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A Diller, A Dollar: Section 1983 Damage Claims in Special Education Lawsuits

Terry Jean Seligmann

A DILLER, A DOLLAR: SECTION 1983 DAMAGE CLAIMS IN SPECIAL EDUCATION LAWSUITS

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*A diller, a dollar, a ten o'clock scholar!
What makes you come so soon?
You used to come at ten o'clock,
But now you come at noon.***

I. INTRODUCTION

Andrew's parents were unhappy with the special education program their autistic son was being offered in public school.¹ While they did not prevail in a state agency hearing or in court on their claim that Andrew needed a private school to meet his special educational needs, the state hearing officer ordered the school district to provide better training for school personnel and to improve communication with his parents.²

Charlie F., a child with disabilities, spent a year in a regular classroom in which the teacher permitted the other students to complain about him.³ The year is over and Charlie is in a better class now, but he suffered through a year of verbal attacks.⁴

D.F., an autistic child, moved with his parents to a new school district.⁵ The school district initially refused to register him without documentation that it had not required for his sister, then sent a school bus without seat belts, and then proposed a class that did not offer the services his special education plan from the prior district had called for.⁶ D.F. finally began a program at another elementary school after several months during which he did not attend school.⁷

Shawn, a ten-year-old with emotional problems, Tourette's syndrome, and other disabilities, was allegedly force fed, made to

** THE REAL MOTHER GOOSE 94 (Scholastic N.Y. 1994) (1916). This traditional children's rhyme seems apropos to open a discussion of the often confusing and complex interaction of statutory remedial schemes protecting schoolchildren's rights, including the elaborate and sometimes lengthy IDEA review process (a diller), and the appropriateness of damages and other relief (a dollar).

¹ Andrew S. v. Sch. Comm., 59 F. Supp. 2d 237, 239 (D. Mass. 1999).

² *Id.* at 247.

³ Charlie F. v. Bd. of Educ., 98 F.3d 989, 990 (7th Cir. 1996).

⁴ *Id.* at 991.

⁵ J.F. v. Sch. Dist., 2000 WL 361866, at *3 (E.D. Pa. Apr. 7, 2000).

⁶ *Id.* at *3-4.

⁷ *Id.* at *5.

run with ankle weights, deprived of food, and isolated during his three years in a public school special education program.⁸ Once his mother sought review through the special education process, he was enrolled in another school where his mother agrees that the services and setting are appropriate for his needs.⁹

Each of these children's parents filed a lawsuit seeking damages from the school district on behalf of their children. The timely and appropriate education of children with disabilities became a national priority with the enactment of the ambitious and comprehensive Individuals with Disabilities Education Act (IDEA).¹⁰ The IDEA entitles a child with disabilities to an appropriate education at public expense.¹¹ But does the IDEA mean that whenever this goal is not met, the child and parents can recover damages?

Most courts initially considering the issue read the IDEA's express right of action as not including a right to sue for money damages.¹² Thus, plaintiffs began filing damage claims for violations of section 504 of the Rehabilitation Act of 1973,¹³ and for constitutional claims using section 1983 of the Civil Rights Act of 1871.¹⁴ Congressional amendments to the IDEA in 1986 rejected a Supreme Court holding¹⁵ that the IDEA was an exclusive remedy for special education related claims, but mandated the use and exhaustion of the IDEA's administrative remedies.¹⁶ Parents of

⁸ *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1272-73 (9th Cir. 1999).

⁹ *Id.* at 1273-74.

¹⁰ 20 U.S.C. §§ 1400-1419 (1994 & Supp. V 1999). The legislation initially passed in 1975 bore the title the Education for All Handicapped Children Act (EHA). Pub. L. No. 94-142, 89 Stat. 773 (1975). In this article "IDEA" is used to refer to the current statute and its predecessors, regardless of title.

¹¹ 20 U.S.C. § 1400(d)(1)(A) (Supp. V 1999). The IDEA provides that, as a condition of receiving federal funds, states must demonstrate that a free, appropriate public education is available to all children with disabilities between the ages of three and twenty-one. 20 U.S.C. § 1412 (a)(1) (1994 & Supp. V 1999). The process for accomplishing this is the creation of an individualized education program (IEP) by a team that includes both teachers and parents. 20 U.S.C. § 1414(d) (Supp. V 1999).

¹² See *infra* note 109 and accompanying text.

¹³ Pub. L. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. § 794 (1994 & Supp. V 1999)).

¹⁴ Ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1994 & Supp. V 1999)).

¹⁵ *Smith v. Robinson*, 468 U.S. 992, 1013 (1984).

¹⁶ Handicapped Children's Protection Act of 1986 (HCPA), Pub. L. No. 99-372, 100 Stat. 796 (1986) (codified as amended at 20 U.S.C. § 1415(l) (Supp. V 1999)).

children with disabilities can now bring suits not only under the IDEA directly, but may also seek relief in the form of damages based on a number of other legal theories.¹⁷ Claims have been brought seeking relief in damages for violation of the IDEA under section 1983.¹⁸ Circuit courts confronting such IDEA-specific claims under section 1983 have split on how to interpret the current IDEA's nonexclusivity provisions, dividing on whether such actions can be brought at all and whether damages can be sought.¹⁹ They have also had to confront arguments that the IDEA's exhaustion requirement should not apply to cases seeking damages.²⁰

This Article contends that Congress intended for "appropriate" relief under the IDEA to be, first and foremost, equitable relief, as opposed to tort-like damage awards. While the amendments to the IDEA made clear that the statute does not preclude other remedies for violations of the educational rights of disabled children, this Article contends that those amendments are not properly interpreted as creating a damages remedy for IDEA violations through the use of section 1983. Opening up liability for damages for missteps in the special education process would likely do little to improve the delivery of services to children on a timely basis and would divert more resources away from their educational purpose. This Article further contends that exhaustion of the IDEA process should precede the hearing of claims for damages asserted under other legal theories whenever the claim raises issues relating to a child's special education services that the IDEA administrative process, with its array of equitable remedial measures, may be able to address.

The IDEA's purposes, structure, and judicial history all provide evidence of its proper interpretation on these issues. This Article first reviews, in Part II, the IDEA's goals and structure.²¹ The review focuses on the process of evaluating and planning to meet the educational needs of a child with disabilities, with specific attention to the administrative processes for resolution of complaints, the

¹⁷ See *infra* PART IV.

¹⁸ See *infra* notes 170-73 and accompanying text.

¹⁹ See *infra* Part IV.A.

²⁰ See *infra* Part V.

²¹ See *infra* notes 27-108 and accompanying text.

judicial review process established under the statute, and the courts' approval of a range of equitably shaped remedies. Part III then discusses the historical treatment of IDEA claims for tort-type damages.²² This section reviews the early court decisions finding that the IDEA did not authorize such damages, the decision in *Smith*,²³ and the congressional amendment of IDEA following that decision.

Part IV examines the current split among the circuits over section 1983 claims alleging IDEA violations.²⁴ This section analyzes Congress' intent in enacting and amending the IDEA, drawing upon the statutory text, structure and legislative history. It considers the application of opposing, judicially endorsed presumptions regarding remedies arising from the jurisprudence of implied private rights of action and from Spending Clause federalism. It concludes that under existing law, awarding tort-like damages under the IDEA directly, or in suits brought to enforce the IDEA under section 1983, is not consistent with the statute's purposes, its language, its history or with the interpretive principles specific to federal statutory remedies.

The application of the IDEA's exhaustion requirements to damage claims is considered in Part V.²⁵ The Article concludes, as the majority of courts have, that exhaustion should not be dispensed with in cases seeking damages which arise out of IDEA-related claims, even where other legal grounds are asserted to support recovery. Part VI returns to the cases of Andrew, Charlie, D.F. and Shawn and analyzes their claims and the relief available to them.²⁶ It suggests that the typical IDEA claim disputing the nature of services or placement is not a compelling one for damages, and that other tort, constitutional, and statutory remedies remain available to compensate plaintiffs in egregious cases.

²² See *infra* notes 109-56 and accompanying text.

²³ *Smith v. Robinson*, 468 U.S. 992 (1984).

²⁴ See *infra* notes 157-274 and accompanying text.

²⁵ See *infra* notes 275-301 and accompanying text.

²⁶ See *infra* notes 302-52 and accompanying text.

II. THE IDEA: EDUCATING CHILDREN WITH DISABILITIES

The IDEA offers federal funds to states that undertake to provide appropriate educational services to disabled children.²⁷ Currently, more than six million children receive services under the IDEA.²⁸

The IDEA was meant to be a remedial and forward-looking statute.²⁹ It fosters cooperation between parents and schools by mandating a team approach to the planning and delivery of individualized services.³⁰ It recognizes the need to periodically review children's progress and the cyclical nature of planning for school-delivered services from year to year by requiring a new individualized educational plan (IEP) for each year.³¹ Delivering the right educational services at the right time in the child's life is the central focus of this visionary legislation.

The statute as written has teeth. Parents have extensive opportunities in administrative proceedings to challenge a school district's assessment of their child and the district's assessment of the services needed to meet their child's needs.³² The IDEA provides

²⁷ The IDEA was enacted as a funding vehicle to provide funds to states that implement its provisions regarding educational services to children with disabilities. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 180-81 (1982). All fifty states now receive funds under the IDEA. Laura F. Rothstein, *Special Education Malpractice Revisited*, 43 EDUC. L. REP. 1249, 1250 (1988). The target was for federal funds to pay 40% of the extra cost of providing special education; even with recent increases, the federal government provides less than 13% of the cost of special education. 146 CONG. REC. S8507 (daily ed. Sept. 13, 2000) (statement of Sen. Jeffords urging full funding). Many states also have parallel provisions entitling children with disabilities to appropriate educational services. See, e.g., MASS. GEN. LAWS ANN. ch. 71B, 1-14 (West 1996 & Supp. 2001) ("Children with Special Needs"); ARK. CODE ANN. § 6-41-202(a) (Michie 1999) (proclaiming state policy to "provide & require school district to provide, as an integral part of the public schools, a free and appropriate public education for children with disabilities.").

²⁸ Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12406, 12,660 (Mar. 12, 1999).

²⁹ 20 U.S.C. §§ 1400(c)(3)-(c)(5) (Supp. V 1999).

³⁰ See *id.* § 1414(d) (establishing IEPs).

³¹ *Id.* § 1414(d)(4). The IEP team reviews the IEP at least annually to determine whether the annual goals for the child are being achieved and revises the IEP as needed to address any lack of expected progress, additional information from parents, and the child's anticipated needs. *Id.* The district conducts a reevaluation of the child's educational needs whenever the child's parent or teacher requests one, and at least once every three years. *Id.* § 1414(a)(2).

³² *Id.* § 1415(b)(6). Parents have the opportunity to present a complaint with respect to any matter relating to the identification, evaluation, or placement of the child, or the provision of a free, appropriate public education to the child. *Id.*

an express right of action in federal district court to review the administrative determination, empowering the court with the authority to grant "appropriate" relief.³³ If the parents prevail, school districts can be ordered to provide specific services and to reimburse parents for providing those services during the disputed period.³⁴ Districts can be required to offer compensatory education to children who did not get the appropriate services, and may even be required to continue that education beyond the age that IDEA services would normally terminate.³⁵ In addition, school districts face paying attorneys' fees for both administrative and judicial proceedings if they do not prevail, so they have a strong financial incentive to resolve disputes short of the hearing and litigation process.³⁶

A. INVOLVING FAMILIES AND OPENING SCHOOLHOUSE DOORS

When Congress enacted the first version of the IDEA in 1975, it had before it a record of widespread exclusion and miseducation of children with disabilities.³⁷ According to Congress' findings, children with disabilities were often excluded from schools entirely, or consigned to separate schools where they might be grouped with other children of greatly differing abilities and disabilities.³⁸ Many such children faced futures of dependence and institutionalization, at significant cost to society.³⁹ Other children sat in classrooms

³³ *Id.* § 1415(i)(2)(A). Any party aggrieved by the result of a due process hearing can appeal by bringing a civil action in any state court of competent jurisdiction or in United States District Court without regard to the amount in controversy. *Id.* The court "shall grant such relief as the court determines is appropriate." *Id.* § 1415(i)(2)(B).

³⁴ *See* Sch. Comm. v. Dep't of Educ., 471 U.S. 359, 370 (1985) (interpreting statute to permit parental reimbursement); *see also infra* notes 77-93 and accompanying text (discussing Supreme Court's reasoning for upholding parental reimbursement).

³⁵ *See infra* notes 94-107 and accompanying text.

³⁶ 20 U.S.C. § 1415(i)(3) (Supp. V 1999).

³⁷ Pub. L. No. 94-142, 89 Stat. 773, 774 (codified in 20 U.S.C. § 1400(c)(2) (Supp. V 1999)).

³⁸ Congress' findings, codified in the IDEA, state that "1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers." 20 U.S.C. § 1400(c)(2)(C) (Supp. V 1999).

³⁹ In debates on the 1997 reauthorization of the IDEA, Senator Harkin estimated savings from reduced institutionalization of children and youth with disabilities since the enactment of the 1974 legislation as \$5.46 billion per year. 143 CONG. REC. S4295, S4309 (daily ed. May

undiagnosed and did not learn.⁴⁰ Some of these children would predictably become frustrated, drop out, and face a discouraging future of unemployment and potential antisocial behavior.⁴¹ Thus, Congress was concerned not only with the individual rights of these children but with the societal cost of failing to educate them.

The approach taken by the IDEA to providing these children with appropriate educational services reflected several philosophical choices founded in educational and social research.⁴² First and foremost, the chosen approach focused on individual evaluation of each child and that child's educational needs, as opposed to group categorization.⁴³ The preparation of an IEP thus represents rejection of a "one size fits all" approach to learning.⁴⁴ Second, the act sought to encourage the involvement of parents in educational decisions about their children.⁴⁵ The IDEA's provisions repeatedly

12, 1997) (statement of Sen. Harkin).

⁴⁰ According to Congress' findings on the IDEA, "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." 20 U.S.C. § 1400(c)(2)(D) (Supp. V 1999).

⁴¹ Dropouts are more likely to be unemployed, to be on welfare, and to populate the prisons of this country. See CHRISTOPHER D. CHAPMAN ET AL., NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DROPOUT RATES IN THE UNITED STATES: 1998 1 (1999) (noting statistical tendency of dropouts to be unemployed, on welfare, and imprisoned); NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS, 1998 428 (1999) (highlighting labor force statistics).

⁴² See, e.g., JACK W. BIRCH, MAINSTREAMING: EDUCABLE MENTALLY RETARDED CHILDREN IN REGULAR CLASSES (1974) (calling for shift in focus from class to individual for planning and conduct of special education); Lloyd M. Dunn, *Special Education for the Mildly Retarded—Is Much of It Justifiable?*, 35 EXCEPTIONAL CHILDREN 5 (1968) (noting racial segregation in separate classes and urging teaching of children with mild learning disorders in regular classes with support and resources of special education teachers); Maynard C. Reynolds, *A Framework for Considering Some Issues in Special Education*, 28 EXCEPTIONAL CHILDREN 367 (1962) (urging avoidance of labeling and rigidities in programs and emphasis on providing benefits to child out of range of placements and services). My thanks to Professor Barbara C. Gartin, Dept. of Curriculum and Instruction, College of Education and Health Science, University of Arkansas, for providing me with educational research material.

⁴³ See 20 U.S.C. § 1412(a)(4) (Supp. V 1999) (requiring that state plan must provide for development and review of individualized education program for each child with disability); 20 U.S.C. § 1414 (1994 & Supp. V 1999) (mandating evaluation of child to gather information, followed by development of individualized educational program that includes goals related to meeting child's needs resulting from disability and states services to be provided for child to advance appropriately toward goals).

⁴⁴ IDEA's purposes include ensuring that children with disabilities receive special education "designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A) (Supp. V 1999).

⁴⁵ The Supreme Court has noted, "Congress repeatedly emphasized throughout the Act

call for the provision of information to parents and the reinforcement of their role as partners with schools in determining their children's needs and placement.⁴⁶ Third, the IDEA stressed the importance of reviewing the child's development and addressing the child's changing needs in a timely fashion.⁴⁷ Finally, the IDEA invoked a preference for the "least restrictive environment," including placing children in the regular educational setting if that setting was appropriate to their needs and abilities—reflecting a desire to integrate rather than separate children with disabilities from their peers.⁴⁸

The IDEA process for an individual child begins with the referral of the child for evaluation. The school system is obligated to try to identify those children within the district who may have disabilities—an obligation known as "child find."⁴⁹ A parent can also request that a child be evaluated.⁵⁰ Evaluation generally requires parental consent.⁵¹ When an evaluation is completed, the district must convene a team meeting to consider the results. Team members include the parents and school district personnel, including the regular classroom teacher if the child may be placed there.⁵²

the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness." *Honig v. Doe*, 484 U.S. 305, 311 (1988).

⁴⁶ See, e.g., 20 U.S.C. § 1414(a) (Supp. V 1999) (calling for informed parental consent for evaluation); *id.* § 1414(d)(1)(B) (appointing parents members of IEP team); *id.* § 1415(b) (detailing procedures required for parental review of records, notice of changes in educational placements, and opportunities to present complaints); *id.* § 1415(f) (making impartial due process hearing available to parents).

⁴⁷ *Id.* § 1412(a)(1). The recognized value of early intervention, for example, is reflected in the IDEA's coverage of services to children beginning at age three, before most publicly mandated schooling begins. *Id.* (mandating that eligible state plans provide free appropriate education available to all children with disabilities between ages 3 and 21 unless, with respect to children ages 3 to 5 or 18 to 21, it would be inconsistent with state law or practice). Regular review and revision of children's educational plans takes place at least annually. *Id.* § 1414(d)(4)(A).

⁴⁸ *Id.* § 1412(a)(5) (IEP should provide that, "to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled.").

⁴⁹ *Id.* § 1412(a)(3).

⁵⁰ 34 C.F.R. § 300.536(b) (2000).

⁵¹ 20 U.S.C. § 1414(a)(1)(C) (Supp. V 1999). The school district is allowed to utilize mediation and due process procedures where consistent with state law in order to pursue an evaluation if the parents refuse to consent. *Id.* § 1414(a)(1)(C)(ii).

⁵² *Id.* § 1414(d)(1)(B). The parent has the right to bring a person to the meeting who is knowledgeable about the child. *Id.* § 1414(d)(1)(B)(vi).

If the results of the evaluation do not reveal a disability that affects the child's ability to learn, the child will not be eligible for IDEA services.⁵³ If there is disagreement about such a determination or about other aspects of the evaluation, the parent can obtain an independent evaluation or can appeal the school district's determination.⁵⁴

If the evaluation suggests a disability⁵⁵ and a need for special education and related services,⁵⁶ the team will prepare an IEP that specifically describes the child's needs, placement, necessary services and their frequency, and the contemplated goals and markers measuring the child's educational progress.⁵⁷ Educational services can run the gamut from a weekly half hour of fine motor therapy to a residential, specialized placement, depending upon the child's needs.⁵⁸ While the school district must provide the services needed for the child to progress in the general curriculum,⁵⁹ the

⁵³ *Id.* § 1401(3).

⁵⁴ *Id.* § 1415(b)(1), (b)(6).

⁵⁵ The IDEA defines a "child with a disability" as a child with specified, categorical disabilities or impairments which result in a need for special education. *Id.* at § 1401(3). The categories include mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities. *Id.* Because eligibility for services under the IDEA is linked to the need for special education, it is possible for a child with one of the enumerated disabilities or impairments not to be considered a "child with a disability" for IDEA purposes. *Id.*

⁵⁶ *Id.* § 1401(25). Special education is broadly defined as "specially designed instruction" to meet the child's unique needs, and may include classroom, home, hospital and institutional settings. *Id.* "Related services" include a variety of services such as transportation, speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, counseling, and diagnostic or evaluative medical services, as are necessary for the child to educationally benefit from school. *Id.* § 1401(22). *See also* Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 79 (1999) (upholding school district's obligation to provide ventilator-dependent child with severe physical disabilities with services of aide who could, among other things, suction child's breathing tube during school day); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 890 (1984) (intermittent catheterization performable by nurse or trained layperson was related service).

⁵⁷ The 1997 amendments to the IDEA place more emphasis on tracking the educational progress of the child. 20 U.S.C. §§ 1414(d)(1)(A)(ii)-(viii).

⁵⁸ *See id.* §§ 1401(22), (25) (defining "related services" and "special education"); 34 C.F.R. § 300.551 (2000) (requiring state plans to provide continuum of options for children with disabilities).

⁵⁹ The 1997 reauthorization of the IDEA set the standard as enabling "progress in the general curriculum" when appropriate. 20 U.S.C. §§ 1400(c)(5)(A), 1414(d)(1)(A). Until 1997, the standard used to measure sufficiency was that set forth in *Board of Education v. Rowley*,

school district still retains the ability to choose among teaching methodologies.⁶⁰ The child's parent must agree to the IEP before it can be implemented,⁶¹ and IEP must be reviewed and revised every year at a team meeting.⁶² Similarly, the child should be reevaluated at least once every three years.⁶³

B. THE IDEA PROCESS FOR DISPUTE RESOLUTION

The Supreme Court has characterized the IDEA as placing a significant emphasis on the procedural due process protections for parental involvement in special education planning and determinations.⁶⁴ A parent can request a due process hearing on a complaint

458 U.S. 176 (1982), which held that a free, appropriate public education was satisfied by instruction and services sufficient to permit the child to "benefit educationally" from the instruction, and, when the child was being educated in the regular classroom, if services were "reasonably calculated" to enable the child to pass from grade to grade. *Id.* at 203-04. For more on the significance of the amended standard, see, e.g., Tara L. Eyer, Commentary, *Greater Expectations: How the 1997 IDEA Amendments Raise the Floor of Opportunity for Children with Disabilities*, 126 Educ. L. Rep. 1, 14-16 (1998); Julie F. Mead, Commentary, *Expressions of Congressional Intent: Examining the 1997 Amendments to the IDEA*, 127 EDUC. L. REP. 511, 516 (1998).

⁶⁰ See *Rowley*, 458 U.S. at 208 (1982) (suggesting Congress did not intend to overturn State's "choice of appropriate educational theories"). In *Rowley*, the Supreme Court held that a school district was not obliged to supply a sign language interpreter for a deaf child who was progressing adequately from grade to grade through use of her lip reading skills. *Id.* at 209-10.

⁶¹ Otherwise, the last agreed-upon placement of the child remains effective until any dispute is resolved. This is known as the IDEA's "stay-put" provision. 20 U.S.C. § 1415(j) (Supp. V 1999). Parents must receive notice of any intended change in placement of the child, *id.* § 1415(b)(3), and of each IEP. *Id.* § 1415(d)(1). Parents can challenge these through the complaint process. *Id.* § 1415(b)(6). Unless the parents and school district "otherwise agree," the child is to remain in the current placement during the resolution of the dispute. *Id.* § 1415(j). If the state hearing process results in a determination that the parents' sought-after placement is the appropriate one, that placement then becomes the "agreed-upon" placement for stay-put purposes, should the school district seek further judicial review. See 34 C.F.R. § 300.514(c) (2000) (stating if hearing officer's decision agrees with parents', placement is treated as agreed-upon placement). If a child is new to the school system, the child may, with the parents' consent, be placed in the public school program pending resolution of disputes. 20 U.S.C. § 1415(j).

⁶² 20 U.S.C. § 1414(d)(4).

⁶³ *Id.* § 1414(a)(2).

⁶⁴ "It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley*, 458 U.S. at 205-06 (1982) (citation omitted); see also *Honig v. Doe*, 484 U.S. 305, 311 (1988) (noting that procedural safeguards

relating to the evaluation, the IEP, implementation of the IEP, or a proposed change in placement of a child.⁶⁵ In addition, school districts are required to notify parents about this right at most significant points in the process, including whenever the district produces an IEP or suggests a change in placement.⁶⁶

These remedies are not commonly used—only one parent out of one thousand with a child receiving special educational services files an administrative complaint for any reason.⁶⁷ If parents and schools do disagree, mediation is available.⁶⁸ If the dispute remains unresolved, the state must provide an administrative hearing before an impartial hearing officer,⁶⁹ which must be held and the decision

guarantee parents' right to seek review of any decisions they think inappropriate).

⁶⁵ 20 U.S.C. § 1415(b)(6). The parent must provide notice, in connection with a complaint, of the particulars of the problem and a proposed resolution, using a model form supplied to the parent for that purpose. *Id.* § 1415(b)(7).

⁶⁶ *Id.* § 1415(b)(3). The notice must include the proposed action, the reasons for it, other options considered with the reasons for their rejection, a description of tests and records on which the decision was based, and a description of the procedures available to parents. *Id.* §§ 1415(c), (d).

⁶⁷ See *supra* note 28 and accompanying text. The reasons for the low rate of disputes are a matter of debate. Some early studies of the IDEA suggested that parents involved in the IEP process may defer to school personnel expertise or be intimidated by the process. See William H. Clune & Mark H. Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis*, 48 LAW & CONTEMP. PROBS. 7, 31-36 (1985) (reviewing low rate of parental participation in IEP conferences and attributing it to either satisfaction or to professional resistance and structure of parent-professional relations); Alan Gartner & Dorothy Kerzner Lipsky, *Beyond Special Education: Toward a Quality System for All Students*, 57 HARV. EDUC. REV. 367, 378 (1987) (noting that parents of children with disabilities may feel that others perceive parents as "part of the problem"); David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 LAW & CONTEMP. PROBS. 63, 76-78 (1985) (reporting early studies showing that parents of upper and middle socio-economic groups bring majority of due process complaints).

In the twenty-five years since the enactment of the IDEA, there has been a great increase in the number of school children receiving some kind of special educational services, particularly in the category of learning disabilities. Over 5.5 million school age children were served under the IDEA in 1998-99, a growth rate of 30.3% over the past decade, when the increase in school enrollment over the same period was 14.1%. OFFICE OF SPECIAL EDUC. PROGRAMS, DEP'T OF EDUC., TO ASSURE THE FREE APPROPRIATE PUBLIC EDUCATION OF ALL CHILDREN WITH DISABILITIES: TWENTY-SECOND ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT II-19 (2000). A recent survey found high rates (81-87%) of parental satisfaction with the educational services provided to their children. *Id.* at II-43.

⁶⁸ Voluntary mediation must be offered to parents. 20 U.S.C. § 1415(e).

⁶⁹ *Id.* § 1415(f). About half of the states have a two-tier hearing system involving a hearing at the local level with a review at the state level; the other half provide a single

issued within a specified time.⁷⁰ The hearing officer can determine that a placement or services different than those proposed are more appropriate for the child and make orders accordingly.⁷¹ Parents have the right to be represented by counsel in the administrative hearing and may recover attorneys' fees if they prevail.⁷²

For cases where resolution is not reached through these administrative processes, the IDEA confers an express right of action in the federal district court, with provision for judicial review of the record

hearing before a state hearing officer. *See id.* §§ 1415(f), (g) (stating that hearing may be conducted by state or local educational agency, with state appeal if conducted by local agency); 143 CONG. REC. S4358 (daily ed. May 13, 1997) (statement of Sen. Jeffords). School districts and parents must provide each other with expert material and evidence in advance. At least five business days before the scheduled hearing, the parties must disclose evaluations and recommendations based upon those evaluations, or risk their exclusion by the hearing officer. 20 U.S.C. § 1415(f)(2).

⁷⁰ 34 C.F.R. § 300.511(a)(1) (2000) (requiring hearing decision to be made within forty-five days of request); *id.* § 300.512(b)(1) (for two-tier systems, appeal to be decided within thirty days). *See Lillbask v. Sergi*, 117 F. Supp. 2d 182, 188 (D. Conn. 2000) (reviewing timeliness of administrative proceedings). States may also have their own time periods. *See, e.g., Engwiller v. Pine Plains Cent. Sch. Dist.*, 110 F. Supp. 2d 236, 240 (S.D.N.Y. 2000) (holding that hearing officer's decision must be rendered within forty-five days after receipt of request for hearing unless deadline extended).

⁷¹ For example, a Tennessee state court required a school district to modify a high-ceilinged, uncarpeted classroom with a noisy ventilation system in order to allow the district to meet a hearing-impaired child's needs in that proposed classroom placement. *Wilson County Sch. Sys. v. Clifton*, 41 S.W.3d 645, 656-57 (Tenn. Ct. App. 2000).

⁷² 20 U.S.C. § 1415(i)(3); *see, e.g., Johnson v. Bismarck Pub. Sch. Dist.*, 949 F.2d 1000, 1003 (8th Cir. 1991) (permitting prevailing parents to recover attorney's fees); *Moore v. District of Columbia*, 907 F.2d 165, 166 (D.C. Cir. 1990) (permitting parents who prevail in administrative proceedings to recover attorney's fees). The current IDEA has elaborated considerably upon the award of attorneys' fees and set several restrictions upon the award of fees. Fees can be cut off by the unjustified refusal of an offer of settlement. 20 U.S.C. § 1415(i)(3)(D). Fees are not generally awarded for representation in an IEP meeting. *Id.* And fees can be reduced for dilatory action, failure to provide information to the school district, and for excessive time and services. *Id.* § 1415(i)(3)(F).

The standards for determining prevailing party status used under the Civil Rights Attorney's Fees Act, codified as amended in 42 U.S.C. § 1988 (1994 & Supp. V 1999), are generally followed in reviewing attorneys' fees claims under the IDEA. *See, e.g., Warner v. Indep. Sch. Dist. No. 625*, 134 F.3d 1333, 1337 (8th Cir. 1998) (analogizing attorney fees claim under IDEA to claim under § 1988); *Johnson*, 949 F.2d at 1003 (entertaining separate action for fees based on administrative proceedings). *Cf. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 121 S. Ct. 1835, 1843 (2001) (holding that prevailing party must obtain court ordered relief either by judgment on merits or consent decree and rejecting "catalyst theory" that permitted fees where plaintiff's pursuit of legal claims had brought about voluntary change in defendant's conduct).

of the state administrative hearing.⁷³ The district court is empowered to grant "appropriate relief."⁷⁴

C. BROAD SCOPE OF EQUITABLE REMEDIES

Early in the IDEA's administration, the clause providing for "appropriate relief" was broadly interpreted to authorize equitably shaped remedies directed toward fulfilling the statute's mandate of a free, appropriate public education. Orders directing specific school placements, services and supports can be detailed and complex. Recognizing that the administrative and judicial process can take time, during which a child may not be appropriately served, the courts have ruled that relief can also include reimbursement awards. Such awards may look like compensatory damages, for the cost of services arranged by parents upon a school district's default.⁷⁵ Remedies can also include orders for compensatory educational services extending into future years.⁷⁶

1. *Reimbursement of Educational Expenses.* In *School Committee of Burlington v. Department of Education*,⁷⁷ the Supreme Court considered a claim by parents for reimbursement of tuition they had expended to send their child to a private special education placement during the period that their challenge to the school district's IEP was being considered.⁷⁸ The parents had rejected the proposed

⁷³ 20 U.S.C. § 1415(i)(2). The review is not strictly an "appeal." Additional evidence may be submitted to the courts, but the courts have restrictively interpreted the circumstances under which they will receive additional evidence. See, e.g., *E.S. v. Indep. Sch. Dist.* No. 196, 135 F.3d 566, 569 (8th Cir. 1998) (confining introduction to circumstances where party can show solid justification); *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659, 667 (4th Cir. 1998) (holding that barring testimony by those who did or could have testified at administrative hearing is appropriate).

The court is to accord "due weight" to the administrative decision. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982); see *O'Toole v. Olathe Dist. Sch. Unified Sch. Dist.* No. 233, 144 F.3d 692, 698-99 (10th Cir. 1998) (discussing proper weight to be given in reviewing decisions made in two-tiered administrative hearing).

⁷⁴ 20 U.S.C. § 1415(i)(2)(B)(iii); *Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). The meaning of this remedial authorization is discussed in detail in Part II.C *infra*. A parent who is a prevailing party may obtain attorneys' fees. 20 U.S.C. § 1415(i)(3)(B); see also *supra* note 72 and accompanying text.

⁷⁵ See *infra* notes 77-93 and accompanying text.

⁷⁶ See *infra* notes 94-103 and accompanying text.

⁷⁷ 471 U.S. 359 (1985).

⁷⁸ *Id.* at 361-67.

IEP and invoked their right to a due process hearing.⁷⁹ Rather than leave their son at the public school, they placed him at a private school specializing in his specific learning disabilities.⁸⁰ The parents prevailed administratively on their claim that the school district had failed to offer their child an appropriate educational plan or placement.⁸¹ The state hearing decision also found that the placement selected by the parents was appropriate for the child's needs and ordered the school district to reimburse the parents for that year's tuition.⁸² The Supreme Court granted certiorari to consider whether the IDEA provision calling for a court to "grant such relief as [it] determines appropriate" authorized reimbursement.⁸³

The *Burlington* Court began with the observation that in order to provide for a free, appropriate public education in a case where the school system's IEP was inappropriate, a court could obviously enter a prospective injunction directing school officials to develop and implement, at public expense, an IEP placing the child in a private school.⁸⁴ Such a remedy might be sufficient if the administrative and judicial process could be completed quickly, the court

⁷⁹ *Id.* at 362.

⁸⁰ *Id.*

⁸¹ *Id.* at 363.

⁸² *Id.* The *Burlington* case originated in Massachusetts, which had enacted legislation used as a model for the IDEA. MASS. GEN. LAWS ch. 71B, §§ 1-14 (1996 & Supp. 2001) (known as "Chapter 766"). The Supreme Judicial Court of Massachusetts had already considered the issue raised in *Burlington* as a matter of state law under Chapter 766 and held that such reimbursement orders were authorized under the state statute. *Amherst-Pelham Reg'l Sch. Comm. v. Dept. of Educ.*, 381 N.E.2d 922, 925 (Mass. 1978).

⁸³ *Burlington*, 471 U.S. at 367-69. The Court also considered the town's argument that by acting unilaterally to place their child into the private school, the parents had violated the IDEA and were barred from seeking reimbursement. *Id.* at 367. On this latter question, the Court refused to read the IDEA's provisions regarding changes in placement to prevent parents from removing children from inappropriate placements on the pain of sacrificing a claim for reimbursement. *Id.* at 372. The Court left it open to the courts' equitable powers to consider estoppel or other equitable considerations in fashioning relief in particular cases. *Id.* at 374. The IDEA has since been amended to identify and confine the circumstances under which reimbursement claims for such parental placements can be asserted. 20 U.S.C. § 1412(a)(10)(C)(iii) (Supp. V 1999). It now requires that parents inform the school system in a timely fashion that they are rejecting the placement proposed and intend to enroll the child in a private school. *Id.* § 1412(a)(10)(C)(iii)(I)(aa). It also directs denial of reimbursement on a "judicial finding of unreasonableness" with respect to the parents' actions. *Id.* at § 1412(a)(10)(C)(iii)(II).

⁸⁴ *Burlington*, 471 U.S. at 369-70.

noted, but as the case before it “so vividly demonstrate[d] . . . the review process is ponderous.”⁸⁵ Because of the inevitable delays caused by the pursuit of this process, parents who disagreed with a proposed IEP would either have to go along with the placement to the detriment of their child, if it turned out to be inappropriate, or pay for services themselves that should have been furnished at public expense if the parent’s position prevailed.⁸⁶ Without reimbursement, the parents’ rights under the IDEA would produce only an “empty victory.”⁸⁷

The *Burlington* decision resisted terming such reimbursement “damages,” stressing instead the statute’s prospective emphasis on furnishing services.⁸⁸ Rather, the Court reasoned that the goals of the statute were accomplished where the child was receiving the right services at the time they should have been furnished.⁸⁹ The reimbursement merely recognized that the obligation for providing those services had been that of the school district—not the parents,⁹⁰ and the Court’s post hoc determination of financial responsibility was an available form of relief in a proper case.⁹¹ The IDEA should be interpreted to advance the objectives of giving children with disabilities “both an appropriate education and a free one,” not to defeat those objectives.⁹² Moreover, the Court explicitly approved of the consideration of equitable factors in fashioning relief for a particular case.⁹³

2. *Compensatory Education.* Following the broad remedial interpretation of the IDEA in *Burlington*, the lower federal courts authorized remedial orders that school districts provide compensa-

⁸⁵ *Id.* at 370. By the time the case reached the Supreme Court, after a series of court skirmishes, the negotiations and proceedings between the parents and the town had spanned more than six years and had included threats by the State Department of Education to freeze the town’s special education assistance for failure to comply with the state administrative order. *Id.* at 361-63.

⁸⁶ *Id.* at 370.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 370-71.

⁹¹ *Id.* at 371.

⁹² *Id.* at 372.

⁹³ *Id.* at 374.

tory education for children who were not adequately served.⁹⁴ The Eighth Circuit's decision in *Miener v. Missouri*,⁹⁵ which revisited a prior denial of such relief in light of *Burlington*, found that the rationale for such orders flowed directly from *Burlington*.⁹⁶ If a parent with the financial resources to obtain appropriate services could be reimbursed under the *Burlington* holding, then surely a child's entitlement to a free, appropriate education should not turn on the parent's financial ability to "front" its costs.⁹⁷ Compensatory education would thus be available to remedy past deprivations.

Compensatory education can extend beyond the age that a child would ordinarily be eligible for services. In *Pihl v. Massachusetts Department of Education*,⁹⁸ the First Circuit noted that the purpose of compensatory education was to offer services at a future time to compensate for what the child lost when his protected rights were denied.⁹⁹ In order to give meaning to the disabled student's right to an education between the ages of three and twenty-one, therefore, compensatory education would have to be available beyond the student's twenty-first birthday.¹⁰⁰ "Otherwise, school districts could simply stop providing required services to older teenagers, relying on the Act's time-consuming review process to protect them from further obligations."¹⁰¹

While recognizing the power to award such relief, these courts also stressed that the circumstances in a particular case will affect

⁹⁴ *Pihl v. Mass. Dep't of Educ.*, 9 F.3d 184, 189 (1st Cir. 1993); *Burr v. Ambach*, 863 F.2d 1071, 1078 (2d Cir. 1988), *vacated and remanded sub. nom. Sobol v. Burr*, 492 U.S. 902 (1989), *reaff'd on reconsideration*, *Burr v. Sobol*, 888 F.2d 258, 259 (2d Cir. 1989); *Lester H. v. Gilhool*, 916 F.2d 865, 872-73 (3d Cir. 1990); *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402, 407 (6th Cir. 1991); *Bd. of Educ. v. Ill. Bd. of Educ.*, 79 F.3d 654, 656 (7th Cir. 1996); *Miener v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986); *Parents of Student W. v. Puyallup Sch. Dist.* 3, 31 F.3d 1489, 1496 (9th Cir. 1994); *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988).

⁹⁵ 800 F.2d 749 (8th Cir. 1986).

⁹⁶ *Id.* at 753.

⁹⁷ *Id.*

⁹⁸ 9 F.3d 184 (1st Cir. 1993).

⁹⁹ *Id.* at 189.

¹⁰⁰ *Id.* at 189-90.

¹⁰¹ *Id.* at 189. One recent district court case upheld a compensatory education order that a school district pay for the student's college tuition at a residential school where he was taking courses in order to get credit toward a high school diploma. *Sabatini v. Corning Painted-Post Area Sch. Dist.*, 78 F. Supp. 2d 138, 145-47 (W.D.N.Y. 1999).

whether such a remedy is appropriate.¹⁰² In particular, the courts are rightly concerned with the degree to which the parents have placed into dispute, at the appropriate time, the adequacy of the school district's educational services, as well as with the school district's efforts to comply with the IDEA.¹⁰³ Thus, for example, where the parents never contested the adequacy of an IEP for a particular year, and the IEP for the subsequent year was resolved promptly, no award of compensatory education related to the first year was warranted.¹⁰⁴ Some courts have suggested that only an egregious violation of the IDEA should justify relief in the nature of compensatory education.¹⁰⁵ In addition, consistent with the equitable nature of the remedy, the specific circumstances of a case can affect whether and the extent to which compensatory services are appropriate, despite a school district's violations of the IDEA.¹⁰⁶ For example, where a disabled student's parents declined extra tutoring and summer school, and the student graduated with his high school class, compensatory educational services were not

¹⁰² See, e.g., *Pihl*, 9 F.3d at 188 n.8 (calling for consideration of equitable factors).

¹⁰³ See, e.g., *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 536-38 (3d Cir. 1995) (finding parents' failure to dispute plan dispositive).

¹⁰⁴ *Id.*; see also *Bd. of Educ. v. Ill. State Bd. of Educ.*, 79 F.3d 654, 660 (7th Cir. 1996) (refusing to allow parent to extend claim for compensatory education by filing claim just before student's twenty-first birthday then invoking "stay-put" requirement). For more discussion of the relationship of limitations periods and exhaustion to the grant of compensatory education, see Perry A. Zirkel, Commentary, *Compensatory Educational Services in Special Education Cases: An Update*, 150 EDUC. L. REP. 311 (2001) (updating author's 1995 and 1991 articles on subject).

¹⁰⁵ *Garro v. Connecticut*, 23 F.3d 734, 757 (2d Cir. 1994) (holding that "gross" violation of IDEA may be prerequisite to award of compensatory education). The Third Circuit had hinted that bad faith or egregious conduct was relevant to the award of compensatory education. See *Carlisle Area Sch.*, 62 F.3d at 537 ("Although we do not believe that good faith is required, most of the cases awarding compensatory education involved quite egregious circumstances."); *Lester H. v. Gilhool*, 916 F.2d 865, 873 n.12 (3d Cir. 1990) (expressing "no opinion whether the time a school district spends in a good faith effort to place a handicapped student into an appropriate program should or must always be included within the period for which compensatory education is awarded."). However, the court has since indicated that bad faith or slothfulness are not prerequisites to use of compensatory education as a remedy. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249-50 (3d Cir. 1999); *M.C. v. Cent. Reg'l. Sch. Dist.*, 81 F.3d 389, 396 (3d Cir. 1996). See James Schwellenbach, Comment, *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*, 53 ME. L. REV. 245 (2001).

¹⁰⁶ *Pihl*, 9 F.3d at 188 n.8.

warranted, despite a loss of education due to the child's earlier, repeated suspensions.¹⁰⁷

To summarize, the IDEA equips parents with important rights: participation in planning, mediation, and prompt resolution of disputes by impartial hearing officers, judicial intervention in emergencies,¹⁰⁸ and judicial review of adverse decisions. The IDEA also provides for flexible remedies: orders for specific services and placements, including private school services, reimbursement for services provided during periods of disputes, compensatory education, and attorneys' fees. These rights and remedies focus on assuring the timely delivery of appropriate special education services to children with disabilities, while providing school districts with incentives to make such services available and resolve disputes short of the courtroom.

III. DAMAGES AND THE IDEA

In contrast to decisions upholding the broad discretion of hearing officers and courts to fashion prospective and remedial orders, the first courts to consider the question ruled that tort-like damages were not recoverable directly under the IDEA.¹⁰⁹ Such tort-like claims would include consequential damages for pain and suffering, emotional distress, lost earning capacity, and punitive damages.¹¹⁰

¹⁰⁷ *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994). See also *Wenger v. Canastota Cent. Sch. Dist.*, 979 F. Supp. 147, 151 (N.D.N.Y. 1997) (upholding state reviewing officer's denial of compensatory services to child who was in coma throughout contested period because of lack of evidence of regression due to failure of district to provide services in timely manner).

¹⁰⁸ The Supreme Court has made it clear that the courts have the power to issue temporary injunctive orders in appropriate cases. See *Honig v. Doe*, 484 U.S. 305, 327 (1988) (reading IDEA to authorize courts to enjoin dangerous children from attending school).

¹⁰⁹ *Anderson v. Thompson*, 658 F.2d 1205, 1209-10 (7th Cir. 1981); *Loughran v. Flanders*, 470 F. Supp. 110, 114 (D. Conn. 1979). *Anderson* preceded the decision in *School Committee v. Department of Education*, 471 U.S. 359, 370 (1985) (the *Burlington* case), which upheld tuition reimbursement as an appropriate remedy under the IDEA. Its rationale has, however, continued to be reviewed and cited by cases and commentators considering general monetary damage claims under the IDEA.

¹¹⁰ For example, in *Heidemann v. Rotner*, 84 F.3d 1021 (8th Cir. 1996), the parents of a nine-year-old, severely handicapped nonverbal girl sought general damages for pain, suffering, emotional anxiety, distress and loss of skills allegedly due to the misuse of "blanket wrapping" treatment used on their child. *Id.* at 1032-33. In *Hall v. Knott County Board of Education*, 941 F.3d 402 (7th Cir. 1991), the claim was for loss of earning power. *Id.* at 405.

A. INTERPRETING THE IDEA—JUDICIAL RELUCTANCE TO RECOGNIZE DAMAGE CLAIMS

Influential early cases addressing the availability of damages for IDEA violations looked to both the structure and the purposes of the Act in determining that it was not intended to authorize damage claims against school districts for missteps in the special education process.¹¹¹ The Seventh Circuit's reasoning in *Anderson v. Thompson*¹¹² was endorsed by several other circuits that subsequently faced the question.¹¹³ The specific relief sought in *Anderson* was tuition reimbursement, which the Supreme Court later upheld as "appropriate relief" and characterized as equitable in nature in the *Burlington* decision.¹¹⁴ The *Anderson* court's review of IDEA's history and purposes has, however, continued to be followed and cited by courts and commentators analyzing claims for general monetary damages under the IDEA.¹¹⁵

¹¹¹ See, e.g., *Anderson*, 658 F.2d at 1212; *Loughran*, 470 F. Supp. at 114.

¹¹² 658 F.2d 1205.

¹¹³ *Heidemann*, 84 F.3d at 1033; *Hall*, 941 F.2d at 407; *Miener v. Missouri*, 800 F.2d 749, 752-53 (8th Cir. 1986); *Manecke v. Sch. Bd. of Pinellas County*, 762 F.2d 912, 915 n.2 (11th Cir. 1985).

¹¹⁴ *Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359, 370 (1985).

¹¹⁵ See, e.g., *Heidemann*, 84 F.3d at 1033 (adopting *Anderson*'s standard for consequential damages); *Hall*, 941 F.2d at 407 (also adopting *Anderson*). For scholarly commentary on the availability of damages, see MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE § 21.13(5) (Supp. 2000); Sheila K. Hyatt, *The Remedies Gap: Compensation and Implementation Under the Education for All Handicapped Children Act*, 17 N.Y.U. REV. L. & SOC. CHANGE 689, 711 (1989/90); Allan G. Osborne, Jr. & Charles J. Russo, *Are Damages an Available Remedy When a School District Fails to Provide Appropriate Education Under IDEA*, Commentary, 152 Educ. L. Rep. 1 (2001); Allan G. Osborne, Jr., Commentary, *Remedies for a School District's Failure to Provide Services Under IDEA*, 112 EDUC. L. REP. 1, 15 (1996); Rothstein, Commentary, *supra* note 27, at 1255; Kevin R. Sido & Philip R. King, *Monetary Remedies Under the Education for All Handicapped Children Act: Toward a New Civil Rights Act?*, 23 TORT & INS. L.J. 711, 723 (1988); Judith Welch Wegner, *Educational Rights of Handicapped Children: Three Federal Statutes and an Evolving Jurisprudence. Part II: Future Rights and Remedies*, 17 J.L. & EDUC. 625, 673-75 (1988); Perry A. Zirkel & Allan G. Osborne, *Are Damages Available in Special Education Suits?*, 42 EDUC. L. REP. 497, 503 (1988); Kara W. Edmunds, Note, *Implying Damages Under the Individuals with Disabilities Education Act: Franklin v. Gwinnett County Public Schools Adds New Fuel to the Argument*, 27 GA. L. REV. 789, 801-02 (1993); Stephen C. Shannon, Note, *The Individuals with Disabilities Education Act: Determining "Appropriate Relief" in a Post-Gwinnett Era*, 85 VA. L. REV. 853, 871 (1999).

1. *The Anderson v. Thompson Analysis.* The *Anderson* court refused to read the authorization of "appropriate" relief as necessarily including a damage remedy, finding that such language was not an express authorization of a damage remedy and that congressional intent was relevant to the issue.¹¹⁶ The court then examined the detailed procedural scheme set up by the IDEA, noting that its focus, and that of the court on review, was the fashioning of an "appropriate" program for the child through that process.¹¹⁷ The court also canvassed the legislative history of the Act, which was found to echo the statutory emphasis on devising the appropriate program to meet the needs of children with minimal disruption.¹¹⁸ There was not even the "slightest suggestion" in the histories of the IDEA and its predecessors that Congress intended for the IDEA "to serve as a vehicle through which to initiate a private cause of action for damages."¹¹⁹

The court also found in the legislative discussions about the difficulties of diagnosing learning disabilities a chord that was inharmonious with the imposition of the equivalent of an educational malpractice action. "[I]t would be incongruous for Congress to subject school systems to liability for damages each time a court disagreed with the school district's program while at the same time admitting the uncertainty of diagnosis in the field."¹²⁰ According to the court, the focus of Congress, and the IDEA, was on cooperative action toward agreement on a plan for each child, not on allocating blame.¹²¹

The overall problem of insufficient funding for special educational services, which the IDEA was enacted to address, was yet another important reason the *Anderson* court did not read the Act as imposing monetary liability on school districts for lack of services.¹²² The court noted that it would take time and increased congressional

¹¹⁶ *Anderson*, 658 F.2d at 1209-10.

¹¹⁷ *Id.* at 1210-11.

¹¹⁸ *Id.* at 1212.

¹¹⁹ *Id.* at 1211 (quoting *Loughran v. Flanders*, 470 F. Supp. 110, 114 (D. Conn. 1979)).

¹²⁰ *Id.* at 1212.

¹²¹ *Id.*

¹²² *Id.* at 1212-13.

funding before the needs of all handicapped children could be addressed.¹²³

Summing up the IDEA's legislative history, *Anderson* characterized it as showing "an emphasis on procedural safeguards to ensure appropriate placements, a recognition that diagnosis of special education problems was difficult and uncertain, an awareness of severe budgeting constraints, and an acknowledgment that it would take time for all handicapped children to be helped."¹²⁴ These circumstances led the court to infer that a damage remedy was not generally intended.¹²⁵

Finally, the *Anderson* court identified policy reasons, based on the goals of the statute, which were contrary to the imposition of money damages against school districts that were making a good faith effort to provide children with an appropriate education. In order to meet the complex service needs of handicapped children, the court noted, there would be a need for flexibility and experimentation in programming.¹²⁶ School districts might hesitate to implement innovative educational reforms if they risked exposing themselves to monetary liability for incorrect placements.¹²⁷ Rather than acting as a spur to appropriate service delivery, then, the threat of a damages remedy could deter creative efforts to help the children served by the Act.¹²⁸

¹²³ *Id.*

¹²⁴ *Id.* at 1213.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* (citing *Loughran v. Flanders*, 470 F. Supp. 110, 115 (D. Conn. 1979)). The *Loughran* court added as a policy concern the traditional reluctance of courts to recognize an educational malpractice action, given that such claims would "necessarily hinge[] upon questions of methodology and educational priorities," nonjusticiable issues presenting a "myriad" of "intractable economic, social, and even philosophical problems." 470 F. Supp. at 115 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1972)). The goals of the statute in assisting states with funding for services and encouraging research and innovation in special education would not support the extent of intervention into educational judgments, traditionally an area for local determination, which such an action would produce. *Id.* This deference to school districts on questions of methodology was stressed in the Supreme Court's later decision, *Board of Education v. Rowley*, 458 U.S. 176 (1982), in the context of the restricted scope of judicial review appropriate under the IDEA. *Id.* at 208.

¹²⁸ The *Anderson* court identified two situations which it characterized as "exceptional circumstances" that might make what it described as a "limited damage award" appropriate because of its consistency with the IDEA's purposes. 658 F.2d at 1213. The court suggested exceptions in cases where parents, either because of the likelihood of harm to a child's

2. IDEA-Based Damage Claims and the Supreme Court.

Although it has not directly addressed the question, the Supreme Court's few glances at the issue of damages for IDEA violations support the view that the IDEA is focused on equitable remedies.¹²⁹ The pursuit of attorneys' fees for the resolution of an IDEA-related claim reached the Supreme Court in 1984 in *Smith v. Robinson*.¹³⁰ In resolving that suit, the Supreme Court held that the IDEA was the exclusive remedy for special education claims, using as part of its rationale its assumption that the IDEA did not provide a right to damages.¹³¹ Soon after, in the *Burlington* decision discussed above, the Court upheld the concept of equitable reimbursement of special education expenses while rejecting the labeling of equitable reimbursement as damages.¹³²

By the time *Smith* reached the Supreme Court, the underlying claims asserted by the Smiths concerning their child's special education had been resolved.¹³³ Because the IDEA then in force did not contain a provision providing for reimbursement of attorneys' fees, the Smiths had amended their complaint to add claims under

physical health or due to an egregious failure by the school district to comply with the procedural provisions of the IDEA, had arranged for what were ultimately determined to be appropriate services. In such narrow circumstances, parents could receive an award of the cost of these services. *Id.* at 1213-14. The Supreme Court's subsequent *Burlington* decision broadened *Anderson's* narrow exceptions to permit tuition reimbursement in most circumstances, while distinguishing this remedy from a general damages claim. *Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359, 369 (1985) (*Burlington*) (concluding that Congress authorized "placement in private schools at public expense where [an appropriate free, public education] is not possible"). The *Burlington* case is discussed *supra* Part II.C.1.

¹²⁹ See, e.g., *Smith v. Robinson*, 468 U.S. 992, 1021 (1984) ("[W]e cannot believe that Congress intended [an award of] otherwise unavailable damages or . . . an award of attorney's fees.").

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Burlington*, 471 U.S. at 369.

¹³³ *Smith*, 468 U.S. at 995-1000. The Smiths were parents of Tommy, a child with cerebral palsy and other physical and emotional handicaps. *Id.* at 995. The School Committee of Cumberland, Rhode Island, had initially agreed to place Tommy at a hospital day program, but then reneged on the grounds that the funding of Tommy's care was the state's responsibility under its mental health programs rather than the school district's under the IDEA. *Id.* The Smiths invoked the due process provisions of the IDEA, but also contended that the state hearing officer was, in the circumstances, not impartial. *Id.* at 995-96. Ultimately, the lower courts ruled on the merits that the school committee had the responsibility for the provision of a free and appropriate education to Tommy, and found that the state hearing officer was not disqualified as one involved in the child's education or care. *Id.* at 1000.

section 1983 for violation of the Equal Protection Clause and under the Rehabilitation Act, and to seek attorneys' fees under section 1988 and under the fees section of the Rehabilitation Act.¹³⁴

The Supreme Court ruled in *Smith* that Congress had intended the IDEA to be the exclusive avenue through which a party could assert an equal protection claim in the context of publicly financed special education.¹³⁵ The Court also held that a claim coextensive with the rights guaranteed under the IDEA could not be asserted under the Rehabilitation Act for "otherwise unavailable damages or for an award of attorney's fees."¹³⁶

Regarding the additional relief apparently available under the Rehabilitation Act, the Court noted that Congress had not explained "the absence of a provision for a damages remedy and attorney's fees in the [IDEA]."¹³⁷ The Court found in the legislative history, however, an awareness by Congress of the financial burden imposed by the responsibility of providing education to handicapped children and, more specifically, an expressed intent to "make every resource, or as much as possible, available to the direct activities and the direct programs that are going to benefit the handicapped."¹³⁸ The Court suggested that the IDEA's provisions and omissions reflected

¹³⁴ *Id.* at 1000 & n.5; see also Rehabilitation Act of 1973 § 505, 29 U.S.C. § 794(b) (1994) (allowing award of attorneys' fees); 42 U.S.C. § 1988(b) (Supp. V 1999) (same). Although not basing its decision on the observation, the Supreme Court noted that the Smiths had only added the equal protection claim after prevailing on the merits of their IDEA claim, noting,

There is, of course, nothing wrong with seeking relief on the basis of certain statutes because those statutes provide for attorney's fees, or with amending a complaint to include claims that provide for attorney's fees. But where it is clear that the claims that provide for attorney's fees had nothing to do with a plaintiff's success, *Hensley v. Eckerhart*, [461 U.S. 424 (1983)], requires that fees not be awarded on the basis of those claims.

Smith, 468 U.S. at 1009 n.12.

¹³⁵ *Smith*, 468 U.S. at 1009.

¹³⁶ *Id.* at 1021. The Court did not foreclose a suit under § 504 of the Rehabilitation Act where it guaranteed "substantive rights greater than those available under the [IDEA]" or where the IDEA was not available. *Id.* Because the Smiths did not prevail on the due process claim which might have been the basis for a fee award, the Court found it unnecessary to determine whether an independent § 1983 action would be available on due process grounds, although it implied that it might be available in situations where litigants were unable to obtain the due process required by the IDEA without judicial relief. *Id.* at 1013-15 & n.17.

¹³⁷ *Id.* at 1020.

¹³⁸ *Id.* (quoting 121 CONG. REC. 19501 (1975) (statement of Sen. Dole)).

a balance struck to establish enforceable rights while relieving financial burdens on local school districts.¹³⁹

The Court did not address directly whether damages were available under the IDEA; however, its discussion assumes that damages are not available, and notes holdings by lower courts to that effect.¹⁴⁰ In addition, the *Smith* plaintiffs employed section 1983 to assert constitutional claims, rather than invoking section 1983 as a vehicle to assert an IDEA violation.¹⁴¹ In this regard, the Supreme Court stated approvingly, "Courts generally agree that the [IDEA] may not be claimed as the basis for a section 1983 action."¹⁴²

The next year, in its *Burlington* decision, the Supreme Court interpreted the IDEA as authorizing an award of monetary relief, but refused to characterize this relief as "damages."¹⁴³ The *Burlington* Court upheld retroactive reimbursement and did not confine it to cases threatening the student's physical health, as the Seventh Circuit in *Anderson* had suggested.¹⁴⁴ The approach and language used by the *Burlington* court, however, stressed the remedial character of the relief in obtaining services for the child in a timely fashion and directed lower courts to consider equitable factors in fashioning relief.¹⁴⁵ The *Burlington* Court's emphasis on

¹³⁹ *Id.* at 1021.

¹⁴⁰ *Id.* at 1020 n.24.

There is some confusion among the Circuits as to the availability of a damages remedy under § 504 and under the [IDEA]. Without expressing an opinion on the matter, we note that courts generally agree that damages are available under § 504, but are available under the [IDEA] only in exceptional circumstances.

Id. (citations omitted). The next year's decision in the *Burlington* case developed such circumstances, and reframed the terminology in equitable terms. *Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 369 (1985).

¹⁴¹ *Smith*, 468 U.S. at 1008-09.

¹⁴² *Id.* at 1008 n.11 (citations omitted).

¹⁴³ *Burlington*, 471 U.S. at 369-70. In the face of the town's characterization of reimbursement as "damages," the Court retorted "[T]hat simply is not the case." *Id.* at 370.

¹⁴⁴ Compare *Burlington*, 471 U.S. at 369 ("[statutory] authority includes the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act."), with *Anderson v. Thompson*, 658 F.2d 1205, 1213-14 (7th Cir. 1981) (reasoning, as grounds for exceptional circumstance for reimbursement, "Congress . . . could not have intended a child to remain in a placement in which there was a serious risk of injury to that child's physical health.").

¹⁴⁵ *Burlington*, 471 U.S. at 369-70.

the equitable nature of the IDEA's remedial purposes and processes and its hostility to the idea of a damage award were apparent to lower courts, which, in the wake of *Burlington*, continued to approve of the *Anderson* court's reasoning when considering nonreimbursement damage claims.¹⁴⁶

B. CONGRESS RESPONDS—THE RESTORATION OF PRE-SMITH REMEDIES

Congress enacted amendments to the IDEA in 1986, known as the Handicapped Children's Protection Act of 1986 (HCPA), that responded to the *Smith* decision in several ways.¹⁴⁷ Within a month of the Supreme Court's decision in *Smith*, Congress introduced bills that expressly provided reimbursement for attorneys' fees in successful IDEA claims.¹⁴⁸ Much of the debate over the bills dealt with the proposed attorneys' fees provision and, specifically, whether fees would be available for legal representation during the administrative process, particularly where the matter was finally resolved at that level.¹⁴⁹ The final bill explicitly made attorneys'

¹⁴⁶ See, e.g., *Heidemann v. Rother*, 84 F.3d 1021, 1032-33 (8th Cir. 1996) ("[G]eneral and punitive damages for the types of injuries alleged by plaintiffs are not available under the IDEA."); *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402, 407 (6th Cir. 1991) ("[T]he Education Act creates no right to recover damages for loss of earning power attributed to a school board's failure to provide 'appropriate' education."); *Miener v. Missouri*, 800 F.2d 749, 754 (8th Cir. 1986) ("relief[] such as general damages . . . not available under the [IDEA]").

¹⁴⁷ Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, §§ 2-5, 100 Stat. 796 (codified as amended at 20 U.S.C. §§ 1415(i)(3), (l) (Supp. V 1999)). See also Myron Schreck, *Attorneys' Fees for Administrative Proceedings Under the Education of the Handicapped Act: Of Carey, Crest Street and Congressional Intent*, 60 TEMP. L.Q. 599 (1987) (providing comprehensive review of legislative history of these amendments).

¹⁴⁸ The Supreme Court decided *Smith* on July 5, 1984. 468 U.S. 992 (1984). Bills were introduced in both the House and the Senate that month. See Schreck, *supra* note 147, at 612 n.91 (citing S. 2859, 98th Cong., 130 CONG. REC. 20,597 (1984); H.R. 6014, 98th Cong., 130 CONG. REC. 20,702 (1984)).

¹⁴⁹ See generally Schreck, *supra* note 147, at 639-50 (discussing legislative history of amendments). At the House of Representatives debate on the Conference Report, Representative Jeffords called this the "critical issue in attempting to resolve the differences" between the House and Senate versions of the bill. 132 CONG. REC. 17610 (1986). Opponents of the award of fees for this purpose thought that it would impose a severe financial burden on school systems. These opponents argued that the provision allowing such recovery "represent[ed] a serious threat to local school districts and state educational agencies because of the significant costs for which they may be liable." H.R. REP. NO. 99-296, at 15-17 (1985); see also Schreck, *supra* note 147, at 646-47 (reviewing legislation history). The House version of the bill, as passed, had sought to "sunset" the right to attorneys' fees in administrative proceedings after a set period of time. The House receded from this position in return for the

fees available to parents for representation during administrative and judicial proceedings under the IDEA, subject to certain limitations.¹⁵⁰

The amendments also dealt with that aspect of *Smith* which foreclosed suits under section 1983 to enforce constitutional equal protection claims and claims brought under the Rehabilitation Act.¹⁵¹ Here, the response of Congress was to restore the availability of these claims, subject to the exhaustion of the IDEA administrative process.¹⁵² The HCPA's language, as now amended, provides:

Nothing in this chapter shall be construed to restrict or limit the rights, procedures and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.¹⁵³

In requiring exhaustion before allowing the assertion of other claims, Congress adopted that part of the rationale of *Smith* which had used the primacy of the IDEA administrative processes as a

Senate's agreement to a provision requiring a General Accounting Office study of the impact of the bill awarding fees and costs. H.R. CONF. REP. NO. 99-687, at 5, 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1807, 1809.

¹⁵⁰ Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 2, 100 Stat. 796 (1986) (codified as amended at 20 U.S.C. § 1415(i)(3) (Supp. V 1999)).

¹⁵¹ *Id.* § 3, 100 Stat. at 797 (codified as amended at 20 U.S.C. § 1415(l) (Supp. V 1999)).

¹⁵² *Id.*

¹⁵³ *Id.* The "procedures under subsections (f) and (g)" are the impartial due process hearing and any appeal from a local educational agency hearing to the state agency. 20 U.S.C. § 1415(f), (g) (Supp. V 1999). The amendments reflected in the current version added the reference to the Americans with Disabilities Act of 1990, substituted "children with disabilities" for "handicapped children and youth," and conformed the subsection numbering. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (1990) (substituting "children with disabilities"); Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-117, 111 Stat. 37 (1997) (renumbering and adding reference to Americans with Disabilities Act).

reason for precluding plaintiffs from resorting to other theories to get into court.¹⁵⁴ It rejected, however, the substitution of the IDEA as the exclusive vehicle to enforce the rights of children with disabilities.¹⁵⁵

There was relatively little discussion of this section of the HCPA and apparently no controversy or debate surrounding it. In summarizing the bill, Congress described it as "clarifying" the IDEA's effect on "rights, procedures and remedies under other laws relating to prohibition of discrimination."¹⁵⁶

The HCPA amendments settled several issues. First, they authorize attorneys' fees directly under the IDEA. Second, they allow claims to enforce the rights of children with disabilities based on particular federal anti-discrimination statutes such as section 504 of the Rehabilitation Act, and later, the Americans with Disabilities Act, as well as claims based upon the Constitution, which presumably would be asserted under section 1983. Third, they mandate exhaustion of the IDEA process in most instances. The question arising in the wake of these amendments is whether the amended statute should be read to authorize actions under section 1983 that seek damages solely for IDEA violations.

IV. THE CURRENT LANDSCAPE

Several routes and remedies are now available to a parent of a child with disabilities who is denied an appropriate education, some of which allow for the recovery of retrospective damages. The IDEA process directly provides specific review of a school district's proposed IEP or of alleged problems in implementing a special

¹⁵⁴ *Smith*, 468 U.S. at 1011-12, 1024. To an extent, then, this part of the HCPA endorsed the reasoning of the Court in *Smith* as it struggled to develop a consistent jurisprudence under the IDEA, § 1983, and the Rehabilitation Act. See Judith Welch Wegner, *Educational Rights of Handicapped Children: Three Federal Statutes and an Evolving Jurisprudence, Part I: The Statutory Maze*, 17 J.L. & EDUC. 387, 419-20 (1988) (contrasting majority's "contraction" approach to interrelationship of statutes with dissent's "consolidation" approach, which had urged judicial adoption of exhaustion requirement).

¹⁵⁵ See § 3, 100 Stat. at 797 (codified as amended at 20 U.S.C. § 1415(1) (Supp. V 1999)) (explicitly allowing claims under other federal laws).

¹⁵⁶ 132 CONG. REC. 17607 (1986); S. REP. NO. 99-112, at 1, reprinted in 1986 U.S.C.C.A.N. 1798; 131 CONG. REC. 21388 (1985). For more on the significance of the sparse legislative history of this part of the HCPA, see *infra* notes 196-212 and accompanying text.

education program for a child.¹⁵⁷ Remedies under the IDEA include orders for appropriate programs and placements, retroactive reimbursement of funds expended to obtain appropriate educational services, compensatory education, and attorneys' fees.¹⁵⁸ Resort to the court for preliminary injunctive relief is authorized in particular circumstances, such as impending placement changes.¹⁵⁹

Intentional, bad faith or egregious conduct by a school district can give rise to damages liability under other federal statutes, including section 504 of the Rehabilitation Act and the Americans with Disabilities Act.¹⁶⁰ Most courts have held, though, that the mere failure to offer a free, appropriate public education, without more, will not support a damage award under section 504.¹⁶¹ These statutory claims lie against the district, rather than individuals.¹⁶²

¹⁵⁷ 20 U.S.C. § 1415(b)(6) (Supp. V 1999); see *supra* notes 65-74 and accompanying text.

¹⁵⁸ 20 U.S.C. § 1415(i) ("appropriate" relief); *id.* § 1415(i)(3) (attorneys' fees); see *supra* notes 71-107 and accompanying text.

¹⁵⁹ See *Honig v. Doe*, 484 U.S. 305, 327 (1988) (retaining power to issue temporary orders); see also *Hernandez v. Bd. of Educ.*, 2001 WL 477222, at *7 (N.D. Ill. May 7, 2001) (ordering intensified regular and compensatory services on preliminary injunctive basis); *LIH v. N.Y. City Bd. of Educ.*, 103 F. Supp. 2d 658, 659 (E.D.N.Y. 2000) (enjoining school system from failing to follow IDEA requirements for discipline during summer school sessions).

¹⁶⁰ See, e.g., *Sellers v. Sch. Bd.*, 141 F.3d 524, 528 (4th Cir. 1998) (requiring bad faith or gross misjudgment); *Heidemann v. Rother*, 84 F.3d 1021, 1032 (8th Cir. 1996) (considering gross departure from accepted educational standards); *Manecke v. Sch. Bd.*, 762 F.2d 912, 921-22 (11th Cir. 1985) (describing conduct amounting to discrimination required for § 504 violation; reviewing but not deciding issue of availability of damages); *Butler v. S. Glens Falls Cent. Sch. Dist.*, 106 F. Supp. 2d 414, 421 (N.D.N.Y. 2000) (stating intentional discrimination satisfied by showing that policymaker acted with deliberate indifference to likelihood of violation of federally protected rights from challenged policy or custom); *R.B. v. Bd. of Educ.*, 99 F. Supp. 2d 411, 419 (S.D.N.Y. 2000) (using bad faith or gross misjudgment standard and finding requirements for stating claim under ADA nearly identical to those under § 504); but see *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (stating that claimant need not prove intentional discrimination to show violation of § 504). See also Gary S. Gildin, *Dis-qualified Immunity for Discrimination Against the Disabled*, 1999 U. ILL. L. REV. 897, 904; Perry A. Zirkel, *Commentary, Section 504 and the ADA: The Top Ten Recent Concepts/Cases*, 147 EDUC. L. REP. 761, 764-65 (2000). Unlike the Rehabilitation Act, the ADA is not by its terms confined to public entities receiving federal funds. *R.B.*, 99 F. Supp. 2d at 419.

¹⁶¹ *Sellers*, 141 F.3d at 529 ("something more than a mere failure to provide the 'free appropriate education' required by [IDEA] must be shown"); *Butler*, 106 F. Supp. 2d at 420 (requiring more than mere violation of IDEA); *R.B.*, 99 F. Supp. 2d at 419 (stating more than incorrect evaluation or substantively faulty IEP needed to establish liability).

¹⁶² See *Smith v. Maine Sch. Admin. Dist. No. 6*, 2001 WL 68305, at *3 (D. Me. Jan. 29, 2001) (holding that neither Rehabilitation Act nor ADA permits claims against persons in their individual capacities).

Constitutionally based damage claims will lie against school districts and their officials under section 1983 for violations of the Equal Protection Clause or the Due Process Clause.¹⁶³ Intentional discrimination is required to establish an equal protection violation.¹⁶⁴ When the defendant is a school district, the violation must also be shown to reflect official policy or practice; districts are not liable on a respondeat superior theory but rather only for their own misconduct.¹⁶⁵ Unlike state defendants, school districts are generally not immune from damages liability for constitutional violations under section 1983.¹⁶⁶ Individual defendants can raise qualified immunity from damages liability and will be liable in damages only if they acted in disregard of clearly established rights.¹⁶⁷

¹⁶³ Section 1983 provides that one who, acting under color of state law, deprives another of federally protected constitutional or statutory rights "shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress." 42 U.S.C. § 1983 (1994). See *Sellers*, 141 F.3d at 530 (stating amended IDEA provides for § 1983 claims for constitutional violations); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987) (holding § 1983 action can be brought based on alleged violations of IDEA or Due Process and Equal Protection clauses); *Andrew S. v. Sch. Comm.*, 59 F. Supp. 2d 237, 246 (D. Mass. 1999) (noting remedy available for violation of children's Fourteenth Amendment rights).

¹⁶⁴ See, e.g., *Sellers*, 141 F.3d at 530 (citing *Washington v. Davis*, 426 U.S. 229 (1976), for proposition that equal protection claim must be supported by evidence of purposeful discrimination); *Smith v. Maine Sch. Admin. Dist.*, 2001 WL 68305, at *6 (noting plaintiff must show she is victim of intentional discrimination to make out violation of equal protection clause).

¹⁶⁵ *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978) (requiring existence of municipal policy or custom to show municipality took action causing injuries); see also *BD v. DeBuono*, 130 F. Supp. 2d 401, 430-31 (S.D.N.Y. 2000) (discussing ways of showing existence of policy for suits against local governing bodies); *Rabideau v. Beekmantown Cent. Sch. Dist.*, 89 F. Supp. 2d 263, 266-67 (N.D.N.Y. 2000) (discussing when individual official's act can rise to level of policy); *J.F. v. Sch. Dist.*, 2000 WL 361866, at *8-9 (E.D. Pa. Apr. 7, 2000) (treating school district as municipality for § 1983 purposes and discussing law regarding when single decisions represent municipal policy). See generally Daniel J. McDonald, *A Primer on 42 U.S.C. § 1983*, 12 UTAH B.J. 29 (1999) (concise overview of § 1983's coverage, including municipal liability and immunities).

¹⁶⁶ The Supreme Court has held that Congress did not abrogate the states' Eleventh Amendment immunity in enacting § 1983. *Quern v. Jordan*, 440 U.S. 332, 340-41 (1979). Eleventh Amendment immunity does not protect political subdivisions, as opposed to the state. *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977). See *infra* note 265 (discussing whether school district is arm of state); see also McDonald, *supra* note 165, at 30-31 (discussing municipal liability).

¹⁶⁷ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The test is one of objective legal reasonableness of the action, assessed in light of the legal rules that were then "clearly established." *Id.* The right must have been established in a more particularized sense, rather than in a general, abstract way. The precise action need not have been held unlawful, but the

In the years following the 1986 HCPA amendments to the IDEA, the lower courts also addressed claims for damages under section 1983 for alleged IDEA violations.¹⁶⁸ Circuits have split over whether, in enacting the HCPA, Congress intended to allow damage suits under section 1983 for an IDEA violation, as opposed to a violation of the Constitution or other federal statutes that specifically address disability rights.¹⁶⁹

A. THE CIRCUIT SPLIT

The post-HCPA cases have struggled with how to deal with damage claims asserted for IDEA violations. Three divergent approaches have emerged. The Fourth Circuit, recently joined by the Tenth Circuit, has foreclosed use of section 1983 to pursue IDEA violations, based in part on the consequences of adding a damages remedy to the IDEA's statutory scheme.¹⁷⁰ The Sixth and Eighth

unlawfulness must be apparent in light of pre-existing law. *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987); *see Saucier v. Katz*, No. 121 S. Ct. 2151, 2156-60 (2001) (reviewing and applying qualified immunity analysis to grant summary judgment). In the context of the IDEA, one court has suggested that "mere failure to provide an appropriate education is not enough to defeat a qualified immunity defense." *BD*, 130 F. Supp. 2d at 436 (internal citations omitted). The same district court, however, then held that while there might be no right to a particular therapy for autistic children, if the evidence showed that the school authorities had placed an "arbitrary limit" on services, that would be a policy in violation of the clearly established law requiring individualized planning for each child's specific needs. *Id.* *See also* *Goleta Union Elementary Sch. v. Ordway*, 166 F. Supp. 2d 1287, 1300-03 (C.D. Cal. 2001) (ruling that director of student services violated student's clearly established rights under IDEA when she agreed to transfer student to another junior high school within district based on parent's telephonic request; director would therefore face individual liability for damages in § 1983 action for IDEA violation).

¹⁶⁸ Most lawsuits raise more than just an IDEA claim, and some avoid making an IDEA-based claim entirely, perhaps in order to evade the exhaustion requirements or to obtain a more favorable limitations period. *See infra* notes 277-301 and accompanying text. Some seek declaratory and injunctive relief under § 1983 for IDEA violations but do not seek damages. This variety and proliferation of claims sometimes makes it more difficult to discern the reach of a court's opinion as it bears on the availability of damages for IDEA claims.

¹⁶⁹ Damage awards are usually available under § 1983, including both out-of-pocket loss and mental suffering. *See Carey v. Piphus*, 435 U.S. 247, 264 (1978) ("mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983"); *SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983* § 4.03, at 279-81 (3d ed. 1991) (discussing elements of damages under § 1983).

¹⁷⁰ *See Sellers v. Sch. Bd.*, 141 F.3d 524, 530 (4th Cir. 1998) (stating HCPA was not intended to allow parties to sidestep IDEA remedies by suing under § 1983); *see also Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1273 (10th Cir. 2000) (agreeing with Fourth Circuit after

Circuits have read the amended IDEA to permit section 1983 claims founded on violations of the IDEA, but have precluded damages recovery for such claims.¹⁷¹ The Third Circuit has ruled, along with district courts within the Second and Ninth Circuits and the District of Columbia, that damages may be sought in such an action.¹⁷² The remaining circuits have not spoken clearly on the issue.¹⁷³

discussing circuit split). District courts within the First Circuit had adopted this position as well. *Andrew S. v. Sch. Comm.*, 59 F. Supp. 2d 237, 244 (D. Mass. 1999) ("Garden variety statutory violations of the IDEA cannot form the basis for a section 1983 action"). In a recent decision, however, the First Circuit Court Appeals appears to accept the premise that a plaintiff can ground a § 1983 claim for damages on an IDEA violation. *Frazier v. Fairhaven Sch. Comm.*, 2002 WL 13887 at *2 (1st Cir. Jan. 9, 2002).

¹⁷¹ Compare *Digre v. Roseville Schs. Indep. Dist. No. 623*, 841 F.2d 245, 249 (8th Cir. 1988) (holding plaintiff entitled to bring § 1983 action based on alleged violations of IDEA), with *Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996) (finding plaintiffs cannot pursue claim for IDEA violations seeking general and punitive damages in § 1983 action). See also *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 387 (6th Cir. 1992) (holding that because § 1983 "merely secures the federally protected rights a plaintiff already holds" and does not expand them, general damages may not be recovered in suit for IDEA violations).

¹⁷² *W.B. v. Matula*, 67 F.3d 484, 493-94 (3d Cir. 1995); accord *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 252 (3d Cir. 1999). The Second Circuit upheld the right to sue under § 1983 for an IDEA violation in *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987), and courts within the Circuit have ruled that damage claims for IDEA violations will lie. *M.H. v. Bristol Bd. of Educ.*, 169 F. Supp. 2d 21, 28 (D. Conn. 2001); *Butler v. S. Glens Falls Cent. Sch. Dist.*, 106 F. Supp. 2d 414, 420 (N.D.N.Y. 2000); *R.B. v. Bd. of Educ.*, 99 F. Supp. 2d 411, 418 (S.D.N.Y. 2000); *Cappillino v. Hyde Park Cent. Sch. Dist.*, 40 F. Supp. 2d 513, 515-16 (S.D.N.Y. 1999).

A district court within the Ninth Circuit joined the Third Circuit in ruling that compensatory damages were available under the IDEA and thus certainly available in a § 1983 action predicated on an IDEA violation. *Emma C. v. Eastin*, 985 F. Supp. 940, 945 (N.D. Cal. 1997). Notably, *Emma C.* rejected a pre-*Smith* decision by the Ninth Circuit Court of Appeals, *Mountain View-Los Altos Union High Sch. Dist. v. B.H.*, 709 F.2d 28, 30 (9th Cir. 1983), which read the IDEA to bar compensatory damages. *Emma C.*, 985 F. Supp. at 945. However, the Ninth Circuit has recently cited *Mountain View* approvingly for the proposition that money damages are ordinarily unavailable under the IDEA. *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275 (9th Cir. 1999). Reviewing this precedent, another district court recently concluded that damages were available for IDEA violations under § 1983. *Goleta Union Elementary Sch.*, 166 F. Supp. 2d at 1296. Two district courts in the District of Columbia, also have upheld compensatory damage claims under § 1983 for IDEA violations. *Zearley v. Ackerman*, 116 F. Supp. 2d 109, 114 (D.D.C. 2000); *Walker v. District of Columbia*, 969 F. Supp. 794, 797 (D.D.C. 1997). Following up on its initial ruling that damages could be sought, the district court in *Walker* recently held that damages would be an "extraordinary remedy" available only in exceptional circumstances, such as where a defendant's conduct was "persistently egregious" and prevented the student from securing equitable relief, and where "normal remedies under the IDEA" would be inadequate to compensate for the harm suffered. *Walker v. District of Columbia*, 157 F. Supp. 2d 11, 30-31 (D.D.C. 2001).

¹⁷³ The First Circuit in *Frazier* applied the exhaustion requirement to a plaintiff's claim

The issue, which requires resolution of the interrelationship of the IDEA, the damages remedy, and section 1983, is one of congressional intent. Relevant to its resolution are the language, purposes, and history of the original IDEA and the HCPA amendments. Presumptions about the availability of legal remedies and rules of construction for federal spending statutes also bear consideration. The task of determining congressional intent has been hindered by the combination of less-than-clear statutory language, little direct legislative history, and battling canons of interpretation about the appropriate result when Congress does not speak clearly.

for damages brought under § 1983 and grounded on an IDEA violation. 2002 WL 13887 at *9. In the course of reaching that conclusion, that court appeared to endorse the viability of such a claim. *Id.* at *2.

The Fifth Circuit's decision in *Angela L. v. Pasadena Independent School District*, 918 F.2d 1188, 1193 n.3 (5th Cir. 1990), is sometimes cited as holding in favor of a § 1983 claim based on an IDEA violation. *See, e.g., Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1272 n.5 (10th Cir. 2000). However, *Angela L.* directly deals only with a claim for attorneys' fees made under the HCPA's amendments to the IDEA. *Angela L.*, 918 F.2d at 1195-96. In a footnote, the court in *Angela L.* correctly notes that the amendments rejected the conclusion in *Smith* that the IDEA was an "exclusive remedy" and says that therefore "parents may continue to allege violations of 42 U.S.C. § 1983 and section 504 of the Rehabilitation Act," statutes which "permit parents to obtain relief which otherwise is unavailable" from the IDEA. *Id.* at 1193 n.3. It is hard to read this unexceptional dicta as authorizing a § 1983 claim for damages for an IDEA violation. *See Andrew S.*, 59 F. Supp. 2d at 246 (characterizing *Angela L.* as lacking "extensive discussion of the relationship between the IDEA and [§] 1983"). Another Fifth Circuit decision, in a muddled opinion that does not directly address the issue, sustained an award of "nominal damages" for a school district's nonprejudicial failure to notify parents about the availability of an evaluation. *Salley v. St. Tammany Parish Sch. Bd.*, 57 F.3d 458, 466 (5th Cir. 1995). It then, however, upheld the district court's denial of attorneys' fees, finding that the parents were not prevailing parties. *Id.* at 468.

The Seventh Circuit held that the separate, early intervention sections of the IDEA could be enforced in a § 1983 class action seeking prospective injunctive relief against state officials, reasoning in part that the HCPA amendments made it "clear that Congress intended that a § 1983 remedy be available to the beneficiaries of the statute." *Marie O. v. Edgar*, 131 F.3d 610, 621 (7th Cir. 1997). The Circuit continues to hold, however, following its opinion in *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981), that damages are not "relief that is available under the IDEA." *Charlie F. v. Bd. of Educ.*, 98 F.3d 989, 991 (7th Cir. 1996) (internal quotations omitted). It has not thus far confronted a damage claim asserted under § 1983 for an IDEA violation. *But see Brett v. Goshen Cmty. Sch. Corp.*, 161 F. Supp. 2d 930, 939, 942-43 (N.D. Ind. 2001) (ruling preliminarily that plaintiff could sue and be awarded compensatory damages for IDEA violation under § 1983, but then finding no violation of plaintiff's right to free, appropriate public education).

The Eleventh Circuit, while invoking the exhaustion requirement for a plaintiff asserting claims for damages under § 1983 for violations of the IDEA, declined to reach the issue of the availability of compensatory damages under the IDEA and § 1983. *N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1378 (11th Cir. 1996). *See also Osborne & Russo, supra* note 115 (providing recent cataloguing of cases concerning IDEA-related damages).

B. THE LESS THAN "PLAIN MEANING" OF THE IDEA

The interpretation of any statute begins (and may end) with its text and structure.¹⁷⁴ Some commentators, pointing to the general and broad language in the IDEA authorizing courts to grant "appropriate relief," have suggested that, in particular cases, plaintiffs could be awarded retrospective damages.¹⁷⁵ However, most of the courts considering the issue refused to so construe the IDEA.¹⁷⁶ Whatever the arguable meaning of this statutory term in the IDEA, it has been construed fairly consistently by courts as precluding tort-like damages.¹⁷⁷ Congress has not revisited or clarified this language since 1975, despite several amendments and an extensive reauthorization process in 1997.¹⁷⁸ Thus, it is reasonable to conclude that Congress is aware of the judicial interpretations placed upon the IDEA's express remedial provisions¹⁷⁹ and has opted not to alter them as it has repeatedly done in reaction to judicial interpretations of other statutes.¹⁸⁰

¹⁷⁴ See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) ("We . . . begin (and find that we can end) our search for Congress's intent with the text and structure of [the statute]."); *Northwest Airlines v. Transp. Workers Union*, 451 U.S. 77, 91 (1981) ("In matters of statutory construction, it is appropriate to begin with the language of the statute itself.")

¹⁷⁵ Hyatt, *supra* note 115, at 734; Sheila K. Hyatt, *Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies*, 29 UCLA L. REV. 1, 44 (1981); Rothstein, *Commentary, supra* note 27, at 1255.

For renewed glosses on this language and its interpretation in light of the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), see *infra* notes 213-29 and accompanying text.

¹⁷⁶ See *supra* Part III.A (discussing judicial reluctance to recognize damage claims under IDEA).

¹⁷⁷ *Id.*

¹⁷⁸ Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (1986) (codified as amended in scattered sections of 20 U.S.C. § 1415 (Supp. V 1999)); Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, 100 Stat. 1145 (1986); Handicapped Programs Technical Amendments Act of 1988, Pub. L. No. 100-630, 102 Stat. 3289 (1988); Education of the Handicapped Act Amendment of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (1990); Pub. L. No. 102-119, 105 Stat. 587 (1991); Pub. L. No. 105-117, 111 Stat. 37 (1997).

¹⁷⁹ Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982) (inferring congressional ratification of lower court decisions from comprehensive revision of statutory scheme without amendment of that provision); but see *Alexander*, 532 U.S. at 292 (asserting that congressional inaction argument as general matter deserves little weight in discussing congressional intent).

¹⁸⁰ For example, Congress amended the IDEA to add attorneys' fees and to restore the availability of remedies under other statutory and constitutional claims via the HCPA

The next inquiry is whether the enactment of the HCPA amendments¹⁸¹ allows a section 1983 claim founded upon the IDEA. The Fourth Circuit's influential decision in *Sellers v. School Board of Manassas*¹⁸² analyzed the language of the amendment and concluded that it did not directly authorize a suit under section 1983 based upon an IDEA violation.¹⁸³ The *Sellers* court found telling that the statute contained no reference to section 1983 in its nonexclusivity language, interpreting the statute's explicit reference to preserving rights "under the Constitution" as permitting plaintiffs to seek a section 1983 remedy for constitutional, rather than IDEA, violations.¹⁸⁴ In the court's view, the statute's reference to "other" federal statutes "protecting the rights of children . . . with disabilities" did not logically include section 1983, which does not

amendments enacted after the Court's decision in *Smith v. Robinson*. Handicapped Children's Protection Act of 1986, §§ 2-3 (codified as amended in scattered sections of 20 U.S.C. § 1415). Congress then acted to expressly abrogate sovereign immunity after the Court's decision in *Dellmuth v. Muth*, 491 U.S. 223 (1989), which provided that the IDEA did not waive the state's Eleventh Amendment immunity from suit. Education of the Handicapped Act Amendments of 1990 § 103, Pub. L. 101-476 (codified as amended at 20 U.S.C. § 1403 (Supp. V 1999)); *Dellmuth*, 491 U.S. at 232. Congress amended the statute to directly authorize school districts to refer potential criminal matters to law enforcement personnel, after a Sixth Circuit decision found the IDEA to bar such referrals when they affected a child with disabilities. Individuals with Disabilities Education Act Amendments of 1997 § 615(K)(9) (codified at 20 U.S.C. § 1415(k)(9) (Supp. V 1999)); *Morgan v. Chris L.*, No. 94-6561, slip op. at 5 (6th Cir. Jan. 21, 1997).

Congress also has incorporated and codified judicial interpretations that it approves of when making subsequent amendments. See, e.g., 20 U.S.C. § 1415(k)(2) (Supp. V 1999) (incorporating limited exception to right to continued placement of child who poses threat to his or others' health and safety, judicially recognized in *Honig v. Doe*, 484 U.S. 305, 327 (1988)); *id.* § 1415(k)(4) (incorporating determination of relationship between misconduct and child's disability called for by court in *Doe v. Maher*, 793 F.2d 1470, 1484 (9th Cir. 1986), *aff'd sub nom. Honig v. Doe*, 484 U.S. 305 (1988)); *id.* § 1415(a)(10)(C) (incorporating, with limitations, right to tuition reimbursement recognized in *School Committee v. Department of Education*, 471 U.S. 359, 369 (1985)).

¹⁸¹ Handicapped Children's Protection Act of 1986, § 3 (codified as amended at 20 U.S.C. § 1415(l)).

Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of handicapped children and youth.

Id.

¹⁸² 141 F.3d 524 (4th Cir. 1998).

¹⁸³ *Sellers*, 141 F.3d at 530. The decision has been cited and followed by later courts reaching similar conclusions. E.g., *Padilla v. Sch. District No. 1*, 233 F.3d 1268, 1273-74 (10th Cir. 2000); *Andrew S. v. Sch. Comm.*, 59 F. Supp. 2d 237, 244 (D. Mass. 1999).

¹⁸⁴ *Sellers*, 141 F.3d at 530.

directly protect the rights of those with disabilities but rather is a vehicle for enforcing many kinds of federal constitutional and statutory rights, including disability rights created by statutes.¹⁸⁵

The *Sellers* court drew support for its interpretation from the differing standards of liability applicable to equal protection claims and IDEA claims. An equal protection violation requires both a showing of intentional conduct and a lack of a rational basis for a school board's decision.¹⁸⁶ By comparison, school boards would be subject to liability for statutory IDEA violations much more frequently.¹⁸⁷

In contrast, decisions that have upheld IDEA-based section 1983 claims have interpreted the statutory language to include section 1983 as among the potential statutory routes for enforcement of children's IDEA-based educational rights, subject to the exhaustion requirement.¹⁸⁸ These decisions adopt a reading of the statute's HCPA nonexclusivity language that is remedial and restorative of all potential alternative enforcement routes.¹⁸⁹ Certainly the language of the amendment is susceptible to such a reading on its face; although, as indicated above, that reading is not compelled.¹⁹⁰

¹⁸⁵ *Id.* (referencing 20 U.S.C. § 1415(l)).

¹⁸⁶ *Id.* at 530-31 (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)).

¹⁸⁷ *Id.* Another court's discussion of this point noted that the implication was strong that Congress meant to provide a remedy beyond that in the IDEA where misconduct was "constitutional in proportion," saying that "[g]iven the history of widespread, entrenched disregard for the rights of disabled children within public schools, it is not difficult to imagine lawsuits raising profound issues of equal protection." *Andrew S.*, 59 F. Supp. 2d at 244. On the other hand, it was less likely that Congress meant to mandate a § 1983 action every time a disagreement arose between parent and school district over an "educational placement, the number of classroom aides, or the credentials of a consultant," thereby turning every special education dispute into a civil rights action. *Id.*

¹⁸⁸ See, e.g., *Marie O. v. Edgar*, 131 F.3d 610, 621 (7th Cir. 1997) (arguing that Congress responded to *Smith* by enacting section that allows § 1983 claims under IDEA); *W.B. v. Matula*, 67 F.3d 484, 494 (3d Cir. 1995) (reasoning that HCPA "overruled" *Smith* and holding that Congress "explicitly approved" of § 1983 actions predicated on IDEA); *Digre v. Roseville Schs. Indep. Sch. Dist.* No. 623, 841 F.2d 245, 250 (8th Cir. 1988) (holding that amendment "supersedes the holding in *Smith* that a section 1983 action is not available to enforce the [IDEA's] substantive rights"); *Walker v. District of Columbia*, 969 F. Supp. 794, 797 (D.D.C. 1997) ("plain language of [HCPA] indicates that Congress intended to preserve all alternative civil rights remedies, including those available under Section 1983, to vindicate the rights created by the IDEA").

¹⁸⁹ See *supra* note 188 and accompanying text.

¹⁹⁰ "If Congress meant to overrule *Smith* on this significant point, it certainly chose an oblique and essentially implausible means of doing so." *Sellers*, 141 F.3d at 530.

A third approach sees the HCPA as authorizing suits under section 1983 to enforce the IDEA, but not thereby permitting recovery of damages in such an action.¹⁹¹ Recovery in such suits would be limited to declaratory, injunctive, and other equitable relief.¹⁹² Because the reach of the available section 1983 action is defined and confined by the IDEA's substantive scope, it merely "secures the federally protected rights a plaintiff already holds."¹⁹³ Having read the IDEA as failing to provide a right to damages, it follows under this approach that the invocation of a section 1983 action will not result in the creation of a right to either general or punitive damages.¹⁹⁴ Considering the IDEA's history, discussed below, this interpretation of the IDEA and the HCPA seems most consistent with Congress' intent in enacting the HCPA.

Where statutory language is not clear, indications of legislative intent can also be gathered from the context, purposes, and history of a statute.¹⁹⁵ The legislative history of the IDEA's first enactment suggests that Congress did not regard the statute as directly providing a vehicle for damage actions against school districts.¹⁹⁶

¹⁹¹ The Eighth and Sixth Circuits take this view. *Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996); *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 387 (6th Cir. 1992). The Second Circuit held following *Smith* that a § 1983 suit will lie to enforce the IDEA, but has not squarely decided that damages are available in such an action. *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987). Prior to the *Smith* decision, the Second Circuit had held that damages were available in a § 1983 action for procedural violations of the IDEA which had prevented the child from using and benefitting from the IDEA's administrative hearing process. *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141, 148 (2d Cir. 1983). The Seventh Circuit has reaffirmed the unavailability of damages under the IDEA, but has not determined whether they can be sought in a § 1983 action based upon a violation of IDEA. *Charlie F. v. Bd. of Educ.*, 98 F.3d 989, 991 (7th Cir. 1996); *but see Brett v. Goshen Cmty. Sch. Corp.*, 161 F. Supp. 2d 930, 940, 942-43 (N.D. Ind. 2001) (suggesting availability of damages under § 1983 for IDEA violation).

¹⁹² *Heidemann*, 84 F.3d at 1033; *Crocker*, 980 F.2d at 387.

¹⁹³ *Crocker*, 980 F.2d at 387.

¹⁹⁴ *Heidemann*, 84 F.3d at 1033; *Crocker*, 980 F.2d at 387. Under this approach, for example, a class-wide action challenging a school district or state policy could be filed under § 1983 seeking declaratory and injunctive relief.

¹⁹⁵ See *Smith v. Robinson*, 468 U.S. 992, 1012 (1984) (reviewing IDEA's structure, purposes and history and noting that "crucial consideration is what Congress intended"); see also Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 133-36 (2001) (stating that, where statute is unclear, court should look at "overall structure and purpose of the statute for guidance").

¹⁹⁶ *Anderson v. Thompson*, 658 F.2d 1205, 1210-13 (7th Cir. 1981); see also *Smith*, 468 U.S. at 1020 (noting absence of damages remedy in IDEA, lack of specific history, and explaining likely purposes of Congress).

Moreover, Congress in 1975 would not have contemplated an IDEA-based action brought pursuant to section 1983. Section 1983 had not yet been interpreted to provide a cause of action to enforce federal statutes generally.¹⁹⁷ Nor had the Supreme Court yet decided that local governments could be sued without concern for sovereign immunity.¹⁹⁸

TIMELINE IDEA AND SECTION 1983	
1971-72	<i>PARC AND Mills</i>
1973	SEC. 504, REHABILITATION ACT
1975	IDEA
1976	SECTION 1983 FEES
1978	SEC. 505, REHABILITATION ACT (attorneys' fees)
1979	<i>Thiboutot</i>
1980	NO IMMUNITY FOR LOCAL GOVERNMENTS (<i>Owen</i>)
1981	NO DAMAGES UNDER IDEA (<i>Anderson</i>)
1984	<i>Smith</i>
1985	EQUITABLE REIMBURSEMENT (<i>Burlington</i>)
1986	IDEA AMENDMENTS (HCPA)
1992	<i>Franklin</i>
1997	IDEA REAUTHORIZATION

¹⁹⁷ It was 1980 when the Court determined that § 1983 authorized suits to redress violations by state officials of rights created by federal statutes. *Maine v. Thiboutot*, 448 U.S. 1, 9 (1980).

¹⁹⁸ This did not occur until 1978 in *Monell v. Department of Social Services*, 436 U.S. 658, 663 (1978).

By the time of the HCPA amendments in 1986, jurisprudence under section 1983 was more fully developed. However, the only express mention of section 1983, in a House Report listing it among the claims Congress meant to preserve, calls it a "separate vehicle" from the IDEA.¹⁹⁹ The House Report clearly disagreed with the Court's holding in *Smith* barring the assertion of an equal protection claim and a claim based on the Vocational Rehabilitation Act.²⁰⁰ The report declaimed "since 1978, it had been Congress' intent to permit parents or guardians to pursue the rights of handicapped children through [IDEA], section 504 and section 1983."²⁰¹ The House Report asserted that congressional intent "was ignored" by the Supreme Court in its *Smith* decision.²⁰² The amendment was designed to "reaffirm, in light of this decision, the viability of section 504, 42 U.S.C. [§] 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children."²⁰³ This terminology can legitimately be read in the light of the express congressional intent to restore the situation that existed before the *Smith* decision, that is to allow the constitutional claims that *Smith* had held precluded.

Certainly there are some references in the legislative history to statements by proponents of the HCPA amendments, expressing their intent to provide broad protection for the educational rights of disabled children.²⁰⁴ And, unlike the Supreme Court, which was

¹⁹⁹ See H.R. REP. NO. 99-296, at 4, 6 (1985) (stating amendments reaffirm "the viability of Section 504 and other federal statutes such as 42 U.S.C. [§] 1983 as separate from but equally viable with [IDEA]"); see also *supra* note 156 and accompanying text.

²⁰⁰ *Smith*, 468 U.S. at 1009, 1021.

²⁰¹ H.R. REP. NO. 99-296, at 4 (1985).

²⁰² *Id.*

²⁰³ *Id.* The reference to separate statutes and other laws is repeated in the House Report's explanation of the provision. The provision was explained as "re-establish[ing] the relationship between [the IDEA] and other statutes redressing the rights of handicapped children that existed prior to the Supreme Court's decision in *Smith v. Robinson*, thereby reaffirming the viability of section 504 and other federal statutes such as 42 U.S.C. [§] 1983 as separate from but equally viable with [IDEA] as vehicles for securing the rights of handicapped children and youth." *Id.* at 6 (emphasis added). The language in the House bill did not mention the Constitution, and referred to Federal laws "redressing" rather than "protecting" children's rights, but it otherwise tracked the language in the Senate bill, which the Conference committee adopted. *Id.* at 2. See H. CONF. REP. NO. 99-687, reprinted in 1986 U.S.C. C.A.N. 1807, 1809 (1986) (noting House recedes on wording).

²⁰⁴ Often quoted is the language from the House Report stating that "since 1978, it has been Congress' intent to permit parents or guardians to pursue the rights of handicapped

troubled by the idea of damage claims under other federal statutes for rights that appeared to be primarily governed by the IDEA,²⁰⁵ Congress was apparently comfortable recognizing and restoring damage claims under the Constitution and the Rehabilitation Act. Therefore, one could argue that a general intent to permit damages actions is inherent in the nonexclusivity provision.²⁰⁶ But this only takes one so far. The Court in *Smith* commented that the issue of whether an IDEA violation could be grounds for a section 1983 claim was not before it in that case and was not a recognized cause of action up to that time.²⁰⁷ Indisputable in the HCPA was Congress's disagreement with *Smith* over the denial of attorneys' fees and its intent to return to the pre-*Smith* status quo.²⁰⁸ That status quo did not provide for section 1983 damage claims based solely on the IDEA.²⁰⁹

children through [IDEA], section 504, and section 1983. . . ." H.R. REP. NO. 99-296, at 4 (1985), quoted in *W.B. v. Matula*, 67 F.3d 484, 494 (3d Cir. 1995).

²⁰⁵ See *Smith*, 468 U.S. at 1020-21 (finding that IDEA remedies are exclusive in part because § 504 allowed recovery of damages).

²⁰⁶ This appears to have been the reasoning in a recent California district court decision. *Goleta Union Elementary Sch. Dist. v. Ordway*, 166 F. Supp. 2d 1287, 1295-96 (C.D. Cal. 2001). Interestingly, though, few of the courts or commentators arguing that there is authority for damage awards for IDEA violations have wholeheartedly endorsed a general right to compensatory or punitive damages for IDEA violations. The *Matula* court, for example, suggests that equitable reimbursement and compensatory services may well be preferable to money damages and more consistent with the IDEA's goal of providing appropriate educational services to the injured plaintiff. The Court's holding instead is framed as "refusing to preclude" such an award. *Matula*, 67 F.3d at 495. See also *Walker v. Dist. of Columbia*, 157 F. Supp. 2d 11, 30-31 (D.D.C. 2001) (reserving damages for exceptional circumstances only and creating four-part test for their recovery); *Cappillino v. Hyde Park Cent. Sch. Dist.*, 40 F. Supp. 2d 513, 515 (S.D.N.Y. 1999) (noting that rule of Circuits denying damages has much to commend it); Hyatt, *supra* note 115, at 734-35 (acknowledging "vagaries and uncertainties" of § 1983 as basis for damages relief and arguing that remedy should originate within IDEA and use *Burlington* approach of remedial justice to provide reimbursement, compensatory education, and in appropriate circumstances, damages); Shannon, *supra* note 115, at 883-86 (confining argument to relief for parental time spent on litigating children's rights).

²⁰⁷ *Smith*, 468 U.S. at 1008 n.11.

²⁰⁸ One court characterized the enactment of the HCPA as "overruling *Smith*." *Matula*, 67 F.3d at 494. On the issue of attorneys' fees in particular, one oft-quoted decision asserted, "Congress read the Supreme Court's decision in *Smith* and acted swiftly, decisively, and with uncharacteristic clarity to correct what it viewed as judicial misinterpretation of its intent." *Fontenot v. La. Bd. of Elementary and Secondary Educ.*, 805 F.2d 1222, 1223 (5th Cir. 1986).

²⁰⁹ While the intent of Congress to allow attorneys' fees after the HCPA is clear enough, one may question whether, on the issue of damage actions, Congress was not more typically opaque. At least one commentator termed the legislative history of the HCPA on this score

Even more persuasive is the total absence in the legislative history of any discussion of the implications of creating a damage claim for IDEA violations, particularly in light of the extended debate over the potential costs to school districts of paying attorneys' fees.²¹⁰ Had Congress meant to create a new and powerful damage remedy for IDEA claims, it should have engendered at least as much, if not considerably more debate, than the fee recovery provision.²¹¹ As one court noted, "none of the comments by various members of Congress suggests that every successful IDEA plaintiff would automatically have a claim under section 1983, including the right to compensatory and punitive damages and a jury trial."²¹² Thus, the legislative history's implications for the creation of an IDEA-based damage remedy are far less clear.

C. PRESUMPTIONS IN THE ABSENCE OF CLARITY

1. *No Right Without a Legal Remedy?* Although the language of the IDEA authorizing "appropriate relief" has not changed, the most recent arguments in favor of providing damage claims for IDEA violations have applied a presumption that damages are available to remedy a protected right absent a clear command by Congress, citing the Supreme Court's 1992 decision in *Franklin v. Gwinnett*

"murky." Hyatt, *supra* note 115, at 709 n.130. Once scholar, writing shortly after *Smith* and the enactment of the HCPA, predicted that, because the IDEA's rights were more extensive, § 1983 would have a more limited role, principally as an alternative means to remedy serious procedural violations or to assert the rights of persons not protected by the IDEA. Wegner, *supra* note 115, at 626, 633. Wegner read the HCPA's mandate that the IDEA not have the effect of limiting or restricting rights, procedures, or remedies under the Constitution and other federal statutes as confirming the prior judicial view that "section 1983 . . . did not afford a basis for . . . circumventing the IDEA's own more specific procedural and remedial measures." *Id.*

²¹⁰ See generally Schreck, *supra* note 147 (discussing debate over attorneys' fees); see also *supra* note 149 and accompanying text (discussing extensive nature of attorneys' fees debate).

²¹¹ See Hyatt, *supra* note 115, at 709 n.130 (noting that "[o]nly the political process explains why Congress would want to raise the potential for damage awards in this oblique manner," referring to availability of § 1983 action upon exhaustion of administrative remedies).

²¹² *Andrew S. v. Sch. Comm.*, 59 F. Supp. 2d 237, 245 (D. Mass. 1999). See also Sido & King, *supra* note 115, at 731 (arguing that lack of congressional history in support of damage remedy shows Congress' sensitivity to financial issues involved in providing free, appropriate public education to children with disabilities).

County Public Schools.²¹³ For several reasons, however, the application of such a presumption to the IDEA is unwarranted.

The Supreme Court in *Franklin* construed the implied right of action for violation of Title IX's anti-discrimination provisions to include a right to a damages remedy.²¹⁴ The *Franklin* Court characterized the question of what remedies are available under a statute that provides a private right of action as "analytically distinct" from the issue of whether the private right of action even exists.²¹⁵ The Court held that when Congress was silent on the question of remedies, courts should apply the general rule that "all appropriate relief" is available in an action to enforce a federal right.²¹⁶

The Court construed congressional silence in the face of prior precedent implying private rights of action with damage remedies as approval of this presumption,²¹⁷ as was the abrogation of the states' Eleventh Amendment immunity under Title IX.²¹⁸

²¹³ 503 U.S. 60 (1992). See *Matula*, 67 F.3d at 493 (applying presumption that absent clear direction from Congress, courts have power to fashion any appropriate relief); *Butler v. S. Glens Falls Cent. Sch. Dist.*, 106 F. Supp. 2d 414, 421 (N.D.N.Y. 2000) (refusing to bar claim as matter of law where Second Circuit had not decided precise issue and Congress had not precluded it); *R.B. v. Bd. of Educ.*, 99 F. Supp. 2d 411, 417-18 (S.D.N.Y. 2000) (finding no direction from Congress sufficient to rebut *Franklin* presumption); *Zearley v. Ackerman*, 116 F. Supp. 2d 109, 114 (D.D.C. 2000) (adopting *Franklin*); *Cappillino v. Hyde Park Cent. Sch. Dist.*, 40 F. Supp. 2d 513, 515 (S.D.N.Y. 1999) (concluding that nothing in IDEA precluded claim for § 1983 damages); *Emma C. v. Eastin*, 985 F. Supp. 940, 944-45 (N.D. Cal. 1997) (adopting *Franklin* rule); *Walker v. Dist. of Columbia*, 969 F. Supp. 794, 797 (D.D.C. 1997) (adopting *Franklin* rule). See also *Edmunds*, *supra* note 115 (examining traditional arguments in favor of and in opposition to imposing damages remedy under IDEA and arguing that *Franklin* presumption applies); *Shannon*, *supra* note 115 (arguing that "compensatory damages are both an appropriate and necessary remedy for protecting the rights of children with disabilities in a post-*Gwinnett* era.").

²¹⁴ *Franklin*, 503 U.S. at 72. The plaintiff in *Franklin* was a high school student who alleged that she had been continually sexually harassed and subjected to repeated "coercive intercourse" by a teacher, and that the school administration had known about the teacher's acts towards her and other students. The school district investigated, but took no action to halt his harassment. *Id.* at 63-64.

²¹⁵ *Id.* at 66 (quoting *Davis v. Passman*, 442 U.S. 228, 239 (1979)). The Court had earlier decided that Title IX's provisions could be enforced through an implied right of action. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979).

²¹⁶ *Franklin*, 503 U.S. at 65-66, 71.

²¹⁷ *Id.* at 71-72.

²¹⁸ Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1845 (codified as amended at 42 U.S.C. § 2000d-7 (1994 & Supp. V 1999)). The Court has noted that the same amendments "abrogated the States' Eleventh Amendment immunity" under Title IX,

Although the government had argued against the presumption of a monetary remedy because Title IX was enacted pursuant to Congress' spending power, the Court rejected the government's suggestion of a notice-based objection to liability, responding that the case before it involved only intentional violations, for which a notice-based objection to liability would not lie.²¹⁹ The Court also rejected the argument that the remedies under Title IX should be limited to those which were "equitable in nature," such as back pay and prospective relief.²²⁰ The majority's treatment of this argument was brief and sweeping. The ordinary convention would be for the court to determine the adequacy of a remedy at law before resorting to equitable relief.²²¹ Equitable relief would be appropriate only if monetary damages did not provide an adequate remedy.²²²

Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975. *Franklin*, 503 U.S. at 72. The abrogation language of 42 U.S.C. § 2000d-7 was enacted in response to the Court's decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), which held that Congress had not unmistakably expressed its intent to abrogate the states' Eleventh Amendment immunity under the Rehabilitation Act. *Id.* at 246-47; see *Lane v. Pena*, 518 U.S. 187, 197-200 (1994) (discussing legislative history of § 2000d-7).

The Supreme Court has since held that despite Congress' clear statement of its intentions, the Age Discrimination Act does not constitutionally subject states to suits for damages where the abrogation is founded upon § 5 of the Fourteenth Amendment. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82 (2000). See also *Bd. of Trs. v. Garrett*, 531 U.S. 356, 373-74 (2001) (finding invalid abrogation of immunity by Americans with Disabilities Act under § 5 of Fourteenth Amendment). Cases newly considering the validity of § 2000d-7's abrogation of immunity as a condition of funding pursuant to an exercise of Congress' spending power with respect to § 504, Title VI, and Title IX have been working their way through the lower courts. See *Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 820 (9th Cir. 2001) (finding no waiver of immunity under Rehabilitation Act); *Jim C. v. United States*, 235 F.3d 1079, 1080 (8th Cir. 2000) (upholding abrogation under § 504 based on Spending Clause in 6-4 en banc decision), *rev'g Bradley v. Ark. Dept. of Educ.*, 189 F.3d 745, 758 (8th Cir. 1999); *Robinson v. Kansas*, 117 F. Supp. 2d 1124, (D. Kan. 2000) (upholding Title VI abrogation). The relevance of this jurisprudence with respect to the IDEA is considered *infra* in notes 265-74 and accompanying text.

²¹⁹ *Franklin*, 503 U.S. at 74-75. For a discussion of the relevance to the IDEA of this interpretive approach, see *infra* notes 232-36 and accompanying text.

²²⁰ *Franklin*, 503 U.S. at 75.

²²¹ *Id.* at 75-76.

²²² *Id.* at 76. In the case, which involved a former student, back pay was clearly inadequate, and prospective relief would leave her without any remedy, regardless of its potentially beneficial effect on other similarly situated students in the school system. *Id.* at 63-64. The accused teacher was no longer teaching at the school and the student was no longer attending school in the district. *Id.* at 76.

Commentators²²³ and courts²²⁴ have pointed to the *Franklin* rationale as a basis for recognizing a damages remedy under the express remedial provisions of the IDEA—that is, for reading the court's statutory authority to award "appropriate" relief to include damage awards.²²⁵ Other courts invoked the *Franklin* rationale in conjunction with an examination of the 1986 HCPA amendments to reach the conclusion that, while damages may not be available directly under the IDEA, in light of the HCPA, they may be sought in a section 1983 action to enforce the IDEA.²²⁶ But even the endorsement of the court in *W.B. v. Matula*,²²⁷ the most often cited decision in support of a damages remedy for IDEA violations, was not unqualified. Indeed, it departed from the *Franklin* Court's characterization of legal relief as preferred and prerequisite to an award of equitable relief, instead noting that "a district court may wish to order educational services, such as compensatory education beyond a child's age of eligibility, or reimbursement for providing at private expense what should have been offered by the school, rather than compensatory damages for generalized pain and suffering."²²⁸ Thus, this court approached the efficacy of a damage award with reservations, recognizing that "remedial educational services may be more valuable than any pecuniary damages that could be awarded."²²⁹

There are several reasons not to apply *Franklin's* seemingly sweeping presumptions to every remedial inquiry under a federal

²²³ Edmunds, *supra* note 115, at 801-02; Shannon, *supra* note 115, at 871; Gildin, *supra* note 160, at 912. Professor Gildin also argues that the courts are erroneously borrowing immunity limitations on damages remedies from § 1983 jurisprudence to limit recoveries of damages in suits brought directly under § 504 of the Rehabilitation Act, the IDEA, and the Americans with Disabilities Act. *Id.* at 898-900.

²²⁴ *Emma C. v. Eastin*, 985 F. Supp. 940, 944-45 (N.D. Cal. 1997). *Emma C.* is of questionable precedent in the Ninth Circuit insofar as it holds that damages are authorized directly under the IDEA, as prior Ninth Circuit law, which had read the IDEA to bar compensatory damages, has continued to be approvingly cited by that Circuit. See *Witte v. Clark County School District*, 197 F.3d 1271, 1275 (9th Cir. 1999) (citing *Mountain View-Los Altos Union High Sch. Dist. v. Sharron B.H.*, 709 F.2d 28, 30 (9th Cir. 1983), approvingly for proposition that monetary damages are ordinarily not available under IDEA).

²²⁵ 20 U.S.C. § 1415(i) (Supp. V 1999).

²²⁶ See *supra* note 213 and accompanying text (discussing *Franklin* presumption).

²²⁷ *W.B. v. Matula*, 67 F.3d 484, 495 (3d Cir. 1995).

²²⁸ *Id.* at 495.

²²⁹ *Id.* (quoting *Jackson v. Franklin County Sch. Bd.*, 806 F.2d 623, 632 (5th Cir. 1986)).

statutory scheme—and, in particular, to the IDEA's amenability to a damages remedy. First, the availability of a private cause of action under Title IX was wholly implied by the Court.²³⁰ The IDEA, in contrast, explicitly provides for a fairly detailed and comprehensive method of privately enforcing its provisions.²³¹ Rather than leaving the court to infer congressional intent from silence regarding private enforcement mechanisms under the Act, the IDEA offers an express route, which the court must then interpret both as to the scope of the claims and the remedies contemplated. In this regard, as the lower courts and the Supreme Court have noted, the IDEA appears to focus primarily on the issuance of prospective and equitable relief to provide services to children with disabilities. "Appropriate" relief in this context would not seem to be accomplished by making monetary awards in preference to such orders, as the common-law preference for legal relief would dictate. At the very least, the IDEA should be interpreted as requiring that a child's needs and a school district's IDEA violations be addressed through orders for prospective and equitable relief as a first, not a last, resort.

Second, the general rule announced in *Franklin* itself has been narrowed by subsequent Supreme Court decisions confining the claims for damages awards against local school districts.²³² In reaching these narrowing interpretations, the Court counseled, statutory structure and purpose are "pertinent not only to the scope of the implied right of [action], but also to the scope of the available remedies."²³³ The presumption will yield "where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the

²³⁰ See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 65 (1992) (noting that "Title IX is enforceable through an implied right of action.").

²³¹ 20 U.S.C. § 1415 (1994 & Supp. V 1999).

²³² See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 632 (1999) (holding damages available in Title IX peer sexual harassment action against school board only on proof of deliberate indifference to known harassment so severe as to bar access to educational opportunity or benefit); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998) (holding no damages against school district without actual notice of teacher's sexual harassment). For a helpful discussion of the Title IX cases within a thoughtful overall critique of the Supreme Court's handling of rights and remedies, see Zeigler, *supra* note 195, at 99-103.

²³³ *Gebser*, 524 U.S. at 284.

statute involved.' ”²³⁴ The reasoning of the decisions finding that damage awards are inconsistent with the IDEA’s purposes continues to be powerful on this score, as even courts now believing themselves bound to allow damage claims for IDEA violations have noted.²³⁵

Third, the argument premised on Congress’s awareness of the presumption in favor of damages could as easily be reversed, to argue that Congress has presumably been aware, throughout its many amendments of the IDEA, of judicial decisions interpreting the IDEA as a statute primarily directed at granting equitable relief rather than monetary damages.²³⁶

²³⁴ *Id.* at 285 (quoting *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 595 (1983)). *Gebser* used these principles to limit damage awards against a school district for a teacher’s sexual harassment of a student to situations where an official with the authority to take corrective action had actual notice of the misconduct and was deliberately indifferent to it. *Id.* at 277, 290-91.

²³⁵ See *Cappillino v. Hyde Park Cent. Sch. Dist.*, 40 F. Supp. 2d 513, 515 (S.D.N.Y. 1999) (observing that rule denying damages has much to commend it).

The United States District Court for the District of Columbia, one of the first courts to specifically hold, in *Walker v. District of Columbia*, 969 F. Supp. 794, 797 (D.D.C. 1997) (*Walker I*), that § 1983 damages could be awarded for an IDEA violation, recently revisited the issue and attempted to outline the circumstances that would justify such an award in *Walker v. District of Columbia*, 157 F. Supp. 2d 11, 30 (D.D.C. 2001) (*Walker II*). The district court noted that compensatory damages were not available under the IDEA, so it presumably was not reading the IDEA’s “appropriate relief” language to authorize the damages award. *Id.* For the plaintiff seeking damages under § 1983, the district court noted that “no court has yet fully articulated what a plaintiff must prove to meet its burden,” but that the case law suggested compensatory damages were “an extraordinary remedy.” *Id.* The district court then outlined a four part test calling for a showing of (1) a violation of a specific provision of the IDEA; (2) exceptional circumstances such as a persistently egregious violation that prevented the plaintiff from securing IDEA-based equitable relief; (3) a custom or practice which would establish municipal liability; and (4) a showing why “normal remedies offered under the IDEA—specifically compensatory education—are inadequate to compensate” the student for the harm suffered. *Id.* at 30-31. The efforts by the *Walker II* court to confine damage awards for IDEA violations to a remedy of last resort resonate with the reading suggested above that “appropriate relief” is normally not damages. The difficulty with the *Walker II* court’s formulation is that it is not based upon the IDEA language but instead creates standards for damages recovery under § 1983 that are contrary to the presumption in favor of damages earlier relied upon by that court to justify upholding a potential damages claim. See *Walker I*, 969 F. Supp. at 797.

²³⁶ See *supra* notes 177-80 and accompanying text (discussing inferences drawn from congressional inaction).

The Supreme Court may soon revisit the implications of its decision in *Franklin*. The Court has granted *certiorari* to review a decision of the Eighth Circuit, which held that punitive damages were available in claims under the Rehabilitation Act and the Americans with Disabilities Act, reasoning that this conclusion was compelled by the methodology of

Finally, the Supreme Court's recent decisions that emphasize the importance of federalism concerns suggest the force of a countervailing presumption from congressional silence, arising from the Spending Clause roots of the IDEA. The next section applies the lens of federalism to the IDEA.

2. *The Counterweight of Federalism.* The most compelling argument against presuming a damages remedy from congressional silence stems from the fact that the IDEA sets conditions on a state's receipt of federal funds, conditions which should be clearly stated if the state is to be held to them. The Supreme Court has repeatedly invoked the need for clarity as central to the legitimacy of Congress' power to legislate under the spending power.²³⁷ Although the Court has interpreted the power under the Spending Clause as not limited by the direct grants of legislative power in the Constitution, it is subject to several general restrictions.²³⁸ First, the exercise of the power must be in pursuit of the general welfare, with substantial deference to the judgment of Congress in considering whether a particular expenditure serves general public purposes.²³⁹ Second, conditions on the state's receipt of funds must be

Franklin. Gorman v. Easley, 257 F.3d 738, 748 (8th Cir. 2001), cert. granted sub. nom Barnes v. Gorman, No. 01-682, 2002 WL 27842 (Jan. 11, 2002). The Eighth Circuit had reached a contrary conclusion to the Sixth Circuit's decision in *Moreno v. Consol. Rail Corp.*, 99 F.3d 782 (6th Cir. 1996), which had relied on Congress' awareness of judicial precedents ruling punitive damages unavailable to support its conclusion. *Moreno*, 99 F.3d at 789-91. The Eighth Circuit termed the *Franklin* presumption, and its use of a Congressional acquiescence argument:

a one-way ratchet: once a cause of action is discovered, it automatically entitles a plaintiff to all appropriate remedies; and that finding then extends those remedies to all other interrelated statutes. This now precludes consideration of what Congress intended through consideration of these earlier court decisions.

Gorman, 257 F.3d at 748. The *Gorman* court, like many of the courts which have approved a damages remedy under the IDEA, see *supra* note 235, was not without misgivings, and indeed invited the Supreme Court's review:

We therefore rule, albeit not with great satisfaction, that these sections permit an award of punitive damages. Perhaps our parting ways with our sister circuit will prompt the Supreme Court or Congress to inject additional clarity into this area.

Id. at 749.

²³⁷ *New York v. United States*, 505 U.S. 144, 172 (1992); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

²³⁸ *Dole*, 483 U.S. at 207.

²³⁹ *Id.*

unambiguous, so that states can “‘exercise their choice knowingly, cognizant of the consequences of their participation.’”²⁴⁰ Third, conditions cannot be unrelated to the federal interest in particular national programs.²⁴¹ Fourth, other constitutional provisions can provide an independent bar to the conditional grant of funds.²⁴² The Court has also suggested that in some circumstances the financial inducement offered by Congress might be “so coercive as to pass the point at which ‘pressure turns into compulsion.’”²⁴³

The requirement of clear conditions reflects the assumption of a voluntary and knowing choice in the state’s decision to accept the terms of the “contract.”²⁴⁴ In *Pennhurst State School v. Halderman*,²⁴⁵ the Court suggested that as a matter of statutory construction, in construing Spending Clause legislation, the requirement of clarity as to the states’ obligations should be applied against any presumption of unforeseen liabilities by the states.²⁴⁶ The Court resisted reading the “bill of rights” provision of the Developmentally Disabled Assistance and Bill of Rights Act as a mandate to provide “appropriate treatment” in the “least restrictive” setting.²⁴⁷ The Court viewed such a condition as a “massive obligation” for states to undertake, particularly in light of the “woefully inadequate” appropriation to the states under the acts.²⁴⁸ The Court noted that the canon of statutory construction requiring clear conditions applied with “greatest force” where the potential obligation under such a mandate was “largely indeterminate,” and instead read the act as encouraging, rather than mandating, the funding of better services.²⁴⁹

²⁴⁰ *Id.* (quoting *Pennhurst State Sch. v. Halderman*, 451 U.S. 1, 17 (1981)).

²⁴¹ For example, in *Dole*, the condition that states raise the drinking age to twenty-one was seen as directly related to safe interstate travel. *Id.* at 208.

²⁴² *Id.*

²⁴³ *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). In *Dole*, a state declining to adopt a minimum drinking age of twenty-one would lose only five percent of certain federal highway grant funds. *Id.*

²⁴⁴ *Pennhurst*, 451 U.S. at 17.

²⁴⁵ *Id.* at 1 (1981).

²⁴⁶ *Id.* at 24-25.

²⁴⁷ *Id.* at 25.

²⁴⁸ *Id.* at 24.

²⁴⁹ *Id.*

Although the issue in *Pennhurst* was whether a statutory right even existed, as opposed to the extent of a remedy for a clear right under the IDEA, the notion that in construing Spending Clause statutes, notice to states of the extent of their liability should be clear, has been invoked to narrow and define the extent of liability for damages under other Spending Clause statutes. The Court restricted liability for damages in two Title IX cases decided after the *Franklin* holding that a damage remedy was available.²⁵⁰ In these opinions, both written by Justice O'Connor, the Court invoked the Spending Clause conditions doctrine as a source of statutory construction:

Title IX's contractual nature has implications for our construction of the scope of available remedies. When Congress attaches conditions to the award of federal funds under its spending power, as it has in Title IX and Title VI, we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition. Our central concern in that regard is with ensuring that "the receiving entity of federal funds [has] notice that it will be liable for a monetary award."²⁵¹

²⁵⁰ See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 632-33 (1999) (permitting damages remedy when board of education was deliberately indifferent to known acts of harassment by student and when acts were so severe as to amount to bar of access to educational opportunity or benefit); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998) (requiring finding that district was deliberately indifferent after having received actual notice of sexual harassment by teacher).

²⁵¹ *Gebser*, 524 U.S. at 287 (citations omitted). See also *Davis*, 526 U.S. at 640 ("In interpreting language in spending legislation, we thus 'insist that Congress speak with a clear voice'" (quoting *Pennhurst*, 451 U.S. at 17)). Cf. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 596 (1983) (White, J.).

In *Guardians Ass'n*, Justice White suggested that "make whole" compensatory remedies "are not ordinarily appropriate in private actions seeking relief for violations of statutes passed by Congress pursuant to its 'power under the Spending Clause to place conditions on the grant of federal funds.'" *Id.* (quoting *Pennhurst*, 451 U.S. at 15). Only Justice Rehnquist joined in this portion of the opinion. *Guardians Ass'n*, 463 U.S. at 612 (Rehnquist, J., concurring). The dissenters criticized White's interpretation of *Pennhurst* as applicable to remedies, rather than rights. They accused him of improperly importing from a discussion about the Eleventh Amendment a general principle of statutory interpretation against compensatory relief. *Id.* at 637-38 (Stevens, J., dissenting).

The Supreme Court is still arguing about the nature of the holding in *Guardians Ass'n*,

The Court used this principle to determine that only certain conduct by the school district itself could be the basis for liability.²⁵²

Even this degree of liability in *Davis* went too far for the dissenters, represented by Justice Kennedy in an opinion joined by Chief Justice Rehnquist, Justice Scalia and Justice Thomas.²⁵³ The dissenters argued that:

the Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach.²⁵⁴

although its recent decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), finding no private right of action to enforce Title VI's disparate impact regulations, would foreclose *all* remedies, rather than just the damages relief Justice White found unauthorized. Compare *id.* at 299 (stating that *Guardians Ass'n* concluded that private individuals could seek declaratory and injunctive relief for violations of Title VI regulations) (Stevens, J., dissenting), with *id.* at 284 (indicating that *Guardians Ass'n* made clear that only intentional discrimination was forbidden by § 601 of Title VI).

²⁵² In *Gebser*, the court rejected a respondeat superior theory and developed a rule that required both awareness of a teacher's harassment and a deliberate indifference to it, analogizing to the markers for § 1983 municipal liability for inaction. 524 U.S. at 290-91. In *Davis*, the Court went even further, ruling that such harassment must be said to deprive the victim of access to school benefits or educational opportunities to justify damages liability. 526 U.S. at 649-50.

²⁵³ *Davis*, 526 U.S. at 655. These four justices represent the core of what has frequently become the majority, with the addition of the swing vote of Justice O'Connor, in several federalism decisions. See, e.g., *Bd. of Trs. v. Garrett*, 531 U.S. 356, 327 (2001) (holding ADA does not validly abrogate states' immunity and suits for money damages against states are barred); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (holding ADEA is not appropriate legislation enforcing Fourteenth Amendment and cannot be applied to states in damage suits); *Alden v. Maine*, 527 U.S. 706, 748-52 (1999) (holding Fair Labor Standards Act cannot be enforced against states in private suits for damages in federal or state court); *Coll. Sav. Bk. v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999) (holding state not subject to suit for unfair competition under Lanham Act where no voluntary waiver of immunity); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287-88 (1997) (holding functional equivalent of quiet title action was barred by Eleventh Amendment). *Gebser's* limitation of damages liability for teacher harassment was also a 5-4 decision. 524 U.S. at 276.

²⁵⁴ *Davis*, 526 U.S. at 654-55 (Kennedy, J., dissenting).

Justice Kennedy's opinion took specific aim at damages remedies in invoking a limited reading of conditions in Spending Clause legislation:

Without doubt, the scope of potential damages liability is one of the most significant factors a school would consider in deciding whether to receive federal funds. Accordingly, the Court must not imply a private cause of action for damages unless it can demonstrate that the congressional purpose to create the implied cause of action is so manifest that the State, when accepting federal funds, had clear notice of the terms and conditions of its monetary liability.²⁵⁵

While acknowledging that the implied cause of action at issue under Title IX by its nature implicated some discretion in the Court to shape a "sensible remedial scheme," the dissent argued that the Court had disregarded its obligation to exercise that discretion "with due regard for federalism and the unique role of the States in our system."²⁵⁶

Some of the courts ruling that a section 1983 damage claim cannot be based upon an IDEA violation have relied in part upon the *Pennhurst* interpretive requirement of clarity of conditions for statutes authorized by the Spending Clause.²⁵⁷ One recent district court decision noted the importance of notice concerning the liability attached to the acceptance of funds.²⁵⁸ That court predicted that construing the HCPA language to permit damage claims would magnify the potential liability of school boards. "Every administrative decision that might, at a later trial, be deemed inappropriate by a jury would expose a school committee to an award of damages for pain and suffering and possible punitive damages under section

²⁵⁵ *Id.* at 656 (Kennedy, J., dissenting).

²⁵⁶ *Id.* at 685 (Kennedy, J., dissenting).

²⁵⁷ See *Sellers v. Sch. Bd.*, 141 F.3d 524, 531-32 (4th Cir. 1998) (citing *Pennhurst State Sch. v. Halderman*, 451 U.S. 1, 17 (1981)); *Andrew S. v. Sch. Comm.*, 59 F. Supp. 2d 237, 245 (D. Mass. 1999) (stating broader interpretation of statute would violate *Pennhurst* mandate).

²⁵⁸ *Andrew S.*, 59 F. Supp. 2d at 245.

1983.”²⁵⁹ Moreover, a trial would not be necessary to work a significant change in the IDEA process. In order to avoid such exposure, school districts would feel pressured to concede claims and reach settlements regardless of their merits.²⁶⁰ These concerns are not trivial, as shown by the extent to which Congress debated them in the context of its adoption of the attorneys’ fee portion of the HCPA.²⁶¹ The court concluded that “without a much clearer mandate from Congress, no such profound alteration in the relationship between school officials and disabled students and their families can be inferred in a statute enacted pursuant to Congress’ spending power.”²⁶² Interestingly, none of the cases which have invoked the *Franklin* presumption in favor of the availability of damage remedies in IDEA suits have analyzed, or even mentioned, the countervailing federalism concerns arising from the interpretation of Spending Clause legislation.²⁶³

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*; see also *supra* note 149 (discussing debate over attorneys’ fees).

²⁶² *Andrew S.*, 59 F. Supp. 2d at 245.

²⁶³ See *W.B. v. Matula*, 67 F.3d 484, 494-95 (3d Cir. 1995) (containing no mention of Spending Clause); *Butler v. S. Glen Falls Cent. Sch. Dist.*, 106 F. Supp. 2d 414, 419-20 (N.D.N.Y. 2000) (holding compensatory and punitive damages unavailable under IDEA but invoking *Franklin* to find such damages “not precluded” under § 1983); *R.B. v. Bd. of Educ.*, 99 F. Supp. 2d 411, 417 (S.D.N.Y. 2000) (finding no “clear direction” from Congress to rebut *Franklin* presumption); *Emma C. v. Eastin*, 985 F. Supp. 940, 944-45 (N.D. Cal. 1997) (invoking *Franklin* in face of acknowledged “silence” in statute and legislative history on question of remedies).

One scholar has reasoned that so long as only intentional violations lead to damages liability, a notice-based objection to damages founded on Spending Clause concerns should meet the same fate under the IDEA as it did under Title IX in *Franklin*. See WEBER, *supra* note 115, at § 21.13(5) n.370 (arguing that damages should be available under IDEA for intentional conduct that violates statute). Two observations are pertinent at this point. First, the express remedial provisions in the IDEA do not, as outlined *supra* Parts III.A and IV.A, give clear notice to the receiving entity that “it will be liable for a monetary award.” See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (discussing contractual nature of Title IX). Second, every “intentional” violation of the complex statutory provisions and procedures of the IDEA is not necessarily a serious one—one that deprives a student of a free, appropriate public education. In the same sense that the Supreme Court limited Title IX liability in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 632 (1999), to acts that amounted to a bar of access to educational opportunity, setting a threshold for liability of “intentional violations” would still leave school districts and individuals open to damage claims in a myriad of situations well short of egregious violations. See, e.g., *Goleta Union Elementary Sch. Dist. v. Ordway*, 166 F. Supp. 2d 1287, 1303 (C.D. Cal. 2001) (denying immunity from § 1983 damages liability to school district official who transferred child who was not receiving any special educational services to another school within district at request

Yet another federalism doctrine, that of sovereign immunity, can come into play where damages are sought from the state or an "arm of the state."²⁶⁴ IDEA suits are generally brought against school districts, which are not typically considered arms of the state and thus not shielded by sovereign immunity;²⁶⁵ however, states do have significant responsibilities under the IDEA.²⁶⁶ In addition, in some circumstances, states directly provide special educational services and placements.²⁶⁷ Because section 1983 does not waive sovereign immunity,²⁶⁸ resolution of the specific issue of whether section 1983 damage suits are authorized for IDEA violations will not change the immunity of states from such suits, nor increase their vulnerability to damage claims. However, to the extent that some courts have read the IDEA itself as permitting damage claims, and such claims are asserted against states, the effectiveness of the IDEA's abrogation of sovereign immunity may be subject to attack on the same grounds that have carried the day with regard to the Americans with Disabilities Act and the Age Discrimination in Employment Act.²⁶⁹

of student's parent, but did so without completing IEP process).

²⁶⁴ See *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (holding state's immunity under Eleventh Amendment covers "arm of the state" but not municipal corporation or other political subdivision).

²⁶⁵ See *Mt. Healthy*, 429 U.S. at 280 (holding Ohio school board not able to assert sovereign immunity), but see *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 250 (9th Cir. 1992) (holding that school districts in California are arm of state). Factors relevant to determining whether a local school district is an arm of the state include how it is characterized under state law, the amount of state control exercised over the local school board, the degree of state funding, and the school district's ability to raise revenues on its own behalf. *Id.* See also *Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 994 (10th Cir. 1993) (finding Utah school districts not arms of state for purposes of immunity from § 1983 suits). The vulnerability of the state's treasury to a judgment is often seen as the most salient factor. See *Duke v. Grady Mun. Sch.*, 127 F.3d 972, 981-82 (10th Cir. 1997) (overruling prior decision and holding that New Mexico school districts were not arms of state; discussing both *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 430 (1997) (noting that potential legal liability for money judgment is of considerable importance), and *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994) (terming impetus for Eleventh Amendment "the prevention of federal-court judgments that must be paid out of a State's treasury.")).

²⁶⁶ See generally Thomas A. Mayes & Perry A. Zirkel, *State Educational Agencies and Special Education: Obligations and Liabilities*, 10 B.U. PUB. INT. L. J. 62 (2000) (discussing States' obligation under IDEA).

²⁶⁷ *Id.* at 66; see 20 U.S.C. § 1413(h)(1) (Supp. V 1999).

²⁶⁸ See *Quern v. Jordan*, 440 U.S. 332, 340-41 (1979).

²⁶⁹ See *infra* notes 270-72 and accompanying text.

Recent cases upholding states' sovereign immunity from damage suits under a variety of federal civil rights and other statutes thus also have implications for the availability of damages from state agencies for IDEA violations. In a series of recent cases, the Supreme Court has emphasized the constitutional status of states' sovereign immunity from suit.²⁷⁰ While Congress has the power to authorize suits against states by exercising its power to enforce the Fourteenth Amendment, the Court has recently set stiff and constricting conditions upon the validity of such an exercise. The Court struck down provisions of the Americans with Disabilities Act and the Age Discrimination in Employment Act that sought to abrogate states' immunity, ruling that the acts go beyond what is necessary to correct or prevent violations of the Fourteenth Amendment.²⁷¹ Insofar as the IDEA's abrogation of sovereign immunity would be justified as legislation enforcing the Fourteenth Amendment, it is subject to the same objections of lack of congruence and proportionality that, rightly or wrongly, proved fatal to the abrogation of immunity argument with regard to these statutes.²⁷²

Alternatively, a state may waive its sovereign immunity by consenting to suit. Waiver may be found in a state's acceptance of funds through its participation in a federal spending program where Congress has clearly expressed its intent to condition the receipt of

²⁷⁰ *Alden v. Maine*, 527 U.S. 706, 728 (1999); *College Sav. Bk. v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996).

²⁷¹ *Bd. of Trs. v. Garrett*, 531 U.S. 356, 373-74 (2001) (holding ADA does not validly abrogate states immunity and suits for money damages against states are barred); *Kimel v. Fla. Bd. of Regents* 62, 82-83 (2000), 528 U.S. (concluding ADEA is not appropriate legislation enforcing Fourteenth Amendment because it lacks "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" when judged by legislative record concerning age discrimination by state and local government); *see also City of Boerne v. Flores*, 521 U.S. 507, 523 (1997) (invalidating Religious Freedom Restoration Act of 1993 using congruence and proportionality test).

²⁷² The Eighth Circuit, which had originally upheld the abrogation of sovereign immunity by the IDEA under Congress' Fourteenth Amendment enforcement authority, revisited the issue after the decisions in *Kimel* and *College Savings Bank* and found that this constitutional basis would not sustain the abrogation. Compare *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 822-31 (8th Cir. 1999) (upholding IDEA abrogation based on Fourteenth Amendment authority), with *Bradley v. Ark. Dept. of Educ.*, 189 F.3d 745, 750-52 (8th Cir. 1999) (concluding IDEA goes beyond Congress' Fourteenth Amendment power), *vacated in part on other grounds sub nom. Jim C. v. United States*, 235 F.3d 1079, 1080 (8th Cir. 2000) (en banc).

funds upon such a waiver.²⁷³ Whether the abrogation is sustained as a condition under the Spending Clause depends upon its satisfaction of the requirements of *South Dakota v. Dole*, including the clarity of conditions provision.²⁷⁴

As this analysis shows, the IDEA and the HCPA amendments do not, by their text, structure, or legislative history, provide a clear statement of congressional intent to impose damage liability for IDEA violations, either directly or via an action brought under section 1983. The purposes and structure of the statute are largely inconsistent with the imposition of retrospective damage awards. The current judicial climate has been warm toward local control over traditionally local spheres of interest, such as education, as well as to claims of state sovereignty, but has been decidedly chilly toward federal legislation imposing obligations upon state and local government. In the absence of a clear congressional statement, the presumption against imposing damages liability, based in the Spending Clause roots of the IDEA, should outweigh traditional assumptions of the primacy and availability of monetary relief.

V. DAMAGE CLAIMS AND EXHAUSTION OF THE IDEA'S ADMINISTRATIVE REMEDIES

Damages remain potentially available in special education-related section 1983 actions for violations of the Constitution, and under the ADA and the Rehabilitation Act for violations of their anti-discrimination provisions.²⁷⁵ As discussed above, some jurisdictions also permit damage claims for violations of the IDEA through section 1983 actions.²⁷⁶ The application of the IDEA's requirement of exhaustion of administrative remedies as a prerequisite to suit has been tested when damage claims under these other statutes are made without prior resort to the IDEA process.²⁷⁷

²⁷³ *College Savings Bank*, 527 U.S. at 670, 686-87.

²⁷⁴ 483 U.S. 203 (1987). The Eighth Circuit has recently sustained the IDEA waiver of sovereign immunity as a valid condition under the Spending Clause. *Bradley*, 189 F.3d at 752-53; *Mauney*, 183 F.3d at 831-32.

²⁷⁵ See *supra* notes 157-67 and accompanying text (discussing available remedies).

²⁷⁶ See *supra* notes 170-73 and accompanying text (discussing circuit split).

²⁷⁷ 20 U.S.C. § 1415(l) (Supp. V 1999).

The IDEA's administrative process remains the primary vehicle for resolving disputes between a school district and parents concerning special educational services for a child with disabilities.²⁷⁸ Congress retained the primacy of this process when it incorporated an exhaustion of administrative remedies requirement into the HCPA amendments, while preserving the availability of other constitutional and statutory remedies.²⁷⁹

The benefits of requiring exhaustion of administrative remedies have long been recognized.²⁸⁰ Exhaustion "enables the agency to develop a factual record, to apply its expertise to the problem, to exercise its discretion, and to correct its own mistakes, and is credited with promoting accuracy, efficiency, agency autonomy and judicial economy."²⁸¹ In the context of issues relating to the educational needs of disabled children, these reasons have particular force. The preference is for parents and school districts to deal first on the local level, where a plan for the individual student's needs can be designed and implemented quickly.²⁸² By turning to the court only after administrative review, federal courts, "which are generalists with no expertise in the educational needs of

²⁷⁸ See *id.* § 1415 (outlining procedural safeguards); *supra* Part II.B (discussing IDEA dispute resolution).

²⁷⁹ 20 U.S.C. § 1415(l). The exhaustion language provides that before filing an action under the Constitution, the ADA, the Rehabilitation Act, or other statutes protecting the rights of children with disabilities that is "seeking relief that is also available under this part [the IDEA], the procedures under subsections (f) and (g) [the due process administrative hearing] shall be exhausted to the same extent as would be required had the action been brought under this part." *Id.*

²⁸⁰ See *McKart v. United States*, 395 U.S. 185, 193-95 (1969) (reasoning that agency development of factual background and exercise of expertise should proceed without interruption and that potential success of complainant in vindicating of rights through process and agency's opportunity to discover and correct its errors can promote judicial efficiency).

²⁸¹ *Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1094 (1st Cir. 1989).

²⁸² *Doe v. Alfred*, 906 F. Supp. 1092, 1100 (S.D. W. Va. 1995). The overall effectiveness of the IEP team process, the due process administrative hearing, and the judicial review process in promptly resolving disputes and in getting appropriate services to children when they can do the most good (*i.e.*, at the right time in the child's developmental life) is a matter beyond the scope of this Article. See Thomas Hehir & Sue Gamm, *Special Education: From Legalism to Collaboration*, in *LAW AND SCHOOL REFORM* 210 (Jay P. Heubert ed., 1999); see also *supra* note 67 (reviewing studies efficacy of IEP and due process scheme).

[children with disabilities],” obtain the benefits of expert fact finding by a state agency.²⁸³

The exhaustion requirement is not to be rigidly applied, however.²⁸⁴ Where an administrative remedy is futile or inadequate, the exhaustion requirement may be excused. Inadequacy can flow from a lack of power to grant effective relief on the issue, due to the nature of the issue (*e.g.*, a purely legal question as to the constitutionality of a statute or a claim going to the adequacy of the process itself), or to the lack of authority to grant the requested relief.²⁸⁵ These principles apply to the IDEA’s exhaustion requirements.²⁸⁶ In adopting the exhaustion requirement, Congress indicated that traditional exceptions to exhaustion should apply and specifically cited several situations in which it would be inappropriate to require exhaustion, including where adequate relief could not be obtained due to a lack of authority in the hearing officer to grant the relief sought.²⁸⁷

²⁸³ *Alfred*, 906 F. Supp. at 1100; *see also* *Zasslow v. Menlo Park City Sch. Dist.*, 2001 WL 1488617 at *7 (N.D. Cal. Nov. 19, 2001) (noting that case “sits in federal court where it must be addressed by an entity ill-equipped to pass judgment on educational policy and services” and applying exhaustion to certain issues).

²⁸⁴ *N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996).

²⁸⁵ *McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992).

²⁸⁶ *See* *Honig v. Doe*, 484 U.S. 305, 326-27 (1988) (explaining exigent circumstances can justify exercise of judicial power to exclude dangerous child from school before completion of due process procedures to change placement); *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 52 n.12 (1st Cir. 2000) (noting that futility excuses exhaustion under IDEA); *Timothy B. v. Neshaminy Sch. Dist.*, 153 F. Supp. 2d 621, 622-24 (E.D. Pa. 2001) (holding futility adequately alleged by district’s repeated failure to appear at scheduled hearings). The *Weber* decision noted that the legislative history of the IDEA had indicated “particular concern with futility.” *Weber*, 212 F.3d at 52 n.12. Senator Williams, principal author of the predecessor statute to the IDEA, has stated that exhaustion should not be required if it would be “futile either as a legal or practical matter.” *Id.* (quoting 121 CONG. REC. 37416 (1975)).

²⁸⁷ The House Report cited as situations where exhaustion would not apply: complaints that: (1) it would be futile to use the due process procedures (*e.g.*, an agency has failed to provide services specified in the child’s individualized educational program (IEP) or an agency has abridged a handicapped child’s procedural rights such as the failure to make a child’s records available); (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (*e.g.*, the hearing officer lacks the authority to grant the relief sought); and (4) an emergency situation exists (*e.g.*, the failure to take immediate action will adversely affect a child’s mental or physical health).

H.R. REP. NO. 99-296 at 7 (1985). *See* 131 CONG. REC. S10396 (daily ed. July 30, 1985)

Plaintiffs seeking damages have argued that the administrative process cannot provide "relief that is available under [IDEA]," making the exhaustion requirement futile.²⁸⁸ However, most of the courts to consider this argument have not accepted the mere assertion of a damage claim as a basis to dispense with administrative review under the IDEA.²⁸⁹ Instead, the courts have asked whether the claim is one for which effective relief might be given through the administrative process, even if that relief is not the

(statement of Sen. Simon) (adding to list of situations "failure to implement required procedures concerning least restrictive environment or convening of meetings," and further defining emergency situations to include "failure to provide services during the pendency of proceedings, or a complaint concerning summer school placement which would not likely be resolved in time for the student to take advantage of the program").

²⁸⁸ *E.g.*, *Frazier v. Fairhaven Sch. Comm.*, 2002 WL 13887 at *3 (1st Cir. Jan. 9, 2002); *Charlie F. v. Bd. of Educ.*, 98 F.3d 989, 991 (7th Cir. 1996); *N.B.*, 84 F.3d at 1379; *Marlana G. v. Unified Sch. Dist.* No. 497, 167 F. Supp. 2d 1303, 1307 (D. Kan. 2001) (applying exhaustion to damage claims where allegations of failure to develop and implement IEP were by their very nature directly addressable by the IDEA); *Porter v. Bd. of Trs.*, 123 F. Supp. 2d 1187, 1200 (C.D. Cal. 2000) (rejecting plaintiffs' argument that exhaustion is futile because administrative remedies cannot provide money damages).

²⁸⁹ *See, e.g.*, *Frazier*, 2002 WL 13887 at *9 (holding that plaintiffs who bring IDEA-based claim under § 1983, in which they seek only money damages, must exhaust IDEA administrative process); *Charlie F.*, 98 F.3d at 992 (holding "relief available" when IDEA process can address events plaintiff is complaining about); *Doe v. Alfred*, 906 F. Supp. 1092, 1098-99 (S.D. W. Va. 1995) (collecting cases for majority and minority approaches).

But see *W.B. v. Matula*, 67 F.3d 484, 496 (3d Cir. 1995) (holding that because damages are not available, § 1415(l) does not require exhaustion as relief sought is not available in administrative proceeding). *Matula* involved an unusual situation where the parties had settled their administrative dispute after findings by the hearing officer that the district had denied plaintiffs' "meritorious requests" and placed a burden upon her that was "unnecessary, unwarranted and largely the product of the district's unwillingness to recognize and appreciate [the child's] neurological impairments despite ample reliable evidence thereof." *Id.* at 490. As the court went on to note, the purposes of the exhaustion requirement with respect to the development of a factual record and the provision of other relief (via the settlement) had already been fulfilled. *Id.* at 496. The court reversed the lower court's summary judgment that the settlement agreement had waived plaintiff's damages claims. *Id.* at 498-99. Cases following *Matula* have apparently applied more generally the part of the opinion finding futility based upon confinement of the claim to one for damages. *See* *Ronald D. v. Titusville Area Sch. Dist.*, 159 F. Supp. 2d 857, 862 (W.D. Pa. 2001) (holding that where damages were sought based on claim of failure to identify child as having disability, administrative remedies need not be exhausted because child's final placement in regular education program was result of settlement with school district and "current educational situation" was not at issue); *J.F. v. Sch. Dist.*, No. Civ. A. 98-1793, 2000 WL 361866, at *7 (E.D. Pa. Apr. 7, 2000) (holding that hearing examiners do not have power to award damages, making plaintiff's pursuit of damages before examiner futile); *but see* *Falzett v. Pocono Mountain Sch. Dist.*, 150 F. Supp. 2d 699, 704-06 (M.D. Pa. 2001) (requiring exhaustion and distinguishing *Matula* both on grounds that administrative record there had already been created and because plaintiffs were seeking only damages).

specific relief that plaintiff has requested.²⁹⁰ These courts are concerned that the addition of a claim for damages not result in circumvention of the IDEA administrative scheme.²⁹¹ In a few cases, where the court believed that exhaustion could not result in any appropriate relief or where the claim was entirely retrospective in nature courts have excused exhaustion.²⁹²

In assessing whether the IDEA administrative process should be exhausted, the courts have emphasized that it is the nature of the claim that counts. According to the Seventh Circuit, "the theory behind the grievance may activate the IDEA's process, even if the

²⁹⁰ See *Frazier*, 2002 WL 13887 at *5 (identifying "special benefits" to exhaustion in IDEA context because educational professionals are at center of decisionmaking process and problems of educating children with special needs are complex and demand the best available expertise); *Charlie F.*, 98 F.3d at 992 (stating that need for educational services and assessment of educational consequences of alleged events should precede court review).

²⁹¹ See *Frazier*, 2002 WL 13887 at *7 (allowing bypass of administrative procedures by plaintiff's choice to structure complaint seeking relief education authorities are powerless to grant would subvert both exhaustion requirement and overall scheme Congress envisioned for dealing with education disabilities); *N.B.*, 84 F.3d at 1379 (noting that if plaintiff's argument were accepted, "future litigants could avoid the exhaustion requirement simply by asking for relief that administrative authorities could not grant," contrary to purpose of requirement to "prevent deliberate disregard and circumvention of agency procedures established by Congress") (citations omitted).

²⁹² See *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1271-74 (10th Cir. 2000) (holding no exhaustion required where damages sought under ADA to redress fractured skull and other physical injuries allegedly resulting from school district's placement of student in "a windowless closet, restrained in a stroller without supervision contrary to her IEP," where student was no longer enrolled in school district and was receiving appropriate educational services); *Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 918 (6th Cir. 2000) (entertaining claims of physical and verbal abuse of child through school's disciplinary practices presented after child had graduated and holding that exhaustion would be futile because only money damages are capable of redressing child's injuries); *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1276 (9th Cir. 1999) (considering allegations centering on physical abuse and injury and concluding IDEA remedies were not "well suited" to addressing past physical injuries adequately).

In these cases, the fact that the child was no longer involved with the school system or disputing the adequacy of the educational program helped convince the court that exhaustion would be futile, although courts have also held that such a conclusion should not be automatic merely because the child has moved to another school district or has graduated. See *Frazier*, 2002 WL 13887 at *7-8 (holding that exhaustion required where student had graduated and noting that different result could encourage parents to wait until after graduation to dispute adequacy of educational programs in hope of recovering money damages); *N.B.*, 84 F.3d at 1379 (refusing to allow parents to bypass exhaustion requirement by moving their child out of school district); *Torrie v. Cwayna*, 841 F. Supp. 1434, 1442 (W.D. Mich. 1994) (holding exhaustion still required where plaintiff no longer lived in district).

plaintiff wants a form of relief that the IDEA does not supply.”²⁹³ The Seventh Circuit elaborated on this approach by discussing a hypothetical in which a school failed to provide a reader for a blind pupil, who fell behind as a result.²⁹⁴ The IDEA process could provide relief through assignment of a reader for the future and provisions for special instruction until the student caught up.²⁹⁵ Requiring exhaustion here would allow educational professionals “to have at least the first crack at formulating a plan to overcome the consequences of educational shortfalls.”²⁹⁶ In addition, the hearing officer could evaluate the claim.²⁹⁷ If it turned out that the school district was not required to provide such services, the process would provide information relevant to the child’s claims under non-IDEA statutes as well as the IDEA claim itself.²⁹⁸ The court concluded, “[w]e read ‘relief available’ to mean relief for the events, condition, or consequences of which the person complains, not necessarily relief of the kind the person prefers.”²⁹⁹

The Supreme Court has recently interpreted a similar exhaustion requirement for prisoner lawsuits, holding that administrative remedies are “available” and exhaustion is therefore required where there is a prison administrative process that could provide some sort of relief on the complaint stated, but not necessarily the desired monetary relief.³⁰⁰ The Court’s focus on the availability of some redress for the wrong, rather than on the particular prayer for relief, suggests the wisdom of the majority view on the application of the IDEA’s exhaustion requirement to damage claims.³⁰¹ Such a measured approach to exhaustion appears appropriate to ensure

²⁹³ *Charlie F.*, 98 F.3d at 992.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Booth v. Churner*, 121 S. Ct. 1824-25 (2001). The *Booth* decision hews particularly to the language of the statute involved, the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (Supp. V 1999). There are obviously different considerations underlying the two statutes and their exhaustion requirements. *Booth* does credit the efficacy of administrative processes to take some action in response to a complaint, if not the remedial action demanded “to the exclusion of all other forms of redress.” *Booth*, 121 S. Ct. at 1823.

³⁰¹ *Id.*; see *Frazier* 2002 WL 13887 at *6-7 (finding *Booth* “instructive” and analogous in deciding to apply IDEA exhaustion requirements to plaintiffs raising damage claims).

that the IDEA process is not either short-circuited by a rush to court seeking damages, or ignored, with the potential consequence of more educational harm being done to the child until no remedy but damages remains.

VI. LOOKING AT SPECIAL EDUCATION DAMAGE CLAIMS—ILLUSTRATIVE CASES

Because the IDEA touches nearly every part of the education of a child with disabilities, a damage claim can be based on a wide variety of school actions. The "typical" IDEA case brought through the administrative process turns on the adequacy of an IEP for a child with acknowledged disabilities. The dispute may be with respect to the type and amount of services or over the placement of the child within the public school system or in a specialized private placement.³⁰² These are the cases which most courts have been reluctant to see framed as damage suits, as they resemble the sort of educational malpractice actions that tort law has generally refused to entertain as a matter of public policy.³⁰³ Special education disputes of this nature, perhaps even more than traditional educational malpractice claims, would necessarily draw courts into hindsight assessments of educational choices made by school districts and would require weighing expert views on the efficacy of approaches to the education of children with disabilities, approaches that are constantly evolving.

Other situations that can generate retrospective claims do not center as much on educational judgment calls. Plaintiffs have raised claims alleging physical abuse or verbal humiliation of a child with disabilities, which resonate with more traditional concepts of

³⁰² See James R. Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 6 EXCEP. CHILD. 469, 478 (1999) (identifying placement of child as primary issue in 63% of representative sample of almost half of all litigated cases between 1975 and 1995). Forty-one percent of students were in private schools or hospitals at the time the dispute arose, and in three out of four placement disputes, parents favored a more restrictive setting than that proposed by school district. *Id.* at 472-73, 478.

³⁰³ See Laura F. Rothstein, *Accountability for Professional Misconduct in Providing Education to Handicapped Children*, 14 J. L. & EDUC. 350-51 (1985) (reviewing types of misconduct and suggesting avenue in most cases should be common law tort action); Rothstein, *supra* note 27, at 1253 (updating 1985 article).

compensation through damage awards. Other claims have been based on a failure of the IDEA's procedures. These claims allege harm coming from a default of the school district in implementing an agreed-upon IEP, from its failure to evaluate a child, or from its failure to develop an IEP over a reasonable period of time. Looking at illustrative examples of these different categories of special education damage claims and how they have been treated by the courts can help assess the propriety of a damage remedy.

A. COMMON IDEA CLAIMS

In terms of reported case law, the most common IDEA claims involve disputes concerning the extent of services a child needs or the school placement of the child. One example of a case in which the plaintiff sought damages is *Andrew S. v. School Committee of Greenfield*.³⁰⁴ Andrew S. was diagnosed from birth with autism and began receiving special educational services at age three through the Greenfield, Massachusetts school district.³⁰⁵ Greenfield recommended placement in an integrated program, while his parents sought placement either in the nonintegrated program, where he had received services before turning three, or at an out-of-state private school.³⁰⁶ The state agency hearing officer made a preliminary finding that Andrew did not need an off-site program and ordered some improvements in Greenfield's program.³⁰⁷ His parents filed suit and asked for a temporary restraining order placing Andrew at another off-site school, but the order was not granted.³⁰⁸ The final decision by the hearing officer found Greenfield's plan adequate, but found its implementation hampered by inadequate staff training and insufficient home-school coordination.³⁰⁹ The decision directed Greenfield to arrange for

³⁰⁴ 59 F. Supp. 2d 237, 238 (D. Mass. 1999).

³⁰⁵ *Id.* at 239.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 239-40.

training comparable to that provided to teachers at the off-site schools.³¹⁰

The parents challenged the decision and also asserted a claim under section 1983 for compensatory and punitive damages and a jury trial.³¹¹ They sought damages for emotional distress for the alleged intentional denial of a free, appropriate public education to Andrew.³¹² Their sole grievance concerned the nature of the services offered—no broad due process or equal protection claim was made. There was no assertion of a widespread or longstanding practice, and there was no claim that the district had refused to recognize Andrew's disability, wrongly evaluated Andrew or denied him substantial services.³¹³ The district court ruled that no section 1983 claim could be sustained for claims such as this, in which the dispute "boiled down to the details" of how the child's needs were to be met, finding that the IDEA's provisions for equitable relief and attorneys' fees provided plaintiffs a complete remedy.³¹⁴

What the *Andrew S.* court referred to as "garden variety" statutory violations of the IDEA,³¹⁵ disputes over a particular placement, the amount or type of services, or about the personnel delivering the services, would seem to be the paradigm cases in which damages are inappropriately awarded.

B. PHYSICAL AND VERBAL ABUSE CLAIMS

Shawn Witte attended the Variety School, a public school in Clark County, Nevada that provided special education, from 1995 until January of 1998.³¹⁶ Shawn was diagnosed with Tourette's syndrome, asthma, attention deficit hyperactivity disorder, and emotional problems.³¹⁷ He was ten years old when suit was filed in

³¹⁰ *Id.*

³¹¹ *Id.* at 240.

³¹² *Id.* at 240-41.

³¹³ *Id.*

³¹⁴ *Id.* at 246. Alternatively, the court found that in the absence of evidence of custom and policy, the school committee, which was the only named defendant, could not be liable under § 1983. *Id.* at 246-47.

³¹⁵ *Id.* at 244.

³¹⁶ Witte v. Clark County. Sch. Dist., 197 F.3d 1271, 1272-73 (9th Cir. 1999).

³¹⁷ *Id.*

May of 1998.³¹⁸ According to his complaint, he was physically, psychologically, and verbally abused by Variety School personnel.³¹⁹ The incidents included force-feeding him oatmeal as a form of punishment (despite his known allergy to it), choking him to make him run faster (despite his inability to do so due to deformed feet and legs), using "take down" restraint as punishment for involuntary body movements and tics, forcing him to run on a treadmill with ankle weight, taking food away, and isolation outside for extended periods. He was also insulted, screamed at and made to write sentences such as "I will not tell my mom" or "I will not tic." When Shawn's mother challenged these practices within the school, the principal threatened to take her child away.³²⁰ Through the IEP process, Shawn was transferred to another school with both parties agreeing that the new school services and setting were appropriate for his needs.³²¹ His complaint sought compensatory and punitive monetary relief only, alleging violations of the Rehabilitation Act, the ADA, and state tort law.³²² The court permitted the case to proceed without exhaustion of IDEA administrative remedies.³²³

³¹⁸ *Id.* at 1272.

³¹⁹ *Id.* at 1273.

³²⁰ *Id.*

³²¹ *Id.* at 1273, 1275.

³²² *Id.* at 1272, 1274.

³²³ *Id.* at 1276. The Ninth Circuit held that, given Witte's use of the IEP process to address Shawn's future educational plans and the retrospective nature of his claim for physical injuries, he need not exhaust the formal administrative processes of the IDEA. *Id.*

See also *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1275 (10th Cir. 2000) (allowing claim for damages for skull fracture based on ADA to proceed without exhaustion); *Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 914 (6th Cir. 2000) (alleging abusive punishment). Shayne Padilla, a child with physical and developmental disabilities, attended school in Denver for five years, until her family moved to a new school district. *Padilla*, 233 F.3d at 1271. She claimed that, during those years, the school district had failed to provide her with the behavioral programming, augmentative communication, and tube feeding services identified in her IEP. *Id.* She also claimed that she had been repeatedly placed in a "windowless closet, restrained in a stroller without supervision," contrary to her IEP. *Id.* During one of those times, her stroller tipped over and she suffered a skull fracture which exacerbated her seizure disorder and kept her out of school. *Id.* She filed suit seeking only damages relief, asserting a § 1983 claim for IDEA violations and an ADA claim. *Id.* at 1270. The Tenth Circuit held that the IDEA did not provide a basis for a § 1983 claim, but that plaintiff could proceed with her ADA damage claim without requiring further exhaustion of administrative remedies in light of both the nature of the claim as one "solely to redress [her] fractured skull and other physical injuries," and the fact that the child was receiving appropriate educational services in her new school. *Id.* at 1273-74. Padilla had filed a request for an administrative hearing after moving to her new school district. *Id.* at 1271.

Cases raising claims of abuse are most appropriate for monetary relief and, if ultimately substantiated,³²⁴ would likely support recovery as "egregious" violations under the Rehabilitation Act or the ADA, and possibly under state tort law.³²⁵ If the alleged actions were shown to reflect official school policies, potential constitutional liability would also seem possible. They are also the most sympathetic cases for the argument that the IDEA should support an award of monetary relief if the alleged acts violated the children's IEPs and inappropriately caused them educational harm that could not be redressed prospectively through educational services and other compensatory relief. However, even these cases are not without harmful implications if they impose retrospective liability upon school districts for educational actions that could arguably have been, but were not, challenged and corrected through the IDEA process.³²⁶

The hearing officer had denied the request, ruling that he "lacked jurisdiction" because she did not live in the school district, and that he "lacked authority to grant the requested relief." *Id.* Given these administrative rulings, it is hard to quarrel with the court's rejection of the district's exhaustion objection.

Covington also concerned abusive punishment. 205 F.3d at 913-14. The complaint in *Covington* alleged that student Jason had been locked in a 4 x 6 "time-out" room at the Knoxville Adaptive Education Center that was "vault-like" and without furniture, heat or ventilation, forced to disrobe on one occasion and on another left for so long that he had to relieve himself and remain with his own excrement. *Id.* Jason's mother had filed for an administrative due process hearing in 1994. The hearing, however, was repeatedly delayed and rescheduled over a three year period for reasons the lower court had found attributable to *Covington*. *Id.* at 914. Jason graduated with a special education diploma in 1996. *Id.* at 913. In 1998, without ever having gone through the administrative hearing, *Covington* filed a § 1983 action alleging constitutional violations (but not IDEA claims) and also asserting state law claims of intentional infliction of emotional distress and false imprisonment. *Id.* at 914.

³²⁴ It must be remembered when reviewing these opinions that the facts alleged are generally taken as true for the purposes of the motion before the court, and are not the product of an evidentiary trial.

³²⁵ See Rothstein, *supra* note 303 (reviewing types of misconduct and suggesting avenue in most cases should be common law tort action); Rothstein, *supra* note 27 (updating 1985 article).

³²⁶ In all three of the cases cited, the court excused exhaustion of administrative remedies. In *Covington*, it did so after the plaintiff had delayed a hearing for over three years and waited until her son had graduated to pursue a damages action. 205 F.3d at 913-14. In *Witte*, there is no indication that an IDEA complaint was pursued during the two and one half years that Shawn attended the Variety School, although, from the facts alleged, the principal may be chargeable with intimidating the mother from doing so. 197 F.3d 1271, 1272-73 (9th Cir. 1999).

The nightmarish allegations in the *Witte* case suggest a school committed to the use

Less egregious conduct that allegedly caused emotional and psychological harm has also generated damage claims. The fourth grade teacher of Charlie F., a child with disabilities including attention deficit disorder and panic attacks, freely invited her students to vent openly their feelings on various topics, including their complaints about Charlie.³²⁷ The students obliged, "leading to humiliation, fistfights, mistrust, loss of confidence and self-esteem, and disruption of Charlie's educational process."³²⁸ Charlie moved to another school after his parents found out about these gripe sessions, which the teacher had instructed her pupils to keep a secret.³²⁹ He filed suit for damages against the teacher, principal, superintendent and school district under section 1983, the Rehabilitation Act, and the ADA.³³⁰ According to the Seventh Circuit, Charlie was first required to pursue his claims through the IDEA process, which arguably could supply compensatory services, but not damages.³³¹ As this kind of incident shows, insensitivity, even

of what are known as "aversives" to modify behavior. Such approaches have strong defenders, however, as officials in Massachusetts discovered when they tried to stop a school for children from making extensive use of aversive techniques. *Judge Rotenberg Educ. Ctr., Inc. v. Comm'r of Dep't of Mental Retardation*, 677 N.E.2d 127 (Mass. 1997). Dispensing with exhaustion means that the court, rather than the administrative agency, will be sorting out the competing views about such techniques, and about the details of the IEP under which the child was receiving services, including whether aversive techniques were identified in the IEP.

³²⁷ *Charlie F. v. Bd. of Educ.*, 98 F.3d 989, 990 (7th Cir. 1996).

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.* at 991.

³³¹ *Id.* at 993. See also *Smith v. Maine Sch. Admin. Dist. No. 6*, 2001 WL 68305, at *3, 8 (D. Me. 2001) (recounting ostracizing treatment of mentally retarded teenager). In that case, isolated incidents at a school dance and a chorus concert gave rise to damage claims under the Rehabilitation Act, the ADA, and the state human rights law by Lacey Smith, a seventh grader with mental retardation, attention deficit hyperactivity disorder and Cohen syndrome. *Id.* at *1-3. Lacey tried to attend a school dance for seventh graders but was sent home along with three other special education students by the assistant principal. *Id.* at *1-2. The assistant principal told them they did not belong there, allegedly asserting that Lacey was a sixth-grader and despite Lacey having received written permission from her teacher's aide to attend. *Id.* Toward the end of the year, during the seventh grade chorus concert, students initially refused to make room on the bleachers for Lacey and another special education student. *Id.* at *1-2. During the singing, allegedly at the direction of the choral director, another student tapped Lacey on the shoulder to tell her she was singing too loudly, and other students moved away from her. *Id.* The complaint alleged that these actions resulted in her ridicule by other students and in severe emotional distress. *Id.* The case came before the court on motions to dismiss by the individual defendants, which the court granted on the

cruelty, on the part of individual teachers and students still exists in our schools. But such isolated instances are less compelling as a basis to award damages against a school district, even assuming that such callousness violates the IDEA. Instead, invoking the prospective remedies of the IDEA to address the future actions of the teacher and to attempt to ameliorate any adverse effects upon the child would seem to be more in accord with the IDEA's purposes.

C. DENIAL OF ACCESS TO IDEA SERVICES

The school district in Bucks County prepared an IEP in the spring of 1996 for D.F., an autistic child, that called for placing him in a full-time autistic support program.³³² That summer, planning a move to Philadelphia, D.F.'s father called the Philadelphia school district and was assured that it could implement the IEP.³³³ However, when school began, the local elementary school refused to register D.F., demanding additional proof of residency that the high school and middle school had not asked for before enrolling his older sisters.³³⁴

The district failed to provide transportation for D.F. for several weeks and then sent a bus without the seat belts required in the IEP.³³⁵ The parents kept D.F. at home and arranged a meeting with the district.³³⁶ When they observed the autistic support class proposed by the district at another school and met with school personnel there, they found that it lacked many of the requirements in the IEP.³³⁷

The parents rejected the district's proposed placement, requested an expedited due process hearing, and received an order that the

Rehabilitation Act and ADA claims. *Id.* at *2, 3, 8. The court retained the school district as a defendant on the equal protection claim, which the court found to adequately allege intentional discrimination. *Id.* at *6.

³³² J.F. v. Sch. Dist., 2000 WL 361866, at *3 (E.D. Pa. 2000). The program included one-on-one instruction, an autistic support class, speech therapy, occupational therapy, physical therapy, adaptive physical education, and eligibility for extended school year programming. *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.* at *4.

district arrange for an appropriate out-of-district program.³³⁸ The district appealed to the state review board, which reversed the order for an out-of-district placement but ordered the district to implement the requirements of the original IEP.³³⁹ D.F. finally began school at a second elementary school in the district in March of 1997.³⁴⁰ Between September and March, he had regressed in his conduct, verbal skills, cognitive skills, sleep, social skills, and other life skills.³⁴¹ The parents sued for compensatory and punitive damages under section 1983, alleging violations of the IDEA and the Fourteenth Amendment, and also brought claims under the Rehabilitation Act, the IDEA directly, and Pennsylvania state law.³⁴² The district court dismissed the section 1983 claims against the school district for lack of a showing of custom or policy but refused to dismiss the damage claims against the district asserted directly under the Rehabilitation Act and the IDEA.³⁴³

The parents here confronted frustrating difficulties in obtaining implementation of agreed-upon services, even though they exercised their due process rights promptly and knowledgeably. The evidence of regression could justify additional remedial services, although it appears that, as of the time the suit was filed, the child was in an appropriate private placement at public expense.³⁴⁴ The district's refusal to enroll the child, its delay in scheduling a meeting, and the extent to which it failed to provide IEP-designated services could well warrant a finding of "gross misconduct" resulting in D.F.'s exclusion from an education by reason of his disability, sufficient to support damages under the Rehabilitation Act.³⁴⁵ On the other

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.* at *5.

³⁴¹ *Id.* After further disputes during planning for the summer and the 1997-98 school year, D.F.'s parents and the district agreed to his placement at a private school at the district's expense. *Id.*

³⁴² *Id.* at *2.

³⁴³ *Id.* at *17-18. The Third Circuit adheres to the view that damages are recoverable as relief in a § 1983 action to enforce the IDEA. *W.B. v. Matula*, 67 F.3d 484, 495 (3d Cir. 1995). It is unclear, however, how the *J.F.* court reasoned that the district could not be liable under § 1983 because of constraints on local governmental liability but could be liable in a direct IDEA statutory action. *J.F.*, 2000 WL 361866, at *12, 17-18.

³⁴⁴ *J.F.*, 2000 WL 361866, at *5.

³⁴⁵ See *supra* notes 160-62 and accompanying text.

hand, had the court required exhaustion, an order through the administrative process for compensatory services might have adequately addressed the six months of educational deprivation the child experienced.³⁴⁶

D. THE ROLE OF DAMAGES AS AN INCENTIVE OR DETERRENT TO EFFECTIVE DELIVERY OF SPECIAL EDUCATION

Despite the considerable jurisprudence on the *availability* of damages for violations of the IDEA, there are currently no reported cases granting an *award* of retrospective, tort-type damages.³⁴⁷ The lack of published decisions showing an award of damages does not mean, of course, that no IDEA-based damage awards have been made. Nor, in a system in which most cases never reach trial, does it mean that there have been no monetary settlements. Indeed, the principal practical significance of the legal rulings in some jurisdictions allowing the possibility of damage awards has probably been to increase the risk for school districts faced with such claims, generating more expensive settlements.³⁴⁸

³⁴⁶ The use of compensatory education and reimbursement remedies for substantial procedural violations is illustrated in *Amanda J. v. Clark County School District*, 267 F.3d 877, 881 (9th Cir. 2001). The school district in Nevada had failed to reveal evaluations that suggested Amanda was autistic, thus delaying her diagnosis and the development of appropriate interventions until she had transferred to a California school district and preschool where she was properly diagnosed. *Id.* at 883-86. The Ninth Circuit reinstated a hearing officer's decision (which had been reversed at the state review level) ordering reimbursement of the cost of Amanda's later evaluations, of an in-home program funded by her parents for several months, and for "inappropriate language services" rendered during her time in the district. *Id.* at 881. Use of such reimbursement remedies and the availability of compensatory education are logical remedies for such procedural violations, although, as the Ninth Circuit noted, "No one will ever know the extent to which this failure to act upon early detection of the possibility of autism has seriously impaired Amanda's ability to fully develop the skills to receive education and to fully participate as a member of the community." *Id.* at 893-94.

³⁴⁷ The decisions which consider the availability of damages typically do so in the context of a dispositive motion, such as a motion to dismiss or a motion for summary judgment, or they consider the issue in the course of considering an objection arising out of the failure of the plaintiff to exhaust IDEA remedies.

³⁴⁸ Cf. *Andrew S. v. Sch. Comm.*, 59 F. Supp. 2d 237, 245 (D. Mass. 1999) (forecasting that liability for damage claims would create pressure to concede marginal claims and "distort the administrative proceedings at [IDEA's] heart").

Proponents of damages remedies sometimes argue that the threat of damages is needed to compel recalcitrant school systems to protect and implement the educational rights of children with disabilities.³⁴⁹ However, the availability of damages for constitutional claims under section 1983 and for claims under the Rehabilitation Act and the ADA for bad faith or egregious special educational discrimination provides sufficient "clout" to encourage compliance by those school districts likely to respond to such incentives.³⁵⁰ Potential attorneys' fees claims up the ante facing a school district that disputes a special education claim.³⁵¹

In practice, the threat of a damage suit may indeed result in a school district acceding to parent demands for services. Where those services are needed, this will be a beneficial result. But where they are not, it will drive the cost of special education higher without accomplishing its purposes. It will thereby add another arrow to the quiver of those who seek to scale back, on the grounds of cost, the nation's commitment to serving children with disabilities.

VII. CONCLUSION

The potential availability of a claim under section 1983 for damages should not be permitted to convert the IDEA into an educational malpractice remedy, routinely invoked when a child is beyond the reach of the school system's help. Holding school

³⁴⁹ See, e.g., Gildin, *supra* note 160, at 898 (arguing damages remedy compensates victim for harm and deters government officials from engaging in proscribed conduct); Hyatt, *supra* note 115, at 727 (asserting that much of legal system rests on notion that conduct is deterred by liability); Rothstein, *supra* note 27, at 1262 (concluding that spectre of accountability is important incentive to assuring adequate training of school personnel and appropriate policies).

³⁵⁰ At least one study found that districts tried to settle disputes with parents in order to avoid the courts, saying "the threat of a hearing is an essential element in the relationship between districts and parents because it raises the stakes in disputes over placement." Hehir & Gamm, *supra* note 282, at 210.

³⁵¹ Schools face paying their own attorneys' fees in every case as well as the parents' fees. "In our experience, districts have at times agreed to parental demands . . . simply because its [sic] own costs in attorneys' fees to defend the cases would likely be greater than the costs of the requested changes." Kevin Lanigan et al., *Nasty, Brutish . . . and Often Not Very Short: The Attorney Perspective on Due Process*, in *RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY* 226 (Chester E. Finn et al. eds., 2001).

districts liable for damages for inadequate special educational services is a dangerous road, and not one consistent with Congress' original purpose of financially assisting the states to provide these services. Educational funds should be directed where they can do the job of educating, rather than diverted to retrospective tort-like recoveries.

The most that can be said about congressional intent regarding a damages remedy for IDEA violations is that Congress has not been clear. A damages remedy, as the Supreme Court's Spending Clause cases counsel, should not be presumed when interpreting a statute which otherwise imposes clear conditions under the Spending Clause. The statutory interpretation issue is one, of course, that Congress could settle simply by adopting clearer language. The political realities make it unlikely that Congress will do so.³⁵² While there may be some cases of constitutional violations warranting relief in the form of damages, or which meet the bad faith requirement set for recovery of damages under the Rehabilitation Act, a routine claim of an IDEA violation should not give rise to a section 1983 damage suit. Courts should also closely scrutinize special education damage claims and enforce the exhaustion requirement

³⁵² Proposed amendments to the IDEA typically draw considerable attention from groups representing advocates for the disabled and from public school teachers and administrators, who would presumably have strongly opposing views on the issue of damages. A divided Congress also affects Congress' ability to resolve the question. Senator Jeffords, whose recent change of party shifted control of the Senate away from the Republican party, has been a leading advocate and proponent of the IDEA for years, and cited the Bush administration's cutting of funds for special education as one reason for his decision to leave the Republican party. Jon Frandsen, *GNS Special Report*, GANNETT NEWS SERVICE, June 8, 2001, available at 2001 WL 5110191; Susan Milligan, *Jefford's Special-Ed Plan Revived as Power Shifts, Democrats Press for Full Funding*, BOSTON GLOBE, June 4, 2001, at A1. The administration successfully resisted the Senate's attempted inclusion of increased funding for special education into its educational reform legislation and intends to seek other reforms in the IDEA when it is up for reauthorization in 2002. Juliet Eilperin, *House Passes Education Reform Bill; Bipartisanship Hailed*, WASH. POST, Dec. 14, 2001, available at 2001 WL 31542498 (reporting House Passage); April Fulton, *Conference Passes Education Bill for Bush to Sign this Week*, CONG. DAILY/A.M., Dec. 12, 2001, available at 2001 WL 27552965 (summarizing struggle over special education funding in bill); Bart Jansen, *Congressional conferees reject special ed funds; A proposal that might have meant \$70 million for Maine is defeated*, PORTLAND PRESS HERALD, Dec. 12, 2001, available at 2001 WL 27640707 (citing opposition to increased funding before changes in special education program are debated in 2002); Lynn Olson & Erik W. Robelen, *ESEA Passage Unlikely Before Fall*, EDUC. WK. (Wh.), July 11, 2001, at 1, 39.

to prevent an end-run around the IDEA and its processes. To be consistent with the IDEA's purposes, the law should encourage school districts and parents to focus not on litigation, but on education.

