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Mixed Messages: An Analysis of the Conflicting Standards Used by the United States Circuit Courts of Appeals when Awarding the Compensatory Education for a Violation of the Individuals with Disabilities Education Act

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MIXED MESSAGES: AN ANALYSIS OF THE CONFLICTING STANDARDS USED BY THE UNITED STATES CIRCUIT COURTS OF APPEALS WHEN AWARDING COMPENSATORY EDUCATION FOR A VIOLATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

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I. INTRODUCTION

With the passage of the Education for All Handicapped Children Act (EAHCA) of 1975,1 now titled the Individuals with Disabilities Education Act (IDEA or the Act),2 each child with a disability was guaranteed the right to a free and appropriate public education.3 It fell to the public schools to provide that free and appropriate education to students with disabilities, many of whom had been denied access to public schools prior to that time.4 It was inevitable that parents would disagree with their local school district, or the state educational agency, as to whether their child was being provided the kind of education that the law requires.5 Since


3. See 20 U.S.C. § 1400(d)(1)(A) (2000). “The purposes of this chapter are ... to ensure that all children with disabilities have available to them a free appropriate public education ...” Id.

4. See id. § 1400(c)(2) (2000). That section reads as follows:

The Congress finds ... [that] ... before the date of the enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142)—(A) the special educational needs of children with disabilities were not being fully met; (B) more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity; (C) 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and will not go through the educational process with their peers; (D) there were many children with disabilities throughout the United States participating in regular school programs whose disabilities prevented such children from having a successful educational experience because their disabilities were undetected; [and] (E) because of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

Id.

5. Regulations were not promulgated until August 1977. See CREMINS, supra note 1, at 27. By 1980 courts had been asked to address a variety of issues related to the EAHCA. See, e.g., Springdale Sch. Dist. v. Grace, 494 F. Supp. 266 (W.D. Ark. 1980) (considering appropriateness of special education program school district had developed for special education student); Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979) (considering extended school year programming for special education students); Tatoo v. Texas, 481 F. Supp. 1224 (N.D. Tex. 1979) (determining extent of what are considered “related services” under IDEA); Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978) (considering conflicts between disciplinary measures and procedural rights of special education students). During the 1979-1980 school year, over 500 special education due process hearings based on parents’ challenges of school programming were held in Massachusetts alone. See JOSEPH BALLARD, ET AL., SPECIAL EDUCATION IN AMERICA: ITS LEGAL AND GOVERNMENTAL FOUNDATIONS 36-37 (1982) (citing a study done by the National Association of State Directors of Special Education). The same study identified the five primary issues addressed in
the Act’s passage, courts have been asked to resolve those disputes, and in doing so, they have struggled both with defining just what an “appropriate” education is and with determining whether it has been provided.\(^6\) Despite this uncertainty, the courts and Congress have crafted a variety of forms of relief for students and parents when it has been determined that schools or state agencies have not met their responsibilities under the Act.\(^7\) One of those forms of relief, compensatory education, is the topic of this Comment.

The definition and the rationale for compensatory educational services were stated by the Eighth Circuit in \textit{Miener v. Missouri}.\(^8\) The purpose of compensatory educational services, according to the court in \textit{Miener}, is to “replace the services the [school district was] obligated to provide.”\(^9\) An award of compensatory educational services is justified, the court found, because it simply requires school districts to “belatedly pay expenses that [they] should have paid all along.”\(^10\) The court also found that compensatory educational services are warranted when it can be proven that a student was “denied … a free appropriate education in violation of [the IDEA].”\(^11\) While the concept of compensatory education and its rationale are deceptively simple, the application of that concept and rationale to individual cases have proven anything but. This Comment considers the remedy of compensatory education and analyzes the standards that the United States Circuit Courts of Appeals have applied when granting or denying such relief.

Part II of this Comment reviews the history of the Individuals with Disabilities Education Act and the rights granted to students and parents both by the IDEA itself and by subsequent court decisions. Part II also considers the forms of relief, including compensatory education, that are now available to students and their parents when the provisions of the IDEA have been violated. It also traces the evolution and development of compensatory education as a form of relief under that Act.

Part III considers, in greater detail, the specific remedy of compensatory education. It reviews, on a circuit-by-circuit basis, the standards that have been applied as each circuit has weighed the issue of when and on what basis to award compensatory education for a violation of the IDEA.

Part III also compares those court-created standards, finding that while there are areas of agreement among the circuits, there is no one consistent standard or rationale for awarding compensatory services. In addition, the Third Circuit’s recent decision in \textit{Ridgewood Board of Education v. N.E.}\(^12\) has created a significant

\begin{itemize}
  \item[a)] due process hearings that year as “(a) private versus public school placements; (b) appropriateness of evaluation and eligibility for special education; (c) appropriateness of programs and services; (d) the length of the school day and/or school year (especially for severely and profoundly handicapped children); and (e) transportation arrangements.” \textit{Id.} at 36.
  \item[b)] \textit{See Thomas F. Guernsey & Kathi Klare, Special Education Law 29-30 (1993).}
  \item[c)] \textit{See, e.g.,} 20 U.S.C. \textsection 1415(i)(3)(B) (2000) (allowing parents to collect attorney’s fees if they are the prevailing party); \textit{Miener v. Missouri}, 800 F.2d 749, 754 (8th Cir. 1986) (compensatory education); \textit{Burlington Sch. Comm. v. Massachusetts Dep’t of Educ.}, 471 U.S. 359, 369 (1985) (tuition reimbursement to parents); \textit{Anderson v. Thompson}, 658 F.2d 1205, 1208 (7th Cir. 1981) (injunctive relief).
  \item[d)] 800 F.2d 749 (8th Cir. 1986).
  \item[e)] \textit{Id.} at 756.
  \item[f)] \textit{Id.} at 753 (quoting \textit{Burlington Sch. Comm. v. Massachusetts Dep’t of Educ.}, 471 U.S. 359, 370-71 (1985)).
  \item[g)] \textit{Id.} at 756.
  \item[h)] 172 F.3d 238 (3d Cir. 1999).
\end{itemize}
conflict among the circuits by greatly expanding the circumstances under which compensatory education can be awarded.\textsuperscript{13}

In Part IV, this Comment concludes that the inconsistency among the circuits, coupled with the inappropriately broad expansion of the rationale for awarding compensatory education recently embraced by the Third Circuit, warrants a review of the issue by the Supreme Court. The Court has historically been hesitant to take up questions related to the interpretation of the Individuals with Disabilities Education Act. Without such clarification, however, courts, parents, students, school districts, and state educational agencies will be left with confusing and inconsistent guidelines regarding compensatory education as a form of relief under the Individuals with Disabilities Education Act.

II. BACKGROUND

A. History of the Individuals with Disabilities Education Act (IDEA)

On November 29, 1975, President Gerald Ford signed into law the Education for All Handicapped Children Act of 1975.\textsuperscript{14} In 1990, the EAHCA was reitled the Individuals with Disabilities Education Act.\textsuperscript{15} The EAHCA was intended to guarantee the availability of a free, publicly supported education for all handicapped children.\textsuperscript{16} It was phased in over a four-year period beginning in 1978.\textsuperscript{17}

Two decades of judicial and legislative efforts to expand public educational opportunities for all children preceded the passage of the EAHCA in 1975.\textsuperscript{18} The start of judicial efforts can be traced to 1954, when the United States Supreme Court, in Brown v. Board of Education,\textsuperscript{19} held that racial segregation in a public school is a violation of the Fourteenth Amendment.\textsuperscript{20} Acknowledging the importance of education in American society, the Court stated, “[I]t is doubtful that any child may be reasonably expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it,

\textsuperscript{13} See id. at 249-50. In Ridgwood, the Third Circuit rejected the decisions of other circuits that required a “bad faith or egregious circumstances standard,” id. at 249, as well as rejecting their own prior decision in M.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996). See Ridgwood Bd. of Educ. v. N.E., 172 F.3d at 250.

\textsuperscript{14} Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified at 20 U.S.C. §§ 1400-1485 (2000)). President Ford actually signed the EAHCA into law somewhat reluctantly. See PHILIP R. JONES, A PRACTICAL GUIDE TO FEDERAL SPECIAL EDUCATION LAW: UNDERSTANDING AND IMPLEMENTING PL 94-142 12 (1981) (quoting Ford’s statement upon the signing of the bill). Though he supported the objectives of the bill, he expressed concern regarding the unrealistic authorization levels promised by Congress. See id. He questioned the EAHCA’s complex procedural requirements, expressing fear that they would force funds to be used to support administrative paperwork and not educational services and programs for children. See id. Ford’s concerns have turned out to be well-founded.

\textsuperscript{15} See supra note 2.

\textsuperscript{16} See ALLEN G. OSBORNE JR., LEGAL ISSUES IN SPECIAL EDUCATION 12 (1996).

\textsuperscript{17} See id. at 24. The passage of the Education for All Handicapped Children’s Act is commonly regarded as a milestone in the history of the education of handicapped children. See CREMINS, supra note 1, at 14.

\textsuperscript{18} See STEPHEN B. THOMAS & CHARLES J. RUSSO, SPECIAL EDUCATION LAW: IMPLICATIONS FOR THE ’90s 5-9 (1995).

\textsuperscript{19} 347 U.S. 483 (1954).

\textsuperscript{20} See id. at 495.
is a right which must be made available to all on equal terms." The Court affirmed that, although public education is a state rather than a federal responsibility, when it is provided it must be provided equitably. The Court’s opinion in Brown has been cited in nearly every related decision since 1954.

It was nearly twenty years, however, before the rationale of the Court in Brown was successfully used to end educational discrimination against handicapped children. In 1971, in Pennsylvania Association for Retarded Children (P.A.R.C.) v. Pennsylvania, the United States District Court recognized the rights of mentally retarded children to a “free, public program of education and training,” preferably in a “regular public school class.” The court also required the state to afford the children and their parents a variety of procedural due process rights, including parental notification of any proposed program changes and the opportunity for a hearing prior to any change in educational placement. In 1972, in Mills v. Board of Education, the United States District Court ordered the District of Columbia to provide a “free and suitable publicly-supported education regardless of the degree of the child’s mental, physical or emotional disability or impairment.” The court also ordered the District of Columbia to implement a variety of procedural and due process safeguards. Although the decision in P.A.R.C. was limited to mentally retarded students, the Mills court extended those same educational and due process rights to all students with disabilities in the District of Columbia. As a result of the decisions in P.A.R.C. and Mills, by June 1975, forty-six right-to-education cases had been filed on behalf of handicapped students in twenty-eight states.

Legislative efforts to provide educational programming for disabled students had been undertaken at the state level as early as 1911. Those state mandates, however, were rarely enforced. Without provisions for actual enforcement, the mandatory legislation proved to be of limited value. Federal legislative efforts in the area began in 1966 with the amendment of the Elementary and Secondary Education Act (ESEA) to include a program of grants to the states to assist with

21. Id. at 493.
22. See id.
23. See CREMINS, supra note 1, at 14.
24. See id. at 15.
27. See id. at 303-06.
29. Id. at 878.
30. See id. at 880-83. The procedural rights granted to the students and their parents by the court include the right to parental notice prior to a student’s placement in a segregated special education program, the right to a hearing if the parents object to the placement, and the right to parental notice and a hearing before a suspension or expulsion of more than two days for disciplinary reasons. See id.
31. See CREMINS, supra note 1, at 17.
33. See id. at 10. “[M]andatory laws establishing programs for handicapped children were enacted in New Jersey in 1911, New York in 1917 and Massachusetts in 1920.” Id. In 1975, only one or two states remained without mandatory laws for all areas of exceptionality. See id.
34. See id.
35. See id.
the education of handicapped students. The ESEA was amended again in 1970, creating a separate act, the Education of the Handicapped Act (EHA), which expanded federal support for services to handicapped students. The Education for All Handicapped Children Act was passed in 1975, amending the EHA by providing for that act's permanent authorization. The EAHCA has since been amended several times, most recently in 1997. In 1990, it was retitled the Individuals with Disabilities Education Act. All forms and titles of the Individuals with Disabilities Education Act will be referred to hereafter as the “IDEA” or “the Act.”

In addition to the IDEA, Section 504 of the Rehabilitation Act of 1973 affords rights to students with disabilities. The rights and obligations created by Section 504 will not be addressed in this Comment.

B. The IDEA

1. An Overview

The IDEA broadly mandates that “all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs.” As was the EAHCA before it, the IDEA is essentially a funding statute. In order to receive certain federal funds, a state must develop and implement policies that insure that all students with disabilities are provided a free and appropriate education by each local

41. See id; see also H.R. Rep. No. 94-332, at 5 (1975).
43. See supra note 2; see also Osborne, supra note 16, at 12-13.
45. Section 504 includes a broad provision that “[n]o otherwise qualified individual ... shall, solely by reason of her or his disability be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a) (2000). Section 504 is primarily a civil rights statute prohibiting discrimination against handicapped individuals. See Cremins, supra note 1, at 23. Section 504 was interpreted in its regulations, however, to prohibit the exclusion of students with disabilities from regular school programs. See id. at 13. Though its initial passage predated the EAHCA by two years, administrative and political roadblocks delayed its implementation until 1977. See Thomas & Russo, supra note 18, at 16.
47. See Guernsey & Klare, supra note 6, at 6.
educational agency (LEA), typically a school district within the state in which the students reside.48 The funding that the states and school districts receive is based on the number of students with disabilities that are identified and served.49

It is this provision of a free appropriate public education (FAPE) to children with disabilities that is the cornerstone of the IDEA and is the key right guaranteed by the Act.50 Simply having a disability, however, does not guarantee eligibility for services under the IDEA.51 Determining whether a student meets the IDEA’s definition of a “child with a disability” requires a two-step inquiry.52 First, the child must be found to have at least one of thirteen categories of disability, which are listed in the statute.53 Second, the child must be one “who, by reason of [the disability], needs special education and related services.”54 A failure to satisfy either of these requirements denies a child the benefits afforded by the IDEA—the right to a free appropriate education designed to meet the child’s unique needs.

2. Free and Appropriate Public Education (FAPE)

a. The Statutory Definition of a FAPE

The IDEA’s goal of a “free appropriate education” for all children with disabilities is accomplished by imposing a variety of procedural and substantive obligations on any state receiving federal funds pursuant to the IDEA, which the state in turn imposes on each LEA within its jurisdiction.55 The procedural obligations that Congress intended are extensive and are clearly and explicitly defined within the Act; the substantive rights and requirements are not.56

48. See 20 U.S.C. § 1412(a) (2000); see also GUERNSEY & KLARE, supra note 6, at 6. A state is eligible to receive funds pursuant to the IDEA if the state demonstrates that it has policies and procedures to ensure that it meets the following conditions: “A free appropriate public education is available to all children with disabilities residing in the State ....” 20 U.S.C. § 1412(a)(1)(A) (2000). “The State has established a goal of providing full educational opportunity to all children with disabilities ....” Id. § 1412(a)(2). “All children with disabilities...are identified, located, and evaluated ....” Id. § 1412(a)(3)(A). “An Individualized Education Program is developed, reviewed, and revised for each child ....” Id. § 1412(a)(4). “[C]hildren with disabilities ... are educated with children who are not disabled ....” Id. § 1412(a)(5)(A). “Children with disabilities and their parents are afforded the procedural safeguards required by [the IDEA].” Id. § 1412(a)(6)(A). “Children with disabilities are evaluated in accordance with [the IDEA].” Id. § 1412(a)(7).

49. See GUERNSEY & KLARE, supra note 6, at 6. By 1982, states were to receive from the Federal Government each year an amount equal to up to 40 percent of the national average per pupil expenditure for children with disabilities multiplied by the number of children with disabilities served by the state and the local educational agencies within it. In the past three years, the government has in fact provided only 9, 11 and 12 percent respectively. See H.R. Con. Res. 84, 106th Cong. (1999).

50. See GUERNSEY & KLARE, supra note 6, at 6.

51. See id. at 61.

52. See id.

53. See 20 U.S.C. § 1401(3)(A)(i) (2000). The areas of disability that make a child eligible for special education services are defined in the statute and include “mental retardation, hearing impairments ..., speech or language impairments, visual impairments ..., serious emotional disturbance ..., orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.” Id.

54. Id. § 1401(3)(A)(ii).


56. See GUERNSEY & KLARE, supra note 6, at 7.
The procedural steps required by the IDEA impose obligations on public educational agencies and afford protections and due process rights to children with disabilities and their parents. The obligations include extensive and detailed procedures that school districts must follow when identifying, evaluating, and making educational decisions regarding eligibility and programming for students suspected of being, or having been found to be, eligible for services.

There are significant procedural safeguards and protections afforded both to children with disabilities and to their parents. These include, but are not limited to, the parents’ right to prior written notice of certain steps, the right to participate in the educational programming and decision making for their child, the requirement of parental consent before evaluation or placement, and the right to an impartial hearing if dissatisfied with certain types of educational decisions. The IDEA also gives parents the right to file suit in state or federal court once administrative remedies have been exhausted.

While most of the procedural safeguards are intended to protect the rights of parents and students, both the public educational agency and the parents are af-

57. See Osborne, supra note 16, at 35.

58. For example, the Act requires that the agency or school district identify and locate any students for whom they are responsible who may be in need of special education services. See 20 U.S.C. § 1412(a)(3)(A) (2000). The IDEA also requires that any child suspected of having a disability must be evaluated by a multidisciplinary team. See id. § 1414(a)(1). Following the evaluation, the agency must convene a meeting, to which the student's parents must be invited, to review all available information and determine whether the child is eligible for special education. See id. § 1414(b)(4). If the student is eligible, the agency must develop, and review at least annually, an IEP for any child who has been identified as a child with a disability. See id. § 1414(d). Once an IEP is developed for a child, the agency must provide services that are in accordance with the IEP, in the least restrictive environment (LRE), and as close to the student’s home as possible. See id. § 1412(a)(5); see also 34 C.F.R. § 300.552(b)(2) (2000); Thomas F. Guernsey, When Teachers and Parents Can’t Agree, Who Really Decides? Burdens of Proof and Standards of Review Under the Education for All Handicapped Children Act, 36 CLEV. ST. L. REV. 67, 71 (1987-1988).

59. Parents are afforded the right to prior written notice regarding the identification or evaluation of their child, and of any changes in placement or changes in programming affecting the provision of a FAPE. See 20 U.S.C. § 1415(b)(3) (2000). The IDEA also includes the requirement of written parental consent for initial evaluation and initial special education placement. See id. § 1414(a)(1)(C); 34 C.F.R. § 300.505(a)(1)(i)-(ii) (2000). Parents are also afforded the opportunity to participate in all IEP Team meetings and to have all identification, placement, and programming decisions made by the IEP Team. See 20 U.S.C. § 1414(f) (2000); 34 C.F.R. § 300.501(b) (2000). The IEP Team includes the parents of the child; at least one regular education teacher of the child (if appropriate); at least one special education teacher or provider of the child; a representative of the public educational agency who is qualified to provide or supervise specially designed instruction, and is knowledgeable about both the general curriculum and the resources of the public agency; an individual who can interpret the instructional implications of evaluation results; and, at the discretion of the parents or agency, other individuals with special knowledge or expertise. See 34 C.F.R. § 300.344 (2000). At the parents' request, a comprehensive re-evaluation of the student must be completed at least every three years. See 20 U.S.C. § 1414(a)(2). If the parents disagree with any decision of the school district related to identification, evaluation, placement, or programming, they have the right to a due process hearing before an impartial officer with representation by counsel. See id. § 1415(f).

60. If the parents disagree with the decision of the hearing officer they have the right to appeal to the state education agency, or if administrative remedies have been exhausted, the right to file a civil action in a state court or in a federal district court without regard to the amount in controversy. See id. § 1415(g). The IDEA’s “stay-put” provision gives a student the right to remain in his or her then-current educational placement during the pendency of any administrative or judicial appeal. See id. § 1415(j).
for the right to an impartial hearing under the IDEA.61 The educational agency may seek review if the parents refuse to consent to an initial evaluation, or refuse to consent to the initial provision of special educational services.62 The Act grants broad discretion to the courts when providing relief under the IDEA, allowing a court to “grant such relief as [it] determines is appropriate.”63

Beyond certain procedural requirements with which local educational agencies must comply,64 the IDEA does little to define the nature or quality of the substantive right to a FAPE to which students with disabilities are entitled under the statute.65 In Hendrick Hudson District Board of Education v. Rowley,66 the United States Supreme Court acknowledged that fact, commenting that “[i]n the language of [the IDEA] is any substantive standard prescribing the level of education to be accorded handicapped children.”67

The IDEA provides only that:

The term “free appropriate public education” means special 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, or secondary school education ...; and (D) are provided in conformity with [an] individualized educational program ....68

The statute goes on to define “special education” rather broadly as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.”69 The student’s “individualized educational program” (IEP), mentioned in the statute’s definition of a FAPE, is the centerpiece of the FAPE requirements under the IDEA.70 The IEP is “a written statement for each child with a disability” that includes the following: (1) a statement of the child’s present levels of educational performance; (2) a statement of measurable annual goals and short term objectives; and (3) a statement of the special education and related services that are going to be provided to the child.71

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62. See id. § 300.505(b).
64. Under the IDEA, public educational agencies must make active efforts to identify those students for whom they are responsible who may need special education services. See id. § 1412(a)(3)(A). They must evaluate suspected disabled students to help determine both eligibility for services and individual educational needs. See id. § 1412(a)(7). They must develop an individualized educational program for each student with a disability who has been determined to be eligible for services. See id. § 1412(a)(4). They must place each student with a disability in a suitable educational program, in the least restrictive environment, based on that student’s IEP. See id. 1412(a)(5); 34 C.F.R. § 300.552(b)(2).
65. See Guernsey & Klare, supra note 6, at 7.
67. Id. at 189.
69. Id. § 1401(25).
70. See Guernsey & Klare, supra note 6, at 7.
71. See 20 U.S.C. § 1414(d)(1)(A) (2000). The IDEA defines the IEP as a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—(i) a statement of the child’s present levels of educational performance, including—(I) how the child’s disability affects the child’s involvement and progress in the general curriculum; or (II) for preschool children, as appropriate, how the disability affects the child’s participation...
ii. The Rowley Standard

The vagueness of the substantive standard supplied by the language of the IDEA left the meaning of the term “free and appropriate public education” to future administrative and judicial interpretation. In the years immediately following the Act’s passage, it was often interpreted by courts to require that handicapped students be provided an opportunity to achieve their full potential.

The Supreme Court considered the meaning of the phrase “free and appropriate public education” for the first time in Hendrick Hudson Central School District v. Rowley. The school district was appealing a decision directing it to provide the child:

- in appropriate activities;
- a statement of measurable annual goals, including benchmarks or short-term objectives, related to—(i) meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum; and (II) meeting each of the child’s other educational needs that result from the child’s disability; (iii) a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—(I) to advance appropriately toward attaining the annual goals; (II) to be involved and progress in the general curriculum in accordance with clause (i) and to participate in extracurricular and other nonacademic activities; and (III) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this paragraph; (iv) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in clause (iii); (v) a statement of any individual modifications in the administration of State or districtwide assessments of student achievement that are needed in order for the child to participate in such assessment; and (VI) if the IEP Team determines that the child will not participate in a particular State or districtwide assessment of student achievement (or part of such an assessment), a statement of—(aa) why that assessment is not appropriate for the child; and (bb) how the child will be assessed; (vi) the projected date for the beginning of the services and modifications described in clause (iii), and the anticipated frequency, location, and duration of those services and modifications; (vii) beginning at age 14, and updated annually, a statement of the transition service needs of the child under the applicable components of the child’s IEP that focuses on the child’s courses of study (such as participation in advanced-placement courses or a vocational education program); (II) beginning at age 16 (or younger, if determined appropriate by the IEP Team), a statement of needed transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages; and (III) beginning at least one year before the child reaches the age of majority under State law, a statement that the child has been informed of his or her rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title; and (viii) a statement of—(I) how the child’s progress toward the annual goals described in clause (ii) will be measured; and (II) how the child’s parents will be regularly informed (by such means as periodic report cards), at least as often as parents are informed of their nondisabled children’s progress, of—(aa) their child’s progress toward the annual goals described in clause (ii); and (bb) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

Id.

73. See id. at 366-67.
vide a sign-language interpreter in the classroom of an eight-year-old deaf student. The United States District Court for the Southern District of New York found that the student was performing better than the average child in her class and was advancing from grade to grade, but, applying the "full potential" standard, the court found a disparity between the student's achievement and her full potential. The district court concluded that the FAPE provision of the IDEA required the district to provide the student with "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children," and that the school district had failed to meet that standard. The court of appeals affirmed.

The Supreme Court reversed. The Court first considered the substantive requirements of the IDEA, finding that Congress did not intend educational services to be provided to the degree necessary to "maximize each handicapped child's potential." Rather, the Court stated, Congress intended only to provide access "to a free public education ... sufficient to confer some educational benefit upon the handicapped child." The Court characterized the requirements of the IDEA as a "basic floor of opportunity."

Turning to the facts of the case, the Court acknowledged that determining when a handicapped child has received sufficient educational benefit to satisfy the requirements of the Act is a difficult problem. The Court announced two inquiries that must be made in any suit related to the adequate provision of a FAPE under the IDEA: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" The Court added that if these requirements are met, "the courts can require no more."

The Court gave great weight to the school district's compliance with the procedural requirements of the IDEA, suggesting that "adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." When considering the appropriate substantive standard, the Court cautioned that lower courts, when reviewing claims based on the IDEA, should give great deference to the programming decisions of local educational agencies and that the courts should not impose their views of "preferable educational methods." The Court stated that despite the "sketchy" substantive requirements in the IDEA, courts are not free to "impose substantive standards of review which cannot be derived from the Act itself."

75. See id. at 184.
76. Id. at 185.
80. Id. at 199.
81. Id. at 200.
82. Id. at 201.
83. See id. at 202.
84. Id. at 206-07.
85. Id. at 207.
86. Id. at 206.
87. Id. at 207.
88. Id. at 206.
Applying its newly created two-part test, the Court found that the school district had complied with the procedures of the Act, and that the student was receiving an adequate and appropriate education because she was performing "better than the average child in her class" and she was "advancing easily from grade to grade."99

ii. Post-Rowley Decisions Regarding a Substantive Standard of a FAPE

The Supreme Court has not directly addressed the issue of what constitutes a free appropriate education since Rowley.90 In the wake of Rowley, school districts and lower courts quickly concluded that schools were not expected to provide the "best" education possible, but only one that would confer at least some educational benefit.91 Lower courts that have entertained the issue have provided little additional guidance.92 Courts have tended to acknowledge the two-part test and the minimum substantive standards created in Rowley. They have distinguished Rowley, however, when necessary, deciding on a case-by-case basis whether the IEP and the educational programming and services were designed to provide sufficient educational benefit.93

For example, in Polk v. Central Susquehanna Intermediate Unit,94 the Third Circuit characterized the Rowley decision as emphasizing procedural protection "almost to the exclusion of substantive inquiry."95 When determining whether a FAPE had been provided, the court found that "the question of how much educational benefit is sufficient to be ‘meaningful’ is inescapable."96 Attempting to clarify the "some educational benefit" standard announced in Rowley, the court held that the IDEA requires more than just a "trivial" or "de minimis" educational benefit.97

A FAPE has also been interpreted to include more than just academic instruc-

89. Id. at 209-10.
90. See Weber, supra note 72, at 405.
91. See Guernsey & Klare, supra note 6, at 29.
92. See id. at 30.
93. See id.
94. 853 F.2d 171 (3d Cir. 1988). Polk involved a severely developmentally disabled student who was receiving his education in a class for the mentally handicapped, with a full-time personal classroom aide. See id. at 173. His educational program consisted of life skills, e.g., feeding himself, dressing himself, and using the toilet. See id. The student had been receiving direct physical therapy (P.T.) services for one hour two times per week from a licensed physical therapist as part of his special education program. See id. at 174. The school district changed the student’s P.T. services to a consultative model, under which the licensed therapist met with his teacher once a month, but provided no direct hands-on services to the student. See id. The change in services was challenged by the student’s parents, who claimed that the student was making very little progress under the consultative approach compared to what he had made when he was receiving direct P.T. services. See id. The district court granted summary judgment for the school district, finding that the student was receiving some educational benefit, which was all that was required based on the Supreme Court’s decision in Board of Education v. Rowley. See id. at 175. The Third Circuit held that the “some educational benefit” requirement of Rowley, means more than just de minimus benefit. See id. at 180. The court remanded the case for proceedings consistent with their decision. See id. at 185-86.
95. Id. at 180.
96. Id.
97. Id. at 180, 184.
tion and progress. In *Battle v. Pennsylvania*,98 another Third Circuit case, the court held that in certain situations an appropriate education must include "basic self-help and social skills such as toilet training, dressing, feeding and communication."99

Courts have also looked to the "least restrictive environment" requirement in the IDEA to distinguish *Rowley*.100 In *Department of Education v. Katherine D.*,101 the Ninth Circuit looked to the plain language of the IDEA and determined that a student with multiple handicaps must be educated in a school-based program rather than at home, as the district had proposed, as long as the services necessary to allow her to be in school could be provided.102 More recently, in *Board of Education of LaGrange School District No. 105 v. Illinois State Board of Education and Ryan B. (Ryan B.),*103 the Seventh Circuit declined to apply the *Rowley* standard, finding that the *Rowley* court "did not reach the issue of placement in the least restrictive environment."104 The court held that the placement proposed by the district "is not a FAPE ... within the meaning of the IDEA because it does not provide the least restrictive environment in which his needs can be met."105 The court concluded that while *Rowley* requires that a school district must provide only "a basic floor of opportunity," it must provide it in the least restrictive environment.106

In *Hall v. Vance County Board of Education*,107 the Fourth Circuit considered the question of how to determine whether *Rowley's* minimum requirement of "some

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98. 629 F.2d 269 (3d Cir. 1981). The plaintiff class in *Battle* was a group of severely handicapped students entitled to a "free appropriate education" under the IDEA. *See id.* at 275. The plaintiffs claimed that breaks during the school year caused regression in skills, and therefore their individual needs required services for more days during the school year than the 180 day limit that was imposed by the state educational agency. *See id.* at 271-72. In holding that the 180 day per year limit on a student's school attendance violated the IDEA, the Third Circuit found that when basic self-help skills are lacking "formal education begins at that point." *Id.* at 275.

99. *Id.* at 275.

100. *See Weber, supra* note 72, at 389-95.

101. 727 F.2d 809 (9th Cir. 1983), cert. denied, 471 U.S. 117 (1985). The student in *Katherine D.* suffered from cystic fibrosis and tracheomalacia. *See id.* at 812. The student had significant medical needs, and in addition to special education services and speech therapy, the IEP stated that she was to receive emergency medical services, when needed, from the school staff. *See id.* These services included dispensing medication, suctioning her lungs, and reinserting her tracheal tube if it became dislodged. *See id.*

102. *See id.* at 815.

103. 184 F.3d 912 (7th Cir. 1999). In *Ryan B.*, the parents of a three-year-old student with Down Syndrome objected to the school district's recommended placement in a program limited to disabled students. *See id.* at 914. The parents wanted their child to attend a program that would afford him the opportunity to share a classroom with typically developing students. *See id.* The school district argued that its proposed placement in a program with other disabled students offered a "basic floor of opportunity," and therefore met the *Rowley* standard for a FAPE. *Id.* at 916 & n.1.

104. *Id.* at 916 n.1.

105. *Id.* at 917.

106. *Id.* at 916 & n.1.

107. 774 F.2d 629 (4th Cir. 1985).
educational benefit” had been met.\textsuperscript{108} It determined that promotion from grade to grade, which had been relied on by the Court in \textit{Rowley} as proof of sufficient educational benefit, is a “fallible measure of educational benefit.”\textsuperscript{109}

Despite the numerous lower court decisions that have addressed the issue of a FAPE since \textit{Rowley}, the key provisions of the \textit{Rowley} decision still stand today: violation of the procedural requirements of the IDEA can be a denial of a FAPE; the IEP of a child identified as one with a disability under the IDEA need only be designed to confer \textit{some} educational benefit, not maximize the child’s full potential; and, when considering a FAPE issue on appeal, a court’s discretion to review the content of a child’s IEP is limited.

c. \textit{Alternate Standards Used to Determine Adequate Provision of a FAPE}

As described above, challenges regarding the adequate provision of a FAPE will typically be analyzed using the \textit{Rowley} standard. This standard involves either procedural questions, regarding such issues as timeliness,\textsuperscript{110} parental notice,\textsuperscript{111} or parental participation in decision-making,\textsuperscript{112} or they will involve substantive questions, such as the content of the child’s IEP,\textsuperscript{113} or the adequacy of programming based on the IEP.\textsuperscript{114} The IDEA’s threshold requirement of a determination of eligibility before services can be provided has proven to be an area of legal controversy, and creates another issue that can be used to challenge an educational agency’s provision of a FAPE.\textsuperscript{115}

\textsuperscript{108} See id. at 635. James Hall IV was functionally illiterate when he entered the fifth grade at eleven years old. See id. at 630. He had been retained in second grade and had been receiving special education services as a learning disabled student since the third grade. See id. at 631. The school district proposed to promote James to fifth grade and continue the same IEP that had been in place the previous year, despite reading skills at the second grade level, standardized test scores in the lowest two percent, and lack of progress in reading. See id. The school district argued that academic progress, as measured by grade promotions, “evinces educational benefit.” Id. at 635.

\textsuperscript{109} Id. at 635-36. Although the Court in \textit{Rowley} found the fact that Amy Rowley was advancing from grade to grade to be dispositive in that particular case, the Court noted that would not necessarily be true in the case of every handicapped child. See Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203 n.25 (1981).


\textsuperscript{111} See, e.g., Buser v. Corpus Christi Indep. Sch., 51 F.3d 490, 494 (5th Cir. 1995) (holding that school district complied with notice requirements when parents were notified of annual IEP meetings).

\textsuperscript{112} See, e.g., W.G. v Board of Trustees, 960 F.2d 1479, 1485 (9th Cir. 1992) (holding that school district did not comply with IDEA when it independently developed IEP without parent input or participation).

\textsuperscript{113} See, e.g., Russel v. Jefferson Sch. Dist., 609 F. Supp. 605, 609 (N.D. Cal. 1985) (holding that IEP violated IDEA when it failed to address all categories of student’s handicap and did not include statement of special education services to be provided).

\textsuperscript{114} See, e.g., Matthews v. Davis, 742 F.2d 825, 829-30 (4th Cir. 1984) (holding that if school district can supply appropriate education in day program then residential placement is not required).

\textsuperscript{115} See Osborne, supra note 16, at 19.
In *Muller v. Committee on Special Education*,116 the disagreement centered on the first part of the two-part IDEA eligibility criteria—whether the student was a child with a disability, in this case a “serious emotional disturbance.”117 The school district argued that the student’s educational problems were the result of a “mere ‘conduct disorder,’” and she was therefore not a student with a disability as defined under either the IDEA or New York State special education regulations.118 The court determined that she was a student with a “serious emotional disturbance” under relevant federal and state law, and that the district’s failure to find her eligible was a violation of the FAPE requirement of the IDEA.119

In *Yankton School District v. Schramm*,120 another eligibility case, the court considered the second part of the eligibility requirement of the IDEA—whether

116. 145 F.3d 95 (2d Cir. 1998). In *Muller*, the parents of a student with a history of psychiatric hospitalizations for attempted suicide and other problems requested that the school district pay for the student’s private school program when the parents’ insurance ran out. See id. at 98-99. During those hospitalizations, the student had been diagnosed as having a “Conduct Disorder,” “Depression,” “Oppositional Defiant Disorder,” and “Post-Traumatic Stress Disorder.” *Id.* Evaluations performed by the school district found “no indication of a depressive condition which would adversely affect her ability to learn” and that her scores “do not indicate the need for Special Education placement.” *Id.* at 99. The school district’s IEP team found that the student “did not meet the eligibility criteria for special education services.” *Id.* The district’s decision was upheld by a hearing officer and by the State Review Officer of the New York State Department of Education. See id. at 100. The parents then brought suit in federal district court, where the student was found to be “emotionally disturbed” and the hearing officer’s decision was vacated. *Id.* at 101. The district court ordered the school district to classify the student as one with an emotional disability. See id. The school district then appealed to the Second Circuit.

117. *Id.* at 97-98.

118. *Id.* at 103. Under federal law, “emotional disturbance” is defined as follows:

condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. (C) Inappropriate types of behavior or feelings under normal circumstances. (D) A general pervasive mood of unhappiness or depression. (E) A tendency to develop physical symptoms or fears associated with personal or school problems .... The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

34 C.F.R. § 300.7(c)(4) (2000). The court found that the New York State regulations were almost identical to the federal ones and that any difference between them was “of no concern here.” *Muller v. Committee on Special Educ.*, 143 F.3d at 103 n.5.

119. See *Muller v. Committee on Special Educ.*, 143 F.3d at 105. The student was eligible for services, despite the district’s claims to the contrary, and the district had no IEP in effect for her, thereby failing to provide her with a FAPE. See *id.*

120. 93 F.3d 1369 (8th Cir. 1996). The student, a sixteen-year-old freshman in high school with an orthopedic impairment, had received special education services since the third grade. See *id.* at 1371. The district dismissed the student from special education at the end of her ninth grade year because her most recent IEP had included only adoptive physical education and transportation, and no physical education was provided to any students past the ninth grade. See *id.* The student’s parents claimed that she continued to need transition services in the areas of “driver’s education, self-advocacy, and independent living skills,” and that she should therefore remain eligible for special education services. *Id.* The state-appointed hearing examiner and the federal district court both found that the student remained eligible for special education services under IDEA because there were related and transition services that the student needed as a result of her orthopedic impairment. See *id.* at 1372.
the student needs special education services. 121 The school district admitted that
the student had a disability—an orthopedic impairment—but argued that she was
nonetheless ineligible for services because she did not need special education in
order to be successful in school. 122 Distinguishing Rowley, the court stated that,
unlike Rowley, "[t]his appeal ... does not focus on a disputed portion of an IEP, but
whether an IEP ... needs to be furnished." 123 The Eighth Circuit agreed with
the district court's decision that the student did need special education, in this case
transition services, and that she was therefore eligible under the IDEA. 124 The
district was required to provide a FAPE in the form of an IEP and appropriate
services. 125

There are four ways, then, in which a school district can typically be found to
have denied a student a FAPE: the district did not find a student eligible for special
education services who is eligible; the district violated one of the procedural
requirements of the IDEA; the IEP that was developed was not designed to confer
educational benefit; or the services provided by the school district failed to meet
the requirements of the IEP or were otherwise insufficient.

3. Remedies Available Under the IDEA

The nature of the remedies available for a violation of the IDEA is left un-
specified by the statute, other than stating that a court "shall grant such relief as [it]
determines [to be] appropriate." 126 Because of the lack of guidance in the statute,
many of the forms of relief available to students and parents have been determined
by the courts or by legislative action in response to court decisions. 127 The forms
of relief that are currently available when a school district fails to provide a free
and appropriate education to a student include injunctive and declaratory relief; 128
reimbursement of the parents for the costs of obtaining appropriate services for
their child; 129 compensatory educational services for a child when a FAPE has
been denied and parents have not obtained services on their own; 130 and reim-

121. See id. at 1372.
122. See id. at 1374-75.
123. Id. at 1374.
124. See id. at 1375-76.
125. See id.
127. See Osborne, supra note 16, at 173.
128. See, e.g., Timms v. Metropolitan Sch. Dist., 722 F.2d 1310, 1311 (7th Cir. 1983) (suit
brought by mentally handicapped student and her parents sought declaratory, injunctive, and
monetary relief); Anderson v. Thompson, 658 F.2d 1205, 1211 (7th Cir. 1981) (IDEA intended
in most cases to provide only injunctive relief as a final procedural safeguard); Battle v. Penn-
sylvania, 476 F. Supp. 583, 605 (E.D. Penn. 1979) (court declared that 180 day limit violates the
EAHCA and "necessitates certain injunctive relief").
reimbursement to parents is within scope of appropriate relief envisioned by Congress when
passing the IDEA); Florence v. Carter, 510 U.S. 7, 14 (1993) (holding that reimbursement to
parents is not barred by private school's failure to meet state education standards).
130. See, e.g., Miener v. Missouri, 800 F.2d 749, 754 (8th Cir. 1986) (holding that student is
entitled to compensatory educational services if school district has denied FAPE); Jefferson
County Bd. of Educ. v. Breen, 853 F.2d 853, 857 (11th Cir. 1988) (holding that compensatory
education is necessary to preserve a handicapped student's right to FAPE).
bursarment of legal fees. Each will be considered in greater detail below.

Because the parties in a special education dispute are typically looking for a determination regarding the relative responsibilities of the parents and the school system for the delivery of services to the child, the most common remedies sought in a special education dispute are injunctive and declaratory relief. Courts have generally been unwilling to award damages beyond injunctive or declaratory relief for violations of the IDEA. The prevailing opinion on the issue is represented by the Seventh Circuit’s opinion in _Anderson v. Thompson_. In _Anderson_, the court held that “damages, however limited, are not within the scope of relief authorized by [the IDEA].” The court found that the purpose of the Act was to insure an appropriate educational program for handicapped children and to that end the IDEA was “intended in most cases to provide only injunctive relief as a final procedural safeguard.”

The Supreme Court first acknowledged the availability of equitable forms of relief for a violation of the IDEA in 1985 in _Burlington School Committee v. Department of Education_. In _Burlington_, the parents of an identified learning disabled child rejected the special education program proposed by the school district, asked for an administrative hearing, and then unilaterally placed the child in a private school that they believed provided an appropriate education for their child. At the hearing it was determined that the school district’s proposed program did not meet the child’s educational needs and that the private school placement made by the parents was “the least restrictive adequate program.” The parents then sought reimbursement of the tuition expenses at the private school.

131. _See_ 20 U.S.C. § 1415(i)(3)(B) (2000). “In any action or proceeding brought under [the IDEA], the court, in its discretion, may award reasonable attorney's fees as part of the costs to the parents of a child with a disability who is the prevailing party.” _Id._

132. _See_ GUERNSEY & KLARE, supra note 6, at 187. Injunctive relief will typically take the form of an order prohibiting a school district from doing something that it intends to do, such as expelling a child with a disability. _See_, e.g., _Stedt v. School Bd._, 885 F. Supp. 1192, 1195 (W.D. Wis. 1995) (special education student entitled to injunction to prevent expulsion from school without hearing); _Stuart v. Nappi_, 443 F. Supp. 1235, 1237-38 (D.C. Conn. 1978) (school district enjoined from holding hearing to expel a child eligible for protection under IDEA). An injunction can also take the form of an order requiring a school district to do something that it is not already doing, such as providing a student with specific services or programming. _See_, e.g., _Holmes v. Sobol_, 690 F. Supp. 154, 161 (W.D.N.Y. 1988) (school district enjoined to provide physical therapy services to student during July and August); _Battle v. Pennsylvania_, 476 F. Supp. 583, 605 (E.D. Penn. 1979) (school district enjoined to provide services beyond 180 day limit). A declaratory judgment establishes the rights and status of the litigants, even though no consequential relief is awarded. _See_ BLACK’S LAW DICTIONARY 846 (7th ed. 1999); _see also_, e.g., _Battle v. Pennsylvania_, 476 F. Supp. at 605 (declaratory judgment made by court that state’s 180 day limit on educational services for any student in a year violated the EAHCA). 133. 658 F.2d 1205 (7th Cir. 1981).

134. _Id._ at 1209-10.

135. _Id._ at 1210. The court did identify two exceptions to its proscription on damages: (1) situations where the child’s physical health is endangered by the actions of the school district, requiring parental action, and (2) situations where the school district acts in bad faith or in some egregious fashion while failing to comply with the procedural provisions of the IDEA. _See id._ at 1213-14.


137. _See id._ at 362.

138. _Id._ at 363.

139. _See id._
The school district argued that the parents’ unilateral placement of the child in a private school violated the “stay-put” provision of the IDEA, requiring that a child remain in his or her current placement during the pendency of any appeal.\textsuperscript{140} The Court rejected the school district’s argument, holding that the parents were entitled to reimbursement of the tuition expenses.\textsuperscript{141} The Court made clear, however, that its award was not “damages,” but instead “merely requir[ed] the Town 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.”\textsuperscript{142}

Following the Supreme Court’s allowance of equitable relief in the form of tuition reimbursement for a denial of a FAPE under the IDEA, courts used the \textit{Burlington} rationale to add compensatory educational services, another form of equitable, “non-damage” relief, to the range of remedies available to students and parents under the IDEA.\textsuperscript{143} In \textit{Miener v. Missouri},\textsuperscript{144} in 1986, and two years later in \textit{Jefferson County Board of Education v. Breen},\textsuperscript{145} the Eighth and Eleventh Circuits, respectively, held that compensatory educational services, like retroactive tuition reimbursement, simply preserve a handicapped student’s right to a free education, making up for services that should have been, but were not, provided by the district.\textsuperscript{146} The \textit{Breen} court concluded that failure to award compensatory services, when reimbursement of tuition was an available remedy, made a child’s right to a free and appropriate education dependent on the ability of the child’s parents to fund a private school education while any administrative hearings or appeals were under way.\textsuperscript{147}

Prior to 1992, courts consistently held that monetary damages were not available for violations of the IDEA.\textsuperscript{148} In denying such awards, courts found that monetary damages would be inconsistent with the goals of the IDEA,\textsuperscript{149} or that a school district’s payment of monetary damages would hinder the purposes of the IDEA by taking funds that would otherwise be spent on educating students with

\begin{itemize}
  \item \footnotesize 140. See id. at 364. The relevant statute states that: “[D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child.” 20 U.S.C. § 1415(j) (2000).
  \item \footnotesize 141. See Burlington Sch. Comm. v. Department of Educ., 471 U.S. at 369.
  \item \footnotesize 142. Id. at 370-71.
  \item \footnotesize 143. See Osborne, supra note 16, at 185-86.
  \item \footnotesize 144. 800 F.2d 749 (8th Cir. 1986).
  \item \footnotesize 145. 853 F.2d 853 (11th Cir. 1988).
  \item \footnotesize 146. See Miener v. Missouri, 800 F.2d at 753; Jefferson Bd. of Educ. v. Breen, 853 F.2d at 857.
  \item \footnotesize 147. See Jefferson Bd. of Educ. v. Breen, 853 F.2d at 857-58.
  \item \footnotesize 148. See Guernsey & Klar, supra note 6, at 193.
  \item \footnotesize 149. See, e.g., Marvin H. v. Austin Indep. Sch. Dist., 714 F.2d 1348, 1356 (5th Cir. 1983) (holding that appropriate relief does not include punitive damages). In \textit{Marvin}, the court also held that:

  \begin{quote}
  \[W\]hen a school district in good faith attempts to provide a free appropriate public education to a handicapped child and has adequately complied with the procedures for determining the child’s correct educational placement, it will not later stand liable to the parents for damages even if a court subsequently determines that the educational placement was incorrect.
  \end{quote}

  \textit{Id.}
\end{itemize}
disabilities.\textsuperscript{150} The Supreme Court, in \textit{Smith v. Robinson},\textsuperscript{151} added its voice to those of the lower courts by refusing to recognize monetary damages as an appropriate remedy for violations of the IDEA.\textsuperscript{152} The Court held that a suit under the IDEA was the exclusive remedy available to parents for a violation of a student's rights protected by the IDEA,\textsuperscript{153} and acknowledged, in a footnote, that "damages . . . are available under [the IDEA] only in exceptional circumstances."\textsuperscript{154} Congress responded to the Court's decision in \textit{Smith}, amending the IDEA to allow causes of action for a violation of the IDEA under "other Federal laws protecting the rights of children with disabilities,"\textsuperscript{155} specifically "the Constitution, the Americans with Disabilities Act of 1990, [and] the Rehabilitation Act of 1973."\textsuperscript{156} That amendment to the IDEA allows parents to bring a suit alleging a violation of their child's IDEA-mandated rights under both 42 U.S.C. § 1983 and § 504 of the Rehabilitation Act, in addition to the IDEA.\textsuperscript{157} Because damages are available under both § 1983 and under § 504, the amendment effectively created the possibility of damage awards for a violation of the IDEA.\textsuperscript{158}

More recently, the Supreme Court, in \textit{Franklin v. Gwinnett County Public Schools},\textsuperscript{159} suggested that monetary damages may indeed be available under the IDEA itself.\textsuperscript{160} The Court, in \textit{Gwinnett}, held that monetary damages are available under Title IX of the Education Amendments of 1972.\textsuperscript{161} The Court went on to state that, absent a clear congressional intent to the contrary, private parties denied a federal right are presumed to be entitled to any appropriate relief.\textsuperscript{162} The rights

\begin{itemize}
  \item \textsuperscript{150} See, e.g., Hurry v. Jones, 734 F.2d 879, 885 (1984) (holding that expanding remedies under the EAHCA to include equitable relief would be improper as school does not financially benefit from one student's absence, and providing monetary award to parents may encourage them to keep students out of school).
  \item \textsuperscript{151} 468 U.S. 992 (1984).
  \item \textsuperscript{152} In \textit{Smith}, the parents of a child whose special education programming was no longer being funded by the school district brought a suit against the school district alleging violation of the EHA. See id. at 992. The Federal District Court had awarded the parent's attorney's fees based on their EHA claim. See id. The First Circuit Court of Appeals reversed, finding that the action arose under the EHA, which included no provision for the awarding of attorney's fees. See id. at 992-93.
  \item \textsuperscript{153} Id. at 1013.
  \item \textsuperscript{154} Id. at 1020 n.24. In \textit{Smith}, the Court stated:
    We have little difficulty concluding that Congress intended the EHA to be the exclusive avenue through which a parent may assert an equal protection claim to a publicly financed special education. The EHA is a comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children. Both the provisions of the statute and its legislative history indicate that Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute.
    Id. at 1009.
  \item \textsuperscript{155} 20 U.S.C. § 1415(l) (2000).
  \item \textsuperscript{156} Id.
  \item \textsuperscript{157} See \textit{Guernsey & Klare}, supra note 6, at 193.
  \item \textsuperscript{158} See id. at 196.
  \item \textsuperscript{159} 503 U.S. 60 (1992).
  \item \textsuperscript{159} See \textit{Guernsey & Klare}, supra note 6, at 196.
  \item \textsuperscript{160} See \textit{Guernsey & Klare}, supra note 6, at 196.
  \item \textsuperscript{162} See id. at 73.
\end{itemize}
granted to students and parents by the IDEA are federal rights.

Attorney’s fees are another form of relief under the IDEA in which congressional action altered the prevailing opinion of the courts. Consistent with the view that damages were not an available remedy under the IDEA, prior to 1984 courts were in agreement that attorney’s fees could not be awarded in an action brought under the IDEA.163 The Supreme Court’s decision in Smith, by denying parents the right to bring special education suits under statutes allowing attorney’s fees, effectively denied the award of attorney’s fees in nearly all special education cases.164 As a consequence, parents often achieved what has been termed a “hollow victory.”165 Even when the parents prevailed, and the court found that a child had been denied a FAPE and ordered the school district to provide appropriate programming in the future, parents still were often left facing large legal bills as a result of simply enforcing the educational rights of their child that were mandated by the IDEA.166

Again Congress responded, amending the IDEA by adding the Handicapped Children’s Protection Act of 1986167 (HCPA), giving courts the authority to award attorney’s fees when the parents were the prevailing party in a case brought pursuant to the IDEA.168 In the years since its initial passage, courts have expanded the interpretation of the HCPA to allow attorney’s fees to be awarded for work performed as part of an administrative action or hearing in addition to court actions.169

The nature of the relief available for violations of the IDEA has evolved since the statute was enacted. While originally only injunctive and declaratory relief were seen by courts as appropriate remedies, court decisions and legislative actions have added reimbursement of tuition expenses, compensatory education services, and attorney’s fees to the list of relief that is consistently afforded to students and parents in actions brought under the IDEA. In addition, recent court decisions and amendments to the IDEA have opened the door to the possibility of monetary damage awards against school districts for violations of a student’s rights protected by the IDEA.

III. DISCUSSION: THE REMEDY OF COMPENSATORY EDUCATION UNDER THE IDEA

Prior to 1986, courts viewed the award of anything but injunctive relief for a violation of the IDEA as “damages,” and the award of damages had been consistently held to be beyond the scope of relief anticipated by Congress when it passed

163. See, e.g., Anderson v. Thompson, 658 F.2d 1205, 1217 (7th Cir. 1981) (“[T]he EAHCA does not itself provide for attorney’s fees and plaintiffs cannot rely on section 1983 as a conduit to attorney’s fees under section 1983.”).
164. See Guernsey & Klare, supra note 6, at 209.
165. Osborne, supra note 16, at 188.
166. See id.
168. See id. The relevant section reads as follows: “In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorney’s fees as part of the costs to the parents of a child with a disability who is the prevailing party.” Id.
169. See Guernsey & Klare, supra note 6, at 209-10.
the Act.\textsuperscript{170} The Supreme Court's decision in \textit{Burlington},\textsuperscript{171} holding that relief in the form of tuition reimbursement to a parent is available when a public school's proposed program did not provide a FAPE, "altered [the] understanding of what 'damages' includes in the context of [the IDEA]."\textsuperscript{172} Free to consider compensatory services as something other than damages, courts were able to order compensatory educational services for students who had been denied a FAPE under the broad mandate in the IDEA that courts were to grant all appropriate relief.\textsuperscript{173}

The \textit{Burlington} decision affirmed a court's right to grant the equitable remedies of reimbursement or compensatory services when a dispute based on a claim under the IDEA reached it on appeal. The \textit{Miener} and \textit{Breen} decisions expanded the range of equitable remedies that courts could order under the IDEA to include compensatory education. \textit{Cocores v. Portsmouth, New Hampshire School District}\textsuperscript{174} extended the authority of hearing officers to award compensatory educational services as part of the local and state level administrative processes that must precede a civil action under the IDEA.\textsuperscript{175} The court found that to hold otherwise would make the impartial due process hearing, which it characterized as "the heart of the [Act's] administrative machinery," less than an effective or complete process.\textsuperscript{176} Thus, by 1991 compensatory education was an available remedy for violations of the IDEA at all levels of dispute.\textsuperscript{177}

Basing their decisions on the Supreme Court's decision in \textit{Burlington}, the Courts of Appeals that have addressed the issue since \textit{Burlington} agree that compensatory educational services are an available remedy under the IDEA.\textsuperscript{178} The standards courts use when awarding compensatory education, however, differ sig-

170. See, e.g., Miener v. Missouri, 800 F.2d 749, 752-53 (8th Cir. 1986) (stating that prevailing view among circuit courts was that damages were not within relief foreseen by Congress when it enacted the IDEA).
172. Miener v. Missouri, 800 F.2d at 753.
173. See id.
174. 779 F. Supp 203 (D.N.H. 1991). In \textit{Cocores}, a hearing officer had dismissed the claim of a twenty-two year old student with cerebral palsy, blindness, and severe mental retardation, finding that he had no authority to order compensatory education, which was the sought-after remedy. See id. at 204. The United States District Court for the District of New Hampshire found that "the hearing officer's ability to award relief must be coextensive with that of the court." \textit{Id.} at 205.
175. See id. at 205.
177. A child's eligibility for services and protections under the IDEA ends at 21 years of age. \textit{See} 34 C.F.R. § 300.121(a) (2000). The federal regulations require that "all children with disabilities aged 3 through 21 ... have the right to a [free appropriate public education]." \textit{Id.} The nature of compensatory services requires that they be provided at a time when the student would not be otherwise eligible for services. \textit{See} Osborne, \textit{supra} note 16, at 185. Because of this, as well as the \textit{Burlington} view that compensatory educational services are simply making up for services or programming that a school district should have already provided to a student, it is common for compensatory services to be awarded to a student who has already passed the statutory age limits for eligibility under the IDEA. \textit{See}, e.g., Miener v. Missouri, 800 F.2d 749, 754 (8th Cir. 1986) (awarding compensatory educational services to twenty-four-year old).
178. \textit{See}, e.g., Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 249 (3d Cir. 1999) (award of compensatory education allows student to make up for a prior deprivation of FAPE); Board of Educ. of Oak Park & River Forest High Sch. Dist. v. Illinois State Bd. of Educ., 79 F.3d 654, 656 (7th Cir. 1996) (finding that IDEA encompasses full range of equitable remedies and empowers a court to order compensatory education if necessary); Murphy v. Timberlane Reg. Sch. Dist.,
nificantly. This inconsistency in the basis for awarding compensatory services leaves lower courts, parents, and school districts confused as to responsibilities, liabilities, and consequences under the IDEA.

In the following sections, this Comment considers the standards that the circuit courts have applied, compares those standards, and discusses those differences among the circuits and the implications, liabilities, and benefits of each approach. Finally, suggestions are made for clarifying and bringing consistency to the standard that courts use when awarding compensatory education for a violation of the IDEA.

A. The Standard Used to Award Compensatory Education

This Section will review, circuit-by-circuit, the decisions by each of the ten United States Circuit Courts of Appeals that have considered the issue of compensatory education. The Sixth Circuit had not addressed the issue at the time this Comment was written.

1. The First Circuit

It was a decision of the First Circuit, awarding tuition reimbursement to parents,\(^\text{180}\) that was affirmed by the Supreme Court in Burlington.\(^\text{181}\) It was not until 1992, however, in Murphy v. Timberlane Regional School District,\(^\text{182}\) that the First Circuit had the opportunity to weigh in on the issue of the availability of compensatory education. Without expressly ruling on the issue of availability of compensatory services under the IDEA or defining the standard to be used to determine its availability, the court assumed “that compensatory education is available in this circuit,”\(^\text{183}\) and ruled that compensatory education is a form of equitable relief, thereby justifying the school district’s use of the equitable defense of laches.\(^\text{184}\)

The Murphys sought compensatory educational services to make up for a two year period during which their son had received no special education services.\(^\text{185}\) A state hearing officer determined that the Murphys’ claim was barred by the doctrine of laches.\(^\text{186}\) The court was asked to consider, among other issues, whether

\(^{22}\) F.3d 1186, 1192 (1st Cir. 1994) (compensatory education award to student no longer eligible for special education services); Garro v. Connecticut, 23 F.3d 734, 736 (2d Cir. 1994) (compensatory education available as relief under IDEA because it is prospective in nature); Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1496 (9th Cir. 1994) (finding “[t]here is no question that the district court had the power to order compensatory education”).

\(^{179}\) Some courts have found that compensatory education awards were justified only when the “the federal regulations were grossly violated.” Burr v. Ambach, 863 F.2d 1071, 1075 (2d Cir. 1988). Other courts have ruled that compensatory education awards are an appropriate remedy when “a school district that knows or should know that a child ... is not receiving more than a de minimis educational benefit.” M.C. v. Central Reg’l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996) (emphasis added).

\(^{180}\) Town of Burlington v. Department of Educ., 736 F.2d 773 (1st Cir. 1984). A year earlier the First Circuit had decided the same issue in Doe v. Brookline School Committee, 772 F.2d 910 (1st Cir. 1983), but that case was not appealed beyond the First Circuit.


\(^{182}\) 973 F.2d 13 (1st Cir. 1992).

\(^{183}\) Id. at 16.

\(^{184}\) See id.

\(^{185}\) See id. at 14.

\(^{186}\) See id. at 15.
the affirmative, equitable defense of laches is available against a claim for compensatory education under the IDEA.\footnote{187} The court reviewed the decisions of the other circuits on the issue of compensatory services up to that time, finding that “every circuit which has addressed this issue since our decision in \textit{Burlington} was affirmed by the Supreme Court has found that compensatory education is available under the Act.”\footnote{188}

A year later, in \textit{Pihl v. Massachusetts Department of Education},\footnote{169} the First Circuit was required to determine whether compensatory services are an available form of relief under the IDEA.\footnote{190} Relying on its own decision in \textit{Burlington}, and on the decisions in the five circuits that had already entertained the question,\footnote{191} the court found that “[w]ith the issue now squarely before us, we have no difficulty in joining those circuits that have decided that compensatory education is available to remedy past deprivations.”\footnote{192}

In \textit{Pihl}, the parents of a seriously disabled student claimed that there had been no appropriate IEP in place, or educational services provided, for a period of more than two years while the school district sought an appropriate out-of-district placement for the student.\footnote{193} The parents filed a claim requesting compensatory services for the period of time that no services had been provided, as well as injunctive relief requiring the school district to provide appropriate services and prohibiting the district’s proposed out-of-state placement.\footnote{194} The court looked to substantive violations of the IDEA as the standard it would use when considering compensatory education, stating that “[i]f an IEP from a past year is found to be deficient, the Act may require services at a future time to compensate for what was lost.”\footnote{195}

The most recent compensatory education case heard by the First Circuit is \textit{Murphy v. Timberlane Regional School District (Murphy II)},\footnote{196} This case involved an appeal by the school district of the summary judgment for the parents following the remand in \textit{Murphy v. Timberlane Regional School District} discussed earlier (\textit{Murphy I}).\footnote{197} Considering the facts of the case in greater detail this time, the court affirmed the award of compensatory education, finding that the school district had violated the IDEA by failing to initiate an administrative process to re-

\footnotesize{\textbf{187.} See id. \\
\textbf{188.} Id. at 16. \\
\textbf{189.} 9 F.3d 184 (1st Cir. 1993). \\
\textbf{190.} See id. at 186-87. \\
\textbf{191.} See id. at 188. The court found that: \\
\textit{Id.} \\
\textbf{192.} Id. \\
\textbf{193.} See id. at 186. \\
\textbf{194.} See id. \\
\textbf{195.} Id. at 189. \\
\textbf{196.} 22 F.3d 1186 (1st Cir. 1994). \\
\textbf{197.} 973 F.2d 13 (1st Cir. 1992).}
solve an impasse between the school district and the parents.\textsuperscript{198} As a result of the school district's violation, the court found, the student "was deprived of [appropriate] educational services for two years."\textsuperscript{199} The court stated that a "speedy resolution" of the impasse when entitlement for services is the issue was "a dominant IDEA policy objective."\textsuperscript{200} In describing the basis for its award of compensatory services, the court noted that "by its longstanding procedural lapse ... Timberlane abdicated its responsibility to terminate the IEP impasse, preventing [the student's] access to a free and appropriate education."\textsuperscript{201} In Murphy II, the court pointed to the severity of the procedural violation as the basis for its award of compensatory education, stating that "a procedural default which permits a disabled child's entitlement to a free and appropriate education to go unmet for two years constitutes sufficient ground for liability under the IDEA."\textsuperscript{202}

The First Circuit has held that both substantive and procedural violations of the IDEA can provide the basis for an award of compensatory educational services, but only if the student has been denied a FAPE. When an award of compensatory educational services is based on a substantive violation of the IDEA, as was the case in Pihl, the deficiency in the IEP must be so significant that the student was denied his or her right to an appropriate education. When an award of compensatory education is based on a procedural violation of the IDEA, as in Murphy II, the violation must have been significant enough to effectively exclude the student from appropriate services for an extended period of time. In both cases, the denial of services was for an extended period of time—two years or more.

2. The Second Circuit

The Second Circuit has considered the issue of compensatory education on three occasions, each time reaching the conclusion that a "gross" procedural violation of the IDEA is required before an award of compensatory education is warranted. The Second Circuit first looked at the issue in 1988 in Burr v. Ambach.\textsuperscript{203} In Burr, the private school program that a severely handicapped student had been attending at public expense closed.\textsuperscript{204} The student was offered no educational program, and received no educational services, for nearly two years while the hearing and appeal process initiated by his parents following the closure of the private school dragged on at the local and state level.\textsuperscript{205} As part of a state level review, the Commissioner of Education rejected a hearing officer’s award of one-and-a-half

\begin{itemize}
\item \textsuperscript{198} See Murphy v. Timberlane Reg’l Sch. Dist., 22 F.3d at 1196.
\item \textsuperscript{199} Id. at 1190.
\item \textsuperscript{200} Id. at 1191.
\item \textsuperscript{201} Id. at 1196.
\item \textsuperscript{202} Id. The court cited four cases in an effort to distinguish between significant procedural violations, such as is the case here, and mere technical, non-injurious violations. See id. Three cases stand for the concept that severe flaws in the IEP process are required for an action to lie under the IDEA. See, e.g., W.G. v. Board of Trustees, 960 F.2d 1479 (9th Cir. 1992); Roland M. v. Concord Sch. Comm., 910 F.2d 983 (1st Cir. 1990) cert. denied 499 U.S. 912 (1991), and Mrs. C. v. Wheaton, 916 F.2d 69 (2d Cir. 1990). But see Hampton Sch. Dist. v. Dobrowolski, 976 F.2d 48, 53 (1st Cir. 1992) (holding that technical violations of IDEA are insufficient to warrant finding an IEP to be inappropriate).
\item \textsuperscript{203} 863 F.2d 1071 (2d Cir. 1988).
\item \textsuperscript{204} See id. at 1073.
\item \textsuperscript{205} See id.
\end{itemize}
years of compensatory education after the student reached age twenty-one, finding that such an award was not authorized by the IDEA.\textsuperscript{206} The court found that the due process hearing and the appeal to the Commissioner had taken nearly two years, despite a federal regulation that such decisions be made within forty-five days, and during that time the student was receiving no educational program.\textsuperscript{207} The court based its decision to award compensatory education past the age of twenty-one on the fact that “the federal regulations were grossly violated in this case.”\textsuperscript{208} The court suggested that, had the student been in some type of school program pursuant to the stay-put provision of the IDEA, a lengthy appeal process such as this one would not have been as damaging to the student and might not have justified an award of compensatory services.\textsuperscript{209} The court opined that not to allow compensatory education because a student has passed the age of twenty-one would mean that the IDEA created “a right without a remedy” and that the student’s right to an education between the ages of three and twenty-one would have been “illusory.”\textsuperscript{210}

Two years later, in \textit{Mrs. C. v. Wheaton},\textsuperscript{211} the Second Circuit again used a gross violation of the IDEA’s regulations as the basis for an award of compensatory services. In \textit{Mrs. C.}, an eighteen-year-old mentally retarded student was discharged from his residential special education program based on his own consent, without notice to, or the consent of, either his mother or a surrogate parent that had been appointed to represent him in the decision making process.\textsuperscript{212} The court determined that the IDEA’s procedural safeguards, requiring parental notice and meaningful input into decisions affecting their child’s education, apply to eighteen to twenty-one-year-old students even though there may have been no adjudication of incompetency.\textsuperscript{213} The court cited its decision in \textit{Burr}, stating that compensatory education is properly awarded when the IDEA regulations are “grossly violated” and exclusion from school for a substantial period of time results.\textsuperscript{214} Describing the results of the state’s actions here as a “complete exclusion from an educational services placement ... with disastrous results,” the court found them comparable to the “gross violations” it had found in \textit{Burr}, and supported the award of compensatory services.\textsuperscript{215}

In \textit{Garro v. Connecticut},\textsuperscript{216} the court again applied the “gross procedural violations” standard, finding that a claim for compensatory education was properly dismissed for failure to show any gross procedural violations of the IDEA.\textsuperscript{217} The case involved a dispute over a student’s eligibility for special education services.

\textsuperscript{206} See id.
\textsuperscript{207} See id. at 1075-76.
\textsuperscript{208} Id. at 1075.
\textsuperscript{209} See id. at 1076.
\textsuperscript{210} Id. at 1078.
\textsuperscript{211} 916 F.2d 69 (2d Cir. 1990).
\textsuperscript{212} See id. at 71.
\textsuperscript{213} See id. at 73.
\textsuperscript{214} Id. at 75.
\textsuperscript{215} Id.
\textsuperscript{216} 23 F.3d 734 (2d Cir. 1994).
\textsuperscript{217} Id. at 737. Compare this with Muller v. Committee on Special Educ., 145 F.3d 95 (2d Cir. 1998), where the court held that the parents of a student were entitled to reimbursement of tuition because the school district failed to identify the student as a student with a disability under the IDEA, and as a result failed to provide her with an IEP or a FAPE. See id. at 105-06.
with the parents challenging a hearing officer’s determination that the school district had been correct in finding that a student did not meet eligibility requirements for special education as a learning disabled student.218 The court found that the district court had properly dismissed the parents’ compensatory education claim “because such relief is unavailable … in the absence of ‘gross’ procedural violations.”219

The Second Circuit has consistently required that in order to sustain an award of compensatory education, a violation of the IDEA’s procedural requirements must rise to a level the court considers “gross,” and that the violation must result in a complete denial of educational services to the student for a substantial period of time.

3. The Third Circuit

In Lester H. v. Gilhoool,220 the first of four compensatory education claims heard by the Third Circuit, the school district had developed and implemented an IEP calling for in-home programming of only five hours of instruction per week for a profoundly retarded student with severe behavior problems.221 The school district acknowledged that the placement was inappropriate, but indicated that it was intended to be only temporary.222 The district then took two and a half years to find an appropriate program for the student, during which time the in-home program continued intermittently.223 The court found that the district “should have known or could have ascertained” that there were appropriate placements available for the student both in the state and outside it, and that the student was harmed by the district’s failure to do so.224 In a footnote, the court suggested that the district had not made a good faith effort to find an appropriate placement for the student, and that, had it done so, compensatory education might not have been warranted.225

In Carlisle Area School District v. Scott P.,226 parents of a seriously brain injured student disagreed with the IEP and the educational placement recommended by the school district, contending that the student had not progressed under a similar IEP during the previous school year.227 The parents had not told the school district at the time that they thought the IEP was deficient.228 The district court supported an award of six months of compensatory education based on a state Special Education Appeals Panel’s finding that the previous year’s IEP was inap-
appropriate. In determining whether to affirm the compensatory education award on appeal by the school district, the court reviewed the prior decisions in the Second, Eighth, and Eleventh Circuits, finding that all required some type of "culpable conduct" on the part of the school district, and that most involved egregious circumstances. The Court of Appeals reversed the compensatory education award, finding that the district was unaware of the parents' dissatisfaction with the previous year's IEP. While the court declined to fully define the standard it used to make its decision, it did note that "it is necessary ... to demonstrate that some IEP was actually inappropriate." The court did state, however, that an award of compensatory education did not require a showing of bad faith on the part of the school district.

In M.C. v. Central Regional School District, parents challenged the appropriateness of their child's IEP. The court found that the child had made little progress on the goals and objectives on his IEP; that regression occurred in some areas; that the IEP failed to include strategies to reduce inappropriate behavior; and that parent training was not included in the IEP. The court used M.C. to "flesh out the standard left sparse by Carlisle," expressly rejecting the standard adopted by other circuits requiring a gross violation or deprivation. Finding that any standard related to compensatory education must focus on the IEP, the court stated that "the right to compensatory education should accrue from the point that the school district knows or should know of the IEP's failure." In a footnote, the court again reiterated its position in Carlisle, that an award of compensatory education required a finding that an IEP was in place and was inappropriate. The court then went on to spell out its then current standard for an award of compensatory education:

[A] school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a de minimis educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation ....

The Third Circuit considered the standard for awarding compensatory education most recently in Ridgewood Board of Education v. N.E. which involved a student who had experienced academic difficulties since starting second grade in 1988. At the parents' request, the school district evaluated the student, but refused to identify him as a learning disabled student because it concluded that he did not meet the eligibility criteria. In May 1994, the school reevaluated the
student, and in March 1995, the school district agreed to classify him as "perceptually impaired," making him eligible for special education services. The parents’ request for compensatory education was denied by an Administrative Law Judge (ALJ) because the ALJ found that the school district’s failure to find the student eligible for special education services did not involve “bad faith or willful misconduct.” The district court affirmed the denial of compensatory education, based on the Third Circuit’s decision in *M.C.*, finding that an award was available only when an IEP was inappropriate, and that in this case the compensatory services were requested for the time period between 1988 and 1995 when no IEP was in place. The Third Circuit rejected the district court’s interpretation of *M.C.*, holding that it is the “denial of an appropriate education—and not merely the denial of an appropriate IEP—that creates the right to compensatory education.” The court then extended its holding in *M.C.*, stating that “a disabled student’s right to compensatory education accrues when the school [district] knows or should know that the student is receiving an inappropriate education.”

The Third Circuit, by its decisions from *Carlisle* through *Ridgewood*, has broadened the circumstances in which it will award compensatory education services under the IDEA. The Third Circuit has rejected any requirement of bad faith or a gross violation of procedural requirements when awarding compensatory education. It has rejected its own requirement, announced in *M.C.*, that an IEP, which the school district knows or should have known was inappropriate, must be in place before an award of compensatory educational services is warranted. The *Ridgewood* decision dispenses with a need for an IEP altogether, requiring only that the district knew or should have known that the education that the student was receiving in the regular educational program was inappropriate for that student’s needs.

4. The Fourth Circuit

The Fourth Circuit has considered the issue of compensatory education only once, in *Burke County Board of Education v. Denton*. In denying an award of compensatory education, the court’s decision indicates when an award of compensatory education is not appropriate rather than articulating what criteria warrant an award of compensatory education. In *Burke*, an autistic student with moderate mental handicaps returned from a residential placement to his home school district. The school district had not complied with the procedural requirements of the IDEA because it failed to provide notice to the parents and failed to have an IEP in place within the time periods specified by state law pursuant to the IDEA. A hearing officer awarded the student 106 days of compensatory education due to the school district’s procedural defaults. The court found, however, that the district’s efforts to develop an IEP were hampered by the lack of up-to-date infor-

244. *Id.* at 244.
245. *Id.* at 245.
246. *See id.* at 250.
247. *Id.* at 249-50.
248. *Id.* at 250.
249. 895 F.2d 973 (4th Cir. 1990).
250. *See id.* at 975-76.
251. *See id.* at 976.
252. *See id.* at 978.
mation from the private school the student had been attending, and that the district presented an IEP to the parents only four days after receiving the evaluations from the private school.253 Without additional explanation, the court found that “the Board’s procedural failure did not deprive [the student] of educational benefits that would entitle him to extra education days.”254

It would appear from Burke that the Fourth Circuit would require at least some deprivation of educational benefits to warrant an award of compensatory education, though the Burke decision gives no indication of the nature or extent of deprivation that would be necessary to justify such an award.

5. The Fifth Circuit

The Fifth Circuit has also addressed the issue of compensatory education only once. Like the Fourth Circuit, it did not clearly announce the standard it would use to determine the appropriateness of an award of compensatory education. In Jackson v. Franklin County School Board,255 the court found that an award of compensatory educational services was warranted.256 Delinquency charges had been filed in juvenile court against a special education student following a suspension from school for accosting a female classmate, and the child was sent to a state facility for evaluation and treatment.257 When the student returned home in April, a month before the end of the school year, the school district suggested to the student’s social worker that the student not return to school at that late date in the school year.258 When the student attempted to attend school the following fall, the social worker was informed that the student’s juvenile court matters had to be resolved before he could return to school.259 The school made no effort to contact the court or resolve the matter.260 Only after the student’s mother sought legal assistance and filed a suit on his behalf did the school district convene a meeting to develop an IEP for the student, more than two months into the school year.261 The court found that the school district’s failure to convene a conference at the time the student returned from the state facility in April “was a per se violation of [the IDEA]” and that such failures are “adequate grounds by themselves for holding that the school failed to provide [a FAPE].”262 The court went on to find that the school district “unilaterally deprived [the student] of his right to an education” and that remedial education was an appropriate remedy in this case.263

While failing to state a clear standard, the facts of Jackson suggest that the Fifth Circuit would require some significant deprivation of an already identified special education student’s right to an education, such as the student being excluded from school, before it would award compensatory education as a form of relief.

253. See id. at 976.
254. Id. at 982.
255. 806 F.2d 623 (5th Cir. 1986).
256. See id. at 631.
257. See id. at 625.
258. See id.
259. See id.
260. See id.
261. See id. at 626.
262. Id. at 628-29 (quoting Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985)).
263. Id. at 631.
6. The Seventh Circuit

The Seventh Circuit was one of the first circuits to address the issue of compensatory education, in *Timms v. Metropolitan School District*.

Though ultimately dismissing the parents' complaint due to a failure to exhaust administrative remedies, the court discussed at some length whether compensatory education is an available form of relief under the IDEA.

In this pre-*Burlington* decision, however, the court left the question open, stating that "[w]e need not here define the precise limits of 'appropriate relief' under [the IDEA]."

The next time the court addressed the compensatory education issue was in *Board of Education of Oak Park & River Forest High School District v. Illinois State Board of Education (Oak Park)*. In *Oak Park*, the parents of an autistic student had filed a complaint seeking two years of compensatory education to make up for two years of past educational programming with which they were dissatisfied.

The student, who was twenty-three years old by the time the appeal reached the Seventh Circuit, was still receiving services at district expense, two years past the IDEA's statutory age limit for providing services had expired. The court refused to order additional compensatory services, finding that the school district had already provided the relief that the parents were seeking.

The court acknowledged that the issue of availability of compensatory education had been decided since *Timms*, stating that compensatory education is one of the "full range of equitable remedies" available under the IDEA. The only standard the court suggested was that compensatory education can be awarded "if necessary to cure a violation [of the IDEA]."

The limited decisions of the Seventh Circuit fail to provide any clear standard for the award of compensatory education. The severity of the violation of the IDEA necessary to justify such an award is left unspecified. The Seventh Circuit has suggested that courts have great discretion to use compensatory education to cure "wrongs" under the IDEA as they deem necessary.

7. The Eighth Circuit

Like the Fourth and Fifth Circuits, the Eighth Circuit has addressed the compensatory education issue only once, in *Miener v. Missouri*, one of the first cases at the circuit court level to consider the issue of compensatory education. In *Miener*, a student with a brain tumor and behavior and learning disorders was tested by her school district on two separate occasions and found to be eligible for special education services.

The district, however, for reasons that are not stated

264. 722 F.2d 1310 (7th Cir. 1983).
265. See id. at 1316.
266. Id.
267. 79 F.3d 654 (7th Cir. 1996) amended April 23, 1996, reh'g and suggestion for reh'g en banc denied July 25, 1996.
268. See id. at 655-56.
269. See id.
270. See id. at 655.
271. Id. at 656.
272. Id.
273. 800 F.2d 749 (8th Cir. 1986).
274. See id. at 751.
in the decision, provided no special education for the student.\textsuperscript{275} Lacking the financial resources to place the student in a private program, the student’s father admitted her to the state hospital.\textsuperscript{276} The student’s father later filed a complaint seeking compensatory education for the time the student spent at the state hospital, claiming that while there she had not received the educational services to which she was entitled.\textsuperscript{277} The court held that the student was entitled to compensatory educational services “to replace the services the [school district was] obligated to provide” if it could be proven that she was “denied … a free appropriate education in violation of [the IDEA].”\textsuperscript{278}

The \textit{Miener} decision leaves open the extent of the denial of a free appropriate education that is necessary to allow an award of compensatory educational services. It is unclear whether the school district convened an IEP meeting, formally identified the student as eligible for special education services, or developed an IEP for her. It is clear, however, that the district evaluated the student on two occasions and had actual knowledge of her educational needs and her eligibility for special education services. The Eighth Circuit’s standard for awarding compensatory education seems to be that compensatory education is warranted when a student who the district knows is eligible for special education services, and for whom an IEP is or should have been in place, is denied access to the services he or she is entitled to under the IDEA.

\section{8. The Ninth Circuit}

The Ninth Circuit has considered the compensatory education standard on two occasions, both times adopting a conservative and narrow view of the circumstances which warrant such an award. In \textit{Parents of Student W. v. Puyallup School District, No. 3},\textsuperscript{279} the parent of a special education student with learning and behavior problems refused the special education services offered by the school district.\textsuperscript{280} Subsequent suspensions from school and moves by the student between several school districts resulted in missed school time.\textsuperscript{281} The student’s parent filed a complaint seeking, among other things, compensatory education sufficient to allow the student to graduate from high school.\textsuperscript{282} The court found that the district \textit{had} violated the IDEA’s procedural requirements by terminating the student’s services without providing any written notice to the parent.\textsuperscript{283} The court refused to award the requested compensatory education, however, finding that compensatory services in the form of tutoring and summer programming had been refused in the past by the student’s parent, noting that the student had in fact successfully graduated from high school with his class.\textsuperscript{284} The IDEA, the court said, “promises him no more.”\textsuperscript{285} Turning to the issue of compensatory education, the court

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{275} See id.
\item \textsuperscript{276} See id.
\item \textsuperscript{277} See id. at 753.
\item \textsuperscript{278} Id. at 756.
\item \textsuperscript{279} 31 F.3d 1489 (9th Cir. 1994).
\item \textsuperscript{280} See id. at 1492.
\item \textsuperscript{281} See id.
\item \textsuperscript{282} See id. at 1493-94.
\item \textsuperscript{283} Id. at 1496-97.
\item \textsuperscript{284} See id.
\item \textsuperscript{285} Id. at 1497.
\end{itemize}
\end{footnotesize}
defined it as an equitable, not a contractual remedy, requiring no "rotely awarded ... block of compensatory education equal to time lost," as some courts had done.286

The court also noted that a compensatory education inquiry should include an analysis of the facts of the case to determine whether it is appropriate or not under the circumstances.287 In *Cronkite v. Long Beach Unified School District*,288 an unpublished opinion, the Ninth Circuit continued its narrow interpretation of the grounds supporting an award of compensatory education. In *Cronkite*, parents of a special education student sought compensatory education for their child, claiming that the IEP was procedurally defective because it failed to identify the student as "dyslexic" and that the student had made no improvement under the school district's IEP.289 The court found that the school district had met the procedural requirements of the IDEA because there is "no procedural provision requiring the use of a specific term, such as dyslexia, provided the IEP properly identifies and addresses the disability."290 Then, with *Rowley* squarely in mind, the court stated that a school district is not required to maximize a student's potential, but is only required to provide "a basic floor of opportunity" by creating an individualized program that is designed to provide educational benefit.291 The court noted that although the student "was not progressing as he would in the best possible educational setting for dyslexic students, the record is clear that [his] education provided the basic floor of opportunity required under the IDEA."292 No compensatory education was warranted, the court held, because the school district had provided the student "with a procedurally and substantively adequate free appropriate public education."293

While it appears that the Ninth Circuit would be willing to award compensatory education for either a procedural or substantive violation of the IDEA, the *Puyallup* and *Cronkite* decisions suggest that the violations would need to be significant, and that the court would take a hard look at the facts of each case before assigning liability and awarding compensatory services.

9. The Tenth Circuit

The Tenth Circuit has considered the issue of when to award compensatory education on two occasions. In *Urban v. Jefferson County School District R-1*,294 the court found that the school district's failure to comply with the IDEA's requirements regarding the contents of a student's IEP did not result in a substantive deprivation of the student's right to a FAPE.295 The school district had failed to include a statement of transition services, as required by the IDEA, in a student's IEP.296 The parents claimed that this omission deprived the student of an appro-

286. Id.
287. See id.
289. See id. at *3.
290. Id. at *3.
291. Id. at *3-4 (quoting Union Sch. Dist. v. Smith, 15 F.3d 1519, 1524 (9th Cir. 1994)).
292. Id. at *4.
293. Id.
294. 89 F.3d 720 (10th Cir. 1996).
295. See id. at 726.
296. See id.
Breen,\textsuperscript{310} the court relied on Burlington, as well as the Eighth Circuit's decision in Miener, to justify an award of compensatory education under the IDEA.\textsuperscript{311} In Breen, the parent of a child with a head injury and significant behavior and learning problems objected to her daughter's proposed placement in a public high school, as well as to the school district's recommended alternative placement at a state mental hospital.\textsuperscript{312} The parent enrolled her daughter in a private program, incurring nearly $10,000 in costs.\textsuperscript{313} The Eleventh Circuit agreed with the findings of both the hearing officer and the district court that the school's proposed programs did not meet the student's educational needs.\textsuperscript{314} The court also found that the parent was entitled to reimbursement of tuition costs and the student was entitled to compensatory education to make up for the school district's "failure to provide an appropriate education" prior to a court ordered placement in a private program.\textsuperscript{315} Perhaps because the student in this case was nearing her twenty-second birthday, the statutory age limit for services under the IDEA, the court also noted that ordering a district to provide compensatory education "should serve as a deterrent against states unnecessarily prolonging litigation in order to decrease their potential liability."\textsuperscript{316}

In Todd D. v. Andrews,\textsuperscript{317} the parents of a severely emotionally disturbed student objected to his placement at a facility in another state because it did not allow the transition related goals in his IEP to be met.\textsuperscript{318} The parents challenged the state's policy of placing students in out-of-state facilities rather than developing in-state programs appropriate to their needs.\textsuperscript{319} The district court, in dismissing the parents' claim, suggested that the IEP should be rewritten to accommodate the out-of-state placement.\textsuperscript{320} The Eleventh Circuit made it clear that courts are not to rewrite IEPs, but "must pay great deference to educators who develop [them]."\textsuperscript{321} The court then concluded that the student's IEP must be implemented as written, which required that he be placed "at a facility close enough to his home community to allow implementation of his transition goals."\textsuperscript{322} Citing Breen, the court then found that compensatory education was warranted in this case because "the responsible authorities have failed to provide a handicapped student with an appropriate education as required by [the IDEA]."\textsuperscript{323}

In Weiss v. School Board,\textsuperscript{324} the Eleventh Circuit held that absent either a procedural or substantive violation of the IDEA, an award of compensatory educational services is not warranted.\textsuperscript{325} In Weiss, a school district developed a six-
appropriate education, and requested compensatory education as a remedy. The court found that the IEP addressed the area of transition services in other language, and that transition services had in fact been provided to the student. In the absence of a violation of the student’s right to an appropriate education, the court did not even have to reach the issue of whether compensatory education is available as a remedy under the IDEA.

In Erickson v. Albuquerque Public Schools, a student’s IEP provided for two hours per week of occupational therapy (O.T.). While the IEP did not specify the type of O.T. to be provided, one of the two hours of O.T. services per week was provided as hippotherapy, involving horseback riding. The school district, at an IEP review meeting, reduced the student’s weekly O.T. from two hours to one, with the consent of the parent. The school district eliminated that part of the O.T. that involved hippotherapy. The student’s parent objected and requested a due process hearing, claiming that the school district had violated the stay-put provision of the IDEA and that the district had made a predetermined decision to eliminate the hippotherapy, violating the student’s right to an individualized placement decision as required by the IDEA. The court found that the stay-put provision was not violated because the termination of the hippotherapy services was not a change in educational placement, but simply a change in methodology. Despite the district’s failure to make an individualized placement decision, the court found that “compensatory education is not an appropriate remedy for a [procedural violation of the IDEA] … when the school district provided the student with a FAPE.”

The Tenth Circuit’s decisions in Urban and Erickson make clear that procedural violations of the IDEA, absent some showing that a FAPE was denied, are insufficient to justify compensatory services. The court failed, however, to specify the extent of the denial of a FAPE that would be necessary to warrant an award of compensatory education.

10. The Eleventh Circuit

The first time the Eleventh Circuit considered the issue of compensatory education, in Powell v. DeFore, was before the Supreme Court’s decision in Burlington. The court concluded that compensatory education was equivalent to damages and was therefore precluded under the IDEA. By the time the Eleventh Circuit again addressed the issue, in Jefferson County Board of Education v.

297. See id. at 725.
298. See id. at 726.
299. See id. at 727.
300. 199 F.3d 1116 (10th Cir. 1999).
301. See id. at 1119.
302. See id.
303. See id.
304. See id.
305. See id.
306. See id. at 1122.
307. Id. at 1123.
308. 699 F.2d 1078 (11th Cir. 1983).
309. See id. at 1081.
month interim IEP, as allowed by state law, to serve an autistic special education student who had moved into the district from another state, in order to allow the school district time to conduct evaluations.\textsuperscript{326} Though the interim IEP was not as comprehensive as the IEP previously used in the other state, it met all the requirements of the IDEA.\textsuperscript{327} The parents disagreed with the contents of the interim IEP and requested an administrative hearing, challenging its use by the school district and requesting compensatory education as a remedy.\textsuperscript{328} The hearing officer found that although there were technical defects in the interim IEP, the student had progressed both academically and behaviorally during the time the IEP was in place.\textsuperscript{329} As a result, the officer concluded that no denial of a FAPE had occurred, and no compensatory services were warranted.\textsuperscript{330} The court affirmed the hearing officer’s decision.\textsuperscript{331} Using Rowley’s two-pronged standard, the court found that the district had committed no procedural or substantive violations of the IDEA, precluding the award of compensatory education.\textsuperscript{332}

\textbf{B. Analysis of the Courts of Appeals’ Standards}

There is little consistency in the language used by the circuit courts when articulating the standards and rationales used to support an award of compensatory educational services under the IDEA.

For example, the First Circuit has looked to deficiencies in the IEP and lack of “access to a free and appropriate education,”\textsuperscript{333} while the Second Circuit requires “a gross violation” resulting in a “complete exclusion.”\textsuperscript{334} In the Third Circuit, compensatory services are warranted when the school district “knows or should know that the student is receiving an inappropriate education.”\textsuperscript{335} The Fourth Circuit refers to actions that “deprive [the student] of educational benefits.”\textsuperscript{336} The Fifth Circuit describes the level of violation necessary as one that “unilaterally deprived [the student] of his right to an education.”\textsuperscript{337} The Seventh Circuit speaks simply of a “violation” of the IDEA,\textsuperscript{338} while the Eighth Circuit, adding to that, describes a denial of “a free and appropriate education in violation of [the IDEA].”\textsuperscript{339} The Ninth Circuit, in refusing to award compensatory education, has found that a “procedurally and substantively adequate free public education” precludes such an award.\textsuperscript{340} The Tenth Circuit has articulated a standard requiring a

\begin{footnotes}
\item[326] See id. at 992.
\item[327] See id.
\item[328] See id. at 993.
\item[329] See id.
\item[330] See id.
\item[331] See id. at 998.
\item[332] See id.
\item[333] Murphy v. Timberlane Reg. Sch. Dist., 22 F.3d 1186, 1196 (1st Cir. 1994).
\item[334] See Mrs. C. v. Wheaton, 916 F.2d 69, 75 (2d Cir. 1990).
\item[335] Ridgevood Bd. of Educ. v. N.E., 172 F.3d 238, 250 (3d Cir. 1999).
\item[336] Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir. 1990).
\item[337] Jackson v. Franklin County Bd., 806 F.2d 623, 631 (5th Cir. 1986).
\item[339] Mener v. Missouri, 800 F.2d 749, 756 (8th Cir. 1986).
\end{footnotes}
denial of a FAPE,\textsuperscript{341} while the Eleventh Circuit has based its decisions on a "failure to provide an appropriate education."\textsuperscript{342}

Despite the inconsistent and vague language and terminology used by the various circuits, a broad reading of the decisions does yield at least some areas of agreement. There seems to be agreement that some past denial of a FAPE must be proven, caused by either a procedural or substantive violation of the IDEA on the part of the school district or state.\textsuperscript{343} It also seems clear that courts are unlikely to award compensatory education for technical or non-injurious violations of the IDEA's sometimes complex procedural requirements, in the absence of some denial of a FAPE.\textsuperscript{344}

Unfortunately, these broad areas of agreement provide little in the way of specific guidelines for school districts, parents, lower courts, and administrative hearing officers to use when evaluating whether certain actions on the part of schools or parents will result in an award of compensatory education. An important question left unanswered by the decisions of the circuits is: How much of a denial of a FAPE is enough? Even if one accepts that the courts are in agreement that a past denial of a FAPE is required before compensatory education is warranted, it is unclear how extensive that denial must be before compensatory education is an appropriate remedy. Decisions to award compensatory education in the First, Second, Fifth, and Eighth Circuits have been based on the total exclusion of the student from educational services—sometimes from any form of education altogether, while at other times just from the special education services described in the student's

\textsuperscript{341} See Erickson v. Albuquerque Pub. Sch., 199 F.3d 1116 (10th Cir. 1999).

\textsuperscript{342} See, e.g., Cronkite v. Long Beach Unified Sch. Dist., No. 97-55544, 1999 U.S. App. LEXIS 4733, at *4 (9th Cir. Mar. 18, 1999) (holding that award of compensatory education not justified when procedural requirements of IDEA had been met); Weiss v. Board of Educ., 141 F.3d 990, 999 (11th Cir. 1998) (holding that compensatory education is not appropriate remedy absent procedural or substantive violation of IDEA); Board of Educ. v. Illinois State Bd. of Educ., 79 F.3d 654, 656 (7th Cir. 1996) amended April 23, 1996 (holding that award of compensatory education is appropriate remedy to cure violation of IDEA); Murphy v. Timberlane Reg'l Sch. Dist., 22 F.3d 1186, 1196 (1st Cir. 1994) (holding that severe procedural violation of IDEA is justification for awarding compensatory education); Burr v. Ambach, 863 F.2d 1071, 1079 (2nd Cir. 1988) (holding that gross violation of IDEA timelines warranted award of compensatory education); Jackson v. Franklin County Sch. Bd., 806 F.2d 623, 628 (5th Cir. 1986) (holding that failure to convene IEP meeting as required by IDEA was per se violation and proved that school district did not provide FAPE).

\textsuperscript{344} See, e.g., Erickson v. Albuquerque Pub. Sch., 199 F.3d 1116, 1122-23 (10th Cir. 1999) (holding that procedural violation does not warrant award of compensatory education absent denial of FAPE); Urban v. Jefferson County Sch. Dist. R-1, 89 F.3d 720, 726 (10th Cir. 1996) (holding that procedural violation in form of incomplete IEP did not warrant award of compensatory education because school district provided services to student); Student W. v. Puyallup Sch. Dist., No. 3, 31 F.3d 1489, 1497 (9th Cir. 1994) (holding that no compensatory education award is warranted, despite procedural violation of IDEA, when district provided FAPE to student); Todd D. v. Andrews, 933 F.2d 1576, 1584 (11th Cir. 1991) (finding that award of compensatory education is justified when school district fails to provide FAPE to student); Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 984 (4th Cir. 1990) (denying award of compensatory education when procedural violation of IDEA did not deprive student of educational benefits); Jackson v. Franklin County Sch. Bd., 806 F.2d 623, 631 (5th Cir. 1986) (holding that student eligible for compensatory education when district's violation of IDEA unilaterally deprived him of right to education).
The Eleventh Circuit's decision in Todd D., on the other hand, suggests that the failure to provide services to meet even one out of what could be many goals on a child's IEP may warrant an award of compensatory services. How long a FAPE must be denied before compensatory services are justified is left uncertain as well. The cases considered time frames ranging from several months to two years. No court has yet directly addressed the question of the requisite duration of the denial of a FAPE. There is no indication whether there is a minimum length of deprivation of services below which the denial of a FAPE would be considered insubstantial or de minimis.

It is also unclear from the decisions how closely the courts will look at actions of the parents or other contributory factors in determining the liability of schools for compensatory education to address past violations. The Fourth and Ninth Circuits have found that even when violations of the IDEA have occurred and a FAPE has been denied, mitigating factors, such as parents' refusal of offered services or delays in providing services that are beyond the control of the school district, may make liability of the school district for compensatory services unwarranted. Other circuits seem to hold districts to what amounts to a strict liability standard, i.e., any substantial deprivation of a FAPE means an automatic award of compensatory services, often on a "day-for-day" basis.

A significant conflict among the circuits now exists, based on the Third Circuit's recent decision in Ridgewood. Granted, there has been inconsistency among the circuits as to the degree and extent of the denial of a FAPE that is necessary for an award of compensatory educational services. Prior to Ridgewood, however, there was agreement that the denial of a FAPE justifying compensatory services required one of three things: bad faith on the part of the school district when failing to identify a student as one who is eligible for special education; a delay in providing services to a student who has been found to be eligible for those services under

345. See Murphy v. Timberlane Reg'l Sch. Dist., 22 F.3d 1186 (1st Cir. 1994) (awarding compensatory education when no services provided to student for two years); Phl v. Massachusetts Dep't of Educ., 9 F.3d 184 (1st Cir. 1993) (awarding compensatory education when no IEP in place for two years); Burr v. Ambach, 863 F.2d 1071 (2d Cir. 1988) (awarding compensatory education when no services provided for nearly two years); Jackson v. Franklin County Sch. Bd., 806 F.2d 623 (5th Cir. 1986) (awarding compensatory education when student prevented from attending school for three months at end of one year and two months at the start of the next); Miener v. Missouri, 800 F.2d 749, 756 (8th Cir. 1986) (awarding compensatory education when identified special education student received no special education services for three-year period).

346. See, e.g., Student W. v. Puyallup Sch. Dist., No. 3, 31 F.3d 1489, 1497 (9th Cir. 1994) (denying award of compensatory educational services when parents had refused individual programming offered by school district in the past); Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 984 (4th Cir. 1990) (denying award of compensatory education when school district's efforts to develop IEP were hampered by lack of up-to-date information from private school student had been attending).

347. See, e.g., Phl v. Massachusetts Dep't of Educ., 9 F.3d 184, 189 (1st Cir. 1993) (holding that deficient IEP warrants award of compensatory education).

348. See, e.g., Garro v. Connecticut, 23 F.3d 734, 737 (2d Cir. 1994) (holding that district's failure to identify student as eligible for special education services not a gross violation of IDEA, so no award of compensatory education).
the IDEA, or a deficiency of some type in the IEP. While there has been little clear direction from the circuit courts as to how long the delay in providing services must be, or how deficient the IEP must be, there has always been at least a minimum threshold requirement that a student must have, or have had at the time in question, an IEP. The Ridgewood decision turns that requirement on its head.

It is possible, under the standard announced in Ridgewood, that a school district could find itself responsible for providing compensatory education to a student whose needs the district was found not to have met, even though the student had never been referred for special education services, had never been evaluated by the district, and for whom the district had never been asked to convene the IEP team. The district could be responsible even though it never saw any reason to consider the student eligible for special education services, and was never asked by the parents to consider whether the student might be eligible.

Most alarmingly, Ridgewood does away with the requirement that, before relief can be granted under the IDEA, a violation of one of the procedural or substantive provisions of the statute must be shown. It opens the door to a new type of educational malpractice claim whenever a student is found to qualify for special education services at some point down the road in his or her school career. The Administrative Law Judge (ALJ) in the case found that the IEP that had been written, once the student was identified as eligible for special education services, was deficient, but there were no findings that the school district had violated any of the procedural requirements of the IDEA when it found the student ineligible for special education services the first time it had evaluated him. The ALJ also specifically found that the district’s determination of ineligibility, and subsequent exclusion from special education services, “did not rise to the required level of bad faith or willful misconduct.”

The court’s decision in Ridgewood disregards the standard established by the United States Supreme Court in Board of Education v. Rowley. The threshold question created by the Court in Rowley was whether the district “complied with the procedures set forth in the Act.” The ALJ determined that the school district had complied, and there is nothing in the Ridgewood opinion that suggests that the Third Circuit does not agree. Because the procedural requirements were met in determining that the student was ineligible for special education, there was no need to reach the second prong of Rowley—whether the substantive requirements of a FAPE were met.

The Court in Rowley also spoke to the role that courts were to play in the

349. See, e.g., Murphy v. Timberlane Reg’l Sch. Dist., 22 F.3d 1186, 1196 (1st Cir. 1994) (awarding compensatory education when IEP impasse resulted in two year delay in services); Jackson v. Franklin County Sch. Bd., 806 F.2d 623, 628 (9th Cir. 1986) (awarding compensatory education when school district failed to convene IEP meeting upon student’s return to school resulting in student’s exclusion from school).

350. See, e.g., M.C. v. Central Reg’l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996) (holding that student with inappropriate IEP is entitled to compensatory education services equal to duration of deprivation); Pihl v. Massachusetts Dep’t of Educ., 9 F.3d 184, 189 (1st Cir. 1993) (holding that compensatory education may be required if IEP from a past year is found to be deficient).


352. Id.


354. Id. at 206
review and enforcement of the IDEA. It cautioned that "courts must be careful to avoid imposing their view ... upon the States."\textsuperscript{355} The Court noted that "it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to [the IDEA]."\textsuperscript{356} This seems to be just what the Third Circuit did in \textit{Ridgewood}.

Based on the decisions in all the circuits, including the Third Circuit's opinions prior to the \textit{Ridgewood} decision, the standard for an award of compensatory education should require: (1) An IEP that was deficient to the degree that it denied the student a FAPE in some significant way; (2) a procedural violation of the IDEA that denied the student access to necessary special educational services or to the regular educational program for a significant amount of time; (3) a "gross" or "bad faith" procedural violation (with the more limited requirements for educational deprivation); or (4) actual knowledge on the part of the school district that the student was, or may have been, a child with a disability, based on the district's own evaluation of the student, an outside evaluation of the student, or a written request for evaluation by the child's parent.

Absent a showing of bad faith or culpability, the "knows or should have known" standard adopted by the court in \textit{Ridgewood} puts school districts in a very difficult position. Their good faith decisions can be second-guessed by courts years down the road, and the school district will be held responsible for the long-term consequences that are claimed to have resulted from those decisions. With the benefit of hindsight, many past decisions can often be found lacking. To assess liability and potentially significant financial responsibility on that basis, absent some showing of culpability, such as negligence or bad faith, is grossly unfair.

\textbf{IV. CONCLUSION}

An award of compensatory education based on a violation of IDEA can have far-reaching consequences for students, parents, school districts and state educational agencies. The circuit courts have provided little consistent guidance for lower courts, administrative hearing officers, or Administrative Law Judges when they are called upon to determine when compensatory education is an appropriate form of relief based on a claim arising under the IDEA. Inconsistencies among the circuits abound as to the nature and degree of the violation of the IDEA required to justify such an award. To make this unclear picture even fuzzier, one of the most recent compensatory education decisions at the circuit court level, the Third Circuit's decision in \textit{Ridgewood}, significantly expands the circumstances in which an award of compensatory education may be granted. That decision allowed an award of compensatory educational services in the absence of an IEP, or the procedural requirement to develop one, and even in the absence of any clear violation of the IDEA.

It is time for the Supreme Court to take up the issue of compensatory education. A ruling by the Court, delineating a standard such as the one proposed in the previous Section, would provide clarification, as well as some direction and consistency—for courts, administrative hearing officers, and other personnel respon-

\textsuperscript{355} Id. at 207.
\textsuperscript{356} Id. at 207-08.
sible for making decisions regarding when and on what basis to award compensatory services. It would also provide useful guidelines for school districts and parents by further defining the schools’, and the parents’, responsibilities and liabilities under the IDEA.

It is also important that the Court send a clear message that the standard announced by the Third Circuit in *Ridgewood* is out of line with the intentions of the IDEA and all other circuit court jurisprudence in the area. The *Ridgewood* decision creates a de facto educational malpractice claim, requiring no proven violation of the IDEA. Such a standard provides remedies in circumstances far beyond any previously allowed by a circuit court. The Third Circuit’s decision in *Ridgewood* puts courts in the position of second-guessing the long-past good faith educational decisions of teachers and school administrators. Most significantly, it places an unrealistic burden of omniscience on those charged with educating our nation’s children.

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