No. 21-15097

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN C., a minor, by and through Frank C., guardian ad litem; TAYLOR P., a minor, by and through Billie P., guardian ad litem; FREDDY P.; DURELL P., a minor, by and through Billie P., guardian ad litem; MOANA L.; ANNA D., a minor, by and through Elsa D., guardian ad litem; OLAF D.; LEVI R., a minor, by and through Laila R., guardian ad litem; LEO R., a minor, by and through Laila R., guardian ad litem; NATIVE AMERICAN DISABILITY LAW CENTER,

Appellants,

v.

BUREAU OF INDIAN EDUCATION; U.S. DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the Interior; LAWRENCE ROBERTS, in his official capacity as Principal Deputy Assistant Secretary – Indian Affairs; TONY DEARMAN, in his official capacity as Director of the Bureau of Indian Education; JEFF WILLIAMSON,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF OF *AMICI CURIAE* EDUCATION CIVIL RIGHTS ALLIANCE, NATIONAL CENTER FOR YOUTH LAW, JUVENILE LAW CENTER, NATIONAL DISABILITY RIGHTS NETWORK, EDUCATION LAW CENTER, COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, CENTER FOR LAW AND EDUCATION, EDUCATION LAW CENTER-PA, DISABILITY LAW COLORADO, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, NATIONAL CENTER FOR PARENT LEADERSHIP, ADVOCACY, AND COMMUNITY EMPOWERMENT, PEGASUS LEGAL SERVICES FOR CHILDREN, THE ADVOCACY INSTITUTE, AND LAWYERS FOR GOOD GOVERNMENT IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Amici Curiae the Education Civil Rights Alliance, National Center for Youth Law, Juvenile Law Center, National Disability Rights Network, Education Law Center, Council of Parent Attorneys and Advocates, Center for Law and Education, Education Law Center-PA, Disability Law Colorado, Washington Lawyers' Committee for Civil Rights and Urban Affairs, National Center for Parent Leadership, Advocacy, and Community Empowerment, Pegasus Legal Services for Children, The Advocacy Institute, and Lawyers for Good Government are all non-profit organizations, except for the Education Civil Rights Alliance, which is an alliance of nonprofit organizations convened by the nonprofit organization National Center for Youth Law. No *amici* have a parent corporation nor are publicly traded.

STATEMENT OF AUTHORSHIP, FINANCIAL SUPPORT, AND CONSENT TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* hereby certify that this brief was authored solely by *amici* and their counsel, and that no person other than *amici* contributed money that was intended to fund preparing or submitting this brief. Counsel for *amici* note, however, that in crafting this brief they have been informed by, inter alia, pre-existing legal research and written arguments on the subjects referenced herein. The Director of the Education Civil Rights Alliance, who has the requisite authority, authorized the filing of this brief. All parties have consented to the filing of this *amici curiae* brief pursuant to Fed. R. App. P 29(a).

Pursuant to Federal Rule of Appellate Procedure 29, the Education Civil Rights Alliance ("ECRA"), National Center for Youth Law, Juvenile Law Center, National Disability Rights Network, Education Law Center, Council of Parent Attorneys and Advocates, Center for Law and Education, Education Law Center-PA, Disability Law Colorado, Washington Lawyers' Committee for Civil Rights and Urban Affairs, National Center for Parent Leadership, Advocacy, and Community Empowerment, Pegasus Legal Services for Children, The Advocacy Institute, and Lawyers for Good Government respectfully submit this Brief of *Amici Curiae* in support of Appellants' request for reversal of the District Court's opinion.

I. STATEMENT OF INTEREST

This case concerns the power of a district court to remedy significant educational injuries experienced by Native American youth attending a school funded and operated by the federal Bureau of Indian Education ("BIE"), the Havasupai Elementary School ("HES").

The District Court in this case held that, even if the BIE had legal obligations to the named plaintiffs regarding their education, and even if the BIE had violated those obligations, the Court could not provide relief to any plaintiff who transferred, dropped out, or graduated from HES after this suit was filed. It thus dismissed numerous named plaintiffs for failing to meet Article III's

redressability requirement and foreshadowed the limited remedies it believed it could award to current students.

Consistent with ECRA's mandate and expertise, this brief seeks to assist the Court by explaining why the District Court had the power to grant all students named as plaintiffs meaningful equitable remedies to redress their injuries, including compensatory education, regardless of whether, when, or why they left HES.

Convened by the National Center for Youth Law, ECRA is a diverse and experienced group of organizers, educator organizations, community groups, professional associations, and civil rights organizations committed to protecting the civil rights of marginalized students. ECRA was formed to protect students' right to an education in the face of growing attacks around the country on students' ability to receive an adequate education. It believes schools should serve, educate, empower, and be safe for all students. ECRA has an interest in protecting marginalized students' and their parents' civil rights in the education context, including by ensuring courts have authority to remedy violations of those rights. The following organizations are members and allies of ECRA with an interest in this matter.

The National Center for Youth Law ("NCYL") is a private, nonprofit law firm that uses the law to help children achieve their potential by transforming the public agencies that serve them. For 50 years, NCYL has worked to protect the rights of marginalized children and to ensure they have the resources, support, and opportunities they need to become self-sufficient adults. One of NCYL's priorities is to ensure youth have access to appropriate services to improve their educational outcomes and reduce the number of youth subjected to harmful and unnecessary incarceration. NCYL provides representation to children and youth in cases with broad impact, and has represented many students in litigation and administrative complaints to ensure their access to adequate, appropriate and non-discriminatory services. NCYL currently represents, and has represented, students in challenging the violation of their federal rights by school districts in federal courts throughout the nation. NCYL has sought compensatory education as an equitable remedy for students with and without disabilities, and is likely to do so in the future.

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first nonprofit public interest law firm for children in the

country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values.

The National Disability Rights Network is the nonprofit membership organization for the federally mandated Protection and Advocacy ("P&A") and Client Assistance Program ("CAP") agencies for individuals with disabilities. The United States Congress established the P&A and CAP agencies to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. Among these agencies is one affiliated with the Native American Consortium which includes the Hopi, Navajo, and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

Education Law Center ("ELC"), a nonprofit organization founded in 1973, serves as a leading voice and advocate for public school children and for equal educational opportunity and education justice in the United States. ELC provides research and analyses related to education cost and fair school funding, high quality preschool, and other proven educational programs; assistance to parent and

community organizations, school districts, and states in gaining the expertise needed to narrow and close achievement gaps for disadvantaged children; and support for litigation and other efforts to bridge resource gaps in the nation's high-need schools. ELC has participated as *amicus curiae* in numerous educational opportunity cases in state and federal courts across the nation.

Council of Parent Attorneys and Advocates ("COPAA") is a nonprofit organization for parents of children with disabilities, their attorneys, and advocates. COPAA's primary goal is to secure appropriate educational services for children with disabilities in accordance with national policy. COPAA's attorney members represent children in civil rights matters. COPAA brings to the Court the unique perspective of parents, advocates, and attorneys for children with disabilities. COPAA has previously filed as *amicus curiae* in numerous cases in both the United States Supreme Court and the United States Courts of Appeal.

The Center for Law and Education ("CLE") is a nonprofit organization working to make the right of all students to a high-quality education a reality, with an emphasis on low-income students. CLE has participated in successful litigation on their behalf, as well as in collaborative projects with school systems in furthering that right and addressing inequalities in educational opportunity. It served for twenty-five years as the national center to support local legal services

programs across the country on education issues. CLE has sought and obtained compensatory education remedies in desegregation and other cases.

The Education Law Center-PA ("ELC-PA") is a nonprofit, legal advocacy organization dedicated to ensuring all children in Pennsylvania have access to quality public education. Through individual representation, impact litigation, community engagement, and policy advocacy, ELC-PA works to eliminate systemic inequities that lead to disparate educational outcomes based on the intersection of race, gender, gender identity/expression, sexual orientation, nationality, and disability status. During its more than forty-five-year history, ELC-PA has been at the forefront of seminal litigation in the Third Circuit Court of Appeals and throughout Pennsylvania to obtain necessary compensatory remedies to address educational civil rights violations.

The Center for Legal Advocacy, d/b/a Disability Law Colorado ("DLC"), is a nonprofit that serves as the federally mandated and state designated Protection and Advocacy System for Colorado. DLC was established in 1976 to protect and promote the legal and human rights of people with disabilities. DLC's work includes advocating on behalf of students with disabilities to enforce their rights under state and federal law. DLC has an interest in ensuring that students receive adequate compensatory services as an equitable remedy under federal law.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs works to create legal, economic, and social equity through litigation, client and public education, and public policy advocacy. The Committee recognizes the central role current and historic race discrimination plays in sustaining inequity, and recognizes the critical importance of identifying, exposing, combating, and dismantling the systems that sustain racial oppression.

The National Center for Parent Leadership, Advocacy, and Community Empowerment ("National PLACE") is a family-led membership organization working to strengthen the voice of families and family-led organizations at decision-making tables that affect our nation's youth and families. Its 70 local, state, and national members represent various family-led, family-run organizations committed to ensuring the highest quality and most effective services and supports for diverse children and families, including those with disabilities and others who face the greatest challenges to equitable access and positive outcomes based on race, ethnicity, language, etc. National PLACE's interest in this litigation lies in the importance of protecting the Havasupai parent(s)' voice and rights to partner in educational decision-making, including parents of children who may have a disability and who have been exposed to complex trauma and/or adverse childhood experiences. Further, National PLACE's interest is in the remedy of compensatory

education for all students, with and without disabilities, deprived of their right to an education, and the opportunity for parents to be part of the decision regarding the amount and type of compensatory education and how it will be provided.

Pegasus Legal Services for Children is a nonprofit public interest law firm dedicated to advancing the rights of children and youth throughout the state of New Mexico, including Native American youngsters residing in Indian Country. Founded in 2002, part of Pegasus' core mission is to promote and defend the rights of children and youth to quality education including special education and related services. Pegasus accomplishes its mission through public policy initiatives, outreach and training activities, and individual and systemic litigation. Pegasus devotes considerable resources to representing students with disabilities and their families in education-related matters, including in due process hearings, federal court litigation, and administrative advocacy. Pegasus thus has a strong interest in ensuring students with and without disabilities have access to the full array of available equitable remedies.

The Advocacy Institute is a national nonprofit organization dedicated to services and projects that work to improve the lives of children, youth, and adults with disabilities. Founded in 2000, the Institute is directed by Candace Cortiella, a leading disability rights advocate. The Institute's work is focused on legislative

activities, effective use of dispute resolution options, data analysis, and training for special education advocates.

Lawyers for Good Government ("L4GG") is a non-profit organization representing a community of more than 125,000 lawyers, law students, and activists. L4GG coordinates large-scale pro bono programs and issue advocacy efforts to ensure that all levels of government—national, state, and local—provide equal rights, equal opportunities, and equal justice to all. L4GG has an interest in this *amici* brief to ensure that compensatory education remains a fully utilized equitable remedy for historically marginalized students.

II. ARGUMENT

The District Court had the power to provide all Havasupai Tribe members ever named as plaintiffs in this lawsuit the equitable remedy of compensatory education. The District Court's failure to recognize this authority led it to erroneously dismiss certain named plaintiffs and would leave unremedied the violations of federal law experienced by those named plaintiffs currently enrolled as students in HES.

The Indian Education Act ("IEA"), which governs BIE-funded schools, requires the BIE to provide "the highest quality" education for the Havasupai youth attending the BIE-funded and operated HES. 25 U.S.C. § 2000. A series of

corresponding regulations require the BIE to provide a comprehensive curriculum to these students that includes core academic classes, integration of the unique cultural and learning styles of the Havasupai students, and other education designed to promote a successful future. 25 C.F.R. § 36. But the BIE's own admission, as well as the facts gathered during discovery, show that the BIE has failed to fulfill its legal obligations to the Havasupai. Accordingly, the Court is empowered under the Administrative Procedure Act ("APA") to "compel agency action unlawfully withheld." 5 U.S.C. § 706.

The District Court had the power under the APA to award equitable remedies such as compensatory education to remedy violations of these legal duties. Compensatory education is a forward-looking injunctive remedy designed to provide services and resources to students previously deprived of adequate—and necessary—education. *See R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011) ("Compensatory education is an equitable remedy that seeks to make up for educational services the child should have received in the first place.") (quotation omitted); *Reid ex rel. Reid v. D.C.*, 401 F.3d 516, 522 (D.D.C. 2005) ("Under the theory of 'compensatory education,' courts and hearing officers may award 'educational services ... to be provided prospectively to compensate for a past deficient program.'"). For decades, federal courts have

deployed this remedy to ensure students facing barriers to their education—whether due to disability, language, or vestiges of the formerly segregated public school system—receive an adequate education. Given the discrimination the Havasupai have endured, including in the education of their children, compensatory education is appropriate and necessary here, and falls squarely within the Court's equitable authority.

A. A district court hearing an APA case has broad equitable authority to remedy any violations.

Congress provided in the APA that agency actions unlawfully withheld are subject to judicial review, and a court can compel such action as a remedy. Specifically, the APA provides that a person is "entitled to judicial review" when that person is "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. The APA further defines "agency action" to include a "failure to act." *Id*. § 701(b)(2) (incorporating § 551(13)).

The APA empowers federal courts to fashion their own equitable relief to remedy deficient agency actions. The APA authorizes district courts to "compel agency action unlawfully withheld or unreasonably delayed." *Id*. § 706(1). "[S]ection 706(1) is a source of injunctive relief to remedy an arbitrary or capricious delay or denial of agency action." *Hondros v. U.S. Civ. Serv. Com'n*,

720 F.2d 278, 298 (3rd Cir. 1983) (quoted with approval in *Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1111 (9th Cir. 1989)).[1]

In addition to express statutory authority, this Court has held that "all the inherent equitable powers of the District Court are available for the proper and complete exercise of [its] jurisdiction" in APA cases. *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 679–80 (9th Cir. 2007) (quoting *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982)) (alteration in original); *see also Lyng*, 866 F.2d at 1111 (district court may exercise "inherent equitable powers" in APA cases "'in accordance with the equitable principles governing judicial action'") (quoting *Ford Motor Co. v. NLRB*, 305 U.S. 364 (1939)); *Bethesda Hosp. v. Heckler*, 1985 WL 77594, at *1 (S.D. Ohio Nov. 25, 1985) (noting the Court "asked the parties to brief the issues of appropriate relief" for the court to assess).

[1] This Circuit has repeatedly compelled agency action where an agency had a legal obligation it failed to fulfill. *See, e.g., Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1082–83 (9th Cir. 2016) (holding under § 706 of the APA that the District Court had the right to issue injunction compelling Army to inform former human test subjects of new relevant medical and scientific information as required by Army regulations); *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 578 (9th Cir. 2000) (applying § 706 of the APA and affirming decision requiring the Department of Interior to provide drainage service pursuant to the San Luis Act); *see also Houseton v. Nimmo*, 670 F.2d 1375, 1377 (9th Cir. 1982) (holding "the APA [section 706] provided the district court with authority to declare EEOC delay a dismissal of the [employer's] reconsideration request").

B. Compensatory education is a long-recognized equitable remedy granted to students facing barriers to education.

"Once invoked, the scope of a district court's equitable powers ... is broad, for breadth and flexibility are inherent in equitable remedies." *Brown v. Plata*, 563 U.S. 493, 538 (2011) (citations and internal quotation marks omitted). For decades, federal courts have recognized compensatory education as an appropriate and often necessary equitable remedy for children experiencing barriers to an adequate education.

Compensatory education "is an award of prospective educational services, such as tutoring, after-school classes, or academic summer camps, designed to correct a past denial of a child's educational rights." Kevin Golembiewski, *Compensatory Education is Available to English Language Learners Under the EEOA*, 9 Ala. C.R. & C.L. L. Rev. 57, 62 (2018). "The services correct a past denial by helping a child overcome educational deficits that she developed because of the denial." *Id.* Compensatory education "secure[s] for the child educational opportunities to which she was entitled all along." *Id.* Thus, compensatory education helps put youth experiencing educational deficits back on track, thereby helping to close the achievement gap.

As discussed below, courts have deemed compensatory education an appropriate remedy in a wide variety of contexts, all of which support the application of compensatory education here.

1. Compensatory Education in the Desegregation Context

Compensatory education was—and continues to be—a key remedy in many of the cases addressing school desegregation in the wake of *Brown v. Board of Education*. *Brown* stated the old "separate but equal" or "dual education" system "deprive[d] the children of the minority group of equal educational opportunities." 347 U.S. 483, 493 (1954). The Supreme Court further stated "education is perhaps the most important function of state and local governments. … [I]t is doubtful that any child may reasonably be 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, is a right which must be made available to all on equal terms." *Id.*

In the wake of *Brown*, multiple courts made clear that a court has the equitable power to grant compensatory education as a remedy for inadequate general education. The Supreme Court made this equitable power explicit in *Milliken v. Bradley* in granting certiorari "to consider two questions concerning the remedial powers of federal district courts in school desegregation cases, namely, whether a District Court can, as part of a desegregation decree, order compensatory

or remedial educational programs for school children who have been subjected to past acts of de jure segregation[.]" 433 U.S. 267, 269 (1977). The Court noted "[i]n light of the mandate of *Brown I* and *Brown II*, federal courts have, over the years, often required the inclusion of remedial programs in desegregation plans to overcome the inequalities inherent in dual school systems." *Id.* at 283; *see also id.* at 280 ("[T]he decree must indeed be remedial in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'"). The Court held compensatory education was appropriate, concluding there was no "reason to believe that the broad and flexible equity powers of the court were abused[.]" *Id.* at 287–88.

Federal Circuit Courts throughout the country have similarly provided compensatory education as an equitable remedy for general education inadequacies in the desegregation context. For example, the Fifth Circuit held "[t]he requirement that the School Board institute remedial programs so far as they are feasible is a proper exercise of the court's discretion." *Plaquemines Parish Sch. Bd. v. United States*, 415 F.2d 817, 831 (5th Cir. 1969). These remedial programs were "an integral part of a program for compensatory education" intended for Black students subjected to the "separate but equal" school system. *Id.* In another

case, the Fifth Circuit, finding that state officials had a duty to eliminate the vestiges of the former dual school system and "compensate for the abiding scars of past discrimination," ordered state officials to "fulfill those duties" by in part providing compensatory education programs. *United States. v. Texas*, 447 F.2d 441, 443, 448 (5th Cir. 1971).[2]

Similarly, the Eighth Circuit ordered the lower court to "take those steps necessary to bring about an integrated school system" using techniques like "[d]eveloping and implementing compensatory and remedial education programs." *Adams v. United States*, 620 F.2d 1277, 1295–96 (8th Cir. 1980). In another case, the Eighth Circuit approved of the district court's remedies, which included "providing compensatory and remedial programs for black children." *Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1*, 778 F.2d 404, 408 (8th Cir. 1985); *see also Liddell v. Missouri*, 731 F.2d 1294 (8th Cir. 1984) (approving a settlement agreement that included compensatory education provisions).

District courts throughout the country have also recognized compensatory education as an appropriate remedy in the desegregation context. *See, e.g., Keyes*

[2] The Supreme Court subsequently denied the state officials' request to stay the order pending appeal because "the order … does no more than endeavor to realize the directive of the Fourteenth Amendment and the decisions of this Court that racial discrimination in the public schools must be eliminated root and branch." *United States v. Edgar*, 404 U.S. 1206, 1207 (1971).

v. Sch. Dist. No. One, 313 F. Supp. 90, 96, 99 (D. Colo. 1970) (approving the Board of Education's proposed plan for compensatory education and holding "the only feasible and constitutionally acceptable program—the only program which furnishes anything approaching substantial equality—is a system of desegregation and integration which provides compensatory education"); *Hoots v. Penn.*, 118 F. Supp. 2d 577, 582, 598 (W.D. Pa. 2000) (noting the Court had previously "concluded that the compensatory programs were necessary to remedy the educational disadvantages African-American children had endured as a result of segregated schooling, and to provide the additional academic support these children were likely to need in order to thrive"); *D.S. ex rel. S.S. v. New York City Dep't of Educ.*, 255 F.R.D. 59, 70, 77 (E.D.N.Y. 2008) (approving a settlement agreement with various compensatory education programs for general education students and noting these programs "suppl[ied] adequate benefits to substantially reduce the harms faced by" certain class members); *Hobson v. Hansen*, 269 F. Supp. 401, 515 (D.D.C. 1967) (ordering the board of education to file a plan for "alleviat[ing] pupil segregation," and further "require[d] that the plan include compensatory education sufficient to at least overcome the detriment of segregation and thus provide, as nearly as possible, equal educational opportunity to all schoolchildren").

In other words, *Brown*'s progeny relied on compensatory education to right past wrongs so that disadvantaged youth could gain equal educational footing to their peers.[3]

2. Compensatory Education Under the IDEA

Although not expressly mentioned in the statute, compensatory education is also a long-established remedy under the Individuals with Disabilities Education Act ("IDEA"). The IDEA's purpose is "to ensure 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[.]" 20 U.S.C. § 1400(d)(1)(A).

[3] Such relief varied, though the courts tended to defer to school boards or other local entities to devise the desegregation plan—which included compensatory education—for the court to then approve. In one case, the court-approved compensatory education programs included "encouragement and incentive to place skilled and experienced teachers and administrators in the core city schools," "use of teacher aides and paraprofessionals," "extended school years," "early childhood programs," classes in the culture and history of the affected youth, training in the language spoken by the youth, and others. *Keyes*, 313 F. Supp. at 99. In another case, approved compensatory education programs included a service center providing academic support and guidance services, counseling, literacy programs, extended public education eligibility allowing continued work toward a high school diploma, and enrollment in a GED, career training, or adult education programs. *D.S. ex rel. S.S.*, 255 F.R.D. at 69–70. In yet another case, the court noted the following compensatory programs had been previously approved by the court: "tutoring labs in mathematics and language arts in the secondary schools, staffed by full-time leaders," reading programs for children in grades 1–3, "thinking skills" programming and after-school tutorials for youth in grades 4–6,

Central to the IDEA is the availability of free appropriate public education, or "FAPE." Although the statutory language of the IDEA does not expressly discuss compensatory education, courts eventually uniformly recognized compensatory education is the appropriate remedy to right an educational failure and "to ensure 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[.]" 20 U.S.C. § 1400(d)(1)(A).[4] Courts have held "the IDEA offers compensatory education as a remedy for the harm a student suffers while denied a FAPE." *R.P.*, 631 F.3d at 1125 (holding compensatory education "aim[s] to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Id.* (quotation omitted); *see also G ex rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir. 2003) ("Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit

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and summer programs for youth in grades K–6. *Hoots*, 118 F. Supp. 2d at 598.

[4] Notably, it was not until a decade after the IDEA's 1975 codification that compensatory education was judicially recognized as a remedy for children deprived of necessary access to education. *See, e.g.*, *Miener By and Through Miener v. Missouri*, 800 F.2d 749, 754 (8th Cir. 1986) (holding "the plaintiff is entitled to recover compensatory educational services if she prevails on her claim that the defendants denied her a free appropriate education").

created by an educational agency's failure over a given period of time to provide a FAPE to a student.").

As the IDEA's mandate makes plain, the statute—and any compensatory education remedies—are focused on a child's *access* to education in the first place. 20 U.S.C. § 1400(d)(1)(A). Access under the IDEA is not limited to physical access, but also includes the *availability* of education. *See Bd. of Educ. of Henrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 201 (1982) ("We therefore conclude that the basic floor of opportunity provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.") (quotation omitted).

Compensatory education also is available to students who have aged out of their respective programs. *See, e.g.*, *Pihl v. Mass. Dep't of Educ.*, 9 F.3d 184, 185 (1st Cir. 1993) (holding the IDEA "empowers courts to grant a remedy in the form of compensatory education to disabled students who are beyond the statutory age of entitlement for special education services"). That is because compensatory education is focused on providing the student *now* something they should have received from their school *before*. Under the IDEA, therefore, children deprived of

statutorily required access are entitled to compensatory education even if they have aged out of their program by the time a court finds liability.[5]

3. Compensatory Education Under the EEOA

Courts have recognized compensatory education as a tool in closing the achievement gap under the Equal Educational Opportunities Act ("EEOA"). *See* Golembiewski, 9 Ala. C.R. & C.L. L. Rev. at 82 ("Taken together, IDEA precedent embracing compensatory education and the EEOA's roots as a statute designed to assist school desegregation efforts confirm that compensatory education is available under the EEOA."). The EEOA's goal is to "specify appropriate remedies for the orderly removal of the vestiges of the dual school system." 20 U.S.C. § 1701(b). The EEOA is rooted in the belief that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin." *Id.* at § 1701(a). It is a statute

[5] Compensatory education relief under the IDEA varies depending on the specific facts of the case and plaintiff's needs. *See, e.g.*, *Morales v. Newport-Mesa Unified Sch. Dist.*, 768 F. App'x. 717, 720 (9th Cir. 2019) (affirming compensatory education award that included tutoring); *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1034 (9th Cir. 2006) (deeming proper compensatory education award in the form of individualized instruction for student's teacher to better serve the student); *Dep't of Educ., Haw. v. R.H.*, 2013 WL 3338581, at *11 (D. Haw. July 2, 2013) (affirming compensatory education in the form of placement in a school designed to serve the student's needs).

frequently invoked when addressing inadequate education for English language learners. *Id.* at § 1703(f).

Courts have thus recognized that compensatory education could be available as a remedy for general education students under the EEOA. *See, e.g.*, *Eltalawy v. Lubbock Indep. Sch. Dist.*, 816 F. App'x 958, 964 (5th Cir. 2020) ("[T]he district court could craft an equitable remedy if an EEOA violation is shown."); *Castaneda v. Pickard*, 648 F.2d 989, 1011 (5th Cir. 1981) (noting the EEOA permits schools to fulfill their obligations "by focusing first on the development of English language skills and then later providing students with compensatory and supplemental education to remedy deficiencies in other areas which they may develop during this period"); *United States v. Texas*, 506 F. Supp. at 405 (ordering the parties to create a relief for EEOA violations that includes remedial education), *rev'd as moot*, 680 F.2d 356 (5th Cir. 1982); *Mumid v. Abraham Lincoln High Sch.*, 2008 WL 2811214, *10 n. 9 (D. Minn. July 16, 2008) (explaining "[i]t is possible that the equitable remed[y] of compensatory education … might be available under [the EEOA's] § 1703(f)").

* * *

Courts throughout the country, presented with students facing a wide variety of educational disparities, have concluded that compensatory education is an

appropriate equitable remedy for violations of federal law in a variety of statutory and other contexts. This consistent body of case law should serve as a guide for an award of compensatory education in the APA context to remedy violations of the IEA.

C. All Havasupai children ever named as plaintiffs are entitled to compensatory education under the APA.

1. The BIE's violation of federal law has resulted in educational injury to all named plaintiffs.

There is no question the BIE failed to fulfill its legal obligations, warranting injunctive relief under the APA. The agency inaction at issue here falls under the IEA, which requires the BIE to provide programs in its schools that "are of the highest quality" and incorporate the unique educational and cultural needs of those students. 25 U.S.C. § 2000. Under the corresponding regulations, which are designed to achieve the IEA's purpose, "[r]ecognizing the special rights of Indian Tribes . . . it is the responsibility and goal of the Federal government to provide comprehensive education programs and services for Indians[.]" 25 C.F.R. § 32.3. "The mission of the Bureau of Indian Affairs, Office of Indian Education Programs, is to provide quality education opportunities from early childhood through life in accordance with the Tribes' needs for cultural and economic well-being in keeping with the wide diversity of Indian Tribes[.]" *Id.*

More specifically, the BIE is subject to a comprehensive list of regulations in operating HES. For example, 25 C.F.R. § 36.21 provides "[t]he curriculum for kindergarten shall provide children with experiences which emphasize language development, native language" and an instruction program that includes, at a minimum, development of youth language, psychomotor and social functions, creativity, environment exploration, and health. Under 25 C.F.R. § 36.22, elementary school programs must include, at a minimum, instruction in language arts, math, social studies, science, art, physical education, career awareness, health, and computer literacy.

The BIE is subject to other specific requirements to ensure students have adequate educational resources. Under 25 C.F.R. § 36.40, "[e]ach school shall provide a library/media program which shall, at a minimum, meet the applicable state and/or regional standards[.]" The governing regulations, *see* 25 C.F.R. § 36.41, require that "[e]ach school shall establish a textbook review committee composed of teachers, parents, and students, and school board members" that will in turn "establish a procedure and criteria for the annual review of textbooks and other materials used to complement instruction." The BIE must also ensure that students are offered "counseling services concerned with physical, social, emotional, intellectual, and vocational growth for each individual." 25 C.F.R. §

36.42. This regulation also provides requirements for such counseling programs. *Id.* Relatedly, 25 C.F.R. § 36.43 requires schools to "provide and maintain a well-balanced student activities program based on assessment of both student and program needs." Such programming must "develop leadership abilities and provide opportunities for student participation" and it must be "an integral part of the overall educational program." *Id.*

Further, "[t]he education program shall include multi-culture and multi-ethnic dimensions designed to enable students to function effectively in a pluralistic society." 25 C.F.R. § 36.20. As part of this requirement, language arts programs must "assess the English and native language abilities," "provide instruction that teaches and/or maintains both the English and the primary native language," "include aspects of the native culture in all curriculum areas," provide instruction based on a required assessment of student learning styles, provide at least one field trip per year, and "meet local tribal approval." *Id.*

The BIE ***admitted*** that it failed to comply with its legal obligations and provide the necessary instruction or resources ensured by the Indian Education Act's implementing regulations. 1-ER-19; 2-ER-74; 2-ER-85; Opening Brief ("OB") 18-20. For example, the BIE admits it has not provided a comprehensive general education curriculum, let alone culturally relevant instruction as required

by the IEA. *Id.* The BIE curriculum only provides a limited number of subjects, while ignoring the academic and cultural components the curriculum must incorporate. *Id.*; *see also* 25 C.F.R. §§ 36.20-.22, .24,.40–.43. Students do not have sufficient basic materials like reference books in the library, nor is there enough staff to deliver adequate instruction. OB 18-19. On top of the lack of resources, the BIE actively excluded the Havasupai community from decisions regarding the school, in violation of the regulations. OB 20; *see also* 25 C.F.R. § 36.20.

As a result of these education deficiencies—and the BIE's dereliction of its legal duties—HES students lack basic knowledge essential to their ability to progress and succeed in high school and beyond. Almost no HES students are proficient in reading, writing, or math. OB 8; 2-ER-170.

The BIE was aware of the School's deficiencies, and yet chose to take no corrective measures. In other words, the BIE knowingly failed to fulfill its obligation to provide the "highest quality" education and resources for the Havasupai youth. Quite simply, the BIE has failed to fulfill its administrative and statutory responsibilities, justifying an equitable remedy of compensatory education under the APA.

The detrimental effects a lack of education can have on children, especially Native American children, is well established. *See* Angelinea E. Castagno et al., *Culturally Responsive Schooling for Indigenous Youth: A Review of the Literature*, 78 Rev. of Educ. Res. 941, 946 (2012) (discussing the "perennial achievement gaps" experienced by Native American children due to the poor-quality education these students often receive). Scholars studying the low high school graduation rates among Native American children have explained how this achievement gap can hinder students' ability to succeed as adults:

> For American Indian and Alaska Native adults, the effects of low graduation and high dropout rates are readily evident. For example, American Indian and Alaska Native people are less likely to join the workforce (i.e. employed or actively looking for work) than the national average. Only 67% of American Indian and Alaska Native males age sixteen and over are part of the labor force compared to 71% of all males (Ogunwole, 2006). Further, American Indians and Alaska Natives tend to be employed in more service-oriented jobs than professional/managerial level jobs. These are jobs much more likely to lack benefits and to pay less than enough to support a family. This results in large gaps in income and homeownership, which are strongly related to educational attainment levels. For example, the median income for American Indians and Alaska Natives is well below the national average. In 2000, the median income for Native men was $28,900 compared to $37,100 for all men. The median income for Native women was even lower at $22,800 compared to $27,200 for all women. Inability to earn competitive wages results in American Indians and Alaska Natives living in poverty at more than twice the rate of their non-Native peers – 26% of American Indians and Alaska Natives compared to 12% of non-Natives.

Susan Faircloth & John W. Tippeconnic, III, *The Dropout/Graduation Rate Crisis Among American Indian & Alaska Native Students: Failure to Respond Places the Future of Native Peoples at Risk*, The Civil Rights Project/Proyecto Derechos Civiles at UCLA, at 22–23 (2010).

In failing to comply with several IEA regulations, the BIE deprived Havasupai children of the basic academic, supportive, and cultural resources that those regulations ensure. *See* 25 C.F.R. §§ 36.20–.22, .24, .40–.43. These are critical resources a young person needs to thrive later in life. Adequately educating Native American children "does provide a vehicle by which children and youth have the social, cultural, and economic capital necessary to be successful wherever they choose to reside." Susan C. Faircloth, *Re-visioning the Future of Education for Native Youth in Rural Schools & Communities*, 24 J. Res. Rural Educ. 1 (2009); *see also* Castagno at 945 ("[E]ducating a child means equipping him or her with the capability to succeed in the world he or she will live in.") (quotation omitted).

2. The rationale for compensatory education in other contexts supports an award of compensatory education in this case.

An equitable remedy is necessary to remedy these deficiencies and ensure Havasupai youth receive "the highest quality" education. 25 U.S.C. § 2000. Such a remedy necessarily includes compensatory education. The rationale for awarding

compensatory education to students with disabilities facing a lack of access to adequate education, or to students facing access barriers due to their national origin or race, applies with equal force here, where Havasupai students with unique cultural needs also lack access to statutorily mandated basic education. Like the IDEA and the EEOA, the IEA recognizes the importance of providing adequate education to students with special circumstances and rights. *Compare* 20 U.S.C. § 1400(d)(1)(A) (The IDEA's purpose is "to ensure 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[.]") *and* 20 U.S.C. § 1701(b) (The EEOA's goal is to "specify appropriate remedies for the orderly removal of the vestiges of the dual school system.") *with, e.g.*, 25 C.F.R. § 32.3 ("Recognizing the special rights of Indian Tribes … it is the responsibility and goal of the Federal government to provide comprehensive education programs and services for Indians[.]").

After historic discrimination, compensatory education provides a long-recognized, forward-oriented remedy to help put students who have faced education barriers back on track. The Supreme Court in *Brown* noted "education is perhaps the most important function of state and local governments. … [I]t is doubtful that any child may reasonably be expected to succeed in life if he is

denied the opportunity of an education." 347 U.S. at 493. The Supreme Court later clarified in *Milliken* "that "[i]n light of the mandate of *Brown I* and *Brown II*, federal courts have, over the years, often required the inclusion of remedial programs in desegregation plans to *overcome the inequalities* inherent in dual school systems." 433 U.S. at 283 (emphasis added). Numerous federal courts since have awarded compensatory education in fighting the devastating impact of segregation on educational access and outcomes.

Here, the BIE's failure to provide even a basic education is part of the pattern of historic education deprivations the Havasupai have suffered, and continue to suffer. Beginning in 1880, the federal government designated a small portion of land at the bottom of the Grand Canyon as the Tribe's reservation, depriving the Havasupai of most of its lands and forcibly removing Tribe members with homes outside of the reservation. As a result, the Havasupai today live in a remote area, and 61% of Havasupai children under age 18 live below the poverty line. Ariz. Rural Pol'y Inst. et al., *Demographic Analysis of the Havasupai Tribe Using 2010 Census and 2010 Am. Cmty. Survey Estimates* 32, http://azcia.gov/Documents/Links/DemoProfiles/Havasupai%20Tribe.pdf. Prior to HES' existence, a Havasupai youth's only opportunity for education was to attend a faraway boarding school, which propounded a curriculum of forced assimilation.

Because of this long history of limited resources and forced assimilation in faraway boarding schools—and the attendant childhood trauma—the desegregation cases also strongly support awarding compensatory education for general education students attending the BIE-operated HES. To ensure Black youth received equal education, courts found it was necessary to do more than merely provide the same education as other youth—compensatory education was necessary to help youth facing long-standing barriers regain equal footing to their peers. Likewise, here, it is not enough for a court to merely compel the BIE to do what it was supposed to do in the first place (provide a core, legally compliant education). The Havasupai youth named as plaintiffs need support—which is long overdue—to get back on track to where they would have been had it not been for the BIE's inadequate operation of the school. This is equally true for students still attending HES and for those who have aged out.

3. Compensatory education should be awarded to all named plaintiffs, even those who have aged out of school.

Compensatory education should be provided for all Havasupai Tribe members ever named as plaintiffs in this lawsuit, including those who have aged out of school. As explained above, compensatory education is a forward-looking injunctive remedy designed "to make up for 'educational services the child should have received in the first place.'" *R.P.*, 631 F.3d at 1125. It does not matter

whether the plaintiffs still attend (or still could attend) HES. What matters is that while they attended HES, the BIE did not provide them with legally mandated education and resources to which they are now entitled through compensatory education. For this reason, federal courts awarding compensatory education under the IDEA have long recognized that the IDEA "empowers courts to grant a remedy in the form of compensatory education to disabled students who are beyond the statutory age of entitlement for special education services." *Pihl*, 9 F.3d at 185.

HES is the only school on the Havasupai reservation, and it is wholly operated and funded by the BIE, leaving most Havasupai with no alternative education option in their place of residence. For years, the BIE has known that HES students are missing several required elements of the curriculum and are nowhere near proficient in math, reading, or writing. Yet the BIE did nothing to remedy this problem and provide an adequate education to these children. Named Havasupai Tribe members who have aged out of HES should not continue to suffer because of agency inaction that was out of their control.

* * *

"Children and youth hold the key to the social, economic, and cultural survival of the American Indian and Alaska Native population in the United States. Failure to ensure that Native youth graduate from high school places the entire

population at risk." Faircloth & Tippeconnic, at 24. The BIE failed to meet its legal mandate of providing adequate education for the children of the Havasupai Tribe, and in doing so, placed not just these children's future, but the future of the entire Tribe, at risk.

A key remedy that will compensate the named Havasupai children for the BIE's failure to comply with IEA regulations is the provision of the education and resources that the BIE should have given them in the first place. Compensatory education is not just appropriate, but essential to ensure that the Havasupai plaintiffs are able to thrive and succeed as adults.

III. CONCLUSION

The Havasupai youth have suffered due to the BIE's failure to meet its legal mandate to provide these children with an education to which they are legally entitled. The text of the APA, the court's inherent equitable authority, and courts' reasoning in other educational contexts support an award of compensatory education here. Accordingly, *amici* urge this Court to reverse the District Court's dismissal of the named plaintiffs who are no longer enrolled in HES and remand with instructions to award all named plaintiffs an equitable remedy that includes appropriate compensatory education.

Respectfully submitted,

Dated: July 2, 2021

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CERTIFICATE OF COMPLIANCE FOR BRIEFS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,756 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

Dated: July 2, 2021

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CERTIFICATE OF SERVICE FOR ELECTRONICALLY FILED DOCUMENT

I hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* the Education Civil Rights Alliance, National Center for Youth Law, Juvenile Law Center, National Disability Rights Network, Education Law Center, Council of Parent Attorneys and Advocates, Center for Law and Education, Education Law Center-PA, Disability Law Colorado, Washington Lawyers' Committee for Civil Rights and Urban Affairs, National Center for Parent Leadership, Advocacy, and Community Empowerment, Pegasus Legal Services for Children, The Advocacy Institute, and Lawyers for Good Government with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 2, 2020.

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Dated this 2nd day of July, 2021

s/ Raymond Williams
Raymond Williams