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Land of the Free (Appropriate Public Education), Home of the Deprived: How Vocational Services Can Remedy Education Deprivations for Former Students with Disabilities

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Land of the Free (Appropriate Public Education), Home of the Deprived: How Vocational Services Can Remedy Education Deprivations for Former Students with Disabilities

Maria N. Liberopoulos*

Abstract

This Note explores the Individuals with Disabilities Education Act's requirement that all children between the ages of three and twenty-one are provided a free and appropriate public education. This Note focuses on the relief available for students who are either older than twenty-one or who received a high school diploma, but who did not receive a free and appropriate public education. After delving into the remedy of compensatory education, this Note proposes the Office of Special Education and Rehabilitative Services of the Department of Education promulgate a new regulation that includes vocational training and services as a specific remedy under the umbrella of compensatory education for this class of former students.

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† 2019 Louise A. Halper Award Winner for Best Student Note

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I. Introduction

Specific learning disabilities, speech or language impairments, autism, developmental delays, visual impairments, emotional disturbances:¹ these disabilities, among others,

1. See THOMAS D. SYNDER ET AL., DIGEST OF EDUCATION STATISTICS 112 (Nat'l Ctr. of Educ. Statics, 53d ed. 2017) (listing autism, specific learning disabilities, hearing impairments, developmental delays, deaf-blindness, and speech or language impairments as recognized disabilities and displaying statistical data regarding the number of children with these disabilities reached by the IDEA).

adversely impact a child's academic performance and long-term postsecondary education outcomes.²

Recognizing the disparity in outcomes for children with and without disabilities, President Gerald Ford signed the Education for All Handicapped Children Act (EHA) in 1975.³ This landmark act created educational opportunities for millions of children and "laid the foundation of the country's commitment to ensuring that children with disabilities have opportunities to develop their talents, share their gifts, and contribute to their communities."⁴ The EHA evolved and is now codified in the Individuals with Disabilities Education Act (IDEA).⁵ Congress asserts, "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."⁶

Today, nearly seven million students, ages three to twenty-one, or fourteen percent of public-school-aged children, in the United States receive special education and related services under the IDEA.⁷ The IDEA entitles every child to a free and appropriate public education (FAPE) that meets the child's unique needs and prepares the child for "further education, employment, and independent living."⁸ The IDEA has extensive procedural

2. See CHRISTOPHER SANFORD ET AL., THE POST-HIGH SCHOOL OUTCOMES OF YOUNG ADULTS WITH DISABILITIES UP TO 6 YEARS AFTER HIGH SCHOOL: KEY FINDINGS FROM THE NAT'L LONGITUDINAL TRANSITION STUDY-2 (NLTS2) 13 (2011) (describing the difficulty individuals with disabilities have in transitioning to post-secondary education).

3. See *About IDEA*, INDIVIDUALS WITH DISABILITIES EDUC. ACT, <https://sites.ed.gov/idea/about-idea/#IDEA-History> (last updated Dec. 6, 2018) (last visited Nov. 19, 2019) (outlining the history of the IDEA from inception, when 1.8 million students were excluded from public schools, to today) [<https://perma.cc/T36W-HD59>].

4. See *id.* (providing general background information about the IDEA including its scope, purpose, and history).

5. See 20 U.S.C. §§ 1400–1450 (2018) (providing the full text of the IDEA, reauthorized in 2004 through Public Law-114-95 in 2015).

6. *Id.* § 1400(c)(1).

7. See SYNDER ET AL., *supra* note 1 (providing statistical information on the number of children reached by the IDEA).

8. See 20 U.S.C. § 1400(d)(1)(A) (2018) (outlining the purpose of the IDEA as being designed to meet the unique needs of children with disabilities).

safeguards with which all states and local education agencies⁹ must comply to ensure children with disabilities receive a FAPE.¹⁰

This Note explores what happens to children who do not receive a FAPE.¹¹ This Note considers what happens to children like L.W., who have IQs of seventy-eight, but who are beyond the age of twenty-one and outside the purview of the IDEA;¹² children like Endrew F., who are autistic, but who have received what may be considered de minimis educational benefit¹³ through public schooling;¹⁴ and children like Kenneth Brett, who have severe emotional disturbances and a high school diploma, but who may have been granted the diploma improperly.¹⁵ This Note proposes a regulation to improve access to vocational services as a form of compensatory relief for students like L.W., Endrew F., and Kenneth Brett, who may have been denied a free and appropriate public education.¹⁶

9. See *id.* § 1401(19) (defining local education agency as “a public board of education or other public authority . . . to perform a service function, for public elementary schools or secondary schools”).

10. See *id.* § 1415 (outlining the procedural safeguards and requirements of the IDEA).

11. See *infra* Part II.B (discussing the procedural and practical consequences of a student receiving a substandard education and therefore failing to receive a FAPE).

12. See *L.W. v. Jersey City Bd. of Educ.*, No. 17-6451, 2018 WL 3536095, at *3 (D.N.J. July 23, 2018) (“L.W. ha[d] an IQ of 78 and was ‘low average’ or ‘borderline’ in all areas of functioning, and ‘would need special education support with accommodations and modifications in order to pass the demands of a general education curriculum.’”) (quoting Plaintiff’s Appendix at 167–71).

13. See *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 183 (1982) (setting the standard for education for disabled children as only providing “some educational benefit”).

14. See *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 996 (2017) (“As Endrew’s parents saw it, his academic and functional progress had essentially stalled: Endrew’s IEPs largely carried over the same basic goals and objectives from one year to the next, indicating that he was failing to make meaningful progress toward his aims.”).

15. See *Brett v. Gosheim Cmty. Sch. Corp.*, 161 F. Supp. 2d 930, 932 (N.D. Ind. 2001) (“Brett alleges that Defendants denied him a free appropriate public education, wrongfully conferred a high school diploma on him, and denied him the services and privileges to which other similarly situated students are entitled.”).

16. See *infra* Part IV.C (advocating for increased access to vocational services as a superior remedy to monetary relief in cases where children have been denied a FAPE).

II. The Essential IDEA

The purpose of the IDEA is to ensure special education and related services are available to all children with disabilities and to ensure the education and services meet each child's individual needs, preparing each child for life beyond schooling.¹⁷ States receiving IDEA funding must provide all disabled students between the ages of three and twenty-one with a Free and Appropriate Public Education (FAPE).¹⁸ Under the IDEA, a free appropriate public education is defined as:

[S]pecial education and related services that (a) have been provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the State educational agency; (c) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) are provided in conformity with the individualized education program required under section 614(d) [20 U.S.C. § 1414(d)].¹⁹

A district is only required to provide a child with “some educational benefit” to meet its statutory duty to provide a FAPE.²⁰ A child need not achieve optimal results or maximize his potential through the best education possible.²¹ The “some educational benefit” standard is known as the “*Rowley* Standard” and determines whether a child has received a FAPE.²² The *Rowley*

17. See 20 U.S.C. § 1400(d)(1)(A) (2018) (outlining the primary purposes of the IDEA).

18. See *id.* § 1412(a)(1)(A) (outlining requirements states must meet in order to be eligible for federal educational funding or assistance for each fiscal year).

19. *Id.* § 1401(9)(a)–(d); see also *id.* § 1414(d) (defining what is required of an IEP under the IDEA).

20. See *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200 (1982) (setting this standard, the Court emphasized that “some educational benefit” is both an adequate and realistic standard of education for disabled children due to varying funds, programs, capabilities, etc.).

21. See *id.* (stating that the lower courts erred in interpreting the IDEA as requiring New York to maximize the potential of each handicapped child); see also *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d. 1202, 1231 (9th Cir. 2008) (acknowledging that the “[c]ourt need only find that C.B. advanced slightly to find that the program was reasonably calculated to enable him to receive a benefit”).

22. See *Rowley*, 458 U.S. at 203 (“[W]e hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”).

Standard is regularly critiqued for allowing states and school districts to provide students with a “de minimis” level of education.²³ A growing number of circuits now require a “meaningful” educational benefit; however, this has not replaced the *Rowley* Standard.²⁴ Notwithstanding criticisms, the *Rowley* Standard stands the test of time and governs IDEA jurisprudence.²⁵ In 2017, the Supreme Court clarified that the *Rowley* Standard does not establish a singular test for determining if a child has received “some educational benefit.”²⁶ The Court emphasized that a child’s level of instruction shall be reasonably calculated in order to allow the child to advance through the curriculum in light of the child’s specific and unique circumstances.²⁷

A. Creating the Education Plan

The level of appropriate instruction is determined by each child’s Individualized Education Plan (IEP).²⁸ The IEP is “the

23. See Ronald D. Wenkart, *The Rowley Standard: A Circuit by Circuit Review of How Rowley Has Been Interpreted*, 257 EDUC. L. REP. 1, 3 (2009) (clarifying that the *Rowley* Standard has not been overturned but has been interpreted broadly within the federal circuits in order to require a greater educational benefit).

24. See *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 24 (1st Cir. 2008) (emphasizing that IEPs, while custom-tailored to the child, do not need to provide an ideal level of educational benefit); see also *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 995 (2017) (acknowledging that Congress was “sketchy” in establishing substantive education requirements under the IDEA but emphasizing that the Court has made it clear that the Act “guarantees a substantively adequate program of education to all eligible children”).

25. See *Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. at 994 (explaining how the Court first addressed the FAPE requirement in *Rowley*).

26. See *id.* at 997 (acknowledging that the IDEA requires educating a wide range of students who can obtain various benefits and that, as a result, it is not feasible to have one test for measuring the adequacy of education).

27. See *id.* at 999 (emphasizing that the reasonable calculation differs for each child and is based upon fact-specific judgments of school officials, parents, etc.).

28. See *Honig v. Doe*, 484 U.S. 305, 311 (1988) (“[T]he IEP sets out the child’s present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives.”).

centerpiece of the statute's education delivery system for disabled children."²⁹ The IDEA defines an IEP as "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 614(d) [20 U.S.C. § 1414(d)]."³⁰ Evaluation of, need for, and development of a child's IEP is governed by 20 U.S.C. § 1414.³¹ Each IEP shall be as unique as the individual student.³²

Though the federal government has a clear national interest in the development of these IEPs, local school authorities are primarily responsible for IEP development for children with disabilities.³³ A child's parents,³⁴ a state education agency, other state agency, or a local education agency (LEA)³⁵ can submit a

29. *See id.* (analyzing procedures for participation by parents and school officials, among others, in developing an IEP; this case serves as a landmark EHA decision); *see also* *Fry v. Napoleon Comm. Sch.*, 137 S. Ct. 743, 749 (2017) (providing that an IEP is the "primary-vehicle" for providing each child with a FAPE); *see also* *Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. at 999 (explaining that the IEP is intended to enable the child to make progress in pursuing academic and functional objectives).

30. 20 U.S.C. § 1401(14) (2018); *see also id.* § 1414(d) (defining the requirements of an IEP under the IDEA).

31. *See id.* § 1414 (requiring a full and individualized evaluation before providing special education or related services).

32. *See id.* § 1414(d)(1)(A)(i)(II)(aa) (stating that the IEP must be designed to meet the needs of the child that result from the child's disability).

33. *See* *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (describing education as "perhaps the most important function of state and local governments"); *see also* *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 830 (8th Cir. 1999) (describing the IDEA as a form of "cooperative federalism"); *see also* *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 51 (describing states as having the "primar[y] responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility" (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 183 (1982))).

34. *See* 20 U.S.C. § 1401(23) (2018)

The term "parent" means: (a) a natural, adoptive, or foster parent of a child . . . ; (b) a guardian . . . ; (c) an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or (d) except as used in [20 U.S.C. §§ 1415(b)(2) and 1439(a)(5)], and individual assigned under either of those sections to be a surrogate parent.

35. *See id.* § 1401(19)(A) ("[A] public board of education or other public authority legally constituted within a state for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, count, township, school district, or other political

request for an evaluation to determine if a child has a disability requiring an IEP.³⁶ Parental involvement and collaboration in the creation of the child's IEP and overall education plan is one of the core tenants of the IDEA.³⁷ Though "[s]chool districts may not ignore disabled student's needs, nor may they await parental demands before providing special instruction,"³⁸ the IDEA seeks to ensure full parental participation.³⁹

While each state's specific procedures may vary, the IEP is generally prepared by a combination of qualified representatives of the LEA, the child's teacher, the child's parents, psychologists, learning-disability consultants, and school social workers.⁴⁰ Sometimes the child is also a member of the team.⁴¹ The meeting

subdivision of a State . . .").

36. *See id.* § 1414(a)(1)(B) (enumerating those eligible to request an examination to determine if a child has a disability requiring a IEP).

37. *See id.* § 1414(d) (outlining procedures for parental consent for the initial evaluation, re-evaluation, etc.); *see also* *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012) ("The core of the IDEA is the collaborative process that it establishes between parents and schools." (citing *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005))).

38. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005) (showing the IDEA's procedural safeguards to protect parents and students).

39. *See Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368 (1985) ("Congress incorporated an elaborate set of what it labeled procedural safeguards to insure the full participation of the parents.") (internal quotations omitted); *see also* § 1414(d) (providing that parental participation and consent are required for protection and success of the child and the child's rights); *M.H. v. N.Y.C. Dep't of Educ.*, 685 F.3d 217, 255 (2d Cir. 2012) (finding that parental participation in IEP development weighed in favor of finding that a FAPE was not denied); 20 U.S.C. § 1400(c)(5)(B) (2018) (emphasizing the role of parental and family engagement and responsibility and how important it is for parents to have meaningful opportunities to participate in the education of their child).

40. *See Honig v. Doe*, 484 U.S. 305, 311 (1988) (describing the individuals typically involved in the creation of an IEP); *see also Shore Reg'l High Sch. Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 198–99 (3d Cir. 2004) (outlining New Jersey's requirement under N.J.S.A. § 18A:46–5.1 that a Child Study Team be composed of a "psychologist, a learning disability teacher-consultant, and a school social worker [to] conduct[] an evaluation of the student").

41. *See L.W. v. Jersey City Bd. of Educ.*, No. 17-6451, 2018 WL 3536095, at *2 (D.N.J. July 23, 2018) (outlining the parties who may be present at an IEP preparation meeting and other child study team meetings) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 182 (1982)); *see also Honig*, 484 U.S. at 311 (stating that, when appropriate, the disabled child may assist in the preparation of the IEP).

of what some states call a “Child Study Team” is not intended to be a one-time meeting.⁴² The IEP is intended to be reviewed and revised throughout the child’s public education.⁴³ “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, explain placements outside the regular classroom, and how progress toward annual goals will be measured.”⁴⁴ The IEP should enable the student to “achieve passing marks and advance from grade to grade.”⁴⁵

The student’s IEP must be updated to include statements of “transition services” before his or her sixteenth birthday.⁴⁶ The child’s IEP must be updated annually thereafter.⁴⁷ Transition services are outcome-oriented and are intended to help bridge the gap between school programs and opportunities for postsecondary adult life.⁴⁸ The exact activities included in these services depend

42. See *Shore Reg’l High Sch.*, 381 F.3d at 198–99 (exhibiting the multiple meetings held by the Child Study Team throughout a child’s education).

43. See 20 U.S.C. § 1414(d)(1)(A)(i)(III) (2018) (stating that periodic reports on the child’s progress toward meeting annual or quarterly goals should be made).

44. Sandhya Gopal, *Compensatory Education and the IDEA*, UNIV. OF N.C. SCH. OF GOV’T SCH. L. BULL., Spring 2004, at 15; see also *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012) (requiring the IEP to include an assessment of the child’s current educational performance, measurable educational goals, and the nature of special services to be provided); see also The Understood Team, *Knowing What’s in an IEP*, LEARNING & ATTENTION ISSUES (2018), <https://www.understood.org/en/school-learning/special-services/ieps/knowning-whats-in-an-iep> (last visited Nov. 21, 2019) (providing resources and information or parents with children with IEPs) [<https://perma.cc/PTE5-TW8A>].

45. See *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203–04 (1982) (showing how the IDEA prefers a child to be fully integrated into the regular classroom if possible).

46. See § 1414(d)(1)(A)(VIII)(aa)–(cc) (clarifying that transition discussions should start at age fourteen and shall be included in the child’s IEP by the time the child turns sixteen).

47. See *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 947 (9th Cir. 2010) (outlining the changes in the 1990 amendment to the IDEA to include transition services as an IEP requirement and redefining transition services); see also *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 25 (1st Cir. 2008) (emphasizing that a separate transition plan is not needed and that the statement of transition services may be included “under the applicable components of the child’s IEP”).

48. See 20 U.S.C. § 1401(34) (2018)

[Transition Services are] designed to be within a results-oriented process that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s

on the student's needs, preferences, interests, and capabilities.⁴⁹ Activities may include further instruction, immersion into community activities, vocational evaluations, and related vocational training.⁵⁰ The *Rowley* Standard of "some educational benefit" applies to transition services.⁵¹ Parental consent and acquiescence in transition planning is just as important as in the initial IEP meetings and discussions.⁵²

B. When the Child's Education Plan Does Not Receive Passing Marks

There are extensive procedural safeguards in place under the IDEA to ensure all eligible students between the ages of three and twenty-one receive a FAPE.⁵³ Following exhaustion of administrative procedures,⁵⁴ a parent, or a child of the age of majority,⁵⁵ may file an appeal directly with the relevant federal

movement from school to postschool activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.

49. See *Mercer*, 592 F.3d at 949 (stating the District Court was correct in characterizing transition services as an outcome-oriented process that should take the into account the students preferences and interests); see also § 1414(d)(1)(A)(VIII)(aa)–(cc) (“[A]ppropriate measurable postsecondary goals [are] based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills . . .”).

50. See *Mercer*, 592 F.3d at 949 (including vocational education and services, integrated employment, and vocational evaluations as acceptable forms of transition services).

51. See *Lessard*, 518 F.3d at 25 (“[T]ransition services must be provided to disabled children who need them, in accordance with the *Rowley* standard.” (citing *Browell v. Lemahieu*, 127 F. Supp. 2d 1117, 1126 (D. Haw. 2000))); see also *Coleman v. Pottstown Sch. Dist.*, 983 F. Supp. 2d 543, 566 (E.D. Pa. 2013) (“The floor set by the IDEA for adequate transition services appears to be low, focusing on whether opportunities are created for a disabled student to pursue independent living and a career, not just a promise of a particular result.”).

52. See 20 U.S.C. § 1415(a) (2018) (highlighting the IDEA's procedural safeguards and the importance of the role of parents in providing FAPEs).

53. See *id.* (stating that procedural safeguards are necessary to the adequate provision of a FAPE).

54. See *id.* § 1415(f)(3)(C) (requiring the initial due process hearing be within two years of the date the parent knew or should have known about the actions forming the basis of the complaint that their child was denied a FAPE).

55. See *id.* § 1415(m) (allowing parental rights to be transferred to a child of

district court or a state court of competent jurisdiction.⁵⁶ The court then receives the records from the administrative proceedings and may hear additional evidence from the parties.⁵⁷ District courts give deference to the findings of the administrative hearing officer using a *modified de novo review*.⁵⁸ In making a decision, the court shall not insert its own opinions on proper or sound education policy.⁵⁹

A court will only provide relief for a FAPE denial under the IDEA if the “gravamen” of an action is a FAPE.⁶⁰ If the claim falls under the Americans with Disabilities Act or the Rehabilitation Act, relief may not be appropriate under the IDEA.⁶¹ “The IDEA, of course, protects only ‘children’ (well, really, adolescents too) and

the age of majority under relevant state laws).

56. *See id.* § 1415(i)(2)(A)–(C) (allowing parties to appeal the decision of a hearing officer to the relevant district court within ninety days of the date of the decision of the hearing officer and requiring the district court to make its decision based on a preponderance of evidence).

57. *See id.* (outlining the procedure for filing an appeal in federal district court after the exhaustion of administrative procedures).

58. *See T.Y. v. N.Y.C. Dep’t of Educ.*, 584 F.3d 412, 418 (2d Cir. 2009) (“[T]he court must show deference to administrative board findings, the court is also empowered to conduct an independent review of the record as a whole and even hear additional evidence.”).

59. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 208 (1982) (encouraging the court to be “mindful that the judiciary generally lack[s] the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy”).

60. *See Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 752 (2017) (“We next conclude that in determining whether a suit indeed seeks relief for such a denial, a court should look to the substance, or gravamen, of the plaintiff’s complaint.”).

61. *See id.* at 755

First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school? Second, could an adult at the school have pressed essentially the same grievance? When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject. But when the answer is no, then the complaint probably does concern a FAPE.

See Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1) (2012) (stating the purpose of the Americans with Disabilities Act is to provide enforceable standards to address discrimination against individuals with disabilities); *see also* Rehabilitation Act, 29 U.S.C. § 701(b)(1) (2012) (stating the purpose of the Rehabilitation Act is to empower individuals with disabilities to maximize employment and economic self-sufficiency).

concerns *only* their schooling.”⁶² “[T]he statute’s goal is to provide each child with meaningful access to education by offering individualized instruction and related services appropriate to her ‘unique needs.’”⁶³ “Title II of the ADA and § 504 of the Rehabilitation Act cover people with disabilities of all ages, and do so both inside and outside schools.”⁶⁴

Once it is determined that the gravamen of the IDEA action is a FAPE, the court must determine if there was, in fact, a FAPE denial.⁶⁵ A denial of FAPE is found when it is demonstrated that the IEP, and therefore the child’s education, was deficient.⁶⁶ The IEP can be deficient due to inadequate goals, a lack of evaluations, inadequate educational programming, a lack of necessary therapy, inadequate transition services, etc.⁶⁷ Bad faith by the school district is not required to find a FAPE denial.⁶⁸

If a court rules a child was denied a FAPE, the court has broad discretion in awarding relief given the specific facts of the case, among other “equitable considerations.”⁶⁹ The appropriateness

62. Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 755 (2017) (emphasis added).

63. *Id.* (citing 20 U.S.C. § 1401(29) (2018)).

64. *See id.* (acknowledging that the same conduct may violate all three statutes, but that does not entitle one to relief under the IDEA for a denial of a FAPE).

65. *See id.* at 759 (explaining that if the lower court determines the gravamen of the complaint to be a FAPE then further exhaustion would be necessary).

66. *See Davis ex rel. C.R. v. Wappingers Cent. Sch. Dis.*, 772 F. Supp. 2d 500, 509 (S.D.N.Y. 2010) (stating that a learning-disabled student’s individualized education plan prepared by a New York school district, was substantively deficient and denied him free appropriate public education in violation of IDEA); *see also* 20 U.S.C. § 1414(d)(1)(B) (2018) (outlining what must be included in a child’s IEP in order to receive a FAPE).

67. *See Turner v. District of Columbia*, 952 F. Supp. 2d 31, 36 (D.D.C. 2013) (concluding that the plaintiff had been denied a FAPE because he did not receive adequate special education as required by his IEP); *see also M.H. v. N.Y.C. Dep’t of Educ.*, 685 F.3d 217, 229 (2d Cir. 2012) (finding the methodologies and IEP placement that have been successful for some students with autism are not successful for all students with autism); *see also Jennifer D. ex rel. Travis D. v. N.Y.C. Dep’t of Educ.*, 550 F. Supp. 2d 420, 427 (S.D.N.Y. 2008) (finding the student’s IEP to be inappropriate because it did not educate him in the least restrictive environment possible).

68. *See E. Penn. Sch. Dist. v. Scott B.*, No. 97-1989, 1999 U.S. Dist. LEXIS 2683, at *26 (E.D. Pa. 1999) (declining to provide a level of culpable conduct on the part of the school district that is required to award compensatory education).

69. *See Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359,

and reasonableness of the actions taken by both the parents and the school district over the course of the child's schooling are part of a court's calculus.⁷⁰ These actions may include the reoccurrence of IEP meetings, appropriate placement, and overall parental involvement.⁷¹

Common remedies for a FAPE denial include tuition and related reimbursements, compensatory education, prospective IEP revisions, prospective services, and further evaluation.⁷² Awards of additional education to recompense for past educational deprivations are often granted while the child is still eligible for IDEA services.⁷³ In contrast, relief in the form of compensatory education does not depend on a child's eligibility for current or future IDEA services.⁷⁴ Most states disallow the award of money damages generally, but allow reimbursement for reasonable attorney's fees.⁷⁵ Rarely, injunctive relief is permitted.⁷⁶ Injunctions are considered extraordinary measures in IDEA cases and "should not be routinely granted."⁷⁷

367 (1985) ("[W]hether to order reimbursement, and at what amount, is a question determined by balancing the equities."); *see also* 20 U.S.C. § 1415(i)(2)(B)(ii)–(iii) (2018) (discussing the court's discretion and equitable considerations).

70. *See Sch. Comm. of Burlington*, 471 U.S. at 360 (conferring broad discretion on the courts in fashioning relief and granting reimbursement).

71. *See id.* at 366 (acknowledging the lower court's opinion that lack of parental consultation with the town may be taken into account in a district court's computation of an award of equitable reimbursement).

72. *See* Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE Under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 215, 223–24 (Spring 2013) (discussing the remedies parents generally seek under the IDEA for a denial of FAPE and analyzing the varying degree to which each remedy is used).

73. *See Honig v. Doe*, 484 U.S. 305, 305 (1988) (requiring future education services under the IDEA is generally not permitted when the child is no longer eligible for IDEA services).

74. *See Pihl v. Mass. Dep't of Educ.*, 9 F.3d 184, 189 (1st Cir. 1993) (asserting that "common sense" commands eligibility for remedial compensatory education even when the student is no longer eligible for renewed IEPs or other IDEA services).

75. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 291 (2006) (awarding reasonable attorney fees for prevailing parents is permitted under 20 U.S.C. § 1415(i)(3)(B) (2018)).

76. *See R.M. ex rel. J.M. v. Vernon Bd. of Educ.*, 208 F. Supp. 2d 216, 223 (D. Conn. 2002) (allowing for the possibility of injunctive relief).

77. *See id.* (denying a preliminary injunction when the plaintiffs could not show irreparable harm and damage to the child).

C. *The Current Scope of Compensatory Education Under the IDEA*

While acknowledging the multiple forms of relief for a FAPE denial under the IDEA, this Note focuses on the remedy of compensatory education.⁷⁸

Compensatory education is a broad legal remedy based on equity and appropriate relief.⁷⁹ It aims to “place disabled students in the same position they would have occupied but for the school district’s violation of the IDEA.”⁸⁰ The remedy may include reimbursement for a parent’s expenditures on private or alternative education and/or the provision of future education services.⁸¹ Because compensatory education covers a broad range of remedies, the outer limits for what is considered compensatory education are not clear.⁸² Neither the Supreme Court nor Congress have clarified the exact meaning of compensatory education and what it entails.⁸³ The remedy is constantly evolving.⁸⁴

Compensatory education accrues at the time the school district “knew or should have known” the child’s educational program or IEP was failing or deficient.⁸⁵ The amount of time reasonably required for the school district to correct the education

78. See *infra* Part V (advocating a superior form of compensatory education).

79. Compare *Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369 (1985) (giving courts broad authority to fashion appropriate relief for students or parents when a FAPE is denied), with *Pihl*, 9 F.3d at 188 (explaining how Burlington’s appropriate relief has been expanded to include grants of compensatory education in most federal circuits).

80. See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005) (explaining the purpose of compensatory education).

81. See *Pihl v. Mass. Dep’t of Educ.*, 9 F.3d 184, 187–88 (1st Cir. 1993) (acknowledging that a court’s authority under the IDEA includes the power to order).

82. See Zirkel, *supra* note 72, at 223–24 (noting the many forms of compensatory education).

83. See Zirkel, *supra* note 72, at 224 (explaining that for research purposes, compensatory education often includes a number of remedies combined, potentially skewing some remedy-related statistics).

84. See Zirkel, *supra* note 72, at 224 (“[Compensatory education] is still evolving and has yet to receive Supreme Court or congressional clarification.”).

85. See *M.C. ex rel. J.C. v. Cent. Reg’l Sch. Dist.*, 81 F.3d 389, 395 (3d Cir. 1996) (permitting compensatory education from the time the district knew or should have known, in good faith, that the child’s education plan was deficient).

plan is excluded from the compensatory education calculation.⁸⁶ The timeline is thought to balance the “interests of the child, who is entitled to a free appropriate education under IDEA, with those of the school district, to which special education and compensatory education is quite costly.”⁸⁷

Even when gross violations of the IDEA occur, there is no obligation or guarantee a child will receive a compensatory education.⁸⁸ Compensatory education is a form of equitable relief and not a contractual remedy.⁸⁹ Each determination of compensatory education is necessarily a fact-specific analysis.⁹⁰

One constant in this fact-specific analysis is that only students between the ages of three and twenty-one are covered by the IDEA and thus eligible for IDEA services.⁹¹ Once a child is twenty-one years old or graduates from high school, he is no longer eligible for services under the IDEA.⁹² However, courts can look to the congressional intent behind the statute and allow relief for past deprivations beyond graduation or the age of twenty-one.⁹³ Courts have acknowledged a high school diploma does not always equate to an education.⁹⁴ Furthermore, courts have allowed relief beyond

86. See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005) (acknowledging that complex problems take time to resolve).

87. See *M.C.*, 81 F.3d at 397 (harmonizing the positions and interests of both the child and the school district).

88. See *Wenger v. Canastota Cent. Sch. Dist.*, 979 F. Supp. 147, 151 (N.D.N.Y. 1997) (“[C]ompensatory education is not a contractual remedy, but an equitable remedy, part of the court’s resources in crafting appropriate relief.”).

89. See *id.* (distinguishing compensatory education from other forms of relief).

90. See *id.* (“When considering an equitable remedy, courts must apply a fact-specific analysis, and may decide that a generalized award of compensatory education is not appropriate under the circumstances.”).

91. See 20 U.S.C. § 1415(a)(1)(A) (2018) (defining states as eligible for funding under IDEA only if they provide a FAPE to all children with disabilities between the ages of three and twenty-one).

92. See *Doe v. E. Lyme Bd. of Educ.*, 262 F. Supp. 3d 11, 35 (D. Conn. 2017) (“[A] child remains eligible under the IDEA until he or she reaches the age of twenty-one or graduates from high school, whichever occurs first.”); see also 20 U.S.C. § 1412 (2018) (describing who is eligible for assistance under the IDEA).

93. See *Lester H. v. Gilhool*, 916 F.2d 865, 871 (3d Cir. 1990) (“We cannot believe that either Congress or the Supreme Court meant to allow a school district to withhold a disabled minor’s educational rights at age 18 or 19 without remedy.”).

94. See *Brett v. Goshem Cmty. Sch. Corp.*, 161 F. Supp. 2d 930, 943 (N.D.

the age of twenty-one to ensure a district is not abdicated of its responsibility to provide a FAPE once the child is eighteen or nineteen years old.⁹⁵ The review process for a FAPE denial claim is lengthy.⁹⁶ Claims filed while a child is eighteen or nineteen are usually not resolved prior to the child's twenty-second birthday.⁹⁷

III. Present Day Compensatory Education Beyond Twenty-One and High School

In some states, the age twenty-one threshold extends through the child's twenty-first year instead of ending on the child's twenty-first birthday.⁹⁸ Either way, compensatory education may take on a variety of forms in the name of equity.⁹⁹ For example, in 2010, the Third Circuit upheld a district court's award of annual IEPs beyond a student's twenty-first birthday for the duration of her compensatory education.¹⁰⁰ The court weighed the interests of the school district with the needs of the student and her family and upheld this equitable award with the intent of furthering the purposes of the IDEA.¹⁰¹ Without the equitable remedy of

Ind. 2001) ("[I]t is possible for students to advance from grade to grade and graduate without receiving a free appropriate public education.").

95. See *Brooks v. District of Columbia*, 841 F. Supp. 2d 253, 259 (D.C. Cir. 2012) (asserting that without the ability to grant compensatory education beyond the age of twenty-one, "school districts simply could stop providing required services to older teenagers, relying on the Act's time-consuming review process to protect them from further obligations").

96. See *Pihl v. Mass. Dep't of Educ.* 9 F.3d 184, 189–90 (1st Cir. 1993) (stating that school districts may not rely on the time-consuming review process to protect themselves from further obligations owed to older teenagers in need of services).

97. See *id.* ("We cannot believe that Congress . . . would allow a school district to suspend the educational rights of such disabled eighteen or nineteen-year-olds without a remedy.").

98. See *St. Johnsbury Acad. v. D.H.*, 240 F.3d 163, 169 (2d Cir. 2001) (allowing for IDEA services through the twenty-first year until the child turns twenty-two in line with New York law).

99. See *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 367 (1985) (emphasizing the broad authority of court's to craft equitable remedies).

100. See *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712, 718 (3d Cir. 2010) (exhibiting how powerful of a remedy compensatory education can be as a form of equitable relief).

101. See *id.* (upholding the lower court's award after evaluating the specific

compensatory education, courts are powerless in situations like this and in aiding “intended beneficiaries who were over twenty-one but who had not sought out an alternative education program.”¹⁰²

In rare situations, compensatory education can be awarded in the form of injunctive relief.¹⁰³ Injunctive relief can be granted when there is a showing of irreparable harm as a result of the FAPE denial.¹⁰⁴ Irreparable harm often stems from a continuous or long-running denial of FAPE due to discontinued or delayed access to special education programs.¹⁰⁵ The longer a child is without these programs, the further a child is subject to developmental delays, damages, and overall harm.¹⁰⁶

Compensatory education is often awarded to a child’s parents to reimburse them for tuition and related expenses and services, like tutoring and various forms of therapy.¹⁰⁷ Critics of financial compensatory education stipulate they “are confident that Congress did not intend the child’s entitlement to a *free* education to turn upon her parent’s ability to ‘front’ its costs.”¹⁰⁸ Critics also contend that relief should not be dependent on a parent’s ability to pursue legal action.¹⁰⁹ For example, in *Doe v. East Lyme Board of*

type of relief that would compensate Ferren and her family following the school district’s violations of her IDEA rights).

102. See *Brooks v. District of Columbia*, 841 F. Supp. 2d 253, 259 (D.C. Cir. 2012) (emphasizing that students should still be protected by the IDEA’s procedural safeguards in their last few years of public schooling).

103. See *id.* at 260 (acknowledging the possibility of injunctive relief if a plaintiff can show he or she is sufficiently entitled to it).

104. See *Cosgrove v. Bd. of Educ.*, 175 F. Supp. 2d 375, 390 (N.D.N.Y. 2001) (allowing for injunctions can include keeping the child in the current educational setting, removing the child from the current educational setting, etc.).

105. See *id.* at 392 (acknowledging that in the absence of an injunction, students’ development may continue to be damaged).

106. See *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 121 (1st Cir. 2003) (finding irreparable harm when a child’s personal and educational development is pushed back even a few months due to a lack of services).

107. See *Miener v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986) (requiring districts to “belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP”).

108. *Id.*

109. See Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL’Y & L. 107, 129 (2011) (“Children from families without financial resources are the most likely to require compensatory education, because their

Education,¹¹⁰ John Doe’s parents enrolled him in private school, paid for speech therapy, a private reading instructor, physical therapy, transportation services, technology assistance, and more.¹¹¹ The District Court for the District of Connecticut awarded Doe’s parents \$36,555.94, plus interest, and placed over \$200,000 in an escrow account for the child in order to compensate for the FAPE denial.¹¹² John Doe’s compensatory education extends beyond his IDEA eligibility and through his college career.¹¹³

While John Doe is extremely fortunate, a “free” education is not intended to have entry barriers and hinge on a family’s socioeconomic status.¹¹⁴ Accordingly, courts have allowed for months, and sometimes years, of compensatory education beyond the age of twenty-one for children whose parents did not or were not able to seek out alternative services at the time of deprivation.¹¹⁵

While many grants of compensatory education are financial, “money-only” awards do not necessarily make a child whole.¹¹⁶ To “simply fund [a student’s] compensatory education would undoubtedly further hamper [the student’s] education and deprive her of her educational rights under the IDEA.”¹¹⁷ Notwithstanding,

parents cannot afford private school tuition, tutoring, and other services . . .”).

110. See *Doe v. E. Lyme Bd. of Educ.*, 262 F. Supp. 3d 11, 37 (D. Conn. 2017) (ordering the school district to reimburse the mother of child who was denied a FAPE as well as provide funding for compensatory education).

111. See *id.* at 18, 23–28 (enumerating the additional services Doe’s parents had to pay for as a result of his FAPE denial).

112. See *id.* at 32, 37 (ordering reimbursement of Doe’s parents and quantifying the total cost Doe’s parents were required to pay out of pocket).

113. See *id.* at 35 (finding a gross violation of the IDEA, the court noted that “[a]fter John graduates from high school he will no longer be eligible for services under the IDEA, however, compensatory education may extend beyond eligibility where there has been a gross violation.”).

114. See Hyman et al., *supra* note 109, at 115 (exploring the unequal distribution of IDEA resources and opportunities in according with a child or his family’s socioeconomic, racial, and other demographics).

115. See *Lester H. v. Gilhool*, 916 F.2d 865, 872 (3d Cir. 1990) (allowing for thirty months of compensatory education beyond twenty-one for prior deprivation of services, not for future services).

116. See *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712, 720 (3d Cir. 2010) (referring to Burlington’s assertion that “money-only” awards are empty victories).

117. *Id.* at 719.

financial awards for tuition reimbursement and related reimbursements make up nearly half of all remedies for a FAPE denial.¹¹⁸

Frequency of Types of Remedies¹¹⁹

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

Despite the apparent ease in awarding financial remedies, compensatory education can be awarded in a number of ways.¹²⁰ For example, when a child's IEP required technology assistance and it was not provided, technology assistance may be provided as compensatory education.¹²¹ Courts have awarded laptop computers with a processing program that allows a child to enhance and improve her capabilities as compensatory education.¹²² Another non-financial remedy courts have used is tutoring services.¹²³ Tutoring services are awarded when the

118. See Zirkel, *supra* note 72, at 228 (introducing the proportion and frequency of certain remedial remedies).

119. Zirkel, *supra* note 72, at 228.

120. See *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985) (indicating the wide latitude courts have in awarding remedies).

121. See *E. Penn. Sch. Dist. v. Scott B.*, No. 97-1989, 1999 U.S. Dist. LEXIS 2683, at *20 (E.D. Pa. Feb. 23, 1999) (illustrating one way compensatory education may be awarded).

122. See *id.* at 20 (explaining what qualifies as "assistive technology" under the relevant Pennsylvania code).

123. See *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 117 (D.D.C. 2008) (discussing tutoring as a form of compensatory education and the kind of evidence necessary to award various tutoring services).

child's instruction lacked due to an inappropriate or non-existent IEP, a lack of special education teachers, or some other scenario resulting in failing grades or a FAPE denial.¹²⁴ While there is no obligation to provide day-for-day compensation for time missed, a child reading at an elementary level in high school may be awarded significant tutoring hours to improve his or her reading skills.¹²⁵ Hours for services like speech therapy and other intended benefits of a child's IEP have also been awarded.¹²⁶ Students can also be provided with interpreters or other auxiliary services when necessary.¹²⁷

Compensatory education is provided for a general FAPE denial, which can include inadequate transition services as a part of the child's IEP.¹²⁸ The outcomes-focused addition of transition services to a child's IEP is just as important to the child's successful FAPE as the initial education-focused IEPs.¹²⁹

124. See *id.* at 116–117 (explaining that awards of tutoring services should not be speculative and should properly serve the student's needs, placing the student in the position he would have been in but for the denial of FAPE).

125. See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 520 (D.C. Cir. 2005) (emphasizing the Ninth Circuit's proposition that compensatory education involves case-specific flexibility).

126. See *Kelsey v. District of Columbia*, 85 F. Supp. 3d 327, 337 (D.D.C. 2015) (awarding speech therapy hours based on significant evidence showing the number of hours required to put the student in the same position she would be in had she not been denied a FAPE).

127. See LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES AND THE LAW* § 2:23 (4th ed. 2018) (stating that an interpreter and related services may be necessary for a child if without these services, he or she does not meet the *Rowley* standard of some educational benefit).

128. See *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 24 (1st Cir. 2008) (finding that a lack of a stand-alone transition plan is not grounds for a FAPE denial, but that an inadequate transition plan can contribute to a FAPE denial); see also 20 U.S.C. § 1414(d)(1)(A)(vii)(I)–(II) (requiring IEPs to have a statement of transition services under the applicable portion of the IEP).

129. See *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 946 (9th Cir. 2010) (focusing on transition services is a big step towards outcome-oriented results when compared to the pre-1997 case law surrounding the IDEA).

IV. What Do Students Beyond Twenty-One and Beyond High School Really Need?

Reimbursing parents for expenses, providing additional hours of services, and injunctions: these are some of the forms of compensatory education this Note has already discussed.¹³⁰ However, when the student is beyond the age of twenty-one and has been denied a FAPE, or when the student has graduated high school despite deficiencies in his education, these are not the best-suited remedies.¹³¹

This Note proposes the Department of Education promulgate a new regulation explicitly offering and providing access to vocational services as a remedy under compensatory education for students over the age of twenty-one and beyond high school who have been denied a FAPE.¹³²

A. The Contortion of Compensatory Education

Compensatory education is widely known as a malleable remedy.¹³³ A court's award often depends on the court's assumptions of equitable relief.¹³⁴ The standards for equitable relief vary among circuits.¹³⁵ Some courts even propose that compensatory education must go beyond what the student *would*

130. See discussion *supra* Part III (discussing the current landscape of compensatory education).

131. See *infra* Part V (discussing a new compensatory services regulation).

132. See *infra* Part V (outlining a new regulation to accommodate students who have been denied a FAPE but who are no longer eligible for IDEA services).

133. See *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 374 (1985) (highlighting the discretionary role of the court in awarding relief).

134. See *id.* at 367 (stating that a court may balance the equities and different equitable factors it deems appropriate).

135. Compare *I.S. ex rel. Sepiol v. Sch. Town of Munster*, No. 2:11-CV-160 JD, 2014 WL 4449898, at *16 (N.D. Ind. Sept. 10, 2014) (acknowledging that the Seventh Circuit is without a specific approach to fashioning compensatory education and proposing that a “qualitative approach is more consistent with the IDEA’s directive to individually tailor a student’s education to meet their unique needs, and with the equitable standards that govern compensatory awards”), with *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. Cir. 2005) (stating that the powers of fact-finding and remedy-crafting under the IDEA entail broad discretion and implicate equitable considerations).

have received in his initial educational placement.¹³⁶ Here, the student must be *compensated* for the school district's wrongs and the award should go above and beyond for the child "so to make up for the deficient education the student had to previously endure."¹³⁷

Accordingly, financial reimbursement should not be the preferred method of compensatory education for a FAPE denial for this class of former students beyond age twenty-one.¹³⁸ Parents and guardians benefit from financial reimbursement because they are paid back for their previous expenditures and efforts to improve the student's opportunities.¹³⁹ However, the IDEA is intended to be student-centric, not parent-centric.¹⁴⁰ It is intended to protect students and ensure students receive a free and appropriate education that uniquely prepares the student for future education and employment endeavors.¹⁴¹ Compensatory education for students older than twenty-one can, and should, be framed outside of the realm of financial reimbursement as a true form of *compensation*.¹⁴²

B. Outcomes-Focused Compensatory Education

Since the 2004 reauthorization of the IDEA, there has been an increased emphasis on student outcomes beyond completion of

136. See *Sch. Town of Munster*, 2014 WL 4449898, at *16 (advocating for greater compensation but acknowledging that "the generally accepted standard is that the compensation should 'provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place'").

137. *Id.* at *17.

138. See John T. *ex rel.* Paul T. v. Pa. Dep't of Educ., No. CIV. A. 98-5781, 2000 WL 558582, at *8 (E.D. Pa. May 8, 2000) ("Compensation in money can never atone for deprivation of a meaningful education in an appropriate manner at the appropriate time.").

139. See 20 U.S.C. § 1415(e)(2)–(3) (2018) (granting parents permission to seek tuition reimbursement for the cost of private education, but limiting this reimbursement's availability to parents who placed the child in private school without the consent of the local school).

140. See *id.* § 1415(d) (outlining the student-centric purposes of the IDEA).

141. See *id.* (enumerating the purposes of the IDEA); see also § 1401(29) (defining "special education" to meet the unique needs of a child with a disability).

142. See *infra* Part IV.B (discussing how compensatory education can be framed around outcomes to be a true form of compensation).

secondary school.¹⁴³ As discussed, outcomes-focused transition services include preparation for further education, community engagement, employment, and independent living from the student's fourteenth birthday and beyond.¹⁴⁴ In addition to these transition services, school districts are required to "provide the student with a summary of the student's academic achievement and functional performance" in a Summary of Performance document that assists the student in meeting his postsecondary goals.¹⁴⁵ An emphasis on outcomes and forward-thinking evaluations is incredibly beneficial for students.¹⁴⁶

A former student who has been denied a FAPE should not be denied these beneficial, outcomes-focused transition services. Transition services specifically tied to vocational services and postsecondary performance should be provided as a part of compensatory education for a FAPE denial.¹⁴⁷ For students who have graduated high school or who are over the age of twenty-one, "systematic transitional planning in which the student directly participates is critical" for the student entering an independent, post-schooling life.¹⁴⁸ Outcomes-focused transition plans should

143. See ROBERT K. CRABTREE ET AL., SPECIAL EDUCATION LAW IN MASSACHUSETTS § 3.3.3 (5th ed. 2014) (emphasizing the 2004 amendment's focus on "enabl[ing] a student to exit the public schools with sufficient academic and functional skills to participate in further education, employment, and/or independent living . . .").

144. See 20 U.S.C. § 1414 (2018) (outlining transition services requirements); see also *supra* discussion accompanying notes 46–52 (explaining how transition services are created as a part of the student's IEP).

145. See BETSY DEVOS, OFF. OF SPECIAL EDUC. & REHABILITATIVE SERVICES, U.S. DEP'T OF EDUC., A TRANSITION GUIDE TO POSTSECONDARY EDUCATION AND EMPLOYMENT FOR STUDENTS AND YOUTH WITH DISABILITIES 2–3 (revised May 2017) (reporting on transition services in order to help students with disabilities and their families facilitate educational outcomes).

146. See CRABTREE ET AL., *supra* note 143 (emphasizing the importance reviewing evaluations throughout a child's education).

147. See *infra* Part V (proposing a new regulation for vocational services).

148. See CRABTREE ET AL., *supra* note 143, § 3.3.4 (relaying that the amendment to the IDEA in 2004 featured an increased emphasis on a student's need for functional skills in addition to academic skills).

include vocational services and should mimic the student's dreams, desires, and abilities¹⁴⁹ beyond the statutory age limit.¹⁵⁰

*C. Shaping Vocational Services Based on
Engagement Opportunities*

In 2011, the Institute of Education Sciences published a study outlining the community engagement opportunities for young adults with disabilities following graduation.¹⁵¹ These community engagement outcomes can be used to help shape vocational services for students beyond the statutory age limit who were denied a FAPE.¹⁵² By understanding employment opportunities, postsecondary opportunities, and other engagement activities, in conjunction with a child's abilities and desires, courts can shape services for students accordingly.¹⁵³

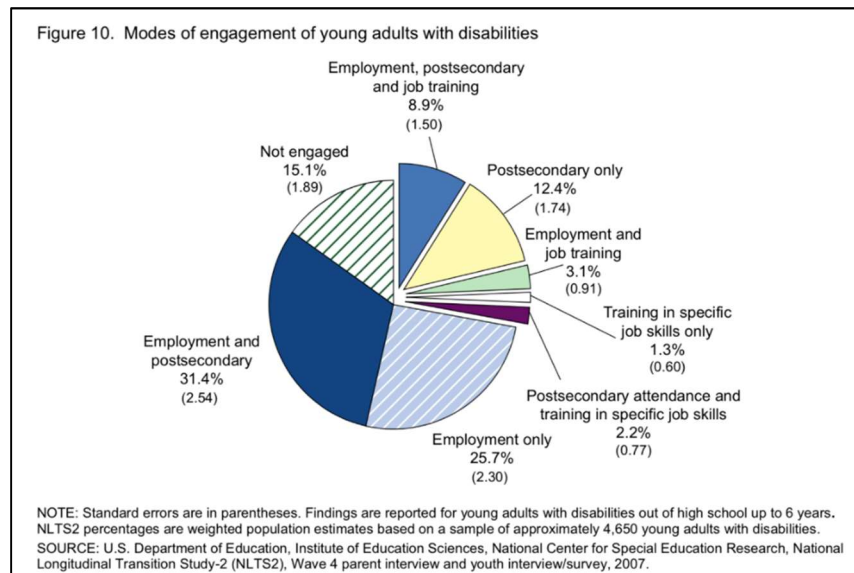
149. See DEVOS, *supra* note 145, at 1 (emphasizing that successful transition planning includes the wants of the student so that his life, including work and play, can be as rich as possible).

150. See *Lester H. v. Gilhool*, 916 F.2d 865, 872 (3d Cir. 1990) ("We cannot believe that either Congress or the Supreme Court meant to allow a school district to withhold a disabled minor's educational rights at age 18 or 19 without remedy.").

151. See SANFORD ET AL., *supra* note 2, at 31–38 (presenting research on disabled adolescents entering adulthood and the proportion of adolescents living independently, earning a postsecondary degree, obtaining full-time employment, and engaging in their communities in a number of ways).

152. See SANFORD ET AL., *supra* note 2, at 51 (finding that community involvement is a central part of a young adult with disabilities' quality of life).

153. Compare SANFORD ET AL., *supra* note 2, at 33 (showing the differences in engagement between people with varying disabilities), with *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 198–200 (1982) (finding that educational outcomes were also dependent on the child's capabilities).

Modes of Engagement of Young Adults with Disabilities¹⁵⁴

Only one-third of working-age Americans with disabilities are a part of the workforce.¹⁵⁵ Former students with intellectual disabilities represent the population of disabled adults with the lowest rate of workforce participation.¹⁵⁶ Adults with disabilities need greater employment opportunities and greater chances to

154. SANFORD ET AL., *supra* note 2, at 33.

155. See Table A-6. *Employment Status of the Civilian Population by Sex, Age, and Disability Status, Not Seasonally Adjusted*, U.S. DEP'T OF LAB. (Oct. 4, 2019), <https://www.bls.gov/news.release/empstat.t06.htm> (last visited Nov. 21, 2019).

A person with a disability has at least one of the following conditions: [i]s deaf or has serious difficulty hearing; is blind or has serious difficulty seeing even when wearing glasses; has serious difficulty concentrating, remembering, or making decisions because of a physical, mental, or emotional condition; has serious difficulty walking or climbing stairs; has difficulty dressing or bathing; or has difficulty doing errands alone such as visiting a doctor's office or shopping because of a physical, mental, or emotional condition.

[<https://perma.cc/C5FS-UASQ>].

156. See SANFORD ET AL., *supra* note 2, at 23 (exhibiting the discrepancy in employment opportunities for young adults based on disability and showing greater employment rates for those with certain learning disabilities or emotional disturbances when compared to adults who are deaf, blind, or who have physical disabilities).

enter the workforce.¹⁵⁷ Bridging the gap between education and entrance into the workforce for former students with disabilities is an important policy goal.¹⁵⁸ It is especially important for former students who have been denied a FAPE and who are seeking relief.

*D. Learning from Past Success and Collaborating for
Future Success*

In developing employment-centered vocational services, lawmakers and courts can look to processes across circuits to fashion such relief.¹⁵⁹ For example, in New Jersey, the transition services prepared during a student's fourteenth year must include a description of whether or not there is a need to consult with another agency, like the Division of Vocational Services or Department of Labor, in order to best serve the future interests of the child.¹⁶⁰ Though in New Jersey this is a strategy for creating goal-oriented transition services, linkage and shared responsibilities between agencies and organizations can help former students achieve postsecondary goals using similar training and vocational assessments.¹⁶¹

Interagency collaboration between state vocational and education agencies is already a DOE goal.¹⁶² Each agency is able to set its own programming and metrics for the services it provides

157. See SANFORD ET AL., *supra* note 2, at 23 ("People with disabilities have a much higher unemployment rate than the overall population; and low adult employment is associated with poor quality of life for individuals with disabilities and their families.") (citations omitted).

158. See *infra* Part V (highlighting recent comments by DOE officials related to postsecondary goals).

159. See *infra* notes 160–186 and accompanying text (describing the programs states, agencies, and communities use to provide vocational services that lawmakers may use in to fashion their own services in the future).

160. See *D.C. v. Mount Olive Bd. of Educ.*, No. 12-5592 (KSH), 2014 U.S. Dist. LEXIS 45788, at *94 (D.N.J. Mar. 31, 2014) (providing that IEPs must be annually updated to include transition services, but failing to specify the amount of transition services required).

161. See *id.* (referring to the goals of interagency activity when conducted as a part of transition services).

162. See DEVOS, *supra* note 145, at 17 (mandating an agreement between the state vocational and education agencies).

to students with disabilities.¹⁶³ While the DOE requires coordination between state agencies, state agencies are not required to coordinate with the corresponding federal agencies, making it difficult to reconcile standards of coordination and services delivered state-to-state.¹⁶⁴ States that offer robust vocational programming such as career placement, employer training sessions, and travel opportunities give adults with disabilities more competitive outcomes than states that do not provide such robust vocational programming.¹⁶⁵ Further collaboration between state agencies and federal agencies can enhance vocational services and create a more beneficial standard of relief to former students who have been denied a FAPE.¹⁶⁶

A number of states have developed adult education and rehabilitation programs.¹⁶⁷ Some of these programs, like the Texas Workforce Commission's Vocational Rehabilitation program, are funded by state and federal dollars.¹⁶⁸ This program, in particular, provides services to both children and adults with disabilities and provides vocational evaluations, counseling, guidance, and preparation in obtaining employment.¹⁶⁹ The program also works

163. See DEVOS, *supra* note 145, at 19 (“Each community agency sets its criteria for services and, once the youth meets the eligibility criteria, service delivery begins.”).

164. See DEVOS, *supra* note 145, at 16–20 (including only state agencies in its mandate for interagency cooperation).

165. See Scott Miller, *Best Vocational Training Programs for Disabled in 2019*, VOCATIONAL TRAINING HQ, www.vocationaltraininghq.com/best-vocational-training-programs-disabled/ (last updated Mar. 20, 2019) (last visited Nov. 20, 2019) (providing resources and access to various state-run/community-run vocational programs for adults with disabilities) [<https://perma.cc/Y3TT-4ZWX>].

166. See DEVOS, *supra* note 145, at 17 (emphasizing that collaboration and cooperation between parties is important); see also discussion *infra* notes 167–186 (providing examples of state and community programs involving interagency collaboration).

167. See discussion *infra* Part IV.D (listing examples of different state adult education and rehabilitation programs).

168. See *Vocational Rehabilitation—Program Overview*, TEX. WORKFORCE COMM’N, <https://twc.texas.gov/programs/vocational-rehabilitation-program-overview> (last updated Jan. 16, 2019) (last visited Nov. 20, 2019) (providing a basic overview of the program and links for further information on funding, current services, and additional reports) [<https://perma.cc/HS9J-QG3H>].

169. See *id.* (serving “adults with disabilities when the disability is a substantial barrier to employment and VR services are required to achieve

closely with local businesses to recruit and place program members with disabilities into the workforce.¹⁷⁰

In California, the California Mentoring Partnership is funded primarily by donations and other fundraising efforts, in addition to modest funding from the California Department of Developmental Services.¹⁷¹ One of the primary programs offered by the California Mentor Partnership is a First Step Independent Living Day Program, which helps disabled adults learn vocational and independent living skills.¹⁷² The Soar 365 program in Virginia, which gives adults with disabilities the opportunity to engage in “physical, intellectual and social activities,” receives some money from Medicaid for adult programs, but operates on a \$500 deficit per enrollee.¹⁷³ The deficit is funded through donations and fundraising efforts.¹⁷⁴

New York State has an application process for adults and students over the age of fourteen who seek Adult Career and Continuing Education Services or Vocational Rehabilitation Services.¹⁷⁵ The Vocational Rehabilitation Services are provided by

employment”).

170. *See id.* (noting that the program will assist with compliance with federal hiring and accommodation requirements in addition to recruitment and hiring).

171. *See Day Programs*, CAL. MENTOR, <https://www.ca-mentor.com/adult-services/day-programs/> (last visited Nov. 20, 2019) (outlining options for day programs offered for disabled adults under the California Mentor and its associate programs) [<https://perma.cc/A6EB-S4B2>].

172. *See Our Partners*, CAL. MENTOR, <https://www.ca-mentor.com/who-we-are/our-partners/> (last visited Nov. 20, 2019) (describing an end-goal of the programs provided as helping “individuals build diverse skills so they may achieve personal success”) [<https://perma.cc/ZN4K-S43X>].

173. *See Adult Programs*, SOAR 365, <https://www.soar365.org/adult-program> (last visited Nov. 20, 2019) (providing an overview of the adult programs offered, the funding necessary for the programs, and additional statistics about the program) [<https://perma.cc/4BH3-KGAB>].

174. *See id.* (“Medicaid Waiver reimbursements for Adult Programs haven’t increased in over 10 years. But our costs have. So your donation helps us cover a \$500 deficit for every adult enrolled in our Adult Programs.”).

175. *See Apply for Vocational Rehabilitation Services*, N.Y. STATE EDUC. DEPT., <http://www.acces.nysed.gov/vr/apply-vocational-rehabilitation-services> (last visited Nov. 20, 2019) (outlining the application process for obtaining vocational rehabilitation services in New York State and providing information about eligibility for services as well as the kinds of services available) [<https://perma.cc/F6G5-RW79>].

the New York State Department of Education and are only available to those whose goal is to secure employment.¹⁷⁶

Beyond state and government agencies, courts and lawmakers can look to how community-based organizations in states deliver adult education.¹⁷⁷ In Rhode Island, there is a state-wide system for adult education for both disabled and non-disabled adults.¹⁷⁸ It is run through community-based organizations and provides “basic education, vocational training, continuing education in professional and technological occupations, general personal development, public service education, and supportive services.”¹⁷⁹ While the programming is not considered public education and is not an extension of the IDEA,¹⁸⁰ the programming is instructive as to how vocational services training can be shaped as a remedy. As the Institute of Education Sciences found in 2011, continued community engagement can lead to successful, measurable outcomes for adults living with disabilities.¹⁸¹ In addition to general personal development and other services, the community-based education and vocational assistance seen in Rhode Island can help former students who have been denied a FAPE achieve a variety of postsecondary goals, like independent living and entering the work-force.¹⁸²

176. See *id.* (“VR services may only be provided if your goal is employment.”)

177. See *infra* notes 178–182 and accompanying text (providing details on community-based organizations that deliver adult education).

178. See *K.S. v. R.I. Bd. of Educ.*, 251 F. Supp. 3d 393, 396 (D.R.I. 2017) (“Rhode Island’s Adult Education Act, R.I. Gen. Laws. § 16-63-1 et seq., provides that all citizens, regardless of age, have the right to education.”); see also 16 R.I. Gen. Laws §§ 16-63-1 to 18 (enabling the Rhode Island state-wide adult education network).

179. See *K.S.*, 251 F. Supp. 3d at 396 (“Rhode Island’s state-wide system of adult education is delivered to adult students through an informal network of community-based organizations.”).

180. See *id.* at 401 (describing the adult education system in Rhode Island as a system of community-based organizations that are not directly affiliated with the state).

181. See SANFORD ET AL., *supra* note 2, at 31 (describing “the productive engagement in the community of young adults with disabilities”).

182. See *K.S.*, 251 F. Supp. 3d at 396 (listing the services provided by the Rhode Island program, many of which are vital to the achievement of post-secondary goals).

Looking to court rulings is also helpful in ascertaining the appropriate services and relief.¹⁸³ In 2008, the District Court for the District of Columbia held that crafting a compensatory education plan requires psycho-evaluations and vocational assessments, emphasizing the importance of vocational assessments and an understanding of a child's abilities.¹⁸⁴ The District Court for the Western District of Pennsylvania awarded over one hundred hours of vocational services, in addition to therapeutic services and extracurricular services, as compensatory education for a student who was denied a FAPE for just one year.¹⁸⁵ Further, a D.C. court even awarded compensatory education in the form of vocational evaluations and assessments in 2012 for a student older than twenty-one who had been denied a FAPE.¹⁸⁶

IV. Bridging the Gap: A New Regulation for Vocational Services

The 2004 reauthorization of the IDEA provided major revisions to the statute.¹⁸⁷ The changes included redefining what it means to be a "highly qualified" special education teacher, additional procedural safeguards, revised testing procedures for

183. See *infra* notes 184–186 and accompanying text (noting how several courts have provided relief in the form of appropriate vocational services or evaluations).

184. See *Friendship Edison Pub. Charter Sch. Coll. Campus v. Nesbitt*, 583 F. Supp. 2d 169, 172 (D.D.C. 2008) (finding that without further assessment, compensatory education could not be awarded).

185. See *A.W. v. Middletown Area Sch. Dist.*, No. 1:13-CV-2379, 2016 WL 6216093, at *10 (W.D. Pa. Oct. 25, 2016) (affirming the Hearing Officer's compensatory vocational education award for 110 hours of services because the district failed to provide the student vocational services several times, leading to the student's continued absenteeism and avoidance behaviors).

186. See *Brooks v. District of Columbia*, 841 F. Supp. 2d 253, 258–60 (D.D.C. 2012) (using the court's discretion to override the D.C. law that did not require compensatory relief for a student beyond the IDEA's statutory limits and providing for further vocational assessments in line with what the student's original IEP should have provided).

187. See generally CONG. RESEARCH SERV., THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA), PART C: EARLY INTERVENTION FOR INFANTS AND TODDLERS WITH DISABILITIES, <https://www.everycrsreport.com/reports/R43631.html> (last updated Aug. 9, 2019) (last visited Nov. 20, 2019) (outlining some of the 2004 revisions to the IDEA, specifically the permanence of funding for Part B of the IDEA, which is the largest part of the Act and is titled "Assistance for Education of all Children with Disabilities") [<https://perma.cc/R9VE-HP9H>].

students, changes in monitoring student compliance, and more.¹⁸⁸ In 2015, the IDEA was amended through the Every Student Succeeds Act.¹⁸⁹ This act replaced the 2002 No Child Left Behind Act and is intended to provide support for all students, regardless of “race, income, zip code, disability, home language, or background.”¹⁹⁰

The above reauthorization and amendment exhibit the DOE’s continued policy goals.¹⁹¹ Further, in September of 2019, Department of Education Secretary Betsy DeVos emphasized the DOE’s commitment to vocational rehabilitation.¹⁹² Secretary DeVos said that IDEA funds can be used to “support dual enrollment, comprehensive transition and other postsecondary education programs for students and youth with disabilities.”¹⁹³ The new head of the Rehabilitation Services Administration, Mark Shultz, echoed Secretary DeVos’s commitment to vocational rehabilitation upon appointment, stating “RSA plays a key leadership role through its resources and technical assistance to state [vocational rehabilitation] programs.”¹⁹⁴

188. See *id.* (providing examples of some of the specific changes from the 2004 reauthorization, many of which are related to Part C’s public awareness and child find programs).

189. See generally *About IDEA*, supra note 3.

190. See *Every Student Succeeds Act*, U.S. DEP’T OF EDUC., <https://www.ed.gov/essa> (last visited Nov. 21, 2019) (outlining a brief history of the act, highlighting key components of the legislation, and stating the program’s goals) [<https://perma.cc/J7KM-AWBE>].

191. See *infra* notes 192–194 and accompanying text (illustrating the DOE’s policy goal of providing support for all children).

192. See *Secretary DeVos Makes Clear Federal Funds can be Used to Support Dual Enrollment, Postsecondary Options for Students and Youth with Disabilities*, U.S. DEP’T OF EDUC. (Sept. 17, 2019), <https://www.ed.gov/news/press-releases/secretary-devos-makes-clear-federal-funds-can-be-used-support-dual-enrollment-postsecondary-options-students-and-youth-disabilities> (last visited Nov. 27, 2019) (announcing the release of a Q&A conducted by Secretary DeVos, the Office of Special Education and Rehabilitative Services, and the Office of Postsecondary Education that seeks to describe how state agencies, local agencies, and state vocational rehabilitation agencies should be coordinating to prepare children for postsecondary success) [<https://perma.cc/C7JC-N2HF>].

193. See *id.* (emphasizing how IDEA funds can be used to provide students and youth with disabilities with valuable vocational services).

194. See *New Commissioner Leads U.S. Education Department’s Rehabilitation Services Administration*, U.S. DEP’T OF EDUC. (Aug. 12, 2019), <https://sites.ed.gov/osers/2019/08/new-commissioner-leads-rsa/#more-2974> (last visited Nov. 19, 2019) (quoting Mark Schultz, commissioner to Rehabilitation

In line with these goals, this Note proposes a new regulation (Regulation), to be read in conjunction with the IDEA. The Regulation shall explicitly include vocational services as a form of compensatory education for a FAPE denial. The Regulation requires ongoing cooperation between the DOE and state vocational services providers to increase access to vocational programming for students who have been denied a FAPE.

Education and disability law commentators acknowledge that the continually shifting floor of adequacy in education leads to the federal government fashioning and enforcing education initiatives, instead of state and local actors.¹⁹⁵ As such, a federal regulation is appropriate for increasing access to vocational and educational evaluations, related vocational training, general skills training, and in the long run, career outcomes.

A. Authority for the Regulation

In order for a federal agency, like the Department of Education, to promulgate a new rule or regulation, the agency must have authority from either a congressionally enacted statute or a delegation of authority from the President.¹⁹⁶ Here, the Department of Education's authority comes from the IDEA, a congressionally enacted statute.¹⁹⁷

Services Administration) [<https://perma.cc/AFB2-U4BH>]. Falling under the Office of Special Education and Rehabilitative Services umbrella, “[t]he RSA assists states and other agencies in their work to provide vocational rehabilitation and other services to individuals with disabilities to maximize their employment, independence and integration into the community and the competitive labor market.” *Id.*

195. See Maureen A. MacFarlane, *The Shifting Floor of Educational Opportunity: The Impact of Educational Reform on Rowley*, 41 J.L. & EDUC. 45, 65 (2011) (discussing the increasing commonality of state-wide and federal level assessments to measure whether students are meeting new education standards).

196. See *A Guide to the Rulemaking Process*, OFF. OF THE FED. REG., https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Nov. 20, 2019) (outlining the general rulemaking process for federal agencies, including where authority for rules comes from, how to propose rules, how the comments process works, how rules are incorporated into the Code of Federal Regulations, etc.) [<https://perma.cc/P496-XHKE>].

197. See *infra* Part V.C (characterizing §§ 1406, 1481, and 1418 of the IDEA as the DOE's authority for the new Regulation).

The DOE's authority is derived from multiple provisions of the IDEA. Section 1406¹⁹⁸ of the IDEA sets out the requirements for prescribing regulations for the education of individuals with disabilities.¹⁹⁹ In general, the Secretary of Education (the "Secretary") can only issue regulations necessary to ensure compliance with the statute.²⁰⁰ Regulations cannot procedurally or substantively limit a child's guaranteed protections under the statute.²⁰¹ The proposed Regulation is necessary to ensure compliance with the purpose of the IDEA, which is to guarantee special education and related services are available to all students with disabilities and these services meet the individual needs of students, preparing them for further education and life beyond schooling.²⁰² In promulgating the Regulation, the Secretary shall focus on the IDEA's commitment to a student's life beyond schooling.²⁰³

Authority for the Regulation is also derived from 20 U.S.C. § 1481.²⁰⁴ The Secretary can award a grant, contract, or cooperative agreement under Parts B and C of the IDEA without regard for the rulemaking requirements set forth in the Administrative Procedure Act.²⁰⁵ In doing so, the Secretary can

198. See 20 U.S.C. § 1406(a)–(b) (2018) (setting out the general requirements for the Secretary to set forth a regulation); see also *id.* § 1406(c)–(e) (outlining the procedures for promulgating a regulation under this chapter).

199. See *id.* § 1406(a)–(b) (prohibiting the Secretary from lessening the protections provided to children with disabilities).

200. See *id.* ("In carrying out the provisions of this chapter, the Secretary shall issue regulations under this chapter only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements of this chapter.").

201. See *id.* (giving the Department the authority to issue regulations to the extent regulations are necessary to ensure compliance with the requirements of Part B, "Assistance for Education of All Children with Disabilities").

202. See discussion *supra* notes 17–27 (outlining the purposes and requirements of the IDEA).

203. See § 1400(d)(1)(A) (stating that the IDEA is intended to prepare students for their adult lives, whether it be through services serving goals of further education, employment, or independent living).

204. See 20 U.S.C. § 1481 (2018) (allowing for the Secretary to develop a comprehensive plan to enhance Part B and Part C activities).

205. See *id.* § 1481(d) (enabling the Secretary to prioritize one or more groups of individuals or services in order to create projects in line with this chapter outside of the rulemaking procedures of 5 U.S.C. § 553); see also 5 U.S.C. § 553 (2018) (setting forth the Administrative Procedure Act's rulemaking

give priority to projects addressing particular disabilities, services, age-ranges, etc.²⁰⁶ In promulgating the Regulation, the Secretary can classify the above-twenty-one population of students and the provision of vocational services as project priorities in line with Part B, which provides for assistance for all children with disabilities.²⁰⁷

After receiving input from experienced and interested individuals, the Secretary can develop a comprehensive plan for activities carried out under both Parts B and C of the IDEA in order to “enhance the provision of early intervention services, educational services, related services, and transitional services to children with disabilities.”²⁰⁸ Where practicable, a plan created under this section should be developed pursuant to 20 U.S.C. § 9567b,²⁰⁹ which calls for consistency in program purposes, balance across age ranges and types of disabilities, etc.²¹⁰ Because the plan is intended to address education and related services, the Secretary’s comprehensive plan can establish the Regulation in order to provide vocational services as a remedy.²¹¹ Vocational services fall under the umbrella of related services within the letter and spirit of Parts B and C of the IDEA.²¹²

requirements).

206. See § 1481(d) (describing the potential projects the Secretary can give priority to: types of educational placement or early intervention environments, age-ranges, disability, children from low-income families, types of services, children with behavioral disabilities, etc.).

207. See *id.* (allowing the Secretary to give priority to projects addressing age ranges or projects addressing needs of children based on severity or incidence of disability).

208. See *id.* (developing the plan “shall include mechanisms to address early intervention, educational, related service and transitional needs . . .”).

209. See 20 U.S.C. § 9567b (2018) (setting out duties related to the research activities used to improve services provided under the IDEA, including academic achievement outcomes, functional outcomes, and specifying that the plan the Research Commissioner provides to the Secretary be consistent with IDEA priorities and coordinated with plans under 20 U.S.C. § 1481); see also *id.* § 1481(a)(1) (giving the Secretary the authority to develop the plans priorities discussed).

210. See § 9567b (requiring further consistency with the purposes of the Individuals with Disabilities Act)

211. See *id.* § 1481(a)(1) (noting that the plan developed should include mechanisms to address transitional needs).

212. See *id.* (“[T]he Secretary shall develop and implement a comprehensive plan for activities carried out under parts B and C in order to enhance the

Section 1418 of the IDEA also provides authority for the Secretary to make a vocational services regulation.²¹³ Section 1418 requires states receiving Part B funding to collect and examine data to see if there is significant disproportionality²¹⁴ based on race or ethnicity occurring within the state or within local education agencies.²¹⁵ If the data shows different education outcomes for students based on race or ethnicity, the Secretary can review and revise policies, practices, and procedures related to Part B.²¹⁶ Revising policies and practices can relate to placement.²¹⁷ The Secretary's discretion to revise policies and practices grants the Secretary the right to create a regulation for placement into

provision of early intervention services, educational services, [and] related services”).

213. *See* 20 U.S.C § 1418(d)(1)–(2) (2018) (allowing for revision of procedures, practices and policies if significant disproportionality for a child with disabilities is found).

214. *See id.* § 1418(d)(1)(A)–(C)

Each State that receives assistance under this subchapter, and the Secretary of the Interior, shall provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the local educational agencies of the State with respect to—

- (A) the identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 1401(3) of this title;
- (B) the placement in particular educational settings of such children; and
- (C) the incidence, duration, and type of disciplinary actions, including suspensions and expulsions.

215. *See id.* § 1418(d)(2)(A) (allowing for the secretary to “review and . . . revis[e] . . . the policies, procedures, and practices used in such identification or placement to ensure that such policies, procedures, and practices comply with the requirements of this chapter” if significant disproportionality is found).

216. *See id.* (requiring each State receiving aid under the IDEA to provide data on the number of children with disabilities by race or ethnicity, providing a basis of revision for the Secretary).

217. *See id.* (providing specifically for placement in data collection for review for disproportionality); *see also* Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities, 83 Fed. Reg. 8396 (proposed Feb. 27, 2018) (to be codified at 34 C.F.R. pt. 300) (“[T]he Department has the authority to resolve the statutory ambiguity and incorporate into the regulations its long-standing interpretation, which is and has been that the required remedies in IDEA . . . apply when there is significant disproportionality in identification, placement”).

vocational services as a remedy when there is disproportionality of services, in addition to the requisite FAPE denial.²¹⁸

B. Potential Challenges to the Regulation

As noted, prescribing regulations under § 1406 of the IDEA requires a public comment period of at least seventy-five days.²¹⁹ The comment period allows interested parties to express opinions on the regulation.²²⁰ The issues raised during the comment period often help to shape the final regulation.²²¹ In anticipating some of the challenges to the proposed Regulation, an agency action reflecting similar equity in IDEA values can be illustrative.²²²

In 2016, the Office of Special Education and Rehabilitative Services (OSERS) proposed a rule to provide assistance to states for the education of children with disabilities through preschool grants for children with disabilities.²²³ One of the sources of authority for the preschool rule is 20 U.S.C. § 1418,²²⁴ which also provides authority for the proposed Regulation.

218. See § 1418(d)(1)–(2) (providing the Secretary with the authority to remedy disproportionality of services).

219. See *id.* § 1406 (outlining the procedures for prescribing regulations under the IDEA).

220. See 5 U.S.C. § 553 (2018) (“[T]he agency shall give interested parties an opportunity to participate in the rule-making process through submission of written data, views, or arguments . . .”).

221. See *id.* (detailing the rule-making process in which the agency considers “relevant matter presented,” like participation of interested parties, then creates a general statement of purpose and publishes the rule).

222. See *infra* notes 223–228 and accompanying text (comparing the criticisms for the preschool regulation with possible criticism for the Regulation).

223. See Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities, 81 Fed. Reg. 92376 (proposed Dec. 19, 2016) (to be codified at 34 C.F.R. pt. 300) (explaining that the purpose of this regulation is to promote equity in the IDEA for preschool aged children by ensuring that States “identify LEAs with significant disproportionality and that States assist LEAs in ensuring that children with disabilities are properly identified for services, receive necessary services . . .”).

224. See 20 U.S.C. § 1418 (2018) (requiring States receiving assistance to provide data on children with disabilities receiving early intervention services, children from birth to age two with disabilities who stopped receiving early intervention services for various reasons, and the number of infants and toddlers at risk for substantial developmental delay receiving early intervention services).

Commentators expressed concern that invoking a standard methodology for finding disproportionality is not in line with the individualized identifications and placements for students under the IDEA.²²⁵ In response to the comment, the agency claimed developing a standard methodology for recognizing disproportionality helps provide data to the public, which in turn, can lead to policy shifts.²²⁶ The concept of public awareness and understanding leading to policy shifts is also stated in a 2018 report published by the National Council on Disability.²²⁷

The Regulation can be further differentiated from the preschool grant regulation.²²⁸ The vocational services Regulation focuses on providing individualized services after there has been an individualized determination a child has been denied a FAPE. The Regulation is not nearly as broad in application as the preschool grant regulation.

A second challenge to the proposed Regulation may be that the Regulation circumvents the IDEA's administrative procedures.²²⁹ The IDEA sets out the process for administrative hearings and the right to bring a civil action following exhaustion of administrative procedures.²³⁰ This potential comment lacks merit because the

225. See Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities, 83 Fed. Reg. 8396 (proposed Feb. 27, 2018) (to be codified at 34 C.F.R. pt. 300) (acknowledging the comments, the agency delayed the date for compliance with the regulation in order to examine all issues raised regarding significant disproportionality, which is an undefined term under the IDEA); see also discussion *supra* Part V.A (explaining the impact of disproportionality on the Secretary's authority to promulgate regulations).

226. See Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities, 83 Fed. Reg. 8396 (following the agency's addressment of concerns, the commenting entities did not bring a legal challenge to the regulation and the date for compliance is set for July 1, 2022).

227. See NAT'L COUNCIL ON DISABILITY, HAS THE PROMISE BEEN KEPT? FEDERAL ENFORCEMENT OF DISABILITY RIGHTS (2018), https://ncd.gov/sites/default/files/Documents/NCD_Federal-Enforcement_508.pdf (last visited Nov. 20, 2019) (stating that understanding disability issues and various disabilities can impact policy outcomes) [<https://perma.cc/2HLR-WNT7>].

228. See *supra* notes 225–226 and accompanying text (describing the difference between the preschool grant regulation and the proposed Regulation).

229. See 20 U.S.C. § 1415 (2018) (providing procedural safeguards to protect the rights of the child and his parents including administrative hearings and related rights, the right to bring civil actions, procedures for ensuring and improving educational placements, etc.).

230. See *id.* § 1415(i)(2) (allowing an aggrieved party to bring an action in a district court and requiring: (1) the court receives the administrative record,

proposed regulation is only relevant in situations when a hearing officer or trial court judge has ruled a student has been denied a FAPE.²³¹ To be in the purview of the Regulation and eligible for vocational services as compensatory education, administrative procedures must have already been exhausted.²³² Again, the process for awarding a student a compensatory education for a FAPE denial is highly fact-specific and dependent on the individual's prior education.²³³

A third challenge to the regulation may involve concern that the federal government is encroaching on services usually provided by states.²³⁴ Though education issues are becoming more and more federalized, statutorily, states are primarily responsible for complying with the IDEA and related programming.²³⁵ Cooperation between the DOE and state entities which provide vocational services is vital for the Regulation's success.²³⁶ The Regulation is not intended to put the federal government at the helm of all vocational services and to eliminate state-run vocational services programs. The Regulation is intended to ensure students who have been denied a FAPE get *access* to vocational services as a remedy. While the creation of new vocational

(2) the court hears additional evidence at the request of the parties, and (3) the court makes a decision and grants relief based on a preponderance of evidence).

231. *Id.*

232. *See supra* notes 53–71 and accompanying text (describing the current process of obtaining relief when a student has been denied a FAPE).

233. *See supra* Part II.C (explaining the current scope of compensatory education and the fact-specific nature of awards granting compensatory education).

234. *See supra* Part II.A (discussing both the federal interest in education and the state being the primary provider of education services).

235. *See supra* Part II.A (discussing both the federal interest in education and the state being the primary provider of education services).

236. *See* 20 U.S.C. § 1415 (2018) (providing procedures for states, parents, agencies, local education agencies, schools, and others to work together for the child's educational benefit); *see also* 5 U.S.C. § 706 (2018) (acknowledging that a less likely, but possible, challenge to the proposed regulation could attack the regulation as being arbitrary and capricious under § 706); *see also* *Motor Vehicle Mfr. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30–31 (1983) (finding that as long as the agency meets its duty to explain the basis of the regulation and considers the arguments raised against the regulation, the court will likely not find the regulation to be arbitrary and capricious).

programming may be encouraged by the regulation, state providers of vocational services will still be providing services.²³⁷

Participation from both education experts and administrative law experts is important in ensuring the proposed Regulation survives public challenges.²³⁸ As the next section illustrates, challenges and comments to proposed rules can help shape rules and are an important part of the rulemaking process.²³⁹

C. *How the DOE can Promulgate the Proposed Regulation*

Meetings between interested parties and OSERS and DOE representatives would likely initiate the rulemaking process.²⁴⁰ Organizations like the National Center for Learning Disabilities regularly post recommended policy changes to the IDEA.²⁴¹ The DOE can meet with representatives from this kind of expert organization and leaders from state-run vocational services programs to determine how to make the Regulation best serve former students.²⁴² Following potential informal conversations

237. See *supra* Part IV.D (providing examples of vocational programs in different states that can serve as a model for providing vocational services and that can be used by the DOE for student placement following the proposed regulation's enactment); see also 20 U.S.C. § 1481(b) (2018) (stating that the Secretary can award grants to entities in order to help them carry out the comprehensive plan, which would allow the Secretary to award grants to currently operating vocational services providers in order to continue or expand services).

238. See *infra* notes 240–255 and accompanying text (illustrating cooperation of administrative law experts, interested parties, and agencies in promulgating the Regulation).

239. See *infra* notes 240–255 and accompanying text (describing the process of incorporating challenges and comments in proposed rules).

240. See *A Guide to the Rulemaking Process*, *supra* note 196 (listing what the agency considers when deciding to make a rule, including petitions from interest groups and members of the public).

241. See *The State of LD: Recommended Policy Changes*, NAT'L CTR. FOR LEARNING DISABILITIES (2017), <https://www.ncld.org/recommended-policy-changes> (last visited Nov. 21, 2019) (recommending policy changes related to early screening, empowering students and families, cultivating informed educators, driving innovation for teaching and learning, and strengthening and enforcing civil rights laws in schools in order to create a more “open, supportive, and inclusive society that recognizes the potential of all individuals”) [<https://perma.cc/LME5-7A52>].

242. See *A Guide to the Rulemaking Process*, *supra* note 196 (outlining the

with subject-matter experts and entities, the DOE should follow the open, public process for rulemaking in line with § 553 of the Administrative Procedure Act (APA) and § 1406 of the IDEA.²⁴³

First, a general notice of the proposed rule is filed in the Federal Register.²⁴⁴ Under the APA, the notice should include a statement of the rulemaking, authority for the rule, a description of the rule, and the subjects involved.²⁴⁵ For the Regulation, notice should include background information on the history of the IDEA and its purposes.²⁴⁶ The notice should include both qualitative and quantitative support for the Regulation.²⁴⁷ The Secretary of Education or the Assistant Secretary for Special Education and Rehabilitative Services should state his authority for the amendment as well as the agency's overarching authority, which is discussed in the preceding section.²⁴⁸ The notice should also include information about additional ways to access the proposed rule, whether it is in braille, large print, audio tape, etc.²⁴⁹

The notice process allows interested persons and entities to participate in the rule's creation through written comments and arguments (with or without the opportunity for oral presentation).²⁵⁰ Interested parties are provided with a phone number, physical address, email address, or instructions to use an electronic comments system in order to submit comments and ask

federal rulemaking process and explaining the informal meetings between parties that can contribute to a rule's creation).

243. See 20 U.S.C. § 1406 (2018) (providing guidelines for creating regulations under § 1406); see also 5 U.S.C. § 553 (2018) (describing the rulemaking process).

244. See § 553(b) (outlining the rulemaking process).

245. See *id.* (listing the requirements for notice of a proposed rule).

246. See *id.* (requiring either the terms or substance of the proposed rule or a description of the subjects and issues involved); see also 20 U.S.C. § 1400 (2018) (describing the purpose of the IDEA).

247. See § 553(b) (requiring that some foundational information be published in the notice for the proposed rule, which can be partially accomplished by including qualitative and quantitative support).

248. See *id.* § 553(b)(2) (requiring that general notice include reference to the legal authority under which the rule is proposed); see also *supra* Part V.A (describing the Secretary's authority for the proposed Regulation).

249. See *id.* § 553 (allowing notice to be delivered in a variety of forms to ensure all interested parties are able to comment as they wish).

250. See *id.* § 553(c) (requiring the agency to permit interested parties to participate in the rule making).

questions.²⁵¹ The notice sets a deadline for submitting questions and comments.²⁵²

After the DOE considers all of the comments from interested parties, like educators, local education agencies, psychiatrists, vocational services providers, and even parents, the Agency should incorporate the relevant feedback into the rules.²⁵³ The Agency then adopts a “concise general statement” of the “basis and purpose” of the new rule.²⁵⁴ Here, the general purpose should reflect the policy goal of providing vocational services as compensation for students who were denied a FAPE in order to make the student whole and an engaged member of society.²⁵⁵

VI. *Implementing and Enforcing the Services in the Regulation*

Implementing the delivery of vocational services requires more than a regulation.²⁵⁶ In addition to cooperation between the entities providing the vocational training and services, the customary IDEA cooperation between parents, educators, and local education agencies is necessary to assess a student’s needs and place him or her with the correct vocational services provider.²⁵⁷

251. *See id.* (“[T]he agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without the opportunity for oral presentation.”); *see also* Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities, 83 Fed. Reg. 8396 (proposed Feb. 27, 2018) (to be codified at 34 C.F.R. pt. 300) (providing examples of how comments and questions are solicited).

252. *See A Guide to the Rulemaking Process*, *supra* note 196 (noting that agencies specify a beginning and end to the comment period).

253. *See* 5 U.S.C. § 553(c) (2018) (stating that upon collecting information from interested parties, agencies should consider the material collected when adopting rules).

254. *See id.* (requiring the rule to incorporate a concise general statement of the basis and purpose of the rule).

255. *See supra* Part IV (describing what students who have been denied a FAPE need).

256. *See infra* Part IV.D (providing examples of collaboration between agencies to show that cooperation between educators, students, parents, and officials is needed for the Regulation’s success).

257. *See* 20 U.S.C. § 1415 (2018) (establishing several procedures protecting the rights of the parents to be involved in ensuring that the student receives a

Compliance and enforcement are imperative for the Regulation's success.²⁵⁸ The IDEA does not impose a specific monitoring framework for each state to follow.²⁵⁹ The U.S. Secretary of Education and state education agencies are responsible for monitoring and enforcement.²⁶⁰ Prior to 2012, monitoring focused almost solely on procedural compliance.²⁶¹ Since then, the DOE introduced a Results Driven Accountability (RDA) framework to monitor IDEA compliance.²⁶² The framework marks each state as "Meeting Requirements," "Needing Assistance," "Needing Intervention," or "Needing Substantial Intervention."²⁶³ Despite the RDA framework, there are no federal changes to monitoring compliance as far as "general standards, improvement measures, or enforcement sanctions."²⁶⁴

FAPE).

258. See *infra* notes 259–270 and accompanying text (describing the processes and challenges of the current monitoring scheme, noting that increasing monitoring and compliance is a current DOE goal).

259. See NAT'L COUNCIL ON DISABILITY, FEDERAL MONITORING AND ENFORCEMENT OF IDEA COMPLIANCE 19 (2018), https://www.ncd.gov/sites/default/files/NCD_Monitoring-Enforcement_Accessible.pdf (last visited Nov. 21, 2019) [hereinafter COUNCIL] (presenting the standard that the IDEA does not impose a specific framework for monitoring but that states receiving IDEA funds must have a system of general supervision that monitors how local education agencies and school districts implement the IDEA and related programs) [<https://perma.cc/D356-A7RW>].

260. See *id.* ("IDEA specifies that IDEA's monitoring and enforcement responsibilities are charged to the Secretary of the U.S. Department of Education, as well as to state educational agencies (SEAs).").

261. See *id.* at 20 (asserting that procedural compliance with the IDEA had nothing to do with student achievement).

262. See *id.* at 23–24 (explaining that the Results Driven Accountability model of monitoring and compliance differentiates how each state is monitored and supported based on data-driven performance metrics, which allows for certain states to get the additional support needed to improve results).

263. See *id.* at 22 (listing the categories of determinations each state may receive after OSEP's annual review); see also *Dep't of Educ., Department Releases 2019 Determination Letters on State Implementation of the IDEA*, INDIVIDUALS WITH DISABILITIES EDUC. ACT, <https://sites.ed.gov/idea/departments-releases-2019-determination-letters-state-implementation-idea/> (last updated July 9, 2019) (last visited Nov. 19, 2019) (outlining the 2019 state determinations on the implementation of the IDEA) [<https://perma.cc/66VK-C3VZ>].

264. See COUNCIL, *supra* note 259, at 27 (explaining that while there are not general standards by law, there are published letters and commentary that provide guidance for parents, schools, and local education agencies).

Comprehensive information about state monitoring practices provided by state or local education agencies is not available.²⁶⁵

Experts in the subject acknowledge there have been improvements in compliance and monitoring efforts since implementing the RDA Framework.²⁶⁶ However, the general consensus is “enforcement efforts have been too mild and need to be more assertive.”²⁶⁷ Increasing monitoring and compliance, with a continued emphasis on technological assistance, is a current DOE goal.²⁶⁸ There is a big push to make local education agencies report implementation plans in a public and user-friendly place to increase public awareness and lead to meaningful improvements in enforcement.²⁶⁹ This Note does not propose changes to the current enforcement of the IDEA and only proposes the previously discussed Regulation focusing on the provision of vocational services.

VII. Conclusion

The IDEA was created to ensure all students with disabilities receive a free and appropriate education that meets each child’s

265. See COUNCIL, *supra* note 259, at 32 (finding that while there is substantial variability among states’ monitoring systems, stakeholder engagement, vision statements and policy documents, as well as customized approaches are best practices for developing a successful monitoring system).

266. See COUNCIL, *supra* note 259, at 43 (stating that a majority of stakeholders agreed that the shift to RDA appeared to be a positive development).

267. See COUNCIL, *supra* note 259, at 44–45 (emphasizing that mild enforcement efforts, particularly private enforcement efforts, disproportionately harm low-income and other marginalized groups because the burden for ensuring compliance often falls on a child’s parents).

268. See COUNCIL, *supra* note 259, at 21–24 (describing criticisms of the DOE’s compliance and monitoring activities, particularly in their use of technology assistance, and then describing the shift in monitoring and compliance that resulted from those criticisms).

269. See COUNCIL, *supra* note 259, at 44 (asserting that making implementation plans public will lead to public scrutiny, which will in turn lead to increased assistance for local education agencies); see also 5 U.S.C. § 555(d)233–(e) (2018) (permitting parties to petition the agency to enforce a regulation in line with a current proceeding and prescribing the court’s process for hearing witnesses and requesting evidence/data for said enforcement proceeding); see also *supra* notes 214–216 (reiterating the agency’s notion that developing a standardized method of recognizing disproportionality will provide the public with data, which will, in turn, increase public awareness).

unique needs and prepares the child for his future life.²⁷⁰ When a child does not receive a FAPE, he deserves to be compensated as an individual in a way tailored to his capabilities, interests, and goals.

All too often, a student who is no longer eligible for IDEA services, whether it is because age or receiving a high school diploma, is awarded compensatory education in the form of financial reimbursement when he is denied a FAPE.²⁷¹ Financial reimbursement does not make a student whole.²⁷² Financial reimbursement does not put a student in the same place he would have been had he not been denied a FAPE.²⁷³ Financial reimbursement does not prepare a student for an independent and engaged postsecondary life.²⁷⁴

This Note proposes the Office of Special Education and Rehabilitative Services of the Department of Education promulgate a new regulation for these students who were denied a FAPE and who are no longer eligible for IDEA services.²⁷⁵ The new Regulation shall be read in conjunction with the IDEA and shall explicitly include vocational services as a form of compensatory education when a student is denied a FAPE.²⁷⁶ These vocational services awards can lead to additional entrance into the workforce for a severely underrepresented population and can lead to

270. See 20 U.S.C. § 1400(d)(1)(A) (2018) (outlining the primary purposes of the IDEA).

271. See *supra* notes 107–109 and accompanying text (compensating a student who was denied a FAPE often instead means compensating a child's parent for costs, and often turns on a parent's ability to bring legal action or "front" the costs of the child's "free" education); see also Zirkel, *supra* note 72, at 228 (exhibiting the high proportion of money-only awards when a child is denied a FAPE).

272. See *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712, 719 (3d Cir. 2010) (upholding Burlington's assertion that money-only awards are empty victories and do not truly compensate a child for a FAPE denial).

273. See *id.* (providing only financial assistance does not make up for true education deprivations).

274. See *supra* Part II (establishing that a child who receives IDEA services should go on to live a successful postsecondary life).

275. See *supra* Part V (discussing the creation of the new Regulation).

276. See *supra* Part V (describing the purpose and function of the proposed Regulation).

continued community engagement for adults living with disabilities.²⁷⁷

The proposed Regulation is not intended to alter the *Rowley* Standard or to redefine what is an “appropriate” education under the IDEA.²⁷⁸ The Regulation’s grant of vocational services and assistance is simply a second chance for a former student who has been denied a FAPE. It is a second chance for a former student to enter the workforce, to live independently, and to achieve his or her dreams.

277. See *supra* Part V (discussing the DOE’s goals and interests pertaining to entrance into the workforce and vocational services for students with disabilities).

278. See *supra* notes 22–25 and accompanying text (defining the *Rowley* standard and noting that while it faces strong criticism, it governs the IDEA jurisprudence).