

COMMENTS

THE USE OF § 1983 AS A REMEDY FOR VIOLATIONS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: WHY IT IS NECESSARY AND WHAT IT REALLY MEANS

*Candace Chun**

INTRODUCTION

In 1994, at the age of three, Michelle H.¹ was diagnosed as having a mild form of autism.² As a result of the diagnosis and in accordance with procedure, the psychologist, who was employed by Hawaii's Department of Health (DOH), made numerous recommendations for addressing Michelle's limitations.³ The recommendations included enrollment in a preschool program run by Hawaii's Department of Education (DOE), the use of autism-specific techniques, and the assignment of a one-to-one therapeutic aide to help Michelle in the classroom.⁴ In her report to the DOE, the psychologist, Dr. Koven, wrote, "Michelle has delays in multiple areas of functioning. [She] will need some very special services in order to progress. Since she has high potentials [sic], it would be a shame to limit services at this critical intervention time."⁵ Upon receipt of this report, the DOE performed its own evaluation of Michelle.⁶ Although the DOE found her to be eligible for special

* Albany Law School, J.D. 2009; Vassar College, B.A. 2001. I would like to thank my friends and family for their support throughout the years, and Professor Kathe Klare for her input during the writing of this Comment. I would also like to thank Carl Varady for his continued guidance, encouragement, and unwavering support.

¹ The facts stated here are from Mark H. *ex rel.* Michelle H. v. Lemahieu, 513 F.3d 922 (9th Cir. 2008).

² *Id.* at 926.

³ *Id.*

⁴ *Id.*

⁵ Brief of Plaintiffs-Appellants at 7–8, Mark H. *ex rel.* Michelle H. v. Lemahieu, 513 F.3d 922 (9th Cir. Oct. 20, 2005) (No. 05-16236).

⁶ *Mark H.*, 513 F.3d at 926–27.

education and related services under the Individuals with Disabilities Education Act (IDEA),⁷ she was classified as having “chronic emotional impairment,” rather than autism.⁸ Subsequent to this classification, the DOE developed an Individualized Education Program (IEP) for Michelle,⁹ as mandated by IDEA.¹⁰ Due to a lack of appropriate personnel, however, the DOE did not include or implement any of Dr. Koven’s autism recommendations.¹¹ The DOE did not inform Michelle’s parents of available services.¹² Furthermore, Michelle was not provided with the speech services that were listed in her IEP because, at that time, general special education was the only service available in the DOE.¹³

Later that year, Michelle’s sister, Natalie, who was two, was also referred to the DOH for a psychological evaluation due to suspected developmental delays.¹⁴ Natalie was officially diagnosed with autism in 1995.¹⁵ After undergoing a separate DOE evaluation, she was deemed eligible for services under IDEA with a classification of “Early Childhood Learning Impairment” rather than autism.¹⁶ The IEP that was developed for Natalie did not include any autism-related services.¹⁷ Thus, like Michelle, Natalie only received general special education.¹⁸

Around this same time, “a class of plaintiffs comprised of disabled children and adolescents . . . sued the Hawaii DOE and the Hawaii DOH . . . claiming a failure to comply with IDEA . . .”¹⁹ After finding that the agencies had failed to provide adequate educational and mental health services, the district court granted summary judgment to the plaintiffs on the issue of liability.²⁰ The parties

⁷ Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400–75 (2008). In 2004, IDEA was re-authorized and renamed the “Individuals with Disabilities Education Improvement Act” (IDEIA), Pub. L. No. 108–446, 118 Stat. 2647 (2004). However, it is still commonly referred to as IDEA, and thus, this note will refer to it as IDEA.

⁸ *Mark H.*, 513 F.3d at 927.

⁹ *Id.*

¹⁰ *See infra* Part I.B.

¹¹ *Mark H.*, 513 F.3d at 926–28.

¹² Brief of Plaintiffs-Appellants at 21, *Mark H. ex rel. Michelle H. v. Lemahieu*, 513 F.3d 922 (9th Cir. Oct. 20, 2005) (No. 05-16236).

¹³ *Id.* at 22–23.

¹⁴ *Mark H.*, 513 F.3d at 927.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Brief of Plaintiffs-Appellants at 20–21, *Mark H. ex rel. Michelle H. v. Lemahieu*, 513 F.3d 922 (9th Cir. Oct. 20, 2005) (No. 05-16236).

¹⁸ *Id.* at 23.

¹⁹ *Mark H.*, 513 F.3d at 926 (citing *Felix v. Waihee*, CV. No. 93-00367-DAE).

²⁰ *Id.*

subsequently entered into a consent decree in which the DOE and DOH acknowledged their violations and agreed to provide all required services.²¹ However, the changes were slow to come.²²

Over the next four years, Michelle's and Natalie's IEPs remained substantially unchanged despite annual reevaluations,²³ and Michelle's reclassification from "emotional impairment" to "autism."²⁴ Notably, no one from the DOH ever attended any of the IEP meetings, even though the DOH was the agency responsible for providing services related to special education.²⁵ As a result, neither of the girls received any of the services appropriate and necessary for autistic children.²⁶ As for their parents, they were left in the dark as to what services their daughters were entitled to.²⁷

In March of 1998, at the age of six, Natalie's classification was changed from "early childhood learning impairment" to "autism," and she was finally referred by the DOE to the DOH for mental health services, to be provided by someone with expertise in autism.²⁸ Although her services began almost immediately, Michelle, who was 7, had to wait until the summer before anything was available for her.²⁹

In 1999, Michelle and Natalie's parents filed a request for an impartial due process hearing on behalf of their daughters. They alleged that the DOE had denied Natalie and Michelle a free appropriate public education through inadequate IEPs and other procedural violations.³⁰ After a full hearing, the impartial hearing officer concluded that the DOE had violated IDEA by failing to provide necessary autism services for four years, failing to provide necessary mental health services, excluding agreed-upon mental health services from the IEPs, and providing the girls with a teacher who had no experience with autistic children.³¹ The hearing officer ordered the DOE to take a number of steps to remedy the

²¹ *Id.*

²² Brief of Plaintiffs-Appellants at 5, Mark H. *ex rel.* Michelle H. v. Lemahieu, 513 F.3d 922 (9th Cir. Oct. 20, 2005) (No. 05-16236).

²³ *Mark H.*, 513 F.3d at 927.

²⁴ *Id.*

²⁵ *Id.* at 927.

²⁶ See Brief of Plaintiffs-Appellants at 21–22, Mark H. *ex rel.* Michelle H. v. Lemahieu, 513 F.3d 922 (9th Cir. Oct. 20, 2005) (No. 05-16236).

²⁷ *Id.* at 21.

²⁸ *Id.*; *Mark H.*, 513 F.3d at 927.

²⁹ See Brief of Plaintiffs-Appellants at 21, Mark H. *ex rel.* Michelle H. v. Lemahieu, 513 F.3d 922 (9th Cir. Oct. 20, 2005) (No. 05-16236).

³⁰ *Mark H.*, 513 F.3d at 927.

³¹ *Id.* at 927–28.

violations.³²

By this point, however, roughly six years had elapsed, during which the girls received an inappropriate education and services. Thus in 2000, Michelle and Natalie's parents filed suit on the girls' behalf, seeking compensatory, punitive, and hedonic³³ damages under § 1983 and various other statutes.³⁴ They alleged that the State's violations of IDEA and its deliberate indifference to the girls' needs had caused irreparable harm to both Michelle, now nine, and Natalie, eight, in that the girls were unable to talk or communicate through an alternative system.³⁵ Additionally the complaint stated that the girls were incapable of caring for themselves, unable to function independently, and would require twenty-four-hour care for the rest of their lives.³⁶

After extensive motions and hearings, the District Court ultimately dismissed the § 1983 claim on Eleventh Amendment immunity grounds.³⁷ The remaining claims are still currently being litigated.³⁸ Were the § 1983 claim brought again today, even if properly pleaded, it would once again be dismissed due to a recent Ninth Circuit decision which held that § 1983 could not be utilized to seek compensatory damages for violations of IDEA.³⁹

Because courts have interpreted the language of IDEA in a manner that precludes an award of money damages for any violations of the Act,⁴⁰ plaintiffs like Michelle, Natalie, and their parents have sought relief under statutes such as § 1983, which do provide for money damages. Considered by many to be a "back door" or way around the prohibition for money damages,⁴¹ this particular issue has become the source of much dispute and

³² *Id.* at 928.

³³ Damages "for the loss of the pleasure of being alive." *Id.* at 930 n.6 (citing BLACK'S LAW DICTIONARY 417 (8th ed. 2004)).

³⁴ *Mark H.*, 513 F.3d at 930.

³⁵ Brief of Plaintiffs-Appellants at 9–10, *Mark H. ex rel. Michelle H. v. Lemahieu*, 513 F.3d 922 (9th Cir. Oct. 20, 2005) (No. 05-16236).

³⁶ *Id.* at 10.

³⁷ *Mark H.*, 513 F.3d at 931.

³⁸ *Id.* at 939–40.

³⁹ *See infra* Part III.A.

⁴⁰ *Gean v. Hattaway*, 330 F.3d 758, 774 (6th Cir. 2003); *Polera v. Bd. of Educ.*, 288 F.3d 478, 483–86 (2d Cir. 2002); *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275 (9th Cir. 1999); *Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524, 526–27 (4th Cir. 1998); *Charlie F. v. Bd. of Educ.*, 98 F.3d 989, 991 (7th Cir. 1996); *Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996); *see also Ortega v. Bibb County Sch. Dist.*, 397 F.3d 1321, 1325–26 (11th Cir. 2005); *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 386–87 (6th Cir. 1992) (holding that general damages were not available under predecessor statute to the IDEA).

⁴¹ *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 29 (1st Cir. 2006).

litigation. Though most circuits have weighed in on the matter, it has only led to a wide array of confusing and contrary positions.⁴²

Part I of this Comment provides the basic framework for a § 1983 claim and outlines the fundamentals of IDEA, highlighting the relevant provisions. Part II explores the development of the law regarding the use of § 1983 as a remedy for violations of IDEA, beginning with the seminal case of *Smith v. Robinson*.⁴³ Part III examines the fallout from Congress's response to the case, summarizing the conflicting views of the various circuits. Finally, Part IV discusses the importance of § 1983 as a means for enforcing certain IDEA violations, arguing that the basis for the decision of courts who have barred such claims is either unfounded or incomplete.

I. AN OVERVIEW OF § 1983 AND IDEA

A. § 1983

Originally adopted as Section 1 of the Civil Rights Act of 1871 and known as the “Ku Klux Klan Act,”⁴⁴ § 1983 was enacted to help combat racial violence after the Civil War⁴⁵ by enforcing the provisions of the Fourteenth Amendment.⁴⁶ Specifically, it provided a civil remedy in the federal courts to those individuals whose constitutional rights had been violated.⁴⁷ Today, § 1983 is the primary means of enforcing federal statutory and constitutional violations. In pertinent part, it states,

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities

⁴² See *infra* Part III.

⁴³ 468 U.S. 992 (1984).

⁴⁴ Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, 13 (1871) (codified as amended at 42 U.S.C.A. § 1983 (2003)); see Michael Bowling, *The Case Against Employment Tester Standing Under Title VII and 42 U.S.C. § 1981*, 101 MICH. L. REV. 235, 264 (2002) (positing that the Ku Klux Klan Act of 1871 led to § 1983).

⁴⁵ Act of Apr. 20, 1871, ch. 22, §§ 1, 4, 17 Stat. 13, 14 (1871) (codified as amended at 42 U.S.C. § 1983 (2003)) (requiring protection of individuals through enforcement of the Fourteenth Amendment and labeling the activities by groups of armed, organized men as acts of rebellion against the government).

⁴⁶ *Mitchum v. Foster*, 407 U.S. 225, 238 (1972) (“[It] was enacted for the express purpose of ‘enforc[ing] the Provisions of the Fourteenth Amendment.’”) (quoting Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, 13 (1891) (codified as amended at 42 U.S.C.A. § 1983 (2003))).

⁴⁷ See *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 723–24 (1989).

secured by the Constitution and laws, shall be liable to the party injured”⁴⁸

Although § 1983 filings make up a significant percentage of the federal court dockets,⁴⁹ its complex nature and the high threshold set by courts for maintaining such a cause of action make it extremely difficult for § 1983 plaintiffs to prevail and recover damages.⁵⁰ Because § 1983 itself does not create any substantive rights and serves only as a vehicle for enforcing the Constitution and its laws,⁵¹ § 1983 plaintiffs must establish (1) that defendant deprived plaintiff of a constitutional or federal statutory right;⁵² (2) that defendant acted under color of state law;⁵³ (3) that plaintiff was actually injured;⁵⁴ and (4) that defendant’s actions were the cause of that injury.⁵⁵

While seemingly straightforward, these requirements are actually quite involved, containing various exceptions and conditions depending on the type of violation alleged and the parties involved. For example, if based on a violation of a Constitutional right,⁵⁶ as was generally the case before the Supreme Court legitimated a §

⁴⁸ 42 U.S.C. § 1983 (2003).

⁴⁹ In 2005, out of 253,273 total civil cases filed, 79,299 of them, or 31.3%, were § 1983 cases. In 2006, there were 259,541 total civil cases filed, of which 72,618, or 28%, were § 1983 cases. U.S. Courts: The Federal Judiciary, *U.S. Courts, Table 4.4: U.S. District Courts. Civil Cases Filed By Nature of Suit* (2006), <http://www.uscourts.gov/judicialfactsfigures/2006/Table 404.pdf>.

⁵⁰ In a study of constitutional tort claims, of which § 1983 cases comprise the “core,” Theodore Eisenberg and Stewart Schwab focused on claims arising in the Central District of California for the years 1980 and 1981. Their study found that, of cases where a favorable decision for either side was reported, plaintiff’s success rate was a mere 13.6%. Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 643–44, 677–78 (1987).

⁵¹ *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) (“[Section 1983] is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.”).

⁵² *Id.* at 140 (“The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right ‘secured by the Constitution and laws.’”).

⁵³ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 930 (1982).

⁵⁴ *Carey v. Piphus*, 435 U.S. 247, 248 (1978) (“We . . . hold that in the absence of proof of actual injury, the students are entitled to recover only nominal damages.”).

⁵⁵ *Baker*, 443 U.S. at 142 (“[A] public official is liable under § 1983 only ‘if he causes the plaintiff to be subjected to deprivation of his constitutional rights.’” (quoting *McCollan v. Tate*, 575 F.2d 509, 512 (1978) (emphasis in original))).

⁵⁶ The most common constitutional claims are First Amendment free speech and retaliation claims; Fourth Amendment excessive force, illegal search and seizure, and malicious prosecution claims; Eighth Amendment excessive force and prison condition claims; Fourteenth Amendment equal protection and procedural due process claims; and substantive due process claims to cover those situations in which the alleged violation is not controlled by a specific Constitutional provision. See U.S. Courts: The Federal Judiciary, *U.S. Courts, Table 4.4: U.S. District Courts. Civil Cases Filed By Nature of Suit* (2006), <http://www.uscourts.gov/judicialfactsfigures/2006/Table 404.pdf>.

1983 cause of action for violations of federal *statutory* rights,⁵⁷ plaintiff must establish the elements and appropriate *mens rea* for *each* constitutional claim, in addition to the remaining § 1983 factors.⁵⁸

For plaintiff to successfully bring a claim based on a violation of a federal statutory right, the Court has held that the statute must confer individual rights on a class of people that includes plaintiff.⁵⁹ A violation of the statute, by itself, is not sufficient to support a § 1983 cause of action.⁶⁰ Yet even if a plaintiff is able to show that a statute *does* create such enforceable rights, the court may still bar the claim if it decides that the “statutory remedial scheme is so comprehensive that an intent to prohibit enforcement other than by the statute’s own means may be inferred.”⁶¹ In other words, the plaintiff has the added burden of convincing the court that Congress did not “intend[] to foreclose such private enforcement.”⁶²

Although overcoming this hurdle is a considerable task in its own right, the challenges to plaintiff’s case do not end here. In fact, the level of difficulty increases with the second element, showing that defendant acted “under color of law.” The Supreme Court has defined “under color of law” as the “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”⁶³ Subsequent case law has revealed this to mean that plaintiff must show that defendant is a public official whose authority is grounded in a right or privilege created by state law.⁶⁴ Alternatively, if defendant is a private actor,

⁵⁷ *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (holding that a § 1983 cause of action exists where claim is based on violation of federal statutory rights).

⁵⁸ See Brian J. Serr, *Turning Section 1983’s Protection of Civil Rights Into an Attractive Nuisance: Extra-Textual Barriers to Municipal Liability Under Monell*, 35 GA. L. REV. 881, 884, 894 (2001) (explaining that the Supreme Court has required a showing of deliberate indifference to hold municipal officers liable).

⁵⁹ See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280, 285 (2002) (“[U]nless Congress ‘speak[s] with a clear voice,’ and manifests an ‘unambiguous’ intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983.”) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 28 n.21 (1981)).

⁶⁰ See *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108 n.4 (1989) (“[A] claim based on a statutory violation is enforceable under § 1983 only when the statute creates ‘rights, privileges, or immunities’ in the particular plaintiff.”).

⁶¹ *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 796 (3d Cir. 2007) (citing *Wright v. City of Roanoke Redevelop. & Hous. Auth.*, 479 U.S. 418, 423 (1987)).

⁶² *Wright*, 479 U.S. at 423.

⁶³ *United States v. Classic*, 313 U.S. 299, 326 (1941).

⁶⁴ *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982) (“[T]he deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.”).

plaintiff must show that defendant is acting in concert with the state, whereby his or her actions are chargeable to the state.⁶⁵

If defendant is a city or municipality,⁶⁶ as is often the case, due to the potential for greater recovery⁶⁷ and the possibility of instituting system-wide change, the violation must be attributable to an unconstitutional municipal policy or custom.⁶⁸ Municipalities may not be sued for the acts of their employees or agents based on a theory of respondeat superior.⁶⁹

Compounding plaintiff's difficulties is the constant threat of absolute or qualified immunity to damages liability, either of which can kill a § 1983 case. Absolute immunity is the more powerful of the two, serving as a complete bar to both the claim and discovery on the claim.⁷⁰ Initially created to protect state legislators from civil suits for actions committed in the course of their duties,⁷¹ the privilege was gradually expanded to include other functions deemed integral to government and society as a whole. Specifically, it was extended to regional⁷² and local legislators,⁷³ judges,⁷⁴ prosecutors,⁷⁵

⁶⁵ *Id.* at 941 ("Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute . . ." (quoting *United States v. Price*, 383 U.S. 787, 794 (1966))).

⁶⁶ The Supreme Court has held that states cannot be sued under § 1983 in either state or federal court. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (holding that "neither a State nor its officials acting in their official capacities" are subject to suit under § 1983); *Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (holding that municipalities are not entitled to qualified immunity for good-faith constitutional violations); *Quern v. Jordan*, 440 U.S. 332, 337-41 (1979) (holding that the Eleventh Amendment bars § 1983 suits against states in federal court; however, it held that local governments may be sued under § 1983); *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 663 (1978) (holding that "local governments are [not] wholly immune from suit under § 1983").

⁶⁷ Though municipalities may be held liable for compensatory damages, the Supreme Court has held that they are absolutely immune from punitive damages. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981).

⁶⁸ *Monell*, 436 U.S. at 690-91.

⁶⁹ *Id.* at 691.

⁷⁰ See *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) ("[T]he essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.").

⁷¹ *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (holding that "[l]egislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives").

⁷² *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 405 (1979) ("[Absolute immunity] is equally applicable to federal, state, and regional legislators. Whatever potential damages liability regional legislators may face as a matter of state law, we hold that petitioners' federal claims do not encompass the recovery of damages from the members of TRPA acting in a legislative capacity.").

⁷³ *Bogan v. Scott-Harris*, 523 U.S. 44, 53-54 (1998) ("Thus, we now make explicit what was implicit in our precedents: Local legislators are entitled to absolute immunity from § 1983

the President,⁷⁶ and witnesses.⁷⁷ To invoke absolute immunity, a § 1983 defendant need only show that he or she was acting in a capacity covered by the immunity.

If a § 1983 defendant does not qualify for absolute immunity, he or she may still be entitled to qualified immunity. Like absolute immunity, qualified immunity effectively stops discovery once asserted⁷⁸ and precludes liability for damages if applicable.⁷⁹ Once the issue has been raised, the judge will look to see whether (1) the alleged violation was in fact a recognized constitutional or statutory violation at that time; (2) the applicable law was clearly established at the time; and (3) a reasonable person would have known that such conduct was unlawful.⁸⁰ If the judge finds that the law was *not* clearly established at the time, it is unlikely that he or she will find that a reasonable person would have known that such conduct was illegal, and the defendant will probably be immune from damages liability.⁸¹ On the other hand, if the judge finds that the law was clearly established at the time, the defendant will not be granted immunity.⁸²

liability for their legislative activities.”).

⁷⁴ *Pierson v. Ray*, 386 U.S. 547, 553–54 (1967) (“Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction We do not believe that this settled principle of law was abolished by § 1983”).

⁷⁵ *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (“We conclude that the considerations outlined above dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law.”).

⁷⁶ *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (“Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts.”).

⁷⁷ *Briscoe v. LaHue*, 460 U.S. 325, 345 (1983) (“[T]he rationale of our prior absolute immunity cases governs the disposition of this case The principles set forth in *Pierson v. Ray* to protect judges and in *Imbler v. Pachtman* to protect prosecutors also apply to witnesses”).

⁷⁸ *See Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982) (stating that discovery should not be permitted on a § 1983 motion for summary judgment based on qualified immunity until it can be determined whether the applicable law was clearly established at the time of the alleged violation).

⁷⁹ *Id.* at 818.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 818–19. It should be noted, however, that a slightly different “objective reasonableness” standard exists for qualified immunity in Fourth Amendment search and seizure cases. In such cases, when considering whether the law was clearly established, courts look to see whether probable cause or exigent circumstances existed to justify the issuing of a warrant, search, or seizure of an individual or their property. However, the Supreme Court has held that it is *not* a clearly established law that the lack of probable cause or exigent circumstances to obtain a warrant, search, or seizure of an individual or their property is objectively unreasonable. The Court stated:

In such a case, however, the Supreme Court has held that § 1983 federal court defendants are entitled to an immediate interlocutory appeal of the denial of qualified immunity.⁸³ Moreover, defendant is not limited to one such appeal. In other words, if defendant initially moves to dismiss the case based on qualified immunity, but is denied and is unsuccessful in an interlocutory appeal, he or she may assert immunity a second time in a summary judgment motion, and appeal again if denied.⁸⁴ Should the immunity claim fail a second time, both the case and discovery will resume.

Plaintiff must then show that the defendant's actions directly caused the deprivation of the plaintiff's rights or again, face dismissal of the case.⁸⁵ Finally, the plaintiff must prove damages.

Because the purpose of a § 1983 claim is to compensate an individual for *injuries* resulting from the deprivation of his or her rights,⁸⁶ the plaintiff must show actual injury.⁸⁷ The deprivation of rights, alone, is not enough for an award of compensatory damages.⁸⁸ If the plaintiff is unable to show any injury, he or she will only be entitled to nominal damages.⁸⁹

For an award of punitive damages, the plaintiff must not only show actual injury, but also that the defendant acted with reckless

We have recognized that it is inevitable that law enforcement officials will in some cases reasonably, but mistakenly, conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable. The same is true of their conclusions regarding exigent circumstances.

Anderson v. Creighton, 483 U.S. 635, 641 (1987) (citation omitted). In other words, to obtain qualified immunity in these cases, officers need only plead “arguable probable cause,” or that, based on the circumstances, a reasonable officer could have believed that probable cause existed. See *Skop v. City of Atlanta*, 485 F.3d 1130, 1137 (11th Cir. 2007).

⁸³ *Mitchell v. Forsyth*, 472 U.S. 511, 526–27, 530 (1985). The distinction between federal and state § 1983 defendants is critical, as the Supreme Court has held that state court § 1983 defendants are *not* entitled to interlocutory appeals for the denial of qualified immunity if their respective state's statute does not allow it. *Johnson v. Fankell*, 520 U.S. 911, 916–23 (1997).

⁸⁴ *Behrens v. Pelletier*, 516 U.S. 299, 306–07 (1996).

⁸⁵ See *Baker v. McCollan*, 443 U.S. 137, 142 (1979) (“[A] public official is liable under § 1983 only ‘if he *causes* the plaintiff to be subjected to deprivation of his constitutional rights.’” (emphasis in original) (quoting *McCollan v. Tate*, 575 F.2d 509, 512 (5th Cir. 1978))).

⁸⁶ *Carey v. Piphus*, 435 U.S. 247, 254–55 (1978).

⁸⁷ See *id.* at 248 (“We . . . hold that in the absence of proof of actual injury, the students are entitled to recover only nominal damages.”).

⁸⁸ See *id.* at 264 (holding that “although . . . distress caused by the denial of procedural due process itself is compensable under § 1983, . . . neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused”).

⁸⁹ See *id.* at 248.

or callous indifference to plaintiff's rights.⁹⁰ Even then, however, the jury has full discretion regarding an award of punitive damages. If successful on the merits of the case, the plaintiff may also be entitled to an award of attorney's fees and costs under a sister section, § 1988,⁹¹ assuming that it was raised in the complaint.

Taken as a whole, § 1983 is an extremely complex vehicle for enforcing individual rights found in either the Constitution or federal laws. Though heavily stacked in favor of defendants, it is a potentially potent tool for plaintiffs. It is particularly helpful in situations where the remedies explicitly set out in a statute do not always provide adequate relief for aggrieved parties. IDEA is one such example.

B. Individuals with Disabilities Education Act

Known today as the Individuals with Disabilities Education Act (IDEA),⁹² the bill was originally promulgated in 1975 as the Education for All Handicapped Children Act (EAHCA).⁹³ Passed largely in response to two court decisions⁹⁴ and federal findings⁹⁵ which highlighted the systemic exclusion of students with disabilities from public schools, EAHCA revolutionized the field of education. First, it mandated that public schools provide all children with disabilities a free and appropriate public education (FAPE) in the least restrictive environment (LRE).⁹⁶ Whereas

⁹⁰ *Smith v. Wade*, 461 U.S. 30, 56 (1983) ("We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.").

⁹¹ 42 U.S.C. § 1988(b) (West 2000).

⁹² *Individuals with Disabilities Education Act*, 20 U.S.C.A. §§ 1400–87 (West 2000 & Supp. 2008).

⁹³ *Education for All Handicapped Children Act*, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-87 (2006)).

⁹⁴ *See Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866, 878 (D.D.C. 1972) (holding that the denial of a free public education to disabled children violated their due process rights and therefore, that the district was required to provide them access to school or a hearing and alternative education); *Pa. Ass'n. for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 302–03 (E.D. Pa. 1972) (requiring Pennsylvania to provide mentally retarded children with a public education and to provide the families with notice and opportunity for a hearing before changing the student's educational status).

⁹⁵ *See H.R. Rep. No. 94-332*, at 7 (1975) (noting that more than one million disabled children were excluded entirely from the public education system).

⁹⁶ *See OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP'T OF EDUC., TWENTY-SECOND ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT* vi, viii (2000), *available at* <http://www.ed.gov/about/reports/annual/osep/2000/preface.pdf> (hereinafter OSEP REPORT)

before, disabled children “were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to ‘drop out,’”⁹⁷ schools now had to acknowledge them as students and provide them with a meaningful education.⁹⁸ In order to encourage states to abide by the law, Congress offered funding to those who complied with its various administrative and procedural requirements.⁹⁹ Among the key requirements were the identification of children with disabilities,¹⁰⁰ creation of an Individualized Education Program for the child,¹⁰¹ provisions facilitating parental participation in all aspects of the child’s education,¹⁰² notice to parents before any changes were made to the child’s program,¹⁰³ and the availability of administrative¹⁰⁴ and judicial¹⁰⁵ proceedings to parents who disagreed with the school and sought appropriate relief. In 1990, Congress amended the Act and renamed it the Individuals with Disabilities Education Act (IDEA).¹⁰⁶

Despite numerous developments and amendments since its renaming, the underlying principles and overall purpose of IDEA has remained largely intact. Schools today are still responsible for identifying and evaluating children suspected of having a disability,¹⁰⁷ which includes everything from minor learning disabilities to severe mental retardation and physical impairments.¹⁰⁸ If the child is deemed eligible for services under IDEA, the IEP team, which includes the parents,¹⁰⁹ must meet and develop an IEP tailored to the child’s unique needs.¹¹⁰ The program

(describing the difference between special education prior to IDEA and subsequent to its passage).

⁹⁷ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982) (quoting H.R. Rep. No. 94-332, at 2 (1975)).

⁹⁸ OSEP REPORT, *supra* note 96, at vii.

⁹⁹ *Id.* at vi.

¹⁰⁰ *Id.* at vii.

¹⁰¹ *Id.* at x; *Honig v. Doe*, 484 U.S. 305, 311 (1988) (calling IEP “the centerpiece of the statute’s education delivery system for disabled children”).

¹⁰² 20 U.S.C.A. § 1415 (West 2000 & Supp. 2008).

¹⁰³ *Id.* § 1415(f), (g).

¹⁰⁴ *Id.* § 1415(b)(3).

¹⁰⁵ *Id.* § 1415(i).

¹⁰⁶ Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901, 104 Stat. 1103, 1141-51 (1990) (codified as amended in scattered sections of 20 U.S.C.).

¹⁰⁷ 20 U.S.C.A. § 1412(a)(3)(A) (West 2000 & Supp. 2008).

¹⁰⁸ OSEP REPORT, *supra* note 96, at vi-vii.

¹⁰⁹ 20 U.S.C.A. § 1414(d)(1)(B)(i) (West 2000 & Supp. 2008).

¹¹⁰ *Id.* § 1400(d)(1)(A).

must allow the child to obtain a meaningful benefit¹¹¹ in the least restrictive environment.¹¹²

To ensure these results, IDEA sets out in detail the requisite components of an IEP, including statements of (1) the “child’s present levels of academic achievement and functional performance”; (2) “measurable annual goals, including academic and functional goals”; (3) “the special education and related services . . . to be provided to the child”; (4) “an explanation of the extent . . . to which the child will not participate with nondisabled [peers] in the regular class[room]”; (5) “any individual appropriate accommodations that are necessary to measure the [child’s] academic achievement and functional performance . . . on State and district wide assessments”; (6) the projected start and end date of each service and modification, as well as its frequency, duration, and location; and (7) transition services necessary to assist the child in attaining postsecondary training, education, employment, or independent living skills.¹¹³ Furthermore, IDEA requires that the IEP team consider “the strengths of the child,” concerns of the parents, language and communication needs, appropriate behavior strategies, the results of the most recent evaluations, and any necessary assistive technology devices and services when creating the IEP.¹¹⁴

Once approved by the parents and put in place by the school, the team is responsible for meeting at least once per year in order to determine whether the child’s annual goals are being achieved and to revise the IEP if necessary.¹¹⁵ Every three years, the school is required to re-evaluate the child, and the team must meet to determine if the child continues to have a particular disability, and if so, whether he or she “continues to need special education and related services.”¹¹⁶ These meetings provide the IEP team with the opportunity to review and revise the IEP in accordance with the child’s changing educational needs.

To guarantee effective parental participation in the process, § 1415 of IDEA mandates that schools provide parents with access to all their child’s information; secure their participation in all

¹¹¹ See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 200 (1982) (It must “be sufficient to confer some educational benefit upon the handicapped child . . .”).

¹¹² 20 U.S.C.A. § 1412(a)(5)(A) (West 2000 & Supp. 2008).

¹¹³ *Id.* § 1414(d)(1)(A).

¹¹⁴ *Id.* § 1414(d)(3).

¹¹⁵ *Id.* § 1414(d)(4).

¹¹⁶ *Id.* § 1414(c)(1)(B).

meetings regarding the child's identification, evaluation and placement; provide written notice whenever the state proposes to take any action regarding the child's program or placement; and provide a copy of the procedural safeguards available to all parents with a full explanation of those procedures.¹¹⁷

Section 1415 further provides parents with administrative and judicial remedies if they disagree with the school's decisions regarding their child, are unhappy with the results, or are otherwise dissatisfied with the process.¹¹⁸ Specifically, they are entitled to pursue mediation, at no cost to themselves, to resolve their dispute with the school.¹¹⁹ Any resulting agreement is legally binding on the parties and enforceable in either state or federal court.¹²⁰ Alternatively, they may request an impartial due process hearing led by a competent and impartial hearing officer.¹²¹ However, parents who choose this course must first attend a Resolution meeting with the local school agency to discuss the complaint in order to provide the agency with an opportunity to resolve the dispute.¹²² If the parties waive the meeting¹²³ or are unable to settle the matter, they proceed to a hearing.¹²⁴ At the hearing, the parties may present evidence, as well as "confront, cross-examine, and compel the attendance of witnesses."¹²⁵ Because hearings can be quite involved, each party has the right to retain counsel.¹²⁶ Upon receipt of the hearing officer's decision, the aggrieved party may appeal to either the state educational agency¹²⁷ or directly into a court of competent jurisdiction,¹²⁸ depending on the laws of that particular state.¹²⁹

¹¹⁷ *Id.* § 1415(a)–(b).

¹¹⁸ *Id.* § 1415(e)–(i)(2).

¹¹⁹ *Id.* § 1415(e).

¹²⁰ *Id.* § 1415(e)(2)(F).

¹²¹ *Id.* § 1415(f).

¹²² *Id.* § 1415(f)(1)(B).

¹²³ *Id.* § 1415(f)(1)(B)(i)(IV).

¹²⁴ *Id.* § 1415(f)(1)(B)(ii).

¹²⁵ *Id.* § 1415(h)(2).

¹²⁶ *Id.* § 1415(h)(1).

¹²⁷ *Id.* § 1415(g).

¹²⁸ *Id.* § 1415(i)(2)(A).

¹²⁹ Under IDEA, states can either have a one or two-tier appeal system. In a one-tier system, the state educational agency does not have an appeals unit. As a result, parties aggrieved by the decision from an impartial due process hearing may appeal directly to state or federal court. In a two-tier system, however, there is a state review office to which aggrieved parties must first appeal. If unsuccessful at that level, they may then appeal into state or federal court. §§ 1415(g), 1415(i)(2)(A). Currently, there are only ten states with two-tier systems. They include Colorado, Indiana, Kansas, Kentucky, North Carolina, New York,

If appealed into state or federal court, IDEA requires the court to “receive the records of the administrative proceedings,” “hear additional evidence at the request of a party,” and make an independent decision based on a preponderance of the evidence.¹³⁰ The statute also says that the court may grant such relief as it deems appropriate and, in its discretion, award reasonable attorneys’ fees to the parents of a disabled child who is the prevailing party.¹³¹

Although this section clearly demonstrates Congress’s intent to create a cause of action for parents, it does not state what type of relief is available, thus leaving it to the courts to interpret “appropriate.”¹³² Through extensive litigation on this singular issue over the years, three types of relief have emerged as “appropriate” and acceptable to courts, including declaratory and injunctive relief,¹³³ tuition reimbursement for parents of a child in an appropriate private placement,¹³⁴ and compensatory education.¹³⁵

Declaratory and injunctive relief generally involve an order from a court requiring a school to provide some service¹³⁶ or to continue paying the tuition of an agreed-upon placement while a hearing or appeal is pending.¹³⁷ A court may order tuition reimbursement where a public school has failed to provide a student with a FAPE,

Ohio, Oklahoma, Pennsylvania (*1 tier proposed in pending regulations Apr. 2007*), and South Carolina. Dorene Philpot, IDEA Hearing Decision Tiers, <http://www.copaa.org/pdf/Hearing%20Decision%20Tiers.pdf> (last visited Feb. 5, 2008).

¹³⁰ 20 U.S.C.A. § 1415(i)(2)(c) (West 2000 & Supp. 2008).

¹³¹ *Id.* § 1415(i)(2)–(3).

¹³² *See id.*

¹³³ *See, e.g.,* Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

¹³⁴ Sch. Comm. of Burlington v. Dep’t of Educ., 471 U.S. 359, 369 (1985) (holding that parents are entitled to reimbursement for reasonable costs of an appropriate unilateral private placement, where the school has failed to provide FAPE in a public setting).

¹³⁵ *G. ex rel. R.G. v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 308–09 (4th Cir. 2003) (agreeing with other circuits that compensatory education may constitute appropriate relief); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 (3d Cir. 1999); *Bd. of Educ. v. Ill. Bd. of Educ.*, 79 F.3d 654, 656 (7th Cir. 1996) (noting that the court’s authority encompasses a “range of equitable remedies and therefore empowers a court to order . . . compensatory education if necessary to cure a violation”); *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1496 (9th Cir. 1994); *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402, 407 (6th Cir. 1991); *Burr ex rel. Burr v. Sobol*, 888 F.2d 258, 259 (2d Cir. 1989); *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857–58 (11th Cir. 1988); *Miener ex rel. Miener v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986).

¹³⁶ *See Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 113 (1st Cir. 2003) (affirming district court’s order compelling school to provide language interpreter as ordered by hearing officer).

¹³⁷ *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 197 (2d Cir. 2002) (affirming district court’s order requiring school district to pay tuition of private school, which was the child’s current placement, while due process hearing was pending).

causing the parents to move their child to a private placement that is capable of meeting the child's needs.¹³⁸ As for compensatory education, it usually involves an extension of services past a child's twenty-first birthday, the point at which IDEA expires, or beyond the regular school year, as compensation for time where the school did not provide the child with a FAPE.¹³⁹

While these three forms of relief are accepted by most courts today as appropriate under IDEA's § 1415(i)(3)(B)(iii), a fourth proposed type of relief, compensatory damages, remains highly controversial. Because most courts have ruled that compensatory damages are not available for violations of IDEA,¹⁴⁰ many parents have turned to § 1983 seeking relief for the egregious violations of students' rights by schools.

II. *SMITH V. ROBINSON* AND § 1415(L): THE ORIGINS OF THE CONTROVERSY

The Supreme Court first addressed the usage of § 1983 as a vehicle to bring claims grounded in the original IDEA, (EAHCA)¹⁴¹ in the 1984 case, *Smith v. Robinson*.¹⁴² *Smith* involved a dispute over an award of attorney's fees, which were not available under IDEA at that time,¹⁴³ for substantial, but undecided § 1983 constitutional claims which arose out of a school's denial of FAPE.¹⁴⁴

The plaintiff, Tommy Smith, was an eight year-old boy who suffered from cerebral palsy and other physical and emotional

¹³⁸ *Burlington*, 471 U.S. at 369.

¹³⁹ *E.g.*, *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 395–97 (3d Cir. 1996); *Pihl v. Mass. Dep't of Educ.*, 9 F.3d 184, 189 (1st Cir. 1993).

¹⁴⁰ *See Ortega v. Bibb County Sch. Dist.*, 397 F.3d 1321, 1325–26 (11th Cir. 2005); *Geau v. Hattaway*, 330 F.3d 758, 774 (6th Cir. 2003); *Polera v. Bd. of Educ.*, 288 F.3d 478, 483–86 (2d Cir. 2002); *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275 (9th Cir. 1999); *Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524, 526–27 (4th Cir. 1998); *Charlie F. v. Bd. of Educ.*, 98 F.3d 989, 991 (7th Cir. 1996); *Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996); *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 386–87 (6th Cir. 1992) (holding that general damages were not available under predecessor statute to the IDEA).

¹⁴¹ The opinion repeatedly refers to EHA, or the Education of the Handicapped Act, which was a predecessor to the EAHCA. *See* Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970). However, it explains that when using "EHA" throughout its opinion, it is referring to the 1975 Amendments to EHA, or EAHCA. *See* 468 U.S. at 997 n.4. To avoid confusion, this Note will consistently refer to it as "EAHCA."

¹⁴² 468 U.S. 992 (1984).

¹⁴³ *Id.* at 1002.

¹⁴⁴ *See id.* at 1002–03.

disabilities.¹⁴⁵ Through an agreement with the school committee, Tommy was placed in a hospital day treatment program.¹⁴⁶ Less than a year later, however, the school committee refused to pay for his continued placement at the hospital.¹⁴⁷ In protest, his parents pursued the administrative remedies available to them under the EAHCA.¹⁴⁸ Additionally, they filed a § 1983 complaint against the school committee, alleging that its refusal to continue payments during the pendency of their administrative appeal was tantamount to a denial of due process.¹⁴⁹ The district court agreed and thus issued a restraining order and preliminary injunction against the committee; moreover, it awarded the Smiths attorneys fees under § 1988 for the fees they incurred upon bringing the action.¹⁵⁰ By this time, the Smiths had completed the administrative process, which did not end in their favor.¹⁵¹ As a result, they amended their complaint to include various state defendants and claims involving the adverse administrative decision and reasonable attorney's fees and costs.¹⁵² After a series of opinions and orders from the court, the Smiths amended their complaint a second time, adding claims¹⁵³ under the Equal Protection Clause¹⁵⁴ and § 504 of the Rehabilitation Act of 1973.¹⁵⁵ The district court ultimately ruled in favor of the Smiths, stating that Tommy was entitled to a free appropriate public education paid for by the school committee.¹⁵⁶ However, the Court found support for its decision in state law and declined to address the federal statutory and constitutional claims.¹⁵⁷

Given their prevailing party status, the Smiths requested attorney's fees and costs against the state defendants.¹⁵⁸ The Court granted their request and awarded the Smiths fees and costs for

¹⁴⁵ *Id.* at 995.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See id.* at 995–96.

¹⁵⁰ *Id.* at 996.

¹⁵¹ *See id.* at 997.

¹⁵² *Id.* at 997–98.

¹⁵³ *Id.* at 1000.

¹⁵⁴ U.S. CONST. amend. XIV, § 1.

¹⁵⁵ Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a) (2006) [hereinafter § 504]. Section 504 prohibits the exclusion, denial of benefits, and discrimination against qualified individuals with a disability, solely because of their disability, by any federally funded program or executive agency. *Id.*

¹⁵⁶ *Smith*, 468 U.S. at 1000–01.

¹⁵⁷ *Id.* at 1001.

¹⁵⁸ *Id.*

both the administrative and court proceedings.¹⁵⁹ It stated that although the administrative appeal and complaint were brought under the EAHCA, which did not provide for attorney's fees, the Smiths had also raised a § 1983 claim based on a cognizable equal protection claim, thus entitling them to the award, even though the Court did not ultimately decide that claim.¹⁶⁰ Upon appeal, the Court of Appeals reversed.¹⁶¹ It held that the comprehensive remedial scheme of EAHCA indicated Congress's intent to foreclose the use of other remedies like §§ 1983 and 1988 for actions based on EAHCA.¹⁶² "In the view of the Court of Appeals, the fact that the § 1983 claims . . . were based on independent constitutional violations rather than violations of [EAHCA] was immaterial. The constitutional claims alleged—a denial of [a FAPE] because of handicap—are factually identical to the [EAHCA] claims."¹⁶³ Thus, the Smiths were not entitled to an award of attorneys fees under §§ 1983 and 1988, where EAHCA did not provide for such fees.¹⁶⁴

Due to the confusion among the circuits at that time, regarding the relationship between EAHCA and other remedies like § 1983, the Supreme Court granted certiorari.¹⁶⁵ In affirming the First Circuit's decision, the Court concluded that

where the [EAHCA] is available to a handicapped child asserting a right to a free appropriate public education, based either on the [EAHCA] or on the Equal Protection Clause of the Fourteenth Amendment, the [EAHCA] is the exclusive avenue through which the child and his parents or guardian can pursue their claim.¹⁶⁶

Of particular interest, however, is a statement made in response to one of the Smiths' arguments. The Court stated:

Petitioners insist that regardless of the wisdom of requiring resort to available [EAHCA] remedies before a handicapped child may seek judicial review, Congress specifically indicated that it did not intend to limit the judicial remedies otherwise available to a handicapped child. *If that were true, we would agree with petitioners that Congress' intent is*

¹⁵⁹ *Id.* at 1001–02.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1002.

¹⁶² *Id.* at 1002–03.

¹⁶³ *Id.* at 1003.

¹⁶⁴ *See id.*

¹⁶⁵ *Id.* at 1004.

¹⁶⁶ *Id.* at 1013.

*controlling and that a § 1983 remedy remained available to them.*¹⁶⁷

Though only dicta, it would eventually come back to haunt the Court.

In his dissent to the majority opinion, Justice Brennan counseled that § 1983 must be read together with the EAHCA to determine if a § 1983 claim was available.¹⁶⁸ Arguing that the aspects of § 1983 not in conflict with the EAHCA should be preserved, he characterized the majority's decision as a repeal of § 1983 to the extent that it covered the Smiths' claims¹⁶⁹ and invited Congress to act.¹⁷⁰

In a rare demonstration of solidarity and efficiency, Congress responded. In February of 1985, less than a year after the decision in *Smith* was handed down, it passed the Handicapped Children's Protection Act¹⁷¹ (HCPA) to correct what it viewed as a significant misstep by the Court.¹⁷² The primary purpose of the Act was "to authorize the award of reasonable attorneys' fees to certain prevailing parties, to clarify the [EAHCA's] effect . . . on rights, procedures, and remedies under other laws relating to the prohibition of discrimination . . ." ¹⁷³ In addressing EAHCA's relationship to other laws, HCPA stated, "[n]othing in this chapter 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."¹⁷⁴ This clause reflected Congress's unequivocal rejection of the holding in *Smith* and brought new meaning to the Court's statement in footnote 16 of the opinion.¹⁷⁵ Congress also followed Justice Brennan's advice¹⁷⁶ by amending EAHCA to include an exhaustion requirement.¹⁷⁷ In other words, EAHCA now mandated that parents had to exhaust

¹⁶⁷ *Id.* at 1012–13 n.16 (emphasis added).

¹⁶⁸ *Id.* at 1023 (Brennan, J., dissenting).

¹⁶⁹ *Id.* at 1025 (Brennan, J., dissenting).

¹⁷⁰ *Id.* at 1031 (Brennan, J., dissenting).

¹⁷¹ Handicapped Children's Protection Act of 1986, 20 U.S.C. §§ 1415(i)(3), 1415(l) (2000).

¹⁷² See S. REP. NO. 99-112, at 2 (1985), reprinted in 1986 U.S.C.C.A.N. 1798, 1799.

¹⁷³ Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796, 796 (1986).

¹⁷⁴ 20 U.S.C. § 1415(f) (Supp. IV 1986), amended by 20 U.S.C. § 1415(l) (Supp. III 1997) [hereinafter § 1415(l)].

¹⁷⁵ See *Smith*, 468 U.S. at 1012–13 n.16; *id.* at 1025 (Brennan, J., dissenting).

¹⁷⁶ See *id.* at 1024 (Brennan, J., dissenting).

¹⁷⁷ 20 U.S.C.A. § 1415(l) (West 2000 & Supp. 2008).

the administrative remedies provided under the Act, before they could avail themselves of any civil action. Congress added this requirement to prevent parents from circumventing the extensive procedural protections of IDEA.¹⁷⁸

Although the HCPA made it clear that EAHCA was *not* intended to limit the rights and remedies available elsewhere, it neglected to specify whether § 1983 was one of the remedies considered by the amendment. In so doing, it invited controversy by leaving it to the various courts to decide. Subsequent Supreme Court decisions elaborated on the availability of § 1983 generally but did not directly address its relationship with the EAHCA after the enactment of HCPA.

In a 1987 case, *Wright v. Roanoke Redevelopment & Housing Authority*,¹⁷⁹ the Court considered the relationship between § 1983 and the Brooke Amendment to the Housing Act of 1937.¹⁸⁰ The case involved a dispute between tenants of low-income housing projects and the city redevelopment and housing authority.¹⁸¹ The tenants brought a § 1983 claim alleging that the housing authority had overcharged them for utilities, in violation of the Housing Act.¹⁸² In granting summary judgment for the housing authority, the district court held that a private cause of action was not available under the Housing Act¹⁸³ and the Court of Appeals for the Fourth Circuit affirmed.¹⁸⁴ The Supreme Court reversed the decision, holding that the Housing Act created enforceable rights for the purposes of § 1983¹⁸⁵ and that its administrative scheme was not so comprehensive as to show an intent by Congress to preclude action under § 1983.¹⁸⁶

In reaching these conclusions, the Court reinforced its holdings in two earlier cases, *Pennhurst State School & Hospital v.*

¹⁷⁸ S. REP. NO. 99-112, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1805. However, subsequent case law has revealed that courts will excuse the exhaustion requirement when the pursuit of administrative remedies would be futile. *See* *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1276 (9th Cir. 1999) (holding that exhaustion was excused where the educational issues had been settled and the administrative remedies were not sufficient to address past physical abuse).

¹⁷⁹ 479 U.S. 418 (1987).

¹⁸⁰ Housing Act of 1937, Pub. L. No. 91-152, § 213(a), 83 Stat. 379, 389 (1969) (current version at 42 U.S.C. § 1437a(a)(1) (2000)).

¹⁸¹ *See Wright*, 479 U.S. at 419–20.

¹⁸² *Id.* at 421–22.

¹⁸³ *Id.* at 422.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 432.

¹⁸⁶ *Id.* at 425.

Halderman,¹⁸⁷ and *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*.¹⁸⁸ In *Pennhurst*, the Court held that for a § 1983 cause of action to lie, the relevant statutory provision must create an enforceable right.¹⁸⁹ In *Sea Clammers*, it held that a comprehensive remedial scheme of a statute suggested Congressional intent to foreclose a remedy under § 1983.¹⁹⁰

The Court took these principles one step further with its 1997 decision in *Blessing v. Freestone*.¹⁹¹ In that case, mothers of children eligible for child support under Title IV-D of the Social Security Act¹⁹² filed a § 1983 suit claiming that the Act provided them with enforceable individual rights.¹⁹³ In holding that the Act did not confer individual federal rights,¹⁹⁴ the Court noted that “[e]ven if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983.”¹⁹⁵ Accordingly, the Court held that a defendant may overcome the presumption if he can establish an implied foreclosure of a § 1983 right of action through a showing that the statute contains a “comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.”¹⁹⁶

However, in the 2005 case *City of Rancho Palos Verdes v. Abrams*,¹⁹⁷ the Court again altered its position on the issue. The case involved the Telecommunications Act of 1996¹⁹⁸ and a city ordinance which required a permit for the commercial use of an antenna.¹⁹⁹ Upon denial of his application for such a permit, the plaintiff sued for injunctive relief under the provisions of the statute and money damages under § 1983.²⁰⁰ The Supreme Court ultimately held that § 1983 was not available as a remedy for the

¹⁸⁷ 451 U.S. 1 (1981).

¹⁸⁸ 453 U.S. 1 (1981).

¹⁸⁹ 451 U.S. at 18–19.

¹⁹⁰ 453 U.S. at 21.

¹⁹¹ 520 U.S. 329 (1997).

¹⁹² 42 U.S.C. §§ 651–69b (West 2000).

¹⁹³ *Blessing*, 520 U.S. at 332–33.

¹⁹⁴ *Id.* at 348; *cf.* 345–46 (stating that the possibility individual rights under Title IV-D remained open); *see also* *Smith v. Robinson*, 468 U.S. 992, 1005 n.9 (1984) (stating that dismissal is proper where “Congress specifically foreclosed a remedy under § 1983”).

¹⁹⁵ *Blessing*, 520 U.S. at 341.

¹⁹⁶ *Id.* (citing *Smith v. Robinson*, 468 U.S. 992, 1005 n.9 (1984) and *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994)).

¹⁹⁷ 544 U.S. 113 (2005).

¹⁹⁸ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

¹⁹⁹ *Rancho Palos Verdes*, 544 U.S. at 115–17.

²⁰⁰ *Id.* at 117, 118.

alleged violations of plaintiff's statutory rights.²⁰¹ In its discussion, the Court focused on the private remedial provisions in the statute, stating that it indicated that Congress did not intend "to leave open a more expansive remedy under § 1983."²⁰² More significant, however, was the Court's statement that "[t]he *ordinary inference that the remedy provided in the statute is exclusive* can surely be overcome by textual indication, express or implicit, that the remedy is to complement, rather than supplant, § 1983."²⁰³ In phrasing the issue this way, the Court seemingly threw out the "rebuttable presumption" theory discussed in *Blessing*²⁰⁴ and replaced it with the theory that Congress's inclusion of a private remedy in a federal statute gives rise to a presumption that the remedy is exclusive. It also indicates that to defeat the presumption, plaintiff must offer "textual" proof that the remedy was not intended to be comprehensive.²⁰⁵

These decisions, together with § 1415(l), have served only to confuse the lower courts. An examination of the positions of the various courts of appeals reveals a deep divide among the circuits.

III. THE FALLOUT FROM § 1415(L)

As of the writing of this Comment, five of the circuits prohibit § 1983 claims for violations of rights guaranteed by IDEA,²⁰⁶ two circuits permit such claims,²⁰⁷ two have issued inconsistent decisions,²⁰⁸ two have not directly addressed the issue,²⁰⁹ and one

²⁰¹ *Id.* at 127.

²⁰² *Id.* at 121.

²⁰³ *Id.* at 122 (emphasis added).

²⁰⁴ 520 U.S. at 341.

²⁰⁵ *Rancho Palos Verdes*, 544 U.S. at 122.

²⁰⁶ *See, e.g.*, *Blanchard v. Morton Sch. Dist.*, 504 F.3d 771, 774–75 (9th Cir. 2007); *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 806 (3d Cir. 2007); *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 29 (1st Cir. 2006); *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1274 (10th Cir. 2000); *Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524, 525 (4th Cir. 1998).

²⁰⁷ *Marie O. v. Edgar*, 131 F.3d 610, 611–12 (7th Cir. 1997); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 750 (2d Cir. 1987).

²⁰⁸ *Compare Gean v. Hattaway*, 330 F.3d 758, 776 (6th Cir. 2003) (recognizing IDEA-based § 1983 claims in certain circumstances), *with Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 383–84 (6th Cir. 1992) (prohibiting damage recovery through § 1983 for EHA (IDEA) violations); *Digre v. Roseville Sch. Indep. Dist. No. 623*, 841 F.2d 245, 250 (8th Cir. 1988) ("Mrs. Digre was entitled to bring a section 1983 action based on alleged violations of the [IDEA] . . ."), *with Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996) ("We now hold as a matter of law that plaintiffs in the present case cannot recover general or punitive damages [under § 1983] arising out of defendants' alleged violations of the IDEA . . .").

²⁰⁹ *See D.G. ex rel. N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996) (holding that plaintiff must exhaust administrative remedies before proceeding with § 1983

appears to allow such claims, but has not officially weighed in on the issue.²¹⁰

A. Prohibit the Use of § 1983 Claims for Violations of IDEA

The two leading cases which bar the use of § 1983 as a remedy for IDEA violations are *Sellers v. School Board of Manassas*²¹¹ and *Padilla v. School District No. 1*.²¹² In *Sellers*, the parents of an eighteen year-old boy who had only recently been diagnosed as learning disabled and emotionally disturbed²¹³ sought compensatory and punitive damages under IDEA, § 504, and § 1983, arguing that the school should have detected his disability back in grade school.²¹⁴ In denying their damages claims, the Fourth Circuit stated that IDEA's comprehensive remedial scheme was the appropriate avenue for enforcing violations of that particular statute.²¹⁵ It further stated that the HCPA amendment, which created § 1415(l), was not meant to allow parties to bypass IDEA's processes.²¹⁶ Although the court conceded that the HCPA overruled *Smith* insofar as it held that the EAHCA precluded Constitutional or Rehabilitation Act claims that were virtually identical to general EAHCA claims,²¹⁷ it refused to interpret the language in § 1415(l) as allowing § 1983 claims because of the absence of any explicit reference to § 1983 in the clause.²¹⁸ It stated, "[t]he reference to 'other' statutes protecting the rights of disabled children cannot naturally be read to include 42 U.S.C. § 1983, a statute which speaks generally and mentions neither disability nor youth."²¹⁹ The court then clarified its interpretation of 1415(l), stating that "[b]y preserving rights and remedies 'under the Constitution,' section

claim based on IDEA violation); *Angela L. v. Pasadena Indep. Sch. Dist.*, 918 F.2d 1188, 1193 n.3 (5th Cir. 1990) (addressing issue in dicta).

²¹⁰ The D.C. Circuit has yet to issue an opinion deciding the issue. *Blackman v. District of Columbia*, 456 F.3d 167, 172 n.6 (D.C. Cir. 2006) ("We have not yet decided whether a section 1983 action can be brought to enforce the FAPE right."). However, the district courts generally recognize § 1983 claims for IDEA violations. *See Hinson v. Merritt Educ. Ctr.*, 521 F. Supp. 2d 22, 28 (D.D.C. 2007); *Johnson v. District of Columbia*, 190 F. Supp. 2d 34, 46–47 (D.D.C. 2002); *Walker v. District of Columbia*, 157 F. Supp. 2d 11, 14 (D.D.C. 2001).

²¹¹ 141 F.3d 524 (4th Cir. 1998).

²¹² 223 F.3d 1268 (10th Cir. 2000).

²¹³ *Sellers*, 141 F.3d at 525.

²¹⁴ *Id.* at 525–26.

²¹⁵ *Id.* at 529.

²¹⁶ *See id.* at 530 n.4.

²¹⁷ *Id.* at 530.

²¹⁸ *Id.*

²¹⁹ *Id.*

1415[l] does permit plaintiffs to resort to section 1983 for *constitutional* violations [b]ut . . . does not permit plaintiffs to sue under section 1983 for an IDEA violation, which is *statutory* in nature.”²²⁰ It reasoned that the relatively low standard of proof required to prevail in an IDEA action, compared with the exceptionally high standard for constitutional claims, meant that school boards would be subject to liability much more frequently for statutory IDEA claims than for similar constitutional claims.²²¹ As such, it made sense for Congress to allow the expansive remedies § 1983 provides for constitutional, but not statutory IDEA, violations.²²²

The court then turned to the legislative history of the HCPA.²²³ In particular, it addressed an excerpt from a House Committee Report, which stated, “since 1978, it has been Congress’ intent to permit parents or guardians to pursue the rights of handicapped children through [EAHCA], section 504, and section 1983 Congressional intent was ignored by the U.S. Supreme Court when . . . it handed down its decision in *Smith v. Robinson*.”²²⁴ It also looked at an excerpt from the House Conference Report, which stated, “[i]t is the conferees’ intent that actions brought under 42 U.S.C. 1983 are governed by this provision.”²²⁵ The court found that neither statement indicated Congress’ approval of § 1983 claims premised on IDEA violations. Rather, it found both statements to be consistent with its own interpretation of 1415(l) and § 1983.²²⁶

Finally, the court considered the fact that IDEA was a joint federal-state program enacted pursuant to Congress’ spending power.²²⁷ It opined that the statute operated like a contract between states and the government, and thus was only valid if the states accepted, knowing the terms which they would be subject to.²²⁸ According to the court, the *Smith* decision put states on notice that they would *not* be subject to § 1983 liability for EAHCA claims because Congress intended EAHCA to be the sole remedy for parents to pursue such violations and related equal protection

²²⁰ *Id.*

²²¹ *Id.* at 530–31.

²²² *Id.* at 531.

²²³ *Id.*

²²⁴ *Id.* (quoting H.R. REP. NO. 99-296, at 4 (1985)).

²²⁵ *Id.* (quoting H.R. REP. NO. 99-687, at 7 (1986) (Conf. Rep.), as reprinted in 1986 U.S.C.C.A.N. 1807, 1809).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 531–32 (quoting *Suter v. Artist M.*, 503 U.S. 347, 356 (1992)).

claims.²²⁹ If Congress meant to overrule this holding, it needed to do so clearly in order to give states adequate notice.²³⁰ Since 1415(l) was not clear and failed to even mention § 1983, the court took it to mean that Congress did not intend to overrule that part of the *Smith* decision and allow § 1983 claims as a remedy to IDEA violations.²³¹

In 2000, the Tenth Circuit joined the *Sellers* court with its decision in *Padilla*.²³² In that case, the parents of a physically and developmentally disabled girl sought money damages and attorney's fees under the Americans with Disabilities Act of 1990 (ADA)²³³ and § 1983.²³⁴ They alleged that the school failed to provide necessary services listed in her IEP for five years.²³⁵ The parents further claimed that the school restrained their daughter in a stroller and left her unsupervised in a closet, where she eventually tipped over and fractured her skull, leading to a worsening of her seizure disorder and her removal from school for the remainder of the term.²³⁶ Finally, the parents alleged that the school failed to provide the required home tutoring while their daughter was recovering from her head injury.²³⁷ Much like the Fourth Circuit, the court determined that § 1415(l) "voided *Smith's* broad holding that the [EAHCA] precludes overlapping but independent claims otherwise cognizable under the Constitution, the Rehabilitation Act, or other Federal laws,"²³⁸ but otherwise, left the decision intact.²³⁹ Relying on the Supreme Court's reasoning in *Wright* and *Blessing*, both of which were decided after *Smith* and the HCPA amendment, the court held that § 1983 was not an available remedy for pure IDEA violations and dismissed the *Padillas'* § 1983 claim.²⁴⁰ Specifically, it noted how the *Wright* and *Blessing* courts had cited *Smith* as an example of a remedial scheme which was comprehensive enough to supplant § 1983.²⁴¹ Because the remedial

²²⁹ *Id.* at 532 (citing *Smith v. Robinson*, 468 U.S. 992, 1013) (1984)).

²³⁰ *Id.*

²³¹ *Id.*

²³² 233 F.3d 1268, 1273 (10th Cir. 2000).

²³³ Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006).

²³⁴ *Padilla*, 233 F.3d at 1271.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 1273.

²³⁹ *Id.*

²⁴⁰ *Id.* at 1273–74.

²⁴¹ *Id.* (citing *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 427 (1987); *Blessing v. Freestone*, 520 U.S. 329, 347 (1997)).

scheme discussed in *Smith* was from the EAHCA/IDEA, the court concluded that the Supreme Court considered its assertion in *Smith* regarding IDEA-based § 1983 claims to be good law, even after enactment of § 1415(l).²⁴²

In 2006, the First Circuit became the third court of appeals to definitively prohibit § 1983 claims based on IDEA violations.²⁴³ In *Diaz-Fonseca v. Puerto Rico*,²⁴⁴ the court held that neither compensatory nor punitive damages were allowed in § 1983, ADA, or § 504 claims which were based on a denial of FAPE under IDEA.²⁴⁵ It reasoned that if money damages are barred under IDEA itself, plaintiffs should not be allowed to circumvent the restriction by utilizing a different vehicle to bring an IDEA claim.²⁴⁶ With respect to § 1415(l), the court's interpretation was consistent with the Fourth and Tenth Circuits.²⁴⁷ It stated, "[w]e read the caveat set out in 20 U.S.C. § 1415(l) as intended to ensure that the IDEA does not restrict rights and remedies that were already independently available through other sources of law."²⁴⁸ Ultimately, it held that monetary relief in IDEA-based claims was limited to compensatory education and tuition reimbursement.²⁴⁹

The following year, 2007, marked a major shift in the controversy, as the Third Circuit reversed its previous course and aligned itself with the First, Fourth, and Tenth Circuits by disallowing § 1983 claims for violations of IDEA.²⁵⁰ Four months later, the Ninth Circuit, influenced by the Third Circuit's decision, also barred such § 1983 actions.²⁵¹

In *A.W. v. Jersey City Public Schools*,²⁵² the Third Circuit overruled *W.B. v. Matula*,²⁵³ which expressly permitted § 1983 actions for IDEA violations.²⁵⁴ The court applied the analysis set

²⁴² *Padilla*, 233 F.3d at 1274.

²⁴³ See *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 28–29 (1st Cir. 2006).

²⁴⁴ 451 F.3d 13.

²⁴⁵ *Id.* at 19, 28–29, 31.

²⁴⁶ *Id.* at 28 (quoting *Nieves-Marques v. Puerto Rico*, 353 F.3d 108, 125 (1st Cir. 2003)).

²⁴⁷ See *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1273–74 (10th Cir. 2000); *Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524, 530 (4th Cir. 1998).

²⁴⁸ *Diaz-Fonseca*, 451 F.3d at 29.

²⁴⁹ *Id.* at 31 (quoting *Nieves-Marques*, 353 F.3d at 124).

²⁵⁰ See *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 803 (3d Cir. 2007).

²⁵¹ See *Blanchard v. Morton Sch. Dist.*, 504 F.3d 771, 774–75 (9th Cir. 2007), *amended and superseded by* 509 F.3d 934 (9th Cir. 2007).

²⁵² 486 F.3d 791 (3d Cir. 2007).

²⁵³ 67 F.3d 484 (3d Cir. 1995).

²⁵⁴ *Id.* at 494. The *Matula* court's holding was based on the legislative history of § 1415(l) and the Supreme Court's ruling in *Franklin v. Gwinnet County Public Schools*. 503 U.S. 60

forth in the Supreme Court's post-*Smith* § 1983 jurisprudence²⁵⁵ and adopted the Fourth and Tenth Circuits' interpretation of § 1415(l).²⁵⁶ It began by acknowledging that IDEA satisfied the first § 1983 requirement articulated in *Gonzaga University v. Doe*²⁵⁷—that the statute in question creates enforceable rights for a class which plaintiffs belongs to²⁵⁸—and thus created a presumption that Congress intended for § 1983 to be available as a remedy for IDEA violations.²⁵⁹ Next, relying on *Sea Clammers* and *Smith*, as discussed in *Rancho Palos Verdes*, the court concluded that IDEA's administrative and judicial remedies constituted a private judicial remedy which, absent some textual indication to the contrary, rebutted that presumption.²⁶⁰ Finally, the court rejected the notion that the text of § 1415(l) reflected Congress's intent that the remedies provided for within IDEA complement, rather than supplant, § 1983.²⁶¹ Instead, it adopted the Fourth and Tenth Circuits' view of § 1415(l), that “this provision merely evidences Congress's intent that ‘the claims available under § 1983 prior to the enactment of the [Act] continue to be available after its enactment.’”²⁶²

In September of 2007, the Ninth Circuit expressed its approval of the *A.W.* court's opinion in *Blanchard v. Morton School District*²⁶³ and promptly joined the four other circuits barring IDEA-based § 1983 claims.²⁶⁴ In a cursory opinion, the court complemented the *A.W.* court's thorough decision,²⁶⁵ agreed with it,²⁶⁶ and cited IDEA's comprehensive remedial scheme as evidence of Congress's intent not

(1992). Specifically, it reviewed the House and Senate reports for § 1415(l) and concluded that Congress had explicitly approved § 1983 claims predicated on IDEA. *Matula*, 67 F.3d at 494. The Court found further support for its theory in *Franklin*, which held that “absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief” for a cognizable statutory violation. *Franklin*, 503 U.S. at 70–71.

²⁵⁵ *A.W.*, 486 F.3d at 802 (quoting *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 122 (2005)).

²⁵⁶ *Id.* at 803.

²⁵⁷ 536 U.S. 273 (2002).

²⁵⁸ *Id.* at 285 (citing *Gonzaga University*, 536 U.S. at 285).

²⁵⁹ *A.W.*, 486 F.3d at 802.

²⁶⁰ *Id.* at 802–03 (quoting *Rancho Palos Verdes*, 544 U.S. at 122).

²⁶¹ *Id.* at 802.

²⁶² *Id.* at 802–03 (quoting *Rancho Palos Verdes*, 544 U.S. at 126).

²⁶³ 504 F.3d 771, 774 (9th Cir. 2007), *amended and superseded by* 509 F.3d 934 (9th Cir. 2007).

²⁶⁴ *Id.* at 774–75.

²⁶⁵ *Id.* at 774.

²⁶⁶ *Id.*

to allow § 1983 claims based on IDEA violations.²⁶⁷

B. Permit the use of § 1983 as a remedy for IDEA violations

Currently, only the Second and Seventh Circuits expressly allow § 1983 claims that are based on IDEA violations.²⁶⁸ In the 1987 case, *Mrs. W. v. Tirozzi*,²⁶⁹ the Second Circuit held that parents were “entitled to bring a § 1983 action based on alleged violations of the [EAHCA]”²⁷⁰ The court’s decision was based on Supreme Court § 1983 jurisprudence and the legislative history of § 1415(f).²⁷¹ In its analysis, the court acknowledged that § 1983 was not available to enforce federal statutory violations where “Congress has foreclosed enforcement of the statute in the statute itself, or when a statutory remedial scheme is so comprehensive that there is an implication that it provides the exclusive remedy foreclosing all other remedies.”²⁷² Interestingly enough, however, the court then cited to footnote 16 in the *Smith* decision²⁷³ and stated, “[o]f course, even the existence of a comprehensive remedial scheme will not bar resort to § 1983, if Congress states that it did not want its enactment construed to restrict or limit the remedies otherwise available.”²⁷⁴ It then went on to examine the Senate and House committee and conference reports for § 1415(l), ultimately finding that § 1415(l) was a clear sign from Congress that the EAHCA was not to limit the availability of remedies such as § 1983.²⁷⁵

Ten years later, in *Marie O. v. Edgar*,²⁷⁶ the Seventh Circuit also permitted the use of § 1983 as a remedy for IDEA violations.²⁷⁷ Similar to the Second Circuit, its decision focused on whether IDEA creates enforceable rights and whether Congress intended to foreclose the use of separate remedies.²⁷⁸ Applying the three step analysis used in *Blessing* to determine whether a federal statute

²⁶⁷ *Id.* at 774–75.

²⁶⁸ *See Marie O. v. Edgar*, 131 F.3d 610, 611–12 (7th Cir. 1997); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 750 (2d Cir. 1987).

²⁶⁹ 832 F.2d 748 (2d Cir. 1987).

²⁷⁰ *Id.* at 755.

²⁷¹ *See id.* at 754–56.

²⁷² *Id.* at 754 (citing *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 424–25 (1987)).

²⁷³ *See* 468 U.S. at 1012 n.16.

²⁷⁴ *Mrs. W.*, 832 F.2d at 754.

²⁷⁵ *See id.* at 755.

²⁷⁶ 131 F.3d 610 (7th Cir. 1997).

²⁷⁷ *Id.* at 622.

²⁷⁸ *See id.* at 619.

creates enforceable rights, the court found that IDEA's detailed guidelines for establishing comprehensive early intervention systems were clear, specific mandates to participating states and not just suggestions.²⁷⁹ As such, it determined that IDEA did in fact create enforceable rights.²⁸⁰ The court then considered whether the comprehensive remedial scheme within IDEA and the enforcement authority granted to the Secretary demonstrated an intent by Congress to preclude IDEA-based § 1983 claims.²⁸¹ Relying again on *Blessing*, the court held that neither the text nor the structure of IDEA supported this conclusion.²⁸² In fact, after reviewing § 1415(l), the court held the exact opposite, stating that "not only did Congress not intend to foreclose resort to § 1983 in Part H, but it actually provided for its availability to enforce the IDEA."²⁸³

C. Unclear or Undecided

The remaining circuits have either issued conflicting opinions or have not directly addressed the issue.²⁸⁴ The Sixth and Eighth Circuits have each issued decisions recognizing the right to bring a § 1983 action for IDEA violations²⁸⁵ and decisions prohibiting such claims.²⁸⁶ The Fifth and Eleventh Circuits have not ruled on the specific issue and thus, have forced the lower courts to interpret dicta²⁸⁷ or to extrapolate existing case law.²⁸⁸

²⁷⁹ *Id.* at 620.

²⁸⁰ *Id.* at 619.

²⁸¹ *Id.* at 621.

²⁸² *Id.* (citing *Blessing*, 520 U.S. at 347–48).

²⁸³ *Marie O.*, 131 F.3d at 622.

²⁸⁴ Compare *Gean v. Hattaway*, 330 F.3d 758, 776 (6th Cir. 2003) (recognizing IDEA-based § 1983 claims in certain circumstances), with *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 387 (6th Cir. 1992) (prohibiting damage recovery through § 1983 for IDEA violations); *Digre v. Roseville Sch. Indep. Dist. No. 623*, 841 F.2d 245, 250 (8th Cir. 1988) ("Mrs. Digre was entitled to bring a section 1983 action based on alleged violations of the [IDEA] . . ."), with *Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996) ("We now hold as a matter of law that plaintiffs in the present case cannot recover general or punitive damages [under § 1983] arising out of defendants' alleged violations of the IDEA . . ."). The D.C. Circuit has yet to issue an opinion deciding the issue. *Blackman v. District of Columbia*, 456 F.3d 167, 172 n.6 (D.C. Cir. 2006) ("We have not yet decided whether a section 1983 action can be brought to enforce the FAPE right."). However, the district courts generally recognize § 1983 claims for IDEA violations. See *Hinson v. Merritt Educ. Ctr.*, 521 F. Supp. 2d 22, 28 (D.D.C. 2007); *Johnson v. District of Columbia*, 190 F. Supp. 2d 34, 46–47 (D.D.C. 2002); *Walker v. District of Columbia*, 157 F. Supp. 2d 11, 14 (D.D.C. 2001).

²⁸⁵ *Gean v. Hattaway*, 330 F.3d 758, 773 (6th Cir. 2003); see *Digre v. Roseville Sch. Indep. Dist. No. 623*, 841 F.2d 245, 250 (8th Cir. 1988).

²⁸⁶ *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).

²⁸⁷ See *Doe v. S & S Consol. I.S.D.*, 149 F. Supp. 2d 274, 303 (E.D. Tex. 2001) (citing *Angela*

The D.C. Circuit has yet to rule on the issue at all.²⁸⁹ However, the district courts for the District of Columbia generally allow the use of § 1983 as a remedy for IDEA violations.²⁹⁰ One such case, *Walker v. District of Columbia*,²⁹¹ has delineated a four part test which plaintiffs must meet in order to prevail.²⁹² According to the test, plaintiffs must show:

- (1) that the defendant violated IDEA; (2) that “exceptional circumstances” exist, such that the defendant’s conduct that caused the IDEA violation was persistently egregious and prevented or frustrated the plaintiff from securing equitable relief under the IDEA; (3) “that the District of Columbia has a custom or practice that is the moving force behind the alleged IDEA violations”; and (4) that the normal remedies offered under the IDEA, including compensatory education, are inadequate to compensate the plaintiff for the harm he or she allegedly suffered.²⁹³

While some courts have adopted and applied the *Walker* test,²⁹⁴ others have only adopted steps one and three of the test.²⁹⁵ This novel approach to IDEA-based § 1983 claims is a significant departure from the all-or-nothing views of the other circuits and holds much promise in resolving the IDEA-§ 1983 conflict.²⁹⁶

L. v. Pasadena Indep. Sch. Dist., 918 F.2d 1188, 1193 n.3 (5th Cir. 1990)).

²⁸⁸ See E.D. *ex rel.* Dukes v. Enterprise City Bd. of Educ., 273 F. Supp. 2d 1252, 1274–75 (M.D. Ala. 2003) (citing *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997)); N.B. *ex rel.* D.G. v. Alachua County Sch. Bd., 84 F.3d 1376, 1379 (11th Cir. 1996)).

²⁸⁹ *Blackman v. Dist. of Columbia*, 456 F.3d 167, 172 n.6 (D.C. Cir. 2006) (“We have not yet decided whether a section 1983 action can be brought to enforce the FAPE right.”).

²⁹⁰ The D.C. Circuit has yet to issue an opinion deciding the issue. *Id.* However, the district courts generally recognize § 1983 claims for IDEA violations. See *Hinson ex rel. N.H. v. Merritt Educ. Ctr.*, 521 F. Supp. 2d 22, 28 (D.D.C. 2007); *Johnson v. District of Columbia*, 190 F. Supp. 2d 34, 46–47 (D.D.C. 2002); *Walker v. District of Columbia*, 157 F. Supp. 2d 11, 14 (D.D.C. 2001).

²⁹¹ 157 F. Supp. 2d 11 (D.D.C. 2001).

²⁹² *Id.* at 30.

²⁹³ *Hinson ex rel. N.H. v. Merritt Educ. Ctr.*, 521 F. Supp. 2d 22, 28 (D.D.C. 2007) (quoting *Walker*, 157 F. Supp. 2d at 30).

²⁹⁴ *Id.* at 28–29; *Robinson ex rel. D.R. v. Dist. of Columbia*, 535 F. Supp. 2d 38, 41, (D.D.C. 2008).

²⁹⁵ See *R.S. v. Dist. of Columbia*, 292 F. Supp. 2d 23, 29 (D.D.C. 2003) (citing *Johnson v. Dist. of Columbia*, 190 F. Supp. 2d 34, 46–47 (D.D.C. 2002)); *Zearley v. Ackerman*, 116 F. Supp. 2d 109, 114 (D.D.C. 2000).

²⁹⁶ It is noteworthy that the District of Columbia allows IDEA-based § 1983 claims, given that its special education system is one of, if not the most, problematic in the nation. See *Johnson*, 190 F. Supp. 2d at 39–40 (citing *Blackman v. Dist. of Columbia*, 185 F.R.D. 4, 5 (D.D.C. 1999)); Bill Myers, *School’s Reform Effort Failing, Says Watchdog Group*, THE EXAMINER, Oct. 3, 2007, available at http://www.examiner.com/a968700~Schools_reform_effort_failing_says_watchdog_group.htm

IV. THE NECESSITY AND REALITY OF ALLOWING IDEA-BASED § 1983 CLAIMS

As the situation currently stands, children like Michelle and Natalie, who have suffered permanent harm due to a school district's willful neglect, are excluded from the protections of the law and left without any meaningful relief in twenty-seven states.²⁹⁷ Having already missed their window of opportunity for obtaining functional communication and life skills, which would allow them to lead independent lives,²⁹⁸ compensatory education, or declaratory and injunctive relief, the only relief available to the girls under IDEA,²⁹⁹ is ineffectual. For no amount of present or future mental health and speech and language services or special education can turn back the clock to the critical intervention period when they were actually able to benefit from such services.³⁰⁰ Likewise, prospective relief, as its name indicates, can only prevent future harm and provides no relief for injuries that have already occurred.³⁰¹ Thus, the reality is that in situations of this nature, § 1983 is one of the only means for providing relief.³⁰²

When this point is properly considered, the opinions of the courts which prohibit IDEA-based § 1983 claims, and the Supreme Court

I; CONSORTIUM FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUCATION, SUMMARY OF NATIONAL DISPUTE RESOLUTION DATA: DUE PROCESS COMPLAINTS [HEARINGS] 2005–2006, available at <http://www.directionservice.org/pdf/DP%20Complaints%202005-06.pdf>.

²⁹⁷ The First, Third, Fourth, Ninth, and Tenth Circuits include twenty-seven of the fifty states, as well as Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands. See U.S.Courts.gov, *Geographic Boundaries of United States Courts of Appeals and United States District Courts*, <http://www.uscourts.gov/images/CircuitMap.pdf> (last visited Mar. 9, 2008).

²⁹⁸ Brief of Plaintiff-Appellant at 9–10, *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008) (No. 05-16236); see *Mark H.*, 513 F.3d at 930.

²⁹⁹ See *supra* note 96 and accompanying text.

³⁰⁰ Brief of Plaintiffs-Appellants at 10, *Mark H. ex rel. Michelle H. v. Lemahieu*, 513 F.3d 922 (9th Cir. Oct. 20, 2005) (No. 05-16236).

³⁰¹ *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1276 (9th Cir. 1999) (“The remedies available under the IDEA would not appear to be well suited to addressing past physical injuries adequately.”).

³⁰² Section 504 and the ADA may also be utilized to obtain damages, in certain circumstances where there is a showing of bad faith or severe educational discrimination. See, e.g., *Sellers v. Sch. Bd. of Manassas*, 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, but not deciding issue of availability of damages); *R.B. ex rel. L.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).

jurisprudence on which those courts rely, are much less sound. For the analyses used cannot be reconciled with the broad purposes of either IDEA or § 1983. In particular, the principle set forth in *Smith, Blessing*, and *Rancho Palos Verdes*—that a sufficiently comprehensive remedial scheme evidences Congress’s intent to foreclose the use of § 1983 as a remedy for statutory violations—is inapposite for statutes like IDEA. While the exhaustion requirement in the HCPA³⁰³ demonstrates that Congress meant for the dispute resolution procedures within the statute to serve as the *primary* vehicle for enforcing education related disputes between parents of special needs children and school districts,³⁰⁴ its legislative history shows that it was not meant to be the exclusive remedy.³⁰⁵ In fact, by providing examples of situations when exhaustion could be excused,³⁰⁶ Congress explicitly recognized that IDEA *could not* be the exclusive remedy for education related claims, as there were clearly situations which IDEA could not or did not have the authority to address. Thus, for the Supreme Court, Third, Fourth, Ninth, and Tenth Circuits to interpret IDEA’s remedial scheme in a manner which forecloses the use of statutes like § 1983, which are capable of remedying what IDEA cannot, is beyond belief. It leaves those few people who have been subjected to particularly egregious violations, but do not fit neatly within IDEA, its exceptions, or other federal statutory remedies, without any protection at all. Congress could not have intended this.

While flagrant violations like that in *Mark H.* are the exception rather than the norm, this fact cannot serve as justification for a blanket denial of the use of § 1983 to remedy IDEA violations.³⁰⁷ The language of § 1983 plainly states that “[e]very person who . . . subjects, or causes to be subjected, *any citizen* of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured”³⁰⁸ It is not limited to citizens who are fortunate enough to live in an area with a competent and caring school district or an agreeable court. IDEA further supports this notion. Its stated purpose, “to ensure that *all* children with disabilities have available to them a free

³⁰³ 20 U.S.C.A. § 1415(l) (West 2000 & Supp. 2008) (requiring parents to exhaust all available administrative remedies before bringing a judicial action in federal court).

³⁰⁴ See 20 U.S.C.A. § 1415.

³⁰⁵ H.R. REP. NO. 99-296, at 7 (1985).

³⁰⁶ *Id.*

³⁰⁷ See *Mark H. v. Lemahieu*, 513 F.3d 922, 931 (9th Cir. 2008).

³⁰⁸ 42 U.S.C.A. § 1983 (West 2000 & Supp. 2008) (emphasis added).

appropriate public education that emphasizes special education and related services designed to meet their unique needs and *prepare them for further education, employment, and independent living*,”³⁰⁹ makes clear that it was enacted to reach all disabled children and provide them with the skills necessary to participate in society. In short, leaving disabled children who have not received any meaningful education and have suffered permanent harm because of a school’s disregard for their needs, without any recourse if the remedies provided for in IDEA are ineffective or insufficient, is tantamount to a repeal of IDEA. For it effectively allows schools to sit back and watch disabled children, who have the potential for a productive life, waste away with impunity.

This perspective also casts doubt on the Third, Fourth, and Tenth Circuits’ interpretation of § 1415(l) as affirming the part of *Smith*’s holding which states that IDEA is the sole remedy for violations of the statute.³¹⁰ As one commentator states, “[i]ndisputable in the HCPA was Congress’s disagreement with *Smith* . . . and its intent to return to the pre-*Smith* status quo. That status quo did not provide for section 1983 damages claims based solely on the IDEA.”³¹¹ To be sure, § 1415(l) did definitively preserve any rights and remedies which were available before *Smith*.³¹² However, given its non-limiting language,³¹³ it is a stretch to say that Congress intended to preclude the use of § 1983 for claims based on IDEA. Section 1415(l) was a forward-looking provision which sought to ensure that disabled children received adequate protection from the law.³¹⁴ With this in mind, it is hard to see how Congress would have intended to prohibit IDEA-based § 1983 claims in situations where § 1983 is one of, if not the only, means of providing relief.

As for the other reasons given by the courts for barring the use of § 1983 as a remedy to IDEA violations, they are either overstated or

³⁰⁹ 20 U.S.C.A. § 1400(d)(1)(A) (West 2000 & Supp. 2008) (emphasis added).

³¹⁰ *Smith v. Robinson*, 468 U.S. 992, 1012–13 (1984).

³¹¹ Terry Jean Seligmann, *A Diller, A Dollar: Section 1983 Damage Claims in Special Education Lawsuits*, 36 GA. L. REV. 465, 505 (2002).

³¹² See 20 U.S.C.A. § 1415(l) (West 2008).

³¹³ The original HCPA amendment which added the provision read, “*nothing in this [chapter] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution . . . or other Federal statutes protecting the rights of handicapped children and youth . . .*” Handicapped Children’s Protection Act of 1986, Pub. L. No. 99-372, § 3, 100 Stat. 796, 797 (1986) (current version at 20 U.S.C.A. § 1415(l)) (emphasis added).

³¹⁴ See H.R. REP. NO. 99-296, at 4 (1985) (stating that § 1415(l) was designed to “reaffirm . . . the viability of section 504, 42 U.S.C. 1983 and other statutes as separate vehicles for *ensuring the rights of handicapped children . . .*”) (emphasis added).

unfounded. This is particularly true of the Fourth and Ninth Circuits' reasoning that allowing such claims will enable, and possibly even encourage parents to circumvent IDEA.³¹⁵ Underlying this assertion is a fear that there will be a sudden onslaught of these cases which expose school districts to potentially devastating liability.³¹⁶ Although it is a legitimate concern, the actual risk of liability is not so great as to warrant a complete bar on IDEA-based § 1983 claims. This is especially true given the complexity of § 1983 actions³¹⁷ and the fact that they are decided in the defendant's favor in most cases.³¹⁸ Additionally, with the exception of the District of Columbia, the number of due process hearings requested and held in states that provide for § 1983 as a remedy is extremely low.³¹⁹ This suggests that the number of IDEA-based § 1983 claims being brought in federal court are also fairly low, since a due process hearing must usually be held before parents can access the courts, in order to satisfy IDEA's exhaustion requirement.

Moreover, as demonstrated by the courts in the District of Columbia, which apply the four-part *Walker* test,³²⁰ there are better ways of addressing this concern. The *Walker* test balances the rights of disabled children to a free appropriate public education with the interests of school districts in not being subject to the potentially devastating effects of § 1983 liability in a fair manner.³²¹ It recognizes that existing IDEA remedies may not be sufficient in particularly egregious cases, but forces plaintiffs to clearly distinguish their injury from the "garden variety IDEA case in which a school district fails to provide an appropriate, timely IEP or fails to hold a timely due process hearing"³²² before awarding them any damages.

One final reason offered by the Fourth Circuit in *Sellers* for prohibiting the use of § 1983 as a remedy is that Congress has failed to provide the states with adequate notice that they may be subject

³¹⁵ See, e.g., *Sellers v. School Bd. of Mannassas*, 141 F.3d 524, 530 (4th Cir. 1998).

³¹⁶ See *id.* at 532.

³¹⁷ See *supra* Part I.A

³¹⁸ Eisenberg & Schwab, *supra* note 50, at 677-79.

³¹⁹ See CONSORTIUM FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUCATION, SUMMARY OF NATIONAL DISPUTE RESOLUTION DATA: DUE PROCESS COMPLAINTS [HEARINGS] 2005-2006 (2007), *available at* <http://www.directionservice.org/pdf/DP%20Complaints%202005-06.pdf>.

³²⁰ See *Hinson ex rel. N.H. v. Merritt Educ. Ctr.*, 521 F. Supp. 2d 22, 28 (D.D.C. 2007) (quoting *Walker v. Dist. of Columbia*, 157 F. Supp. 2d 11, 30 (D.D.C. 2001)).

³²¹ See *Walker*, 157 F. Supp. 2d at 29-31.

³²² *Id.* at 34.

to § 1983 liability if they violate IDEA.³²³ As a result, the states have not been able to make an informed decision about whether or not to participate and receive federal funds.³²⁴ It took particular issue with Congress's lack of clarity about liability in the HCPA.³²⁵ This argument rings hollow, and at best, is a moot point since all fifty states have participated in IDEA as far back as 1981, well before *Smith* or the HCPA came about.³²⁶ Additionally, no state within circuits that allow IDEA-based § 1983 claims has rescinded its decision to participate in IDEA.³²⁷ Finally, considering that more children with disabilities are identified in states each year,³²⁸ it would be ludicrous, and in direct contravention of public policy for states, to now withdraw from the Act.

CONCLUSION

When considered as a whole, both the Individuals with Disabilities Education Act and § 1983 support the conclusion that parents must be allowed to use § 1983 as a remedy for violations of IDEA. Though five of the circuits have barred parents from bringing such claims, those decisions were based on principles and precedent wholly inconsistent with the broad purposes of IDEA and § 1983, as well as exaggerated or unfounded concerns. In doing so, these decisions have placed those few, yet very real victims, like Michelle and Natalie H., who have suffered grievous injury at the hands of their school district, beyond the boundaries of the law. To rectify this misstep and truly conform with the spirit of IDEA and § 1983, the various courts must consider a realistic yet inclusive solution such as the *Walker* test, which recognizes the rights of seriously injured parties without threatening schools with bankruptcy.

³²³ *Sellers*, 141 F.3d at 532.

³²⁴ *Id.* at 531–32.

³²⁵ *Id.* at 532.

³²⁶ PHILIP R. JONES, A PRACTICAL GUIDE TO FEDERAL SPECIAL EDUCATION LAW 30–31 (1981).

³²⁷ See generally 1 OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEPT' OF EDUC., TWENTY-SEVENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (2005), at 63, <http://www.ed.gov/about/reports/annual/osep/2005/parts-b-c/27th-vol-1.pdf> (reporting data from all 50 states).

³²⁸ See *id.* at 10 tbl. 1-1, 20 tbl. 1-2, 28 tbl. 1-5.