COMPENSATORY EDUCATION IS AVAILABLE TO ENGLISH LANGUAGE LEARNERS UNDER THE EEOA

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I. INTRODUCTION

The Equal Educational Opportunities Act (EEOA) promises equal educational opportunity to the over 4.5 million English Language Learners (ELLs)[1] attending public schools.[2] It requires states to "remove barriers to [ELLs'] equal participation in educational programs,"[3] proclaiming:

> No [s]tate shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . [failing] to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.[4]

If a state violates this command, thereby denying an ELL equal educational opportunity, the ELL can "institute a civil action in an appropriate district court . . . for such relief, as may be appropriate."[5]

Equal educational opportunity, however, has proven elusive for ELLs—the EEOA's promise to them has not been realized. A significant achievement gap exists between ELLs and other public school students.[6] According to one

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1. "English Language Learner" refers to a child "who need[s] assistance in academic English"—a child who is learning English as a second language. *See* Erin Archerd, *An IDEA for Improving English Language Learners' Access to Education*, 41 FORDHAM URB. L.J. 351, 356 (2013). ELLs were "formerly known as 'limited English proficient.'" *Id.* at 356 n.10.

2. *See* Horne v. Flores, 557 U.S. 433, 466–67, (2009) ("[The EEOA] seeks to provide 'equal educational opportunity' to 'all children enrolled in public school.'"); Archerd, *supra* note 1, at 357–58 "*[T]he majority* of ELLs are born in the United States, though they *may* grow up hearing and speaking their family's native language at home and English outside the home . . . Spanish speakers make up the vast majority of ELL students, 70–80% of the population, but ELLs speak many different languages." *Id.* (emphasis in original); *English Language Learners in Public Schools*, NATIONAL CENTER FOR EDUCATION STATISTICS, https://nces.ed.gov/programs/coe/indicator_cgf.asp ("The percentage of public school students in the United States who were ELLs was higher in school year 2014-15 (9.4 percent, or an estimated 4.6 million students) than in 2004-05 (9.1 percent, or an estimated 4.3 million students) and 2013-14 (9.3 percent, or an estimated 4.5 million students).").

3. United States v. Texas, 572 F. Supp. 2d 726, 761–62 (E.D. Tex. 2008), *rev'd on other grounds,* 601 F.3d 354 (5th Cir. 2010).

4. 20 U.S.C. § 1703(f) (2012).

5. 20 U.S.C. § 1706 (2012).

6. *See* Michael John Orosco & Janette Klingner, *One School's Implementation of RTI With English Language Learners: "Referring Into RTI"*, 43

national academic assessment, for example, ELLs consistently score "below the basic level as compared to their" non-ELL peers.[7] Also, high school dropout rates are higher for ELLs than other students in all 38 states that track ELL graduation rates, as well as in the District of Columbia.[8]

Although the EEOA may never fully deliver on its promise to ELLs, it can be more effective than it has been to date. The EEOA gives courts significant discretion in crafting remedies for violations of ELL rights,[9] and that discretion includes the ability to award compensatory education—a powerful tool for remedying educational deficits that arise when a state infringes a child's educational rights.[10] But courts have yet to recognize compensatory education as a permissible form of EEOA relief.

This failure to recognize compensatory education has undermined the EEOA's effectiveness. Compensatory education can ensure that, when an ELL's rights are violated, the ELL receives the educational services and access to opportunities that she requires to overcome the violation. Further, compensatory education can increase EEOA compliance. Since compensatory education can be a powerful tool for helping individual ELLs, the prospect of compensatory education awards can incentivize private enforcement of the EEOA, thus increasing costs for school districts that fail to comply with the EEOA.[11]

That the EEOA permits compensatory education awards is confirmed by (1) precedent awarding compensatory education under the Individuals with Disabilities Education Act (IDEA)[12]—a civil rights statute that parallels the

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J. LEARN. DISABIL. 269, 270 ("English language learners achieve at lower levels (particularly in literacy) than their non–English language learner peers; they also are retained more often and drop out of school in greater numbers . . . ."); Rosemary C. Salomone, *Educating English Learners: Reconciling Bilingualism and Accountability*, 6 HARV. L. & POL'Y REV. 115, 139 (2012) ("[A] persistent achievement gap between white and EL[L] (specifically Latino) students [exists.]"); *English Language Learners in Public Schools*, *supra* note 2.

7. Jennifer Samson & Nonie Lesaux, *Disadvantaged Language Minority Students and Their Teachers: A National Picture*, 117 TEACHERS COLL. REC. 1, 3 (2015).

8. Kristi L. Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N.C. L. REV. 911, 940 (2010).

9. *See* discussion *infra* at Section III(A).

10. *See* discussion *infra* at Section III.

11. *Id.*

12. *See* discussion *infra* at Section III(A).

EEOA but protects only students with disabilities[13]—and (2) the EEOA's school desegregation roots.[14] First, IDEA precedent embracing compensatory education awards establishes that the EEOA allows such awards because the relief available under the EEOA and the IDEA overlaps.[15] The EEOA and the IDEA both protect educational rights; they afford courts the same broad discretion when crafting relief for a student; and they require courts to consider similar criteria when awarding relief to a student.[16] Second, courts exercised broad equitable powers in pre-EEOA school desegregation cases, including the power to award compensatory education,[17] and Congress, intending the EEOA to assist with school desegregation efforts,[18] appears to have incorporated into the EEOA those same broad equitable powers.

Courts' failure to recognize compensatory education as a permissible form of EEOA relief is legally problematic. But, for practical reasons, the failure is understandable. EEOA claims based on violations of ELL rights are uncommon,[19] and when such claims are raised, they are usually raised by groups of ELLs requesting broad reforms to a school district's ELL programming.[20] Claims seeking individualized relief (like compensatory education) are a legal novelty.[21] Consequently, courts have had limited opportunities to explore the role of compensatory education under the

13. Archerd, *supra* note 1, at 358–59; *see* discussion *infra* at Section III(A).
14. *See* discussion *infra* at Section III.
15. *See* discussion *infra* at Section III(A).
16. *See id.*
17. *See* discussion *infra* at Section III(B).
18. *See* Bowman, *supra* note 8, at 927.
19. *See id.*
20. *See, e.g.*, *Horne*, 557 U.S. at 466–67, Issa v. Sch. Dist. of Lancaster, 847 F.3d 121, 129 (3d Cir. 2017); Castaneda v. Pickard, 648 F.2d 989, 992 (5th Cir. 1981); Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1012 (N.D. Cal. 1998), *aff'd sub nom.* Valeria v. Davis, 307 F.3d 1036 (9th Cir. 2002) ("Plaintiffs are several limited English proficient . . . students enrolled in California public schools [seeking to enjoin a]…change [to] the system under which students who are limited in English proficiency are educated in California's public schools."); N.Y. by Schneiderman v. Utica City Sch. Dist., 177 F. Supp. 3d 739, 753 (N.D.N.Y. 2016) ("[The] complaint is brought on behalf of [ELL] immigrants who have allegedly been denied equal educational opportunities on the basis of their national origin as part of a diversionary policy enacted and enforced by senior policymakers in the [school district]. These allegations suffice to state an EEOA claim."); McFadden v. Bd. of Educ. for Ill. Sch. Dist. U-46, 984 F. Supp. 2d 882, 894 (N.D. Ill. 2013).
21. *See* discussion *infra* at Section II(B).

EEOA.[22] This lack of opportunity has served as a practical barrier to courts recognizing compensatory education as a permissible form of EEOA relief.[23]

Moving forward, compensatory education should be a mainstay of EEOA lawsuits. Congress drafted the EEOA as a broad remedial civil rights statute;[24] to remedy discriminatory educational practices, courts can both award individualized relief to harmed students and order injunctive relief.[25] Yet, to date, the EEOA has for the most part been approached only as a tool to obtain the latter form of relief.[26] Correcting discrimination against ELLs requires more—it requires individualized relief in the form of compensatory education.

This Article proceeds in four parts. Part I offers a primer on compensatory education. It outlines the basic characteristics of compensatory education and explains how compensatory education can secure educational opportunities for ELLs. Part II sets forth the statutory and jurisprudential context necessary for understanding the role of compensatory education under the EEOA. It explores the EEOA's text, purpose, and legislative background; the characteristics of EEOA litigation; and the (limited) EEOA jurisprudence bearing on the statute's relationship with compensatory education. Because IDEA precedent is important to understanding the role of compensatory education under the EEOA, Part II also examines the same features of the IDEA, providing a comparison of the two statutes. Part III then argues that compensatory education is an available form of relief under the EEOA in light of IDEA precedent and the EEOA's school desegregation roots. Finally, Part IV recommends that advocates undertake a concerted effort to establish compensatory education as a permissible form of EEOA relief.

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22. *See* discussion *infra* at Section III(C).

23. *See id.* Indeed, only after several years of grappling with compensatory education requests did courts embrace compensatory education as a permissible form of IDEA relief. *See* discussion *infra* at Section III(C).

24. *See generally* Bowman, *supra* note 8, at 927 (noting that the EEOA sparked radical change).

25. *See* discussion *infra* at Section III.

26. *See, e.g.*, *Horne*, 557 U.S. at 433.

II. A PRIMER ON COMPENSATORY EDUCATION

Compensatory education is an equitable remedy.[27] It is an award of prospective educational services, such as tutoring, after-school classes, or academic summer camps, designed to correct a past denial of a child's educational rights.[28] The services correct a past denial by helping a child overcome educational deficits that she developed because of the denial.[29] In doing so, the services secure for the child educational opportunities to which she was entitled all along.[30]

An example of a compensatory education award from the IDEA context is instructive. Say a student with a learning disability is denied accommodations that she needs to understand the instructional materials used by her schoolteacher, and unable to comprehend the materials, the student develops reading deficits. An award of compensatory education to the student might include regular one-on-one instruction with a private reading instructor for a period of time equal to the period that the student was denied accommodations. Such an award would make the student whole, affording her the educational services necessary to put her in the position she would have been in but for the denial of her educational rights.[31]

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27. G. ex rel. Ssgt RG v. Fort Bragg Dependent Sch., 324 F.3d 240, 254 (4th Cir. 2003); G ex rel. RG v. Fort Bragg Dependent Sch., 343 F.3d 295 (4th Cir. 2003).

28. *See* Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1280 (11th Cir. 2008) ("Compensatory education provides services 'prospectively to compensate for a past deficient program.'").

29. Woods v. Northport Pub. Sch., 487 Fed. App'x 968, 978 (6th Cir. 2012) (holding that "it was reasonable for [a hearing officer] to conclude that substantial compensatory-education hours were needed" where, due to IDEA violations, a student "was significantly behind in reading, writing, and mathematics").

30. *See* R.P. ex rel. C.P. v. Prescott Unified Sch. Dist., 631 F.3d 1117, 1125 (9th Cir. 2011) ("Compensatory education is an equitable remedy that seeks to make up for 'educational services the child should have received in the first place, and aims to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.'") (internal quotation marks omitted); Garcia v. Bd. of Educ. of Albuquerque Pub. Sch., 520 F.3d 1116, 1125 (10th Cir. 2008) ("[A]n award of compensatory education . . . compensates for a past deprivation of educational opportunity.").

31. In this way, compensatory education is similar to backpay. Backpay is an equitable remedy that is regularly awarded in employment discrimination cases. *See* Gurmankin v. Costanzo, 626 F.2d 1115, 1123 (3d Cir. 1980) ("[B]ackpay is appropriately classified as an equitable remedy." (citing Great Am. Fed. Savings & Loan Assoc. v. Novotny, 442 U.S. 366, 374 (1979))). A backpay award "make[s] the claimant whole, that is, [it] place[s] him in the position he would have been in

For an ELL, a compensatory education award might include one-on-one reading instruction with a bilingual tutor, direct instruction in English, English instruction in peer-based learning groups, extended-school-year services (i.e., participation in summer school programs), after-school sheltered or bilingual classes in content areas in which the ELL has deficits, cultural immersion programs, remedial math courses at a local community college, or vocational training. Studies show that these types of interventions can improve educational outcomes for struggling ELLs.[32] So a compensatory education award providing an ELL with such interventions can help the ELL overcome deficits arising from a violation of his EEOA rights.

Take, for instance, an ELL in eighth grade who has languished in school for several years, deprived of programming that allows him to "overcome [his] language barriers."[33] Without appropriate programming, the ELL has not been able to comprehend his classroom instruction and as a result is reading and performing math at a third-grade level. Absent intensive educational interventions, the ELL is on a path towards being one of the countless ELLs who drop out of school.[34] Compensatory education could afford the ELL the interventions that he requires to overcome his deficits and avoid that outcome. A compensatory education award for the ELL could include rigorous summer courses designed to improve his English skills,

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but for discrimination." Rasimas v. Mich. Dep't of Mental Health, 714 F.2d 614, 626 (6th Cir. 1983).

32. *See* Carolyn A. Denton et al., *Effects of Two Tutoring Programs on the English Reading Development of Spanish-English Bilingual Students*, 104 ELEM. SCH. J. 289, 291 (2004) ("[T]here is evidence of the benefits of intensive tutoring for the English literacy development of students whose primary language is Spanish."); Sylvia Linan-Thompson et al., *Determining English Language Learners' Response to Intervention: Questions and Some Answers*, 30 LEARN. DISABIL. QUART. 185, 186 (2007) ("In intervention studies that provided additional reading instruction to ELLs, students who received comprehensive instruction had better outcomes than students in comparison conditions in at least one area of reading."); Tamara Lucas et al., *Promoting the Success of Latino Language-Minority Students: An Exploratory Study of Six High Schools*, 60 HARV. EDUC. REV. 213, 222–23 (1990) (concluding that, among other things, "advanced and honors bilingual/sheltered classes in content areas," "academic support programs that help [ELLs] make the transition . . . to mainstream classes," and "courses in . . . primary language instruction" can "promote the achievement of language minority students"); Orosco & Klingner, *supra* note 6, at 272–73.

33. *See* 20 U.S.C. § 1703(f) (2012).

34. *See* discussion *supra* at Introduction.

after-school tutoring from a bilingual teacher in reading and math, and educational advising with an expert who would help keep him motivated to learn despite his significant deficits.

III. CONTEXTUALIZING THE ANALYSIS: AN EXAMINATION OF THE EEOA AND THE IDEA

Before explaining why IDEA precedent and the EEOA's school desegregation roots confirm that the EEOA permits compensatory education awards, an examination of the relevant statutory and jurisprudential context is necessary. It is critical to examine the text, purpose, and legislative background of both the EEOA and the IDEA; the defining features of EEOA and IDEA litigation; and the jurisprudence arising under the EEOA and the IDEA that bears on each statute's relationship with compensatory education.

By highlighting the EEOA and the IDEA's similarities and differences, this inquiry offers insight into why IDEA compensatory education precedent is relevant to the EEOA. The inquiry also sheds light on the practical barriers that appear to have stalled courts' development of case law examining compensatory education under the EEOA. Finally, the inquiry provides context for understanding the significance of the EEOA's school desegregation roots.

A. Introduction to the EEOA and the IDEA

The EEOA and the IDEA share a number of similarities. They were both enacted in the mid-1970s as part of Congress' effort to ensure that all children have access to educational opportunities.[35] They both seek to protect the rights of historically marginalized groups: ELLs and students with disabilities.[36] And they both serve not only an important civil rights function but also an important economic function. There are around 11 million public school students who are either ELLs or students with disabilities.[37] The EEOA and the IDEA require school districts to take affirmative steps to help

35. *See* 20 U.S.C. § 1701(a) (1974); *see also* 20 U.S.C. § 1400 (2004).

36. *See* 20 U.S.C. § 1701(a) (2012); 20 U.S.C. § 1400 (2012).

37. *Children and Youth with Disabilities*, NATIONAL CENTER FOR EDUCATION STATISTICS, https://nces.ed.gov/programs/coe/pdf/coe_cgg.pdf (reporting that in 2013-2014 there were 6.5 million students receiving services under the IDEA); *English Language Learners in Public Schools*, *supra* note 2 (reporting that in 2013-2014 there were 4.5 million ELLs).

these students overcome their respective barriers to learning so that they can develop the skills necessary to become productive, self-sufficient adults.[38]

1. The EEOA

Congress passed the EEOA in late 1974, enacting the statute pursuant to its enforcement authority under § 5 of the Fourteenth Amendment.[39] Congress designed the EEOA to assist in school desegregation efforts and to correct educational inequities for various minority groups.[40]

Although the legislative history of the EEOA "is very sparse,"[41] it is clear that Congress intended the EEOA to secure meaningful educational opportunities for minority student groups.[42] The EEOA's policy-and-purpose provision states that Congress "declares it to be the policy of the United States that . . . all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin."[43] Further, the Supreme Court has found that the "ultimate focus [of the EEOA] is on the quality of educational programming and services provided to students."[44]

The story of the EEOA's ELL protections begins with the Supreme Court's decision in *Lau v. Nichols*.[45] In early 1974, the *Lau* Court considered

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38. *See generally* 20 U.S.C. §1701(a) (2012) (stating requirements for compliance with the EEOA); 20 U.S.C. § 1400 (2012) (stating requirements for compliance with the IDEA).

39. 20 U.S.C. § 1702(b) (1974); Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist., 714 F.2d 946, 951 (9th Cir. 1983); *Castaneda*, 648 F.2d at 1008 n. 9.

40. 20 U.S.C. §§ 1701(b), 1703(a)–(e) (1974). A major goal of the EEOA is to remove "the vestiges of the dual school system." 20 U.S.C. § 1701(b) (2012). Accordingly, in addition to setting forth protections for ELLs, the EEOA includes a number of provisions addressing school desegregation. *Id.* § 1703(a)–(e).

41. *Castaneda*, 648 F.2d at 1001.

42. *See* Jeffrey Mongiello, *The Future of the Equal Educational Opportunities Act § 1703(f) After Horne v. Flores: Using No Child Left Behind Proficiency Levels to Define Appropriate Action Towards Meaningful Educational Opportunity*, 14 HARV. LATINO L. REV. 211, 218 (2011) (noting that President Nixon referred to the EEOA as "an educational bill of rights for . . . those who start their education under language handicaps, and ensure at last that they too would have equal opportunity") (internal quotation marks and brackets omitted).

43. 20 U.S.C. § 1701(a) (2012).

44. *Horne*, 557 U.S. at 466–67.

45. Lau v. Nichols, 414 U.S. 563 (1974).

the scope of protections that Title VI of the Civil Rights Act provides ELLs.[46] Title VI prohibits "[d]iscrimination among students on account of race or national origin."[47] Embracing one of the regulations implementing this prohibition, the Court concluded:

> Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.[48]

"[T]here is no equality of treatment," the Court explained, "merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."[49]

Section 1703 of the EEOA codified *Lau*'s holding that school districts must take affirmative steps to overcome students' language barriers.[50] Congress titled the section, "Denial of equal educational opportunity prohibited."[51] Section 1703(f) states:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . [failing] to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.[52]

Under this provision, states and school districts "must make a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students."[53] That means states and school districts must provide ELLs programming that (1) is reasonably

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46. *Id.* at 566.
47. *Id.* at 567.
48. *Id.* at 568.
49. *Id.* at 566.
50. *Issa*, 847 F.3d at 133 (citing *Castaneda*, 648 F.2d at 1008); Bowman, *supra* note 8, at 927.
51. 20 U.S.C. § 1703 (2012).
52. 20 U.S.C. § 1703(f) (2012).
53. Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030, 1043 (7th Cir. 1987) ("[Section] 1703(f) requires that state, as well as local, educational agencies ensure that the needs of [ELL] children are met."); *Issa*, 847 F.3d at 133.

calculated to address their language deficiencies and (2) affords them an opportunity to make educational progress.[54] The programming "can range from whole programs set up around English language proficiency with separate texts and class periods to individual tutoring, or help from a teacher's aide in a regular education classroom."[55]

The EEOA affords courts broad discretion in fashioning relief for a violation of the statute.[56] An ELL, or any other student protected by the EEOA, who is "denied an equal educational opportunity . . . may institute a civil action . . . for such relief, as may be appropriate."[57] And significant "discretion is given to the [courts] to determine what is 'appropriate.'"[58] The only restrictions on courts' discretion are that (1) any remedy imposed must be "essential to correct particular denials of equal educational opportunity or equal protection of the laws,"[59] and (2) money damages are impermissible.[60]

2. The IDEA

The IDEA was enacted in 1975, just a year after the EEOA.[61] Similar to the EEOA, the IDEA was passed to secure meaningful educational opportunities for a historically marginalized group: students with

54. *See Issa*, 847 F.3d at 134 (embracing *Castaneda*'s standard for § 1703(f) violations); *Gomez*, 811 F.2d at 1041 (agreeing with the same standard as *Castaneda* in regard to § 1703 violations); *Castaneda*, 648 F.2d at 1009–13 (holding that § 1703(f) requires school districts to (1) adopt a "sound" educational theory for teaching ELLs, (2) use educational practices that are "reasonably calculated to implement effectively the" theory, and (3) abandon programming that fails to "produce results").

55. Claire Raj, *The Gap Between Rights and Reality: The Intersection of Language, Disability, and Educational Opportunity*, 87 TEMP. L. REV. 238, 296 (2015).

56. *See* Martin Luther King Jr. Elementary Sch. Children v. Ann Arbor Sch. Dist. Bd., 473 F. Supp. 1371, 1383 (E.D. Mich. 1979).

57. 20 U.S.C. § 1706 (2012).

58. *Martin Luther King Jr. Elementary Sch. Children*, 473 F. Supp. at 1383.

59. 20 U.S.C. § 1712 (2012).

60. Mumid v. Abraham Lincoln High Sch., 618 F.3d 789, 797–98 (8th Cir. 2010).

61. The IDEA was originally called the "Education for All Handicapped Children Act of 1975." *See* Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 180 (1982).

disabilities.[62] The purposes section of the IDEA states that it was enacted "to ensure that all children with disabilities have available to them a free appropriate public education" (FAPE).[63] And another part of the IDEA requires all states to "establish[] a goal of providing full educational opportunity to all children with disabilities . . . ."[64]

Also similar to the EEOA, the IDEA requires school districts to take affirmative steps to help students with disabilities overcome the effects of their disabilities.[65] The critical right established by the IDEA is the right of all students with disabilities to receive FAPE.[66] That right requires school districts to afford each student with a disability programming that is "reasonably calculated to enable [her] to make progress appropriate in light of [her] circumstances."[67] To comply with this FAPE obligation, school districts must, among other things, timely identify students with disabilities; develop individualized education programs for students who, due to their disabilities, require special education services; and adhere to a number of procedural safeguards.[68]

The IDEA gives courts "broad discretion" in fashioning relief for a violation of the statute.[69] When a court finds that a student is denied FAPE, the IDEA "directs the court to 'grant such relief as [it] determines is appropriate.'"[70] The relief afforded to a student, however, should be "necessary to cure [the] violation" of the student's rights[71] and cannot be money damages.[72]

Courts have found that the "appropriate relief" language in the IDEA allows "the full range of equitable remedies," including reimbursement for

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62. 20 U.S.C. § 1400 (2012).
63. 20 U.S.C. § 1400(d) (2012).
64. 20 U.S.C. § 1412(a)(2) (2012).
65. 20 U.S.C. § 1400 (2012).
66. *Id.*
67. Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist., 137 S. Ct. 988, 999 (2017).
68. *See* Raj, *supra* note 55, at 301.
69. Sch. Comm. of Town of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 369 (1985).
70. *Id.* (citing a provision that is now codified at 20 U.S.C. § 1415(i)(2)(C)(iii)).
71. *See* Brown v. Bartholomew Consol. Sch. Corp., 442 F.3d 588, 598 (7th Cir. 2006) (citing Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Illinois State Bd. of Educ., 79 F.3d 654, 656 (7th Cir. 1996), *amended* (Apr. 23, 1996)).
72. *See* Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 980 F.2d 382, 386 (6th Cir. 1992) ("[A student] cannot recover general damages under the [IDEA]").

educational expenses, broad reforms to a school district's programming, and compensatory education.[73]

And so the EEOA and the IDEA both seek to secure educational opportunities for marginalized groups of students,[74] and both statutes afford courts broad discretion in fashioning the relief necessary (i.e., essential) to secure the opportunities that they promise.[75] Indeed, the statutes include the exact same language in their relief provisions: both provisions state that courts can award "appropriate" relief.[76]

B. Litigation under the EEOA and the IDEA

Despite the similarities between the EEOA and the IDEA, litigation under the statutes differs dramatically. The IDEA, unlike the EEOA, has a number of features that facilitate individual claims by reducing the time and costs associated with such claims.[77] Private enforcement of the IDEA is therefore common while private enforcement of the EEOA is rare.[78] Also, the typical EEOA case looks much different than the typical IDEA case.[79] The typical EEOA case involves several claimants who seek injunctive relief in the form of school- or district-wide reforms to ELL programming.[80] But the typical IDEA case involves an individual parent seeking educational remedies specifically for her child.[81]

These differences between EEOA and IDEA litigation illustrate why courts' development of EEOA compensatory education jurisprudence lags behind the IDEA's jurisprudence. Compensatory education is an

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73. *See Bd. of Educ. of Oak Park*, 79 F.3d at 656-59 (finding that compensatory education is an appropriate form of relief under the IDEA); *see also Burlington*, 471 U.S. at 369–70 (finding that tuition reimbursement for private school expenses is an appropriate form of relief under the IDEA); Jose P. v. Ambach, 669 F.2d 865, 867 (2d Cir. 1982) (affirming an order in an IDEA case that required a school district to undertake district-wide reforms designed to improve the district's identification of students with disabilities).

74. *See* 20 U.S.C. § 1703 (2012); 20 U.S.C. § 1400 (2012).

75. *See Martin Luther King Jr. Elementary Sch. Children*, 473 F. Supp. at 1383; *Burlington*, 471 U.S. at 369.

76. *See* 20 U.S.C. § 1706 (2012); 20 U.S.C. § 1415 (2012).

77. Archerd, *supra* note 1, at 378–79.

78. *Id.* at 365–80.

79. *See id.*

80. *See id.* at 368–70.

81. *See id.* at 372–77.

individualized remedy—a remedy awarded to correct an individual child's educational deficits[82]—and relative to IDEA claims, EEOA claims seeking individualized remedies are few and far between.[83]

1. Private Enforcement Barriers and Incentives: EEOA vs. IDEA

The IDEA has three features that facilitate individual claims. The IDEA provides for specific, individualized protections, an administrative hearing process, and prevailing-party attorney's fees.[84] The EEOA lacks these features, and as a result, the cost-benefit analysis for individual EEOA claims is far less appealing than the analysis for individual IDEA claims.

First, the IDEA requires school districts, as part of their FAPE obligation, to comply with a number of specific protections.[85] Those protections streamline the process of identifying IDEA violations and crafting individual IDEA claims. One protection, for example, is the requirement that school districts provide each student an individualized education program.[86] An individualized education program is a written legal document that sets forth the special education interventions that a student needs to make educational progress.[87] When a school district does not comply with a student's program or refuses to include interventions in the program that the student's parent believes are necessary, the parent can file a suit seeking compliance or changes to the program.[88] The program therefore simplifies the process of identifying an IDEA violation and provides parents with a concrete basis for enforcing their children's IDEA rights.

Second, the IDEA affords parents and students the right to an administrative due process hearing to resolve disputes with school districts.[89] This feature expedites the resolution of IDEA disputes. The IDEA requires states to ensure that due process hearings are decided within 45 days of the filing of a complaint,[90] and states are fairly effective at complying with this

82. *See* Sandhya Gopal, *Compensatory Education and the IDEA*, 35 Sch. L. Bull. 14, 17–18 (2004).

83. Archerd, *supra* note 1, at 368–70.

84. *See* 20 U.S.C. §§ 1414–1415 (2012).

85. 20 U.S.C. § 1415 (2012).

86. *See* 20 U.S.C. § 1414(d) (2012).

87. *See id.*

88. *See* Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 122 (2d Cir. 1998) ("Parents who are dissatisfied with a proposed [individualized education program] may file a complaint with the state educational agency.").

89. 20 U.S.C. § 1415(f) (2012).

90. 34 C.F.R. § 300.515 (2004).

requirement: the typical filing-to-decision time is 52 days.[91] In comparison, the typical civil suit in federal district court lasts around 9 months.[92] The short timeframe for a due process hearing fosters individual claims because it reduces litigation costs while enhancing the benefits of the claims. If, for instance, a student seeks a change to his individualized education program, a due process hearing will allow the student to obtain the change quickly and therefore benefit from the change for a longer period of time.

Third, the IDEA provides for prevailing-party attorney's fees.[93] Although fee-shifting provisions are common in civil rights statutes,[94] the EEOA does not provide for fee shifting. The fee-shifting feature of the IDEA is a critical incentive for individual claims.[95] Attorney's fees "typically account for most of the cost of litigation" and can serve as a significant barrier to individuals filing a lawsuit.[96] "The problem is especially acute in areas [such as the IDEA] where relief [comes only] in the form of an injunction [or another equitable remedy] rather than [money] damages."[97] Fee shifting erodes the attorney's fees barrier and facilitates individual claims.[98]

Because the EEOA lacks these three features, the cost-benefit analysis for bringing an individual EEOA claim is starkly different than the analysis for an IDEA claim. For starters, because the EEOA has no specific requirements that inform or expand upon its affirmative-steps obligation, identifying a violation of a particular student's rights and establishing a claim

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91. Perry A. Zirkel et al., *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27, 39 (2007).

92. ADMIN. OFFICE OF THE U.S. COURTS, *United States District Courts – National Judicial Caseload Profile*, FEDERAL COURT MANAGEMENT STATISTICS (June 30, 2017) http://www.uscourts.gov/sites/default/files/datatables/fcmsnadist profile1231.2016.pdf.

93. 20 U.S.C. § 1415(i)(3)(B) (2012).

94. Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 791 (2011) (listing statutes that contain fee-shifting provisions, including "the Civil Rights Attorney's Fees Awards Act, which prescribes a fee shift for victorious plaintiffs in a variety of civil rights actions . . . and the Age Discrimination in Employment Act, which entitles plaintiffs who prove unlawful discrimination to recover a reasonable attorney's fee").

95. *Id.* at 793 (explaining that fee shifting "permits more people to sue to enforce the relevant statute").

96. *Id.* at 790.

97. *See id.*

98. *Id.* at 793.

is more difficult under the EEOA than under the IDEA. That difficulty imposes a de facto barrier to individual claims.[99] Further, since the EEOA provides for neither administrative proceedings nor fee shifting, the financial costs of an EEOA claim are greater than an IDEA claim while the potential benefits are lesser.[100] EEOA claims must be brought in federal court[101]—a forum where claims can linger for months, if not years.[102] So a student raising an EEOA claim will inevitably incur significant attorney's fees. Yet the student will face a risk that, by the time her litigation concludes, she will be too old to meaningfully benefit from any relief awarded.

2. The Paths of Litigation Under the EEOA and the IDEA

Considering the different barriers to and incentives for EEOA and IDEA litigation, the respective paths of EEOA and IDEA litigation are unsurprising. Private enforcement of the EEOA is uncommon and is mostly limited to multi-claimant cases seeking broad injunctive relief[103]—the types of cases that draw in pro bono legal services.[104] However, private enforcement of the IDEA is common and is driven by individual claims.[105] Only about 160 cases

99. Additionally, ELL parents face other informational and resource barriers that parents of students with disabilities are less likely to face. The EEOA is a lesser known statute than the IDEA, and studies have shown that immigrant parents—who undoubtedly overlap with the ELL-parent population—are more likely than other parents to be unfamiliar with the United States' education system and to defer to school personnel when disputes arise. *See* Barbara Schhneider et al., *Barriers to Educational Opportunities for Hispanics in the United States*, NATIONAL RESEARCH COUNCIL (US) PANEL ON HISPANICS IN THE UNITED STATES, https://www.ncbi.nlm.nih.gov/books/NBK19909/ ("Mexican-American immigrant parents are particularly vulnerable and more likely to defer to teachers and administrators, rarely questioning their decisions . . . . First-generation immigrant parents may be unfamiliar with the complex policies and practices of the U.S. education system, which require a high level of parent knowledge and involvement, particularly with respect to academic preparation for college.").

100. *See* Archerd, *supra* note 1, at 378–79.

101. 20 U.S.C. § 1706 (2012).

102. *Id.*

103. Archerd, *supra* note 1, at 365–80.

104. *Id.* at 368–70.

105. Of course, not all EEOA cases are multi-plaintiff cases, and not all IDEA cases involve individual claims. *See* Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1304 (9th Cir. 1992) (considering class action claims by a group of parents challenging certain school district policies under the IDEA); K.A.B. ex rel. Susan B. v. Downington Area Sch. Dist., 2013 WL 3742413, at *11 (E.D. Pa. July 16, 2013) (considering an individual EEOA claim and finding that an individual EEOA

have cited the EEOA provision providing substantive desegregation and ELL protections,[106] but over 4,300 cases have cited the IDEA provision setting forth the FAPE requirement.[107]

Castaneda v. Pickard,[108] a 1981 decision by the Fifth Circuit Court of Appeals, is the archetypal EEOA case. In *Castaneda*, a group of Mexican-American students and their parents sued their school district under the EEOA and other federal statutes.[109] The students and their parents alleged that the school district had several policies that denied the students equal educational opportunity. [110] In particular, they asserted that the school district failed to implement a bilingual education program that would allow the students to overcome their linguistic barriers.[111] The students and parents sought as relief an order requiring the school district to abandon the educational theory underlying its bilingual education program, adopt different tests to identify and assess ELLs, and reform its evaluation system for ELL teachers.[112]

Jefferson County Board of Education v. Breen[113] is the archetypal IDEA case. There, the parents of a student with "a multitude of physical and emotional problems such as impaired memory, attention, perception, and judgment" sued the student's school district.[114] The parents alleged that the

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"plaintiff must show '(1) language barriers; (2) defendant's failure to take appropriate action to overcome these barriers; and (3) a resulting impediment to student's equal participation in instructional programs'").

106. Section 1703 of the EEOA is the provision setting forth the desegregation and ELL protections. 20 U.S.C. § 1703 (2012). Westlaw's "Citing References" indicate that 157 cases have cited the provision. Although some of these "Citing References" might include non-EEOA cases that are merely cross-referencing the EEOA, the references provide a sense of the scope of EEOA litigation.

107. Section 1412 of the IDEA is the provision setting forth the FAPE requirement. 20 U.S.C. § 1412 (2012). Westlaw's "Citing References" indicate that 3,519 cases and around 790 administrative decisions have cited the provision. Although some of these "Citing References" might include non-IDEA cases that are merely cross-referencing the IDEA, the references provide a sense of the scope of IDEA litigation.

108. Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).

109. *Id.* at 992.

110. *See id.*

111. *Id.*

112. *See id.* at 1006.

113. Jefferson Cty. Bd. of Educ. v. Breen, 853 F.2d 853 (11th Cir. 1988).

114. *Id.* at 854.

school district failed to provide the student with adequate educational programming.[115] Specifically, they asserted that the educational placement offered by the district for the student did not meet her unique needs.[116] The parents requested as relief a residential educational placement, reimbursement for expenses they incurred in paying for a residential educational placement, and compensatory education.[117]

C. Compensatory Education Jurisprudence

Because of the different paths of EEOA and IDEA litigation, the question whether compensatory education is permitted under the EEOA has received limited attention from courts, but courts have closely examined whether compensatory education is permitted under the IDEA.[118] Through courts' close examination of compensatory education in the IDEA context, compensatory education has become an accepted, commonly awarded form of IDEA relief.[119] But it has neither been recognized as a form of EEOA relief nor dismissed as an impermissible form of EEOA relief.

1. IDEA Jurisprudence

Compensatory education under the IDEA has been described as "discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by [a school district's] failure over a given period of time to provide [FAPE] to a student."[120] Awards of compensatory education require school districts to provide a student additional educational services beyond the services to which she is entitled as part of her school program.[121] The additional services can include, among other things, one-on-one tutoring, speech and language therapy, and summer classes.[122]

Compensatory education is usually necessary to correct a denial of FAPE; it "is crucial to achieve th[e] goal" of making students with disabilities

115. *See id.*
116. *See id.*
117. *See id.* at 857.
118. *See, e.g.*, Lopez-Young v. D.C., 211 F. Supp. 3d 42, 46 (D.D.C. 2016).
119. *Id.*
120. *Fort Bragg*, 324 F.3d at 254.
121. Terry Jean Seligmann and Perry A. Zirkel, *Compensatory Education for Idea Violations: The Silly Putty of Remedies?*, 45 URB. LAW. 281, 282 (2013).
122. *Id.* at 282, 298.

whole when their school districts have failed them.[123] When a student requires certain educational services to receive FAPE but is denied those services, the student is deprived of his statutory rights.[124] The only remedy for that deprivation in many cases is an award of the services to which the student was entitled all along.[125] Because compensatory education plays such an important role in curing IDEA violations, it is commonly awarded.[126] Almost 40% of decisions granting relief for an IDEA violation award compensatory education.[127]

However, this has not always been the case. Courts began recognizing compensatory education as a permissible form of relief only after grappling for several years with IDEA claims seeking compensatory education.[128] During the years immediately following the IDEA's enactment, courts generally viewed compensatory education as unavailable under the IDEA.[129] In a 1983 decision by the Eleventh Circuit Court of Appeals, for example, parents of a student with disabilities sought "remediation or compensatory educational services so that [the student could] catch up to his age group."[130] But the Eleventh Circuit rejected the parents' request, concluding: "We find nothing in the [IDEA] or its legislative history requiring a school board to remediate a previously handicapped child. Any relief sought in the nature of compensatory education is the same as a claim for damages," which are not permissible under the IDEA.[131]

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123. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 625–26 (3d Cir. 2015) ("[W]hen a school district has failed in [its FAPE] responsibility and parents *have* taken appropriate and timely action under the IDEA, then that child is entitled to be made whole with nothing less than a 'complete' remedy. . . . Compensatory education is crucial to achieve that goal, and the courts, in the exercise of their broad discretion, may award it to whatever extent necessary to make up for the child's lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation.") (citations omitted) (original emphasis).

124. Id. at 618.

125. *Id.* at 625.

126. Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE Under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 214, 234 (2013).

127. *Id.*

128. *See* Perry A. Zirkel, *Compensatory Educational Services in Special Education Cases*, 67 ED. LAW REP. 881, 882–83 (1991).

129. *See id.*

130. *See* Powell v. Defore, 699 F.2d 1078, 1081 (11th Cir. 1983) (internal quotation marks omitted).

131. *Id.*

Yet in the mid-1980's courts changed their view of compensatory education.[132] The Supreme Court's decision in *School Committee of the Town of Burlington v. Department of Education*[133] was the inflection point.[134] In *Burlington*, the Court held that reimbursement for private school tuition is a permissible form of relief.[135] The Court found that, "by empowering the court[s] to grant 'appropriate' relief[,] Congress meant to include retroactive reimbursement [of private school tuition] to parents as an available [IDEA] remedy . . . ."[136] Tuition reimbursement is "appropriate" relief, the Court explained, because it is necessary under certain circumstances to correct a denial of FAPE,[137] and it is an equitable remedy rather than damages:[138] "[r]eimbursement merely requires [a school district] to belatedly pay expenses that it . . . would have borne in the first instance had it" complied with the IDEA.[139]

Burlington's analysis led courts to start viewing compensatory education as an equitable remedy permitted by the IDEA's "appropriate relief" language.[140] The Eighth Circuit Court of Appeals' decision in *Miener v. Missouri*[141] is illustrative. There, a parent sought compensatory education to correct the denial of his daughter's right to FAPE.[142] A few years prior to *Miener*, the Eighth Circuit held that remedies like compensatory education are not available under the IDEA.[143] But the *Miener* court, pointing to *Burlington*, departed from that precedent.[144] The court concluded:

> Like the retroactive reimbursement in *Burlington*, imposing liability for compensatory educational services on the defendants merely requires them to belatedly pay expenses that they should have paid

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132. *See* Zirkel, *supra* note 128, at 882–83.

133. *Burlington*, 471 U.S. 359.

134. *Burlington*, 471 U.S. at 359; Seligmann and Zirkel, *supra* note 121, at 296.

135. *Burlington*, 471 U.S. at 369.

136. *Id.* at 370.

137. *Id.* at 370–71.

138. *Id.*

139. *Id*.

140. *See* Solomon A. Metzger, *Compensatory Education Under the Individuals with Disabilities Education Act*, 23 CARDOZO L. REV. 1839, 1840 (2002) ("[Under the IDEA, a court] is authorized to grant a prevailing party 'such relief as the court determines is appropriate.' The compensatory education remedy springs from this language.").

141. Miener v. Missouri, 800 F.2d 749 (8th Cir. 1986).

142. *Id.* at 751.

143. Miener v. Missouri, 673 F.2d 969, 979–80 (8th Cir. 1982).

144. *See generally Miener*, 800 F.2d 749 (8th Cir. 1986) (finding that compensatory education is an available equitable remedy under the IDEA).

> all along . . . . Here, as in *Burlington*, recovery is *necessary* to secure the child's right to a free appropriate public education. . . . [The parent] wishes to recover compensatory educational services to remedy [the] denial of . . . a free appropriate education. [H]e does not request educational services as compensation . . . .[145]

Thus, the *Miener* court determined that compensatory education can be awarded under the IDEA because, like tuition reimbursement, it (1) is an equitable remedy, rather than a form of compensation, and (2) is sometimes necessary to secure the educational opportunities promised by the IDEA.[146]

Courts have universally embraced *Miener*'s view of compensatory education.[147] Federal courts in every circuit have recognized that the IDEA

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145. *Id.* at 753–54 (internal quotation marks omitted) (emphasis added).

146. *See id.*

147. *See, e.g.*, B.D. v. D.C., 817 F.3d 792, 798 (D.C. Cir. 2016) (awarding compensatory education); Pihl v. Mass. Dep't of Educ., 9 F.3d 184, 188 (1st Cir. 1993) ("[W]e have no difficulty in joining those circuits that have decided that compensatory education is available to remedy past deprivations."); Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2022 (2016), *reh'g denied,* 136 S. Ct. 2546 (2016) ("[W]e have typically endorsed compensatory education as a remedy for substantive FAPE claims . . . ."); Carlisle Area Sch. v. Scott P. By & Through Bess P., 62 F.3d 520, 536 (3d Cir. 1995), *amended* (Oct. 24, 1995) ("We [previously] held that Congress intended compensatory education to be available to remedy the deprivation of the right to a free appropriate education."); *G ex rel. RG*, 343 F.3d at 309 ("We agree with every circuit to have addressed the question that the IDEA permits an award of [compensatory education] in some circumstances."); J.D. v. Georgetown Indep. Sch. Dist., 2012 WL 996901, at *4 (W.D. Tex. Mar. 21, 2012) ("One commonly sought form of relief under IDEA is compensatory education, which requires a school board to provide a child with appropriate educational services to compensate for its past failure to provide a FAPE."); Barnett v. Memphis City Sch., 113 Fed. App'x 124, 129 (6th Cir. 2004) (awarding compensatory education); *Bd. of Educ. of Oak Park*, 79 F.3d at 656 (recognizing that the IDEA permits awards of compensatory education); Birmingham v. Omaha Sch. Dist., 220 F.3d 850, 856 (8th Cir. 2000) ("Under the IDEA, the court 'shall grant such relief as the court determines is appropriate.' 'Such relief' includes compensatory education services." (citation omitted)); *R.P. ex rel. C.P.*, 631 F.3d at 1125 ("[T]he IDEA offers compensatory education as a remedy for the harm a student suffers while denied a FAPE."); Moseley v. Bd. of Educ. of Albuquerque Pub. Sch., 483 F.3d 689, 693–94 (10th Cir. 2007) ("[Courts may] provide plaintiffs with the remedy of compensatory education services when they

permits awards of compensatory education.[148] Compensatory education is not merely a permissible form of relief under the IDEA; it is the primary form of relief for correcting denials of FAPE.[149]

2. EEOA Jurisprudence

No court has ruled on whether the EEOA permits awards of compensatory education, but compensatory education has lurked in the background of EEOA litigation since the statute's enactment. The EEOA was passed, in part, to assist with school desegregation efforts,[150] and courts have historically awarded compensatory education in school desegregation cases.[151] Further, in recent years courts considering ELL cases have begun to acknowledge that compensatory education may be a permissible form of EEOA relief.[152]

Compensatory education, in the form of remedial educational services that mitigate the effects of past and ongoing segregation, has for decades been a mainstay of school desegregation cases brought under the Fourteenth Amendment[153] and related civil rights statutes.[154] Three cases—*United States*

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have been denied a FAPE."); *Draper*, 518 F.3d at 1290 (upholding an award of compensatory education).

148. *See infra* note 147.

149. *See* Parents of Student W. v. Puyallup Sch. Dist., No. 3, 31 F.3d 1489, 1497 (9th Cir. 1994) ("[It is] a rare case when compensatory education is not appropriate [for a FAPE violation.]").

150. *See* 20 U.S.C. § 1701 ("[T]he purpose of this subchapter is to specify appropriate remedies for the orderly removal of the vestiges of the dual school system."); 20 U.S.C. § 1701(a)–(e).

151. *See, e.g.*, Evans v. Buchanan, 416 F. Supp. 328, 360 (D. Del. 1976).

152. *See, e.g.*, McFadden v. Bd. of Educ. for Ill. Sch. Dist., 984 F. Supp. 2d. 882, 903 (N.D. Ill. 2013) (holding that the district would have to provide a remedial plan to compensate Hispanic students for discrimination in the context of a gifted program).

153. Shavar D. Jeffries, *The Structural Inadequacy of Public Schools for Stigmatized Minorities: The Need for Institutional Remedies*, 34 HASTINGS CONST. L.Q. 1, 2 (2006) ("Among the remedies available to litigants for [Fourteenth Amendment] equal-protection violations is compensatory education designed to counteract the harms of educational inequity.").

154. *See* Tracy Ellen Sivitz, *Eliminating the Continuing Effects of the Violation: Compensatory Education As A Remedy for Unlawful School Segregation*, 97 YALE L.J.1173, 1173–74 (1988).

v. Texas,[155] *Plaquemines Parish School Board v. United States,*[156] and *Liddell v. Missouri*[157]—are demonstrative.

In *Texas*, which was decided prior to the enactment of the EEOA, the United States raised desegregation claims under Title VI of the Civil Rights Act and the Fourteenth Amendment.[158] The District Court for the Eastern District of Texas found in favor of the United States and ordered relief based on its "broad powers to fashion appropriate relief" to correct violations of Title VI and the Fourteenth Amendment.[159] Guided by "equitable principles,"[160] the court crafted an award that included "[c]ompensatory [e]ducation for [m]inority [c]hildren in [r]acially and [e]thnically [i]solated [s]chools."[161] Explaining the award, the court stated: "[T]o afford . . . [minority] students equal educational opportunities, the State must . . . develop and implement special curricular and extra-curricular activities, which will compensate to some extent for the inequality in the[] [students'] education resulting from their racial or ethnic separation."[162]

Plaquemines, a case arising under the Civil Rights Act, was also decided prior to the enactment of the EEOA.[163] In *Plaquemines*, a district court entered a decree enjoining the school district "from operating a racially segregated public school system,"[164] and as part of the decree, the court ordered the school district to, among other things, "establish remedial programs to assist students who previously attended all-[black] schools . . . ."[165] Reviewing the district court's order, the Fifth Circuit Court of Appeals concluded that:

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155. United States v. Texas, 321 F. Supp. 1043, 1045 (E.D. Tex. 1970), *supplemented*, 330 F. Supp. 235 (E.D. Tex. 1971), *aff'd as modified,* 447 F.2d 441 (5th Cir. 1971), and *aff'd*, 447 F.2d 441 (5th Cir. 1971).

156. Plaquemines Parish Sch. Bd. v. United States, 415 F.2d 817, 831 (5th Cir. 1969).

157. Liddell v. Missouri, 731 F.2d 1294 (8th Cir. 1984).

158. *See Texas*, 321 F. Supp. at 1045.

159. *Id.* at 1055.

160. *Id.* at 1055–56.

161. United States v. Texas, 330 F. Supp. 235, 248 (E.D. Tex.), *aff'd as modified*, 447 F.2d 441 (5th Cir. 1971).

162. *Id.*

163. *Plaquemines*, 415 F.2d at 821–22.

164. *Id.* at 825.

165. *Id.* at 831.

> The remedial programs, ordered by the district court, are an integral part of a program for compensatory education to be provided [black] students who have long been disadvantaged by the inequities and discrimination inherent in the dual school system. The requirement that the School Board institute remedial programs so far as they are feasible is a proper exercise of the court's discretion.[166]

The Fifth Circuit thus found that compensatory education is critical to remedying the effects of segregation, so district courts have authority to award compensatory education to students who have suffered segregation.[167]

The Eighth Circuit's 1984 decision in *Liddell* mirrored *Plaquemines*. The *Liddell* court concluded that "remedial and compensatory [educational] programs" are necessary desegregation remedies.[168] And citing the Supreme Court's landmark desegregation decision in *Milliken v. Bradley*,[169] the court explained:

> [Remedial] programs assist students who previously attended all-[black] schools when those students transfer to formerly all-white schools. The *remedial programs are an integral part of a program for compensatory education to be provided* [*black*] *students who have long been disadvantaged* by the inequities and discrimination inherent in the dual school system.[170]

Hence, like the Eastern District of Texas in *Texas* and the Fifth Circuit in *Plaquemines*, the Eighth Circuit embraced compensatory education as an essential form of relief in school desegregation cases.[171]

Following the passage of the EEOA, school desegregation plaintiffs in a number of cases began relying on the EEOA in addition to the Fourteenth Amendment and the Civil Rights Act.[172] In at least one of those cases the court crafted relief for the plaintiffs that included compensatory education.[173]

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166. *Id.*

167. *See id.*

168. *Liddell*, 731 F.2d at 1313.

169. Milliken v. Bradley, 433 U.S. 267, 284 (1977).

170. *Id.* (internal quotation marks omitted) (emphasis in original).

171. *Liddell*, 731 F.2d at 1315.

172. *See, e.g.*, United States v. City of Yonkers, 96 F.3d 600, 602–03 (2d Cir. 1996) (plaintiffs alleged discriminatory housing and school violations under the Civil Rights Act and the EEOA).

173. *See* Stanley v. Darlington Cty. Sch. Dist., 879 F. Supp. 1341, 1359 (D.S.C. 1995), *rev'd in part*, 84 F.3d 707 (4th Cir. 1996).

In *Stanley v. Darlington County School District*,[174] a school district alleged that the State of South Carolina, in violation of the EEOA, Title VI, and the Fourteenth Amendment, took "actions [that] made it more difficult and expensive to desegregate."[175] The District Court for the District of South Carolina, siding with the school district, concluded that the State created "the dual school system" in the school district and failed to "discharge its affirmative duty to eradicate" the system.[176] Based on that finding, the court determined that it was "appropriate for the State to participate . . . in certain desegregation measures," including compensatory education programs.[177] Compensatory education programs were needed because, despite a desegregation order issued by the court years earlier, students were being forced to attend "schools [that] continu[ed] to provide inferior education opportunities."[178]

In awarding compensatory education, though, the *Stanley* court made no specific findings about the availability of compensatory education under the EEOA. The court did not specify whether it derived its authority to issue the award from the EEOA, Title VI, or the Fourteenth Amendment.[179]

In a departure from the opaque treatment of compensatory education in *Stanley*, a few courts in recent years have directly commented on the relationship between compensatory education and the EEOA.[180]

First, in *Mumid v. Abraham Lincoln High School*, former students of a Minnesota high school alleged that the school violated their EEOA rights, and they requested injunctive relief requiring changes to the school's educational practices.[181] The District Court for the District of Minnesota, however, found that the students lacked standing to seek injunctive relief because they were no longer attending the school.[182] In dismissing the students' claims, the court indicated that, although the students did not request compensatory education, their claims might have survived if they had.[183] The court stated:

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174. *Id.*

175. *See id.* at 1357–59.

176. *Id.* at 1415–16.

177. *Id.* at 1418.

178. *Id.* at 1415–16, 1418.

179. *See id.* at 1418.

180. Mumid v. Abraham Lincoln High Sch., No. 005-CV-2176, 2008 WL 2811214, at *9 (D. Minn. July 16, 2008), *aff'd*, 618 F.3d 789 (8th Cir. 2010).

181. *Id*.

182. *Id.*

183. *Id.* at *10 n.9.

> It is possible that the equitable remedies of compensatory education or tuition reimbursement might be available under § 1703(f) [of the EEOA]. In cases under the [IDEA] . . . courts have held that such remedies are available and, even if they involve the payment of money, are equitable in nature. *Miener v. Missouri*, 800 F.2d 749, 754 (8th Cir. 1986) . . . . But [the students] have not asked for either compensatory educational services or tuition reimbursement, nor have they briefed the question whether such remedies are available under the EEOA.[184]

In other words, the court signaled that compensatory education might be available under the EEOA since it is available under the IDEA.

Second, in *Issa v. School District of Lancaster*—a Third Circuit Court of Appeals case—a group of ELLs requested, among other things, "'supplemental educational services' as compensatory relief for" their school district's EEOA violations.[185] The Third Circuit recognized that the students' request was potentially viable, but it found that the request was moot because the students had "disavowed any intention to 'further their education' within the [s]chool [d]istrict."[186]

IV. THE EEOA PERMITS COMPENSATORY EDUCATION AWARDS

Taken together, IDEA precedent embracing compensatory education and the EEOA's roots as a statute designed to assist school desegregation efforts confirm that compensatory education is available under the EEOA. Courts have yet to recognize this not due to substantive concerns but rather because they have had limited opportunities to consider EEOA claims seeking compensatory education.

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184. *Id.*

185. Issa v. Sch. Dist. of Lancaster, 847 F.3d 121, 126 n.2 (3rd Cir. 2017).

186. *Id.* The Third Circuit's mootness finding is problematic. Compensatory education serves to correct past violations. A claim for compensatory education is no more mooted by a student's separation from a school than is an employee's claim for backpay when the employee separates from his employer. *See* Morris v. D.C., 38 F. Supp. 3d 57, 67 (D.D.C. 2014) ("Courts have specifically held that where the possibility of compensatory education is still available, a plaintiff's claim will survive a mootness challenge.").

A. Applying IDEA Precedent, the EEOA Permits Compensatory Education Awards.

IDEA precedent—in two ways—establishes that courts have discretion to award compensatory education under the EEOA. First, precedent interpreting the IDEA's relief provision as permitting compensatory education awards establishes that the EEOA's provision also permits such awards. The EEOA's and the IDEA's relief provisions mirror each other, so they should be interpreted consistently.[187] Second, even putting aside the relief provisions' similarities, IDEA precedent establishes that the EEOA permits compensatory education awards because the precedent shows that compensatory education conforms to the specific criteria that courts have identified as governing EEOA awards.

1. Because the IDEA's Relief Provision Affords Courts the Discretion to Award Compensatory Education, so Does the EEOA's.

Under the Supreme Court's construction of the IDEA's relief provision in *Burlington*,[188] the provision parallels the EEOA's relief provision. Therefore, the provisions should be interpreted consistently:[189] both should be interpreted as allowing compensatory education awards.

The *Burlington* Court began its analysis of the IDEA's relief provision by considering the ordinary meaning of the provision's "appropriate relief" language.[190] The ordinary meaning of the language, the Court concluded, "confers broad discretion" to courts.[191] But the Court, noting that "[t]he type of relief" allowed under the IDEA "is not further specified," departed from the text of the provision and looked to the "purpose of the [IDEA]" to discern the scope of that discretion.[192] The purpose of the IDEA, the Court found, is "principally to provide" students with disabilities meaningful access to educational opportunities.[193] Or, in the nomenclature of the IDEA, the

187. According to the canon of statutory construction, *in pari materia*, similar statutes should be interpreted similarly. *See* Wimberly v. Labor & Indus. Relations Comm'n, 479 U.S. 511, 517 (1987).

188. Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 370 (1985).

189. *See Wimberly*, 479 U.S. at 517.

190. *Burlington*, 471 U.S. at 369.

191. *Id.*

192. *Id.*

193. *Id.*

purpose is to provide those students with FAPE.[194] Based on that purpose, the Court determined that "appropriate relief" includes tuition reimbursement—[195] a type of relief that is similar to compensatory education.[196]

Applying *Burlington*, the EEOA's relief provision parallels the IDEA's relief provision. The EEOA provision contains the same "appropriate relief" language as the IDEA provision.[197] And the EEOA provision, like the IDEA provision, does not further specify the type of relief that is "appropriate" for remedying violations of ELL rights.[198] The EEOA's purpose is thus relevant in determining what relief is "appropriate" under the statute,[199] and the EEOA's purpose is similar to the IDEA's. The goal of the EEOA is to ensure that ELLs (and other student groups) receive equal educational opportunity.[200] In fact, like the IDEA's FAPE requirement, the EEOA requires school districts to take affirmative steps to secure educational opportunities for students.[201]

Because the EEOA's relief provision, under *Burlington*, parallels the IDEA's relief provision, the provisions should be interpreted consistently.[202] Both should be interpreted as affording courts discretion to award compensatory education. Both provisions authorize courts to grant

194. *See id.*

195. *Id.* at 370.

196. *See Miener*, 800 F.2d at 753–54.

197. *Compare* 20 U.S.C. § 1706 (2012) ("Individuals . . . may institute a civil action . . . for such relief, as may be appropriate.), Martin Luther King Jr. Elementary Sch. Children v. Ann Arbor Sch. Dist. Bd., 473 F. Supp. 1371, 1383 (E.D. Mich. 1979) ("Section 1706 of Title 20 provides that an individual who has been 'denied an equal educational opportunity' (as defined in s 1703) may 'institute a civil action . . . for such relief as may be appropriate.' Although this statute is a direct congressional mandate to the federal courts to become involved in matters of this kind, this statute makes it clear that discretion is given to the judge to determine what is 'appropriate.'"), *with* 20 U.S.C. § 1415(i)(2)(C)(iii) (2012) ("[The court] shall grant such relief as the court determines is appropriate.").

198. *See* 20 U.S.C. § 1706 (2012). The EEOA states in a separate provision that relief must be "essential to correct particular denials of equal educational opportunity." 20 U.S.C. § 1712. But that statement does not distinguish the EEOA from the IDEA. IDEA relief also must be "necessary to cure a violation." *See Bartholomew*, 442 F.3d at 597–98 (internal quotation marks omitted).

199. *See Burlington*, 471 U.S. at 369.

200. *Horne*, 557 U.S. at 466–67 ("The EEOA seeks to provide equal educational opportunity to all children enrolled in public schools. . . . Its ultimate focus is on the quality of educational programming and services provided to students.).

201. 20 U.S.C. § 1706(f) (2012); *see also Horne*, 557 U.S. at 466–67.

202. *See Wimberly*, 479 U.S. at 517.

appropriate relief, and "consistent with the Supreme Court's generous reading of" that language, both provisions "encompass[] the full range of equitable remedies," thus empowering "court[s] to order . . . compensatory education."[203]

2. IDEA Precedent Establishes that Compensatory Education Conforms to the Criteria Governing EEOA Awards.

Courts have found that the EEOA gives them discretion to award relief that (1) is an equitable remedy and (2) is essential to correct an EEOA violation.[204] So, as long as an award is an equitable remedy that is essential to cure a denial of the educational rights that the EEOA promises, the award is permissible.[205] IDEA awards are governed by similar criteria.[206] An IDEA award must be an equitable remedy that is necessary (i.e., essential)[207] to cure a denial of the educational rights that the IDEA promises.[208] Given these similar criteria, courts, in embracing compensatory education as a primary form of IDEA relief, have established that compensatory education is a type of relief that conforms to the EEOA's criteria for permissible relief.[209]

First, IDEA precedent plainly establishes that compensatory education is an equitable remedy.[210] Courts across the country have held in IDEA cases that compensatory education is an equitable remedy.[211]

Second, IDEA precedent embracing compensatory education as a primary form of relief establishes that compensatory education is generally necessary (i.e., essential) to make a student whole after her educational rights are violated.[212] Courts have repeatedly underscored that compensatory

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203. *See Bd. of Educ. of Oak Park*, 79 F.3d at 656.

204. *See, e.g.*, *Mumid*, 618 F.3d at 797–98 ("[A] court shall impose 'only such [equitable] remedies as are essential *to correct* particular denials of equal educational opportunity or equal protection of the laws.'" (citing 20 U.S.C. § 1712)).

205. *Id*. at 798.

206. *Compare Mumid*, 618 F.3d at 797–98 *with Bartholomew*, 442 F.3d at 597–98.

207. "Necessary" and "essential" have the same meaning. *Necessary*, Black's Law Dictionary (10th ed.) ("That is needed for some purpose or reason; *essential* . . . ." (emphasis added)).

208. *Bartholomew*, 442 F.3d at 597–98 (internal quotation marks omitted).

209. *Id*. at 598.

210. *See supra* note 147.

211. *Id.*

212. *Id.*

education serves an essential corrective function when a student's rights are violated.[213] For example, the Third Circuit in *Lester H. v. Gilhool*[214] held that "compensatory education . . . cures the deprivation of a handicapped child's statutory rights, thus providing a[n] [equitable] remedy which Congress intended to make available."[215] Likewise, the Eighth Circuit in *Miener* concluded that recovery of compensatory education was "necessary to secure the child's right to a free appropriate public education."[216]

Of course, IDEA precedent addresses special education rights, rather than ELL rights, so one could argue that the precedent offers limited guidance about the role of compensatory education in curing a violation of the EEOA. But given the similarities between the EEOA and the IDEA, this argument is unavailing. EEOA and IDEA violations have the same consequences (a student is denied educational opportunities to which she is entitled, resulting in educational losses), and the violations require the same corrective action (an award that provides educational remediation). Because the same corrective action is required in IDEA and EEOA cases, precedent identifying compensatory education as an appropriate IDEA remedy is instructive for EEOA cases.[217]

D. The EEOA's School Desegregation Roots Signal that the EEOA Permits Compensatory Education Awards.

Congress appears to have incorporated equitable powers for courts into the EEOA that are similar to the powers that courts exercised in pre-EEOA school desegregation cases.[218] And those pre-EEOA powers included the authority to award compensatory education.[219]

In 1974, the year Congress passed the EEOA, school desegregation efforts stemming from *Brown v. Board of Education*[220] were ongoing, and

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213. *See* Lester H. v. Gilhool, 916 F.2d 865, 873 (3d Cir. 1990); *Miener*, 800 F.2d at 753.

214. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990).

215. *See id.* at 873.

216. *Miener*, 800 F.2d at 753–54 (internal quotation marks omitted).

217. At least one court appears to have acknowledged the same. *See* Mumid v. Abraham Lincoln High Sch., No. 005-CV-2176, 2008 WL 2811214, at *10 n.9 (D. Minn. July 16, 2008), *aff'd*, 618 F.3d 789 (8th Cir. 2010).

218. *Compare* Hobson v. Hansen, 327 F. Supp. 844, 864 (D.D.C. 1971) (ordering compensatory education as a remedy in a pre-EEOC claim) *with* Mumid v. Abraham Lincoln High Sch., 618 F.3d 789, 798 (8th Cir. 2010) (discussing Congress' mandate in 20 U.S.C § 1703 to consider equitable remedies when ordering a party to correct a denial of equal educational opportunity).

219. *See, e.g.*, *Hobson*, 327 F. Supp. at 864.

220. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

courts, based on their broad equitable authority under the Fourteenth Amendment and Title VI of the Civil Rights Act, were regularly awarding compensatory education in desegregation cases.[221] Amidst this context, Congress enacted the EEOA protections designed to assist with desegregation efforts.[222] And rather than cabining courts' authority to award compensatory education when school districts violate the protections, Congress seems to have embraced the broad equitable power that courts exercised in the years leading up to 1974.[223] Congress looked to the Fourteenth Amendment for authority and, in the EEOA's relief provision, used equitable language—the "appropriate relief" language—that "confers broad discretion" to courts.[224] Congress, then, appears to have intended to incorporate into the EEOA equitable powers that are similar to those used by courts in pre-EEOA school desegregation cases.[225] Congress appears to have armed courts with the power to award compensatory education.

The District Court of South Carolina's decision in *Stanley* supports this understanding of Congress' intent.[226] *Stanley* signaled that courts' equitable powers under the EEOA overlap with the powers exercised in pre-EEOA cases.[227] The *Stanley* court awarded compensatory education to students raising school desegregation claims under the Fourteenth Amendment, Title VI, and the EEOA.[228] But the court did not identify which authority it relied on; instead, it approached the claims uniformly—it approached the claims as implicating the same broad equitable powers.[229]

E. Courts' Delay in Recognizing Compensatory Education as a Form of EEOA Relief is Understandable.

The argument that the EEOA permits compensatory education awards is not impervious to attack. Perhaps the strongest retort is that the EEOA has

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221. *See* discussion *supra* at Section II(C)(2).

222. *See* 20 U.S.C. § 1703 (a)–(e) (2012).

223. *See* 20 U.S.C. § 1713 (2012); *Mumid*, 618 F.3d at 799.

224. *See Burlington*, 471 U.S. at 369.

225. The only way in which Congress appears to have circumscribed courts' equitable powers in EEOA desegregation cases is by requiring courts to prioritize neighborhood-based desegregation orders. *See* 20 U.S.C. § 1713 (2012).

226. Stanley v. Darlington Cty. Sch. Dist., 879 F. Supp. 1341, 1359 (D.S.C. 1995), *rev'd in part*, 84 F.3d 707 (4th Cir. 1996).

227. *Id.* at 1357, 1359.

228. *Id.* at 1359, 1419.

229. *See Stanley*, 879 F. Supp. at 1415–18.

existed for forty years and no court has held that compensatory education is available under the statute. If compensatory education were available under the EEOA, courts would have recognized that by now. What's more, that compensatory education is a prominent form of IDEA relief cuts *against* the argument that the EEOA permits compensatory education awards. Courts' embracing compensatory education in IDEA cases but not EEOA cases evidences a conscious decision by courts to avoid awarding compensatory education to EEOA claimants.

However, this argument is unpersuasive. It ignores the fact that courts did not identify compensatory education as a permissible form of IDEA relief until after several years of considering compensatory education requests.[230] It also ignores the fact that courts have had limited opportunities to grapple with requests for compensatory education in the EEOA context.[231] Courts' recognition of compensatory education under the IDEA but not the EEOA does not evidence a conscious decision by courts to avoid awarding compensatory education to EEOA claimants. It is merely a consequence of the different paths that IDEA and EEOA litigation have taken.

The IDEA was enacted in 1975, and soon thereafter, parents and students began requesting compensatory education.[232] Yet courts did not recognize compensatory education as a permissible form of IDEA relief until the mid-1980s.[233] There appear to be two reasons for that delay.

First, jurisprudence on a novel issue often develops slowly, even when claims addressing the issue are frequently raised.[234] IDEA jurisprudence on compensatory education is just one example of this phenomenon. As one judge has noted: "The jurisprudence that is evolving on the subject of compensatory education is an example of how time-consuming and expensive it can be to develop a body of law on a case-by-case basis . . . ."[235]

Second, identifying the proper role of compensatory education under the IDEA was a difficult task given the unique features of compensatory education and the limited guidance offered by the IDEA about the types of relief that it permits. Compensatory education involves school districts *paying* for educational services for a student.[236] This damages-like feature is unique for an equitable remedy, and it makes compensatory education appear,

230. *See* discussion *supra* at III(C)(1).
231. *See* discussion *supra* at III(B)(2).
232. Metzger, *supra* note 140, at 1839.
233. *Id*. at 1845.
234. *Id*. at 1862.
235. *Id.*
236. *See* B.T. v. Dep't of Educ., 676 F. Supp. 2d 982, 989–90 (D. Haw. 2009).

at first blush, to be an unsuitable IDEA remedy.[237] Equitable considerations are important in IDEA cases and the prospect of damages-like awards raises concerns about overburdening school districts.[238] With the IDEA's text providing limited guidance about the types of relief that the IDEA permits,[239] courts confronted with compensatory education claims struggled with these concerns. Only after several years of grappling with requests for compensatory education did courts embrace it as a permissible form of IDEA relief.[240]

Considering courts' delay in recognizing compensatory education in the IDEA context and the reasons for that delay, it is unsurprising that courts have yet to establish compensatory education as a permissible form of EEOA relief. The EEOA, like the IDEA, provides limited guidance about the types of relief it permits,[241] and courts have had few opportunities to consider the relationship between compensatory education and the EEOA. Ostensibly due to the EEOA's private enforcement barriers, EEOA litigation is far less frequent than IDEA litigation, and EEOA litigation rarely involves requests for individualized relief, such as compensatory education.[242] As a result, courts have not had a meaningful opportunity to grapple with the novel

237. *See Powell*, 699 F.2d at 1081 (finding, in a 1983 IDEA case, that "[a]ny relief sought in the nature of compensatory education is the same as a claim for damages"); *Miener*, 498 F. Supp. at 951 ("Plaintiff's claim for 'compensatory education' clearly should be classified as 'damages.' She seeks such relief not to force defendants to comply with their duties under federal law in the future . . . but rather to compensate her for the damage done to her by defendants' past shirking of their responsibilities. That plaintiff phrases her prayer for relief in equitable terms is not significant.").

238. *See* Smith v. Robinson, 468 U.S. 992, 1020 (1984) ("[The IDEA and its legislative history] indicate that the omission[] [of a general damages remedy] w[as] in response to Congress' awareness of the financial burden already imposed on States by the responsibility of providing education for handicapped children."); *Burlington*, 471 U.S. at 374 ("[E]quitable considerations are relevant in fashioning [IDEA] relief."); Metzger, *supra* note 140, at 1844 (pointing out that early IDEA decisions considering compensatory education "were to one degree or another concerned that compensatory education would open the door to a broad damages remedy that would siphon funds from the educational process and inhibit school district efforts at innovation").

239. Miller v. Bd. of Educ., 565 F.3d. 1232 (10th Cir. 2009).

240. Harris v. District of Columbia, No. 91-1660, 1992 WL 205103 (D.D.C. August 7, 1992).

241. Valeria G. v. Wilson, 12 F. Supp. 2d 1007 (N.D. Cal. 1998).

242. *See* discussion *supra* at Section III(B).

questions implicated by such requests. Courts have had limited opportunities to examine the fit between compensatory education, the EEOA's "appropriate relief" language, and the EEOA's purpose.

V. THE ROLE OF COMPENSATORY EDUCATION IN EEOA CASES MOVING FORWARD

Moving forward, advocates should make a concerted effort to establish compensatory education as a form of EEOA relief. Beyond having the potential to be a powerful tool for remedying individual ELLs' educational deficits, compensatory education has the potential to bolster private enforcement of the EEOA and improve the efficacy of the statute. Access to compensatory education awards would increase the benefits of individual EEOA claims, thereby altering the current (problematic) cost-benefit analysis for these claims and fostering greater private enforcement. And with greater private enforcement,[243] the EEOA would become a more effective anti-discrimination statute. School districts would be more likely to prioritize EEOA compliance since an EEOA violation would trigger a meaningful risk of litigation and the prospect of a costly compensatory education award.[244]

But compensatory education will not shift the cost-benefit analysis for individual EEOA claims unless it is clearly established as a permissible form of EEOA relief. Unless parents and ELLs considering an EEOA lawsuit know that compensatory education will be available if they succeed, their cost-benefit analysis will be no different than it has been over the past forty years. Given the current barriers to private enforcement of the EEOA, this presents a dilemma. To solidify compensatory education as a permissible form of relief, courts must be presented with opportunities to examine the role of compensatory education under the EEOA. However, the EEOA's private

243. Admittedly, access to compensatory education awards may not have a significant impact on the volume of EEOA litigation. Even if parents and students have access to compensatory education, the financial and informational barriers to EEOA litigation would still be significant. Legislative action might be necessary to facilitate greater private enforcement of the EEOA. Though a full discussion of possible legislative changes is beyond the scope of this Article, legislation that provides prevailing-party attorney's fees and more specific protections for ELLs should be considered.

244. *See* Kevin Hoagland-Hanson, Note, *Getting Their Due (Process): Parents and Lawyers in Special Education Due Process Hearings in Pennsylvania*, 163 U. PA. L. REV. 1805, 1838 (2015) ("[C]ostly compensatory education awards are powerful motivators for [school] districts to ensure staff are adequately trained and provide necessary services.").

enforcement barriers make it difficult for individual parents and ELLs to do so.[245]

Advocates can overcome this quagmire and establish compensatory education as a form of EEOA relief by requesting EEOA-based compensatory education awards in (1) cases seeking broad reforms to school districts' ELL programming and (2) IDEA cases involving students who are both disabled and ELLs.

First, advocates should add individual requests for compensatory education to complaints seeking broad ELL reforms. The requests will not impose undue litigation costs, but they will afford courts opportunities to consider the role of compensatory education under the EEOA.[246]

Second, when an ELL who has special needs seeks IDEA relief, if the ELL and her parent have concerns about her ELL programming, their advocate should encourage them to raise a claim for EEOA-based compensatory education. Parents and students regularly pursue non-IDEA claims, such as claims under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, in IDEA cases.[247] Adding EEOA claims to the mix is feasible and will present courts with further opportunities to examine whether the EEOA allows compensatory education awards.

VI. CONCLUSION

The EEOA guarantees ELLs equal educational opportunity.[248] That promise, however, has not been realized. One factor contributing to this failure appears to be that courts have yet to recognize the full scope of relief permitted by the EEOA. Courts have not recognized that the EEOA permits awards of compensatory education—a powerful tool for remedying deficits

245. *See* discussion *supra* at Section III(B).

246. Some advocates seem to have already started employing this strategy. *See Issa*, 847 F.3d at 126 n.2 (noting, in a case where a group of ELLs requested ELL-programming reforms, that the ELLs also requested "supplemental educational services").

247. *See, e.g.*, Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 112 (1st Cir. 2003) ("[The plaintiff] asserted claims under IDEA; Title II of the Americans with Disabilities Act (ADA) . . . [and] Section 504 of the Rehabilitation Act . . . ."); A.G. v. Paradise Valley Unified Sch. Dist. No. 69, 815 F.3d 1195, 1201 (9th Cir. 2016) ("[P]laintiffs alleged a denial of FAPE under the procedural provisions of the IDEA, Title II of the ADA, and Section 504 of the Rehabilitation Act . . . .").

248. Horne v. Flores, 557 U.S. 433, 466–67 (2009).

that develop when a student's educational rights are violated.[249] Given the litigation history of the EEOA, courts' delay in recognizing compensatory education is understandable. But the delay cannot be justified on substantive grounds.

Congress, in enacting the EEOA, acknowledged that ELLs face significant barriers in our public schools.[250] The EEOA affords courts broad discretion to fashion appropriate relief when those barriers are left unaddressed. That discretion includes the discretion to award compensatory education.

249. *See generally* LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW § 2:50 (4th ed.) for an overview of compensatory education.

250. *See* Castaneda v. Pickard, 648 F.2d 989, 1007–08 (5th Cir. 1981).