The Result of Fitzgerald v. Barnstable School Committee on Special Education Law

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The Individuals with Disabilities Educational Act (IDEA) requires that states receiving federal funds provide a Free and Appropriate Education (FAPE) to students with disabilities. Failing to provide a FAPE is discriminatory under the Equal Protection Clause of the Fourteenth Amendment, the Rehabilitations Act (RA), and the Americans with Disabilities Act (ADA). The IDEA provides remedies to correct inadequacies with compensatory but does not provide compensatory damages. Parents dissatisfied with the adequacy of the education of a child with special needs have tried to bypass this, using §1983 to seek damages for an inadequate education under the IDEA and under the discrimination statutes. The circuits are in agreement that the detailed remedial scheme that Congress provided in the IDEA precludes §1983 damages for inadequate education under the IDEA. Some circuits also disallow §1983 damages for inadequate education in violation of the equal protection clause and the RA, but some of these have allowed damages directly under remedial provisions of the RA. This can no longer stand after *Fitzgerald v. Barnstable School Committee*, 129 S. Ct. 788 (2009). Any remedies implied under Title IX, and by implication, all other discrimination statutes such as the RA, do not preclude damages under §1983. If a plaintiff can seek damages under the RA, then he or she can seek damages under §1983 for a violation of the RA. Either the remedial scheme of the IDEA is broad enough to preclude suits for compensatory damages directly under the RA as well as those brought under §1983, or it precludes nothing at all; for what difference does it make to a plaintiff if his or her action seeking
damages for inadequate education brought under § 1983 is for a violation of the IDEA, which is definitely precluded, or for a violation of the RA, which is not precluded? The result is the same. There would be no preclusion of § 1983.

**Fitzgerald v. Barnstable School Committee**

The *Fitzgerald* Court unanimously decided that the implied remedies under Title IX for gender discrimination in an educational institution receiving federal funds do not preclude a plaintiff from bringing “a suit for parallel and concurrent §1983 claims.” *Fitzgerald*, 29 S. Ct. at 796. In *Fitzgerald*, a kindergarten girl was allegedly bullied by an older boy into pulling up her skirt and pulling down her under garment. Her parents claimed that school officials did not adequately address the harassment and brought suit under §1983 for violations of Title IX gender discrimination and the equal protection clause. The Court allowed the suit to proceed, in part, ruling that the remedies implied in Title IX do not preclude suits under §1983 for violations of Title IX. The immediate consequence of the ruling is that a student may bring a suit against school officials for student on student conduct. A less well-known consequence will be that circuits that denied §1983 suits for compensatory damages against schools and officials for not providing adequate special education services in violation of §504 of the Rehabilitation Act, a statute was modeled after Title IX, are effectively overruled.

Most circuits have been using Title IX and §504 of the RA to respectively preclude §1983 discrimination suits for sexual harassment and for denial of adequate education for learning disabled students. *Fitzgerald* means that plaintiffs will no longer be precluded by the argument that the civil rights statutes such as Title IX for gender
discrimination and §504 for discrimination against the handicapped were intended to be the sole remedy for discrimination by educational institutions. Plaintiffs will be able to directly seek damages for violations of those statutes and for violations of the equal protection clause under §1983, the very law primarily intended to protect against state discrimination.

Congress passed 42 U.S.C. §1983 as part of the Civil Rights Act of 1871. Commonly known as the Ku Klux Klan Act, the statute provided a private right of action against those who acted under the color of law to violate the recently ratified Fourteenth Amendment. The law provides for liability against any “deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” Given its historic purpose, it would be rather anomalous if it the Court did not allow §1983 suits for violations of Equal Protection by those acting in the name of the state. That would have been the result for public school students if Fitzgerald came out differently.

Implied Right of Action under Federal Statutes

A person can sue under §1983 for a violation of a right in the constitution or a federal statute. Sometimes the §1983 action is a supplement to an expressed or implicit right of action provided by a federal statute, while other times, the remedy provided in the statue is so detailed that Congress “precluded” any other right of action, particularly those under § 1983. If the statute does not provide its own right of action at all, a plaintiff is not precluded from bringing suit under §1983.

The Education Amendments of 1972, or Title IX, protects against gender discrimination in schools. "No person in the United States shall, on the basis of sex, be
excluded from participation in, be denied the benefits of, or be subjected to
discrimination under any education program or activity receiving Federal financial
assistance.” 20 U.S.C. §1681. This act expressly provides termination of federal funding
for its violations, but does not include an express private right of action. In Cannon v.
University of Chicago, 441 U.S. 677 (1979), the Supreme Court determined that
Congress, nonetheless, implied a right of action, consistent with the doctrine that a
private remedy can be implicit in a statute even when the statute has not expressed a
right of action.

Implied rights of action date back to the Federal Safety Appliance Act of 1893
that required railroads to install grip irons or handholds in trains. “A disregard of the
command of the statute is a wrongful act, and where it results in damage to one of the
class for whose especial benefit the statute was enacted, the right to recover the
damages from the party in default is implied. . . .” Texas & Pacific R. Co. v. Rigsby, 241
U.S. 33, 40 (1916). In Cort v. Ash, 422 U.S. 66, 95 (1975) the Court set up a four part
test to determine when a plaintiff has a private right of action under a federal statute. 1) Is the plaintiff in a class for whose benefit the law was enacted? 2) Did Congress
explicitly or implicitly create a remedy or deny one? 3) Is a private right of action
consistent with the purposes of the any remedial scheme set up by the law? 4) Is this
type of private action one which is historically reserved to and the concern of state law?
The Cannon Court applied the Cort test and found that the gender discrimination law,
Title IX, implied a private right of action. The Fitzgerald Court determined that this
implied right does not preclude suit under §1983.

Statutory preclusion of §1983 actions to enforce rights
Fitzgerald relied on three previous cases in which the Court ruled that Congress precluded §1983 action in order to determine whether Title IX precluded §1983. In Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1 (1981), the Court held that §1983 actions under the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq. and the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1401 et seq., were precluded because those statutes contained citizen suit provisions. In Smith v. Robinson, 468 U. S. 992 (1984), the Court held that §1983 actions for violations of the Education of the Handicapped Act (EHA), 20 U.S.C. § 1400 et seq., and for violation of the equal protection clause, were precluded because the EHA addressed them with a detailed remedial scheme. In Rancho Palos Verdes v. Abrams, 544 U. S. 113 (2005), the Court held that §1983 actions under the Telecommunications Act of 1996 were precluded because Congress intended to limit remedies under that statute.

The Fitzgerald court determined that the implied remedies of Title IX “stand in stark contrast to the ‘unusually elaborate,’ ‘carefully tailored,’ and ‘restrictive’ enforcement schemes of the statutes at issue in Sea Clammers, Smith, and Rancho Palos Verdes.” 129 S. Ct. at 795. Title IX does not have the administrative remedies of the EHA in Smith. Violations of Title IX can be brought under both Title IX and § 1983 since “parallel and concurrent §1983 claims will neither circumvent required procedures, nor allow access to new remedies.” Id. at 796. The Court noted that “Title IX reaches institutions and programs that receive federal funds, which may include nonpublic institutions, but it has consistently been interpreted as not authorizing suit against
school officials, teachers, and other individuals.” Id. Now, as a result of Fitzgerald, “§1983 equal protection claims may be brought against individuals as well as municipalities and certain other state entities.” Id.

The Court ruled that Title IX does not preclude §1983 action for discrimination under either Title IX or the equal protection clause. A contrary ruling, that § 1983 actions for violations of the equal protection clause are precluded by Title IX, would have lead to a counterintuitive result. Title IX was passed pursuant to the power of Congress under the spending clause. It applies to an “education program or activity receiving federal financial assistance.” see Gebster v. Lago Vista Independent School District, 524 U.S. 274 (1998). The assumption is that in enacting Title IX and other general welfare statutes, Congress uses only its spending power and does not use its §5 power of the Fourteenth Amendment. “Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment.” Pennhurst State School and Hospital v. Halderman, 451 U.S. 1,15 (1981). Several contradictions of reason would result if Fitzgerald had come out differently and §1983 would have been precluded. By exercising its spending power and setting up a complete remedial scheme, Congress precludes §1983 actions, including otherwise valid equal protection claims. A plaintiff who is excluded from the comprehensive remedial scheme, rather than being disadvantaged, is allowed to proceed with a §1983 claim for violation of the constitutional right of equal protection, while those for whom Congress expressly protected in the statute are precluded from the “more expansive” §1983 remedy. In a
state that chooses not to accept funding, a plaintiff can go forward with the §1983 claim since the precluding statute does not apply to that state. Thus, an entity would be protected from suit under §1983 because it accepts federal money. Fitzgerald corrects this counterintuitive result. On the other hand, preclusion created by the remedial scheme in the IDEA leads to the same contradiction.

The constitutional and statutory rights for a FAPE

While §1983 historically was used against the individual for invidious discrimination, the clear consequence of Fitzgerald is civil rights liability against schools and supervisors of children for student-on-student conduct. The more important consequence of Fitzgerald is potential §1983 liability of schools and supervisors for educational inadequate liability under the Rehabilitation Act of 1972.

Two important district court decisions, Pennsylvania Assn. for Retarded Children v. Commonwealth, 334 F.Supp. 1257 (Ed Pa. 1971) and Mills v Board of Education of District of Columbia, 348 F.Supp. 866 (D.C. 1972), held that learning disabled students have a constitutional right for an adequate education under the equal protection clause. These cases were decided before passage of the EHA or the Individuals with Disabilities Educational Act (IDEA), which requires the Individual Educational Plan (IEP) and a detailed process of administrative and judicial review for the purpose of ensuring adequate special educational services. The Supreme Court adopted the rulings of PARC and Mills in Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley 458 U.S. 176. (1982). The standard of adequacy adopted by Congress in the IDEA was determined to be the same standard as that
adopted under the equal protection clause by the lower courts in *PARC* and *Mills* before the IDEA and EHA. The “substantive standard which can be implied from these cases comports with the standard implicit in the Act. . . . [E]ach child must receive ‘access to a free public program of education and training appropriate to his learning capacities,’ and that further state action is required when it appears that ‘the needs of the mentally retarded child are not being adequately served.’” *Id.* at 193, ft.15. The IDEA, therefore, is what Justice Frankfurter might have called “legislation expressing Congressional policy in the enforcement of the Constitution.” *Wolf v Colorado*, 338 U.S. 25, 28 (1949).

Denial of IDEA rights is denial of constitutional right. It is also discrimination against the disabled under §504 of the RA. "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a)(2002). Federal regulations for enforcing the RA adopt the requirements of the IDEA. “Public schools receiving federal funds are required to locate and notify all eligible students in their district,” 34 C.F.R. 104.32 and “to provide a free appropriate public education” *Id.* at 104.33. The implementation of regulations can be viewed as the terms of a contract in consideration for the acceptance of federal funds since “legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.” *Pennhurst*, 451 U.S. at 17 (citations omitted).

Special education students also have a statutory right under the power of Congress to enforce equal protection in Title II of the Americans with Disabilities Act of
1990, which echoes the language of §504 of the RA.\(^1\) In *Tennessee v. Lane*, 541 U.S. 509 (2004), the Court held that Congress exercised its §5 of the Fourteenth Amendment power in the ADA when suit was brought against the state to enforce access to county courthouses for the disabled. Section 5 of the Fourteenth Amendment authorizes Congress to enforce equal protection against the states, whether they accept federal funding or not. *Lane* involved the facility of one of the fundamental privileges and immunities, “to institute and maintain actions of any kind in the courts of the state. . . . “ *Corfield v. Coryel*, 6 F. Cas. 546, 552 (Cir. Crt, E.D. Pa. 1823). On the other hand, disability, the class protected in the IDEA, is not even a “a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation.” *City of Cleburne Living Ctr*, 473 U.S. 432, 442 (1985). Education is not fundamental right. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 35 (1973). Nonetheless, the Court affirmed in *Rowley* that students with special needs have an equal protection right to education, so the ADA enforcement provision based on §5 of the Fourteenth Amendment is available.

The consequence of Fitzgerald on §1983 suits under the constitution and §504 of the RA suits for inadequate special education services

Fitzgerald throws special education law into confusion. The circuits are in agreement that tort-like remedies, such as compensatory damages, are not available for violations under the IDEA. see *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d

\(^1\) “No qualified individual with a disability shall, by reason of that disability, be excluding from participation in or be denied the benefits of the service, programs or activities of a public entity, or be subjected to discrimination by any such entity.”
This is the result of the preclusion found in *Smith*, which referred to the Education of the Handicapped Act, the forerunner of the IDEA, as a “detailed remedial scheme.” The Third Circuit, on the other hand, allows a plaintiff to proceed with a compensatory damages claim under §504 of the RA for inadequate special education services while rejecting §1983 actions under both the equal protection clause of the constitution, the IDEA, and §504 of the RA.³

After *Fitzgerald*, §1983 suits should no longer be precluded by §504. This puts the circuits in general, and the Third Circuit in particular, into a dilemma. The IDEA precludes §1983 torts for the constitutional violation of not providing a free and adequate education to the disabled class. The RA, on the other hand, like Title IX, implies the availability of compensatory damages from an institution for discrimination. Other than remedies, there are “few differences, if any, between IDEA’s affirmative duty and §504’s negative prohibition.” *W.B. v. Matula*, 67 F.3d 484, 492-93 (3rd Cir. 1995). Whatever logic differentiated §1983 from RA so that the Third Circuit determined that the IDEA precluded suits for constitutional violations under §1983 but allowed suits under §504 of the RA, can no longer stand.⁴

*Fitzgerald* determined that §1983 suits are not precluded by the remedies in the civil rights acts. “Congress modeled Title IX after Title VI... [which] allow[s] for parallel remedial action...” ²

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⁴ The part of *Matula* that allowed §1983 suits was reversed in *A.W. v. Jersey City Pub. Sch.* 486 F.3d 791 (3rd Cir. 2007). The Third Circuit still allows plaintiffs to bypass the IDEA with §504 suits but not with §1983 suits.
and concurrent §1983 claims.” 129 S. Ct. at 797. This reasoning directly applies to §504, which is addressed by the same “remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964.” 29 U.S.C. §794a(a)(2). Fitzgerald effectively reverses the Third Circuit, which relied on §504 to preclude § 1983. “There is no showing that the remedial scheme in Section 504 was intended ‘to complement, rather than supplant §1983.’” A.W. v. Jersey City Pub. Sch., 486 F.3d at 805 (citation omitted). Fitzgerald forces the circuits to choose between concluding that the intent of Congress in enacting the detailed remedial scheme of the IDEA was to preclude both RA suits and §1983 suits or to allow both.

§1415(l) of the IDEA

The Smith Court anticipated that plaintiffs might try to bypass the IDEA scheme of prospective remedies by framing a claim under the RA for retrospective damages. “The only elements added by §504 are the possibility of circumventing EHA administrative procedures and going straight to court with a §504 claim, the possibility of a damages award in cases where no such award is available under the EHA, and attorney’s fees.” 468 U.S. at 1019. The Smith Court rejected this ploy in light of the detailed procedure in the EHA and in the IDEA for compensatory educational services rather than compensatory damages. “To the extent §504 otherwise would allow a plaintiff to circumvent that state procedure, we are satisfied that the remedy conflicts with Congress’ intent in the EHA.” Id. at 1019-20.

After Smith, Congress enacted §1415(l) of the IDEA.

“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.”

Whether a circuit allows damages under the RA or §1983 depends upon its interpretation of this amendment to the IDEA, which includes both a permissive and a restrictive reading.

The passage can be read permissively to allow both RA and §1983 suits to proceed when a party asks for compensatory damages. It would be futile for a plaintiff seeking damages to pursue IDEA procedures since the IDEA does not provide for damages. From the start, the administrative remedy is considered “exhausted to the same extent as would be required had the action been brought under this subchapter” if a party asked for compensatory damages under the RA, since the IDEA does not provide for damages.

On the other hand, §1415(l) can read restrictively to block both RA and §1983 compensatory damages. IDEA remedies are not futile since compensatory education is still the appropriate relief even “if the plaintiff wants a form of relief that the IDEA does not supply.” Charlie F. by Neil F. v. Board of Educ., 98 F.3d 989, 991,992 (7th Cir. Ill. 1996). The Third Circuit has taken a permissive position that RA suits for damages resulting from inadequate educational services can proceed if the plaintiff seeks them, since IDEA administrative remedies do not provide for damages. But ultimately, it determined that §1983 suits were precluded by the IDEA. It maintains this semi-permissive reading of §1415(l) by reasoning that it intended to restore the right of

The reasoning of the Third Circuit is puzzling. We already saw in Rowley that there is no difference between the IDEA right for a FAPE and the constitutional standard. If §1415(l) is to take a permissive reading, to have restored §1983 damages for violations of “constitutional rights,” then it has to permit plaintiffs seeking compensatory damages to proceed with §1983 suits for violations of the standards in the IDEA, just the same as it restored the right to proceed under the RA. The constitutional standard, the IDEA standard and the RA standard are all the same. Put another way, Fitzgerald requires that the civil rights statutes cannot serve as the source of precluding §1983, and if a plaintiff can sue under the RA, then a plaintiff can sue under §1983.

The option of allowing §1983 damages for IDEA violations

Circuits have three options on how to reinterpret §1415(l) post Fitzgerald. One approach is to allow §1983 damages for violations of the constitutional standard under the equal protection clause. Under this approach, the acceptance of federal funding will no longer confer the advantage of preclusion under the IDEA since all state schools, even those that accept federal funding, will be subject to §1983 suits for denial of a FAPE under the constitution. This, of course, contradicts the essential ruling in Smith which is still good law. The Supreme Court continues “to refer to the IDEA as an example of a statutory enforcement scheme that precludes a §1983 remedy.” A.W. v. Jersey City Pub. Sch., 486 F.3d at 803.
Rowley declared that the standards of IDEA encompass the constitutional standard, and Smith declared that because of its detailed remedial scheme, IDEA precluded §1983 suits under both the constitution and the IDEA. It would be difficult to conclude, despite the language of Rowley, that the standard under the constitution is less than that of the IDEA, and Smith preclusion should therefore only apply to the more exacting IDEA violation. The issue decided in Rowley was whether the IDEA created the exacting standard of maximizing the potential of each student. The Court held that a lessor standard, that of adequacy, which is the constitutional standard found by the district courts, is the standard under the IDEA. Thus, if Smith is still good law, §1983 damages for constitutional violations are still precluded.

The option of precluding §1983 but not §504 damages

Another approach would not allow §1983 suits for any violation while allowing suits for violation of the RA. This approach is narrow preclusion because it precludes §1983 but allows actions for the same violations under a separate statute such as the RA with its own statutory scheme. This seemingly contradicts Fitzgerald, which declared that §1983 was not precluded by the civil rights statutes. One can distinguish §504 from Title IX in Fitzgerald, so that §1983 actions can be brought only for claims under Title IX and the constitution, but cannot be brought for educational inadequacy under §504 and under the constitution, because the IDEA precludes damages. Otherwise, it would be an anomaly if §1983 could be used for a violation of a civil rights statute such as §504 and not for the violation of the constitution. Fitzgerald merely stated that the civil rights statutes alone do not prelude §1983. It said nothing about the breadth of the IDEA and
its preclusion of §1983 for all violations under the constitution, RA and the IDEA. The advantage of this approach is that the circuits that have already allowed RA suits may continue to allow those suits. Still, those circuits need to explain why this narrow preclusion disallows all §1983 suits, including those under the constitution, while allowing suits directly under the civil rights statutes, such as the RA. This is puzzling since the RA merely implies a private right of action whereas §1983 expressly grants a right of action. The RA standard of discrimination for educational inadequacy does not create any requirement on its own but merely incorporates both the constitutional standard and the standard under IDEA, which are the same.

Even if the circuits manage to distinguish constitutional suits under §1983 from suits directly under the RA, they will still be faced with the contradiction of protecting states that accept federal funds from constitutional suits using §1983, while allowing §1983 suits in a state that refuses funding. It is difficult to explain how the administrative compensatory education scheme of the IDEA which precludes private suits against individual teachers and principals under §1983 is more onerous upon states in consideration for their acceptance of federal funding than the burden upon a state that rejects the IDEA scheme and its funding. Private suits against individuals, teachers and principals under §1983 are not precluded in non-IDEA states, as denial of educational opportunity for the disabled is a violation of the equal protection clause. The option of general preclusion of compensatory damages

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5 Currently all states participate in the IDEA.
A third approach would not allow compensatory damages under either the RA or §1983. This approach is broad preclusion because it precludes tort-like damages under any form of pleading, whether a school violated the IDEA, the constitution, or the RA, in providing inadequate special education. This reflects an understanding that the Congressional intent in enacting the Mills and PARC constitutional scheme of compensatory education implies that the proper remedy in all federal cases of an inadequate education is proactive relief rather than retroactive torts. This is the rule regardless of whether a claim is pled under the equal protection clause, the IDEA, or the RA. This approach, like the first approach, does not penalize a state that does not accept federal funding since IDEA preclusion is a broad policy statement, since no officer any state is subject to §1983 damages. Broad preclusion rejects tort like remedies regardless of pleading and regardless of whether a state actually participates in the IDEA as long as the suit is in federal court. This is the most reasonable approach.

This approach is consistent with the restrictive reading of §1415(l) of the IDEA in that any type of remedial action “shall be exhausted to the same extent as would be required had the action been brought under this subchapter.” This also preserves “rights, procedures, and remedies” under the constitution, the RA and §1983, despite general statutory provisions for compensatory damages that are lacking in the IDEA. Compensatory education is consistent with those statutes because it is the only practical solution to educational inadequacy. As Judge Easterbrook put it: “If disgruntled parents spurn this solution and demand compensation, the response should be that they cannot ignore remedies available under the IDEA and insist on those of their own devising.” Charlie F. by Neil F. v. Board of Educ., 98 F.3d at 992. Parents who “spurn
this solution” to wait until after a child graduates, and is no longer eligible for compensatory education, cannot then bring suit for compensatory damages. Thus, compensatory education rather than compensatory damages is the correct remedy for all statutes that address the issue.

Even a state in that opts out of the IDEA is required by federals court to offer compensatory education under the equal protection clause, which sets the same standard as the IDEA. Tort-like damages will not be available to parents in any state regardless whether a state accepts federal funding. Only in the rare case of bad faith, in which a school district and its administrators deliberately refuse to cooperate with administrative or court orders would compensatory damages be available to parents and students in any state.

The standard for a §1983 suit for compensatory damages for violation of a free and appropriate education would be more than deliberate indifference to the educational needs of the child during the time that the child is in school, but deliberate indifference to administrative and court orders for compensatory education. When school officials, rather than parents, “spurn this solution” imposed through the remedial process, compensatory damages will then be available. This is especially true in light of the declaration of the Court in *Rowley* “that Congress expressly ‘recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome.’” 58 U.S. at 492. The intent of the IDEA was more “to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.” 458 U.S. at 192, (1982, citation omitted). The IDEA provides
parents with equal responsibility and just procedures to advocate for special education services. It is puzzling how a scheme designed to enhance equal educational opportunity by making school officials and parents aware of the constitutional rights of the disabled should become, short of actual invidious discrimination, the yardstick to measure an educational malpractice suit for school incompetency, generally denied to any other student.⁷

Conclusion

The rights of the learning disabled are protected by the constitution, the IDEA, the RA and the ADA. Congress provided a detailed remedial scheme of special education rights in the IDEA. Courts have interpreted the intent of Congress to either preclude §1983 suits for damages while allowing suits under the RA, to preclude any suit for damages unless IDEA remedies have become futile, or to allow both §1983 suits and RA suits for damages. Fitzgerald is a springboard for the circuits to reexamine their position on IDEA preclusion and to iron out their inconsistencies.

⁷ A “complaint alleging ‘educational malpractice’ might on the pleadings state a cause of action within traditional notions of tort law does not, however, require that it be sustained. . . . the courts should [not], as a matter of public policy, entertain such claims.” Donohue v. Copiague Union Free School Dist., 391 N.E.2d 1352, 1354 (N.Y. 1979).