer entitled to IDEA's protections. In *Honig*, the Court ruled that a twenty-four-year-old man could not require a school district to comply with the requirements for discipline of disabled students in EHA, because only disabled students between the ages of three and twenty-one are protected by the act. Similarly, the school district in *Pihl* argued, the plaintiff should not be able to receive compensatory education once he has passed IDEA's age of eligibility.⁴²

The court rejected that argument, ruling that the rationale in *Honig* was inapplicable to claims for compensatory education. Because compensatory education is a remedy for past deprivation of services, the student's current eligibility for services under IDEA was irrelevant. Compensatory education must be an available remedy even when a student is beyond the age of twenty-one "[i]n order to give meaning to a disabled student's right to an education between the ages of three and twenty-one." IDEA's "time-consuming review process" further justified awarding compensatory education; otherwise, school districts could simply stop providing services to students nearing the age of twenty-one without facing any later obligation to them. Therefore, awarding compensatory education for a student older than twenty-one was appropriate if the student proved that the school district had denied him a FAPE.⁴³

Since *Pihl* and *Breen*, all the courts of appeals to address the issue have held that a court may award a student compensatory education beyond the age of twenty-one.⁴⁴

Compensatory Education in the Fourth Circuit

The Fourth Circuit Court of Appeals has only recently expressly adopted compensatory education as a proper form of relief for IDEA violations.⁴⁵ Before this decision, district courts in the Fourth Circuit had utilized compensatory education as a form of relief but relied on *Burlington* and the decisions of other circuit courts in fashioning such awards.⁴⁶

42. *Pihl*, 9 F.3d 184, 189 (1st Cir. 1993); *Honig*, 484 U.S. 318 (1988).

43. *Pihl*, 9 F.3d. at 189-90.

44. See Board of Educ. of Oak Park & River Forest High School Dist. 200 v. Illinois State Bd. of Educ., 79 F.3d 654, 656 (7th Cir. 1996); Parents of Student W. v. Puyallup School District, 31 F.3d 1489, 1496 (9th Cir. 1994); Hall v. Knott County Bd. of Educ., 941 F.2d 402, 407 (6th Cir. 1991).

45. See *G. v. Fort Bragg Dependent Schools*, 343 F.3d 295 (4th Cir. 2003).

46. See, e.g., *Cavanagh v. Grasmick*, 75 F. Supp. 2d 446, 457 (D. Md. 1999); *Wagner v. Short*, 63 F. Supp. 2d 672, 676 (D. Md. 1999); *Leake by Shreve v. Berkeley County Bd. of Educ.*, 965 F. Supp. 838 (N.D. Va. 1997).

In 1985, in a decision consistent with *Burlington*, the Fourth Circuit held, in *Hall v. Vance County Board of Education*, that parents can be reimbursed for the expenses of a unilateral private placement if the school district fails to provide an appropriate public placement. The court explained that such a reimbursement was not a form of damages but merely a way for the school district to fulfill statutory obligations it had neglected in the past.⁴⁷

Five years later, in 1990, in *Burke County Board of Education v. Denton*, the Fourth Circuit refused to award compensatory education because it found the student was receiving a FAPE under the school district's IEP. This case involved an autistic student with serious emotional and mental difficulties who engaged in violent behavior.⁴⁸

At the school board's recommendation and at public expense, the student's parents placed him in a residential home. During the day he also received educational services at public expense at a nearby facility. This combination of educational services and a residential behavior management program was "successful in promoting [the student's] learning and reducing the incidents of aggressive behavior."⁴⁹

After almost three years in the residential facility, the student's parents sought to move him closer to home. They proposed a plan that included enrolling their child at a state facility for daytime educational services and having him at home at night and on weekends. They asked the school board to fund "a one-on-one day program aide, transportation to the [state facility], and one-half the cost of a [home] care coordinator, whose function was to provide and supervise habilitation services in the . . . home." The school board agreed to pay for the program aide and the transportation costs as "educational services costs" but was unwilling to pay for the home-care coordinator, who would be "primarily involved in controlling [the student's] behavior."⁵⁰

After receiving, with some delay, updated evaluations from the child's last educational placement, the public school developed an IEP that would place him in a local daytime school program replicating the previous placement's combination of educational services and behavior management. The student's parents rejected the IEP because it did not include a home-care component, which they argued was a necessary part of a FAPE.

The student's parents then initiated an administrative review, challenging the board's proposed IEP. The hearing officer found the IEP appropriate, with some modifications, and stated that the student did not need educational services twenty-four hours a day, seven days a week to receive

47. *Hall*, 774 F.2d 629, 633 (4th Cir. 1995).

48. *Denton*, 895 F.2d 973, 975 (4th Cir. 1990).

49. *Id.* at 976.

50. *Id.*

educational benefits. The hearing officer also found that the board had not complied with IDEA procedures in developing the student's IEP, but that those procedural errors did not "deprive [the student] of any educational benefits."⁵¹ Thus, the student was not entitled to compensatory education for the delay in implementing the IEP, because he was provided a FAPE.

The student's parents appealed the hearing officer's decision to the state review officer, who reversed the decision. The review officer found that the student needed a "residential program of special education and related supportive services" in order to "educational[ly] benefit to the degree commensurate with his potential" and that the least-restrictive environment for such a program was the family home.⁵² The IEP was therefore inappropriate because it did not include home services. In addition, because of the board's procedural delays in developing the IEP, the state review officer awarded the student one hundred and six days of compensatory education.

The school board then filed suit in federal court. The district court held that the board's IEP was appropriate, relying on evidence that the student made "good progress at school" even when the behavior management program was not consistently implemented at home.⁵³ In addition, the court stated that while the board did violate IDEA procedures, the violations did not deprive the student of any educational benefit.

The Fourth Circuit affirmed the district court, holding that full-time habilitative services were not necessary to provide the student with a FAPE. The court applied the *Rowley* standard, finding that the board's IEP was reasonably calculated to allow the student to benefit educationally. The circuit court relied on the district court's finding that the student had made educational progress at school even when the behavior management program was not regularly implemented at home. Finally, the court held that the student was not entitled to any compensatory education; as the school board's "procedural faults . . . did not cause [the student] to lose any educational opportunity," he was not entitled to any "extra education days."⁵⁴ The court did not address more broadly the question of whether compensatory education was ever an appropriate a remedy for an IDEA violation.

The parents in *Denton* also challenged the IEP on state law grounds, because North Carolina law provides greater protection to children with disabilities than federal law does.⁵⁵ As established in *Rowley*, federal law requires only that the stu-

dent receive some educational benefit from the IEP to satisfy the FAPE standard, while North Carolina requires that special education provide a child "with an equal opportunity to learn if that is reasonably possible, ensuring that the child has an opportunity to reach her full potential commensurate with the opportunity given other children."⁵⁶ Despite this higher standard, the Fourth Circuit rejected the parents' state law claim for full-time habilitative services. The type of services the parents were seeking were not educational services but habilitative services that go beyond the scope of the IEP. Therefore, the court found no state law violation in the school district's IEP.

As noted above, several district courts in the Fourth Circuit addressed claims of compensatory education before 2003—when the appeals court expressly adopted it as a form of relief. For example, in 1997, in *Leake by Shreve v. Berkeley County Board of Education*, a district court in West Virginia addressed the time limits applicable to a plaintiff's claim for compensatory education brought pursuant to an initial request for an administrative hearing under IDEA. Because the Fourth Circuit had not yet addressed this issue, the court relied on the First Circuit's decision in *Murphy v. Timberlane Regional School District*.⁵⁷

In *Murphy*, the First Circuit applied a "borrowing" analysis to determine that local time limits can be applied to a federal cause of action "if it is not inconsistent with federal law or policy to do so." The court also noted that "the interests of the parties and the legislative goals of the particular statute" must be balanced in selecting the applicable state time limitation for the federal cause of action.⁵⁸

Relying on *Murphy*, the *Leake* court looked to the West Virginia statutes to determine what statute of limitation should apply to a party's initial request for an IDEA administrative hearing. It decided to apply the statute of limitations for "personal injuries" because, although compensatory education claims are not personal injury claims, they are "personal actions."⁵⁹ The court also took note that other jurisdictions used the statute of limitation for personal injury actions in determining appropriate limits for filing IDEA claims. By addressing the issue of what statute of limitation to apply to initial hearing requests for compensatory education, the district court in *Leake* implicitly recognized compensatory education as a possible remedy for IDEA violations.

In 1999, in *Wagner v. Short*, a Maryland district court considered the effect of age limits for IDEA eligibility on awards

51. *Id.* at 978.

52. *Id.*

53. *Id.*

54. *Denton*, 895 F.2d. at 982.

55. *Id.* at 983; *Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 203 (1981). See also *Harrell v. Wilson County Schools*, 58 N.C. App. 260, 265 (1982) (stating that North Carolina's special education statute requires more than the *Rowley* standard).

56. *Denton*, 895 F.2d at 983.

57. *Leake*, 965 F. Supp. 838 (N.D. W.Va. 1997); *Murphy*, 22 F.3d 1186 (1st Cir. 1994).

58. *Murphy*, 22 F.3d at 1190. See also *Leake*, 965 F. Supp. at 844.

59. *Leake*, 965 F. Supp. at 845.

for compensatory education. At issue in *Wagner* was the provision of early intervention services for infants and toddlers. Under IDEA, a child is eligible for early intervention services only until the age of three, at which time he or she becomes eligible for the traditional special education and related services designed for students aged three to twenty-one.⁶⁰

The plaintiff in *Wagner* was a child with autism who required special education and related services. After his parents sought early intervention services from the county, a services coordinator was assigned to the family. The family canceled a few home visits with the coordinator; but when she finally did visit the family, she asked the parents to sign release forms to allow complete medical evaluations of their child. The parents never signed the release forms but did request that their child be placed in a particular autism program. During a subsequent home visit, the coordinator and parents drafted an individualized family services plan (IFSP) that included funding for the autism program the parents requested.⁶¹ The parents did not, however, sign the draft IFSP.

A representative from the county's early intervention program met with the child's parents to inform them that the autism program was not an approved early intervention placement, because it typically did not accept children under three years old. The representative advised them to seek permission for early admission to the program from the local school district. To assist in obtaining the admission, the representative asked the parents to sign releases for their child's medical evaluation. The parents again refused to sign the release but two weeks later provided the early intervention program with a private evaluation.

The parents requested a due process hearing to challenge the early intervention services proposed by the county. An administrative law judge determined that the draft IFSP satisfied the *Rowley* standard and was "reasonably calculated to provide [the child] with developmental benefit."⁶² The parents then filed suit in federal court, and the state filed a motion for summary judgment, arguing that even if it had violated its early intervention obligations under IDEA, the child was now beyond the age of three, rendering his claims for early intervention services moot. The district court rejected the state's argument and relied on *Pihl* and other circuit decisions upholding the principle that compensatory education is an available remedy to students who no longer

meet the ages of eligibility under IDEA.⁶³ Although these earlier decisions addressed compensatory education claims for students beyond the age of twenty-one, the Maryland district court found no reason not to apply them to early intervention services. In order to "give meaning to the state's obligations" to provide early intervention services, the court said, a child over the age of three must be able to seek compensatory education if those services were not provided earlier. If compensatory education were not an available remedy, the state could "escape any accountability" for providing early intervention services. Thus, the child's claim for compensatory education was not moot.⁶⁴

In the end, the *Wagner* court did not award compensatory education, because it determined that the proposed IFSP offered the child a FAPE and that the parents had failed to cooperate in establishing the child's developmental needs.

In 1999, in *Cavanagh v. Grasmick*, another district court judge in Maryland acknowledged compensatory education as a form of relief under IDEA.⁶⁵ In this case as well, no compensatory education was actually awarded, because the school district was found to have met its obligations under IDEA.

In March 2003, in *G. v. Fort Bragg Dependent Schools*, the Fourth Circuit explicitly acknowledged compensatory education as an available form of relief for IDEA violations.⁶⁶ The case involved an autistic student who began receiving services under the act at the age of two-and-a-half years. When he was enrolled in school two years later, the school board developed an IEP pursuant to IDEA requirements for the 1994–1995 and subsequent school years. At the end of the 1995–1996 school year, the student's mother proposed a different educational method, the Lovaas method, because she was concerned that her child was not making sufficient progress under his current IEP. However, the school district's proposed IEP for the next school year was similar to the preceding year's and did not incorporate any aspect of the Lovaas method. She rejected the new IEP.

In the summer of 1996, the parents implemented the new educational method in their family home, using private consultants funded by private contributions. The consultants created IEP goals for the student and recommended continued use of the Lovaas method at home. The student did not return to public school for the 1996–1997 school year, and in November of 1996 his parents requested that the school district pay the \$19,000-a-year cost of home-provided Lovaas services. The school district did not respond, and the parents

60. *Wagner*, 63 F. Supp. 2d 672, 675–76 (D. Md. 1999); 20 U.S.C. § 1432 (2004).

61. The individualized family services plan (IFSP) is developed by the state and is similar to the IEP, except that it is a written document that focuses upon early intervention services for infants and toddlers with special needs and their families. See generally 20 U.S.C. § 1436(d) (2004) (describing content requirements for IFSPs).

62. *Wagner*, 63 F. Supp. 2d at 677.

63. *Id.* at 676; *Pihl v. Massachusetts Department of Education*, 9 F.3d 184 (1st Cir. 1993).

64. *Wagner*, 63 F. Supp. 2d at 677.

65. *Cavanagh*, 75 F. Supp. 2d 446 (D. Md. 1999).

66. *Fort Bragg*, 343 F.3d 295 (4th Cir. 2003).

continued to pay for the private educational services. The student made significant educational progress.

In April of 1997 the school district proposed another IEP for the student—this time incorporating some of the instructional methods his mother had proposed.⁶⁷ The mother again rejected the IEP, because it failed to provide for a consultant certified in the Lovaas method. In May of 1997, the student's parents requested an administrative review, alleging that their child had been denied a FAPE.

The hearing officer concluded that the student had been denied a FAPE for the school years between 1994 and 1997 and ordered the school board to pay the costs of home-provided Lovaas services from the summer of 1996 through the summer of 1999. The school district appealed, and the appeal board significantly narrowed the scope of the parents' recovery. The board found that because the April 1997 IEP offered the student a FAPE, the parents were not entitled to recover private educational expenses beyond that date. In addition, the board noted, the parents were only entitled to reimbursement for private home instruction provided from November 1996, when they first asserted claims that their child was being denied a FAPE. The board also found the award of prospective relief through the summer of 1999 improper, because it would violate IDEA's requirement that IEPs be reevaluated annually.

The parents filed suit in district court contesting the reduction of their reimbursement for home-education costs.⁶⁸ The district court agreed with the appeal board that they were entitled to reimbursement only for the period from November 1996 to April 1997. The parents appealed to the Fourth Circuit to address whether the district court had properly rejected the prospective relief—this time claiming that the prospective relief was a form of compensatory education to which they were entitled because of the past denial of a FAPE to their child.

In addressing the compensatory education claim, the Fourth Circuit stated that the district court, in dismissing the claim, had incorrectly relied on the parents' failure to object to the IEP during the 1994–1995 and 1995–1996 school years.⁶⁹ The district court found that the student's mother had not asserted a deprivation of a FAPE until November 1996, when she requested reimbursement for the private services. School boards, that court stated, need sufficient notice of problems in order to remedy them; unless parents object to the child's placement, the school board does not have such notice.

The Fourth Circuit did not, however, find the parents' early failure to object to the IEP determinative and refused to reject the compensatory education claim as a matter of law. In addition, the appeals court expressly upheld compensatory education as a remedy for IDEA violations in some circumstances: "Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an education deficit created by an educational agency's failure over a given period of time to provide a [free appropriate public education] to a student."⁷⁰ By referencing decisions in other circuits, the court also suggested that it would allow awards of compensatory education even when the student is beyond the age of twenty-one, although it did not expressly adopt this principle.⁷¹ Even though the court remanded the case to determine whether an award of compensatory education was warranted, *Fort Bragg* makes it clear that in the Fourth Circuit compensatory education may be awarded for IDEA violations and that this remedy will not be limited to the time period following the parents' first objection to the proposed IEP.

Conclusion

Compensatory education is a remedy widely recognized in federal courts to grant relief to disabled students denied a FAPE under IDEA. It is a remedy rooted in equitable principles and is not considered a form of damages. In addition, because of its equitable nature, compensatory education may be awarded in some circumstances in which other IDEA violations may not be remediable—for example, when children are beyond the age of eligibility for IDEA services or when parents fail to object to their child's proposed IEP.

While district courts in the Fourth Circuit have utilized compensatory education as a remedy for many years, the recent decision in *G. v. Fort Bragg Dependent Schools* confirms that the Fourth Circuit Court of Appeals now recognizes compensatory education as a proper form of relief for disabled students denied a free appropriate public education. The decision makes it likely that the Fourth Circuit will fashion compensatory education awards by using the same principles as other circuit courts of appeals and focusing on the statutory goal of protecting children with disabilities. ■

67. *Id.* at 301.

68. *Id.* at 302.

69. *Id.* at 308.

70. *Id.* at 309. The Third Circuit has also held that a parent's failure to object to an IEP does not preclude awarding compensatory education as a form of relief if the IEP is inappropriate. See *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999).

71. *Fort Bragg*, 343 F.3d at 308–09.