Western New England Law Review

Volume 25 *25 (2003)*
Issue 2 *ENVIRONMENTAL LAW SYMPOSIUM – THE FIRST YEAR OF THE BUSH ADMINISTRATION*

Article 5

1-1-2003

EDUCATION LAW—THE RELATIONSHIP BETWEEN THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND SECTION 1983: ARE COMPENSATORY DAMAGES AN AVAILABLE AND APPROPRIATE REMEDY?

Rebecca L. Bouchard

EDUCATION LAW—THE RELATIONSHIP BETWEEN THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND SECTION 1983: ARE COMPENSATORY DAMAGES AN AVAILABLE AND APPROPRIATE REMEDY?

INTRODUCTION

Andrew was diagnosed with autism at birth.[1] Until age three he received educational services through an independent program, at which time he was integrated into the special education program within the Greenfield, Massachusetts public school system. His parents were concerned that the school's staff was not adequately trained to meet their son's needs. Consequently, they sought to have his individualized education program ("IEP")[2] revised to return him to his prior placement or to another off-site program out-of-state. Negotiations and discussions took place between the parents and school officials, but the school district maintained Andrew's placement in the Greenfield program. Dissatisfied with this decision, the parents requested a hearing before the Massachusetts Board of Special Education Appeals.

The hearing officer ruled that the IEP calling for integration into the Greenfield program was appropriate, but ordered the school district to improve their staff-training and home-school coordination. In the face of this disagreement over where and by whom Andrew's services would be provided, Andrew's parents filed a complaint in federal district court.[3] In addition to requesting an off-site placement, the plaintiffs claimed that they were entitled to compensatory damages under § 1983[4] for the emotional distress they suffered as a result of the school district's violation of the Individuals with Disabilities Education Act ("IDEA").[5]

The District Court of Massachusetts ruled that a § 1983 compensatory damages claim for violation of IDEA could not be sus-

---

1. The facts presented here are from *Andrew S. v. School Committee of Greenfield*, 59 F. Supp. 2d 237, 239 (D. Mass. 1999).

2. *See infra* note 90.

3. *Andrew S.*, 59 F. Supp. 2d at 239.

4. 42 U.S.C. § 1983 (2000); *see infra* Part I.A.

5. 20 U.S.C. §§ 1400-1487 (2000). Title 20 of the U.S. Code requires the Department of Education to develop and publish IDEA regulations. 34 C.F.R. § 300 (1999); *see infra* Part I.B (discussing IDEA). Although the designation "IDEA" did not take effect until 1990, this term will be used throughout this Note for the sake of consistency.

tained on the facts of this case.[6] If, however, Andrew and his family had lived in New York, for example, where compensatory damages under § 1983 are an available remedy for violation of IDEA,[7] Andrew and his parents might have been awarded the damages that they sought.

The premise of a suit like this[8] is that a school district has failed to provide a child with a free appropriate public education ("FAPE") in violation of IDEA.[9] Most likely, the families, as plaintiffs, will name multiple defendants, including the teachers, principal, special education supervisor and superintendent, school district, school board, and the municipality.[10] The plaintiffs are also likely to bring additional claims under constitutional and state tort law,[11] as well as a variety of federal statutes.[12] These additional

---

6. *Andrew S.*, 59 F. Supp. 2d at 239, 244-46 (ruling on a matter of first impression and holding that "[g]arden variety statutory violations" could not form the basis of a compensatory damages suit brought under § 1983 for violation of IDEA, but arguably leaving the door open for egregious violations).

7. *See, e.g.*, Cappillino v. Hyde Park Cent. Sch. Dist., 40 F. Supp. 2d 513, 515-16 (S.D.N.Y. 1999) (holding that nothing in the IDEA precludes a damages claim and stating that "it is entirely possible that [the student's] earning capacity since graduation was diminished, and that such diminution may only be remediable via damages").

8. Among parents who choose to sue, Andrew's case is considered typical. These cases generally revolve around the sufficiency of the child's IEP, where the disagreement may concern the nature or extent of services or the way in which services are provided. Terry Jean Seligmann, *A Diller, A Dollar: Section 1983 Damage Claims in Special Education Lawsuits*, 36 GA. L. REV. 465, 526 (2002) (citing James R. Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases,* 6 EXCEP. CHILD. 469, 478 (1999) ("identifying placement of child as the primary issue in 63% of [a] representative sample [that included] almost half of all litigated cases between 1975 and 1995")).

9. IDEA guarantees a FAPE to all children with disabilities and, to fulfill that promise, imposes a set of procedural safeguards, including the right to bring a civil action in federal court. 20 U.S.C. §§ 1400-1487. *See infra* Part I.B.1 (discussing the purpose of IDEA).

10. *E.g.*, Charlie F. v. Bd. of Educ. of Skokie Sch. Dist., 98 F.3d 989, 991 (7th Cir. 1996) (naming the board of education, superintendent of schools, principal, and teacher as defendants in the suit).

11. Constitution-based claims might include allegations of equal protection and substantive or procedural due process deprivations; state law claims might include allegations of assault, negligence, or intentional infliction of emotional distress. *E.g.*, M.H. v. Bristol Bd. of Educ., 169 F. Supp. 2d 21, 23 (D. Conn. 2001).

12. *E.g.*, *id.* (bringing claims under § 1983 for violation of § 504, the Americans with Disabilities Act ("ADA"), and the Constitution, and claims for state tort law damages incurred through the school district's alleged negligence). Generally, these suits include claims under Section 504 of the Rehabilitation Act of 1973 (§ 504), 29 U.S.C. § 794 (2000). The first federal civil rights legislation for all persons with disabilities, § 504 states, "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving

claims may provide equally various forms of relief.[13] If, however, the plaintiffs seek compensatory damages[14] under § 1983 for the alleged violation of IDEA, it is unclear what remedies will be available to them. The question of whether a violation of IDEA could make school boards liable for compensatory damages under § 1983 is an unsettled, yet much visited issue in the courts.[15] Most circuits of the United States Courts of Appeal have weighed in on this issue resulting in an array of confusing and contrary positions.[16]

Part I of this Note outlines § 1983 and IDEA, highlighting their relevant provisions. Part II examines § 1415(l) of IDEA, the section which most influences the interaction of IDEA and § 1983. It also summarizes the divergent views reflected in current decisions among the circuits. Finally, Part III explores the availability of

---

Federal financial assistance. . . ." *Id.* Although § 504 extends protection beyond public schools, school districts fall within its scope because they receive federal funds. Among its provisions, § 504 includes a definition of FAPE. 34 C.F.R. § 104.33(b)(1). Parents have used this FAPE provision, among others, to obtain certain programs and services for individual disabled students. KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 445 (5th ed. 2001). Students who qualify for protection under IDEA, however, should generally seek a remedy under it rather than relying on § 504 because IDEA's protections are more specific. In other words, students and parents should use § 504 only for claims that cannot be resolved under IDEA. DIXIE SNOW HUEFNER, GETTING COMFORTABLE WITH SPECIAL EDUCATION LAW 80 (2000).

In addition, these suits often include claims under Title II of the ADA, 42 U.S.C. § 12101 (2000), a federal nondiscrimination statute that extends to private sector employment and public sector accommodations. Public school students generally sue under Title II of the ADA because it requires government agencies to make reasonable accommodations for disabled people. HUEFNER, *supra* at 53. However, it seems likely that to the extent that IDEA and § 504 provide more specific rights and standards, students with disabilities will rely on them more often than on the ADA. *Id.* at 59.

13. For example, in ADA suits courts have ordered relief ranging from injunctions to damages and civil penalties. In addition, courts often award attorney's fees to parties who prevail in these suits. Furthermore, courts have steadily held that monetary damages are available under § 504 and the ADA, although there is a difference of opinion as to whether proof of gross misjudgment or bad faith is required. *See* Perry A. Zirkel, *Special Education's "Top Twenty" Cases/Concepts from 1997 to the Present*, 151 EDUC. L. REP. 1, n.36 (2001).

14. *E.g.*, Heidemann v. Rother, 84 F.3d 1021, 1025 (8th Cir. 1996) (where parents sought compensatory damages due to alleged misuse of blanket wrapping treatment on their daughter). Compensatory damages are monetary compensation "awarded to a person as compensation, indemnity, or restitution for harm sustained by him." BLACK'S LAW DICTIONARY 352 (5th ed. 1979). These might include damages for pain and suffering, emotional distress, or loss of earning power.

15. Andrew S. v. Sch. Comm. of Greenfield, 59 F. Supp. 2d 237, 241 (D. Mass. 1999).

16. W.B. v. Matula, 67 F.3d 484, 495 (3d Cir. 1995) (allowing plaintiff to pursue § 1983 compensatory damages claims for IDEA violations). *Contra* Padilla v. Sch. Dist. No. 1, 233 F.3d 1268, 1274 (10th Cir. 2000) (finding § 1983 unavailable); Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 529 (4th Cir. 1998) (same).

compensatory damages under § 1983 for violation of IDEA. It begins by arguing that § 1415(l) fails to clearly authorize an award of compensatory damages pursuant to § 1983. It also discusses whether compensatory damages, even if available, are appropriate by exploring additional arguments in favor of and against awarding § 1983 damages for violation of IDEA.

I. AN OVERVIEW OF SECTION 1983 AND IDEA

As mentioned, parents of children with disabilities may rely on § 1983 and IDEA together to bring a claim. Determining whether such a claim is permissible requires an examination of both statutes.

A. *Section 1983*

Conceived as part of the Civil Rights Act of 1871, § 1983[17] initially provided remedies for civil rights violations against African Americans after the Civil War.[18] Today, it is a widely used means of enforcing a broad range of rights,[19] providing the basis of most litigation against local governments and local officers for constitutional violations. [20] Section 1983 provides that any person who, acting under color of law, deprives another of rights secured by federal law may be held liable to the injured party.[21]

Because § 1983 creates remedies and not substantive rights,[22] the cause of action must be for violation of rights secured by "the

---

17. 42 U.S.C. § 1983 (2000).

18. Reconstruction and the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments were accompanied by a reign of terror and violence against blacks throughout the South. In response to Senate investigations, Congress adopted this legislation. In considering the Civil Rights Act, members of Congress discussed "the failure of state police and state courts to adequately control the problem." Section 1 of the Act, now § 1983, empowers the federal government to act through the federal court to prevent and redress violations of federal rights. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 426 (2d ed. 1994).

19. *Id.* at 424-29; Wilson v. Garcia, 471 U.S. 261, 273 (1985).

20. CHEMERINSKY, *supra* note 18, at 491. *See generally* Daniel J. McDonald, *A Primer on 42 U.S.C. § 1983*, UTAH B.J. (May 1999).

21. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

22. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 616-18 (1979) (stating that a person cannot claim a violation of § 1983 because it is only a vehicle for vindicating rights secured by the Constitution and federal law).

Constitution and laws." In early cases, constitutional rights formed the basis of most § 1983 claims. The Supreme Court later determined, however, that § 1983 also provides claimants with a cause of action for violations of their federal statutory rights.[23] Consequently, a parent of a student with disabilities may bring a statute-based claim under § 1983 by alleging a violation of the rights guaranteed by IDEA,[24] and a constitutional claim alleging, for instance, a violation of the rights guaranteed by the Equal Protection Clause.[25]

In conjunction with making both constitutional and statutory § 1983 claims available, the Supreme Court placed significant limits on them. To begin with, the Court has held that § 1983 is available in a statutory context only where the federal statute creates an enforceable right.[26] In other words, it is the violation of rights, not laws, which gives rise to § 1983 actions.[27] Once it is determined

---

23. Maine v. Thiboutot, 448 U.S. 1, 5-6 (1980) (holding that § 1983 provides claimants with a cause of action for violation of federal statutory rights provided for in the Social Security Act).

24. *See, e.g.*, Marie O. v. Edgar, 131 F.3d 610, 619 (7th Cir. 1997) (holding that IDEA does create enforceable rights).

25. *See, e.g.*, Murrell v. Sch. Dist. No. 1, 186 F.3d 1238 (10th Cir. 1999) (involving a suit against a school for sexual harassment). For a discussion of the nature of statutory-based and Constitution-based § 1983 claims, see Michael A. Zwibelman, Comment, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV. 1465 (1998).

26. The Supreme Court has held that these rights may be explicitly provided for in the statute, such as in IDEA, or implied from the statute, such as in the context of Title IX. Cannon v. Univ. of Chi., 441 U.S. 677, 691 (1979) (holding that Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 create individual rights because the statutes are phrased "with an unmistakable focus on the benefited class").

27. In *Gonzaga University v. Doe*, the Supreme Court held that "unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to create individually enforceable rights, federal funding provisions provide no basis for enforcement by § 1983." 122 S. Ct. 2268, 2273, 2278 (2002) (holding that FERPA's confidentiality provisions create no private right of action enforceable under § 1983) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17, 31 (1981) (holding that the Developmentally Disabled Assistance and the Bill of Rights Act did not confer an enforceable right)). Therefore, violation of a statute by itself does not guarantee that a plaintiff may bring suit under § 1983. *Compare* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 522 (1990) (allowing § 1983 suit by health care providers to enforce the reimbursement provision of the Medicaid Act on the ground that it conferred specific monetary entitlements upon the plaintiffs), *and* Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 430 (1987) (holding that the rent ceiling provision of the Public Housing Act, which conferred a benefit "focusing on the individual family and its income," did create an enforceable right), *with* Blessing v. Freestone, 520 U.S. 329, 343 (1997) (holding that a Social Security Act provision, which focused on "the aggregate services provided by the State" rather than "the needs of any particular person," did not confer rights en-

that a statute confers a private right of action, it is presumptively enforceable by § 1983.[28] However, the Court has held that a state may rebut this presumption by showing that Congress "specifically foreclosed a remedy under § 1983."[29] For example, a court could find that "Congress shut the door to private enforcement . . . expressly, through 'specific evidence from the statute itself.'"[30] In addition, a court could find that Congress foreclosed a § 1983 action "impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."[31] Furthermore, in cases where the § 1983 claim is based on violation of constitutional rights that are virtually identical to the rights conferred by the statute, a court may determine that the § 1983 action is precluded because Congress intended that the statute provide the exclusive remedy.[32] Therefore, even though IDEA expressly confers a private right of action, a school district's violation of IDEA is not automatically actionable under § 1983.[33]

In addition to bringing suits based on both "the Constitution and laws," plaintiffs may also bring claims against a variety of persons. The Supreme Court has held that states and state agencies are not persons for purposes of § 1983.[34] As such, plaintiffs may

---

forceable through § 1983), *and* Suter v. Artist, 503 U.S. 347 (1992) (ruling that the Adoption Assistance and Child Welfare Act did not confer on its beneficiaries a private right enforceable under § 1983 because of a lack of congressional intent to create such a remedy).

28. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 70-71 (1992) (holding that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute").

29. *Gonzaga Univ.* 122 S.Ct. at 2276 n.4 (citing Smith v. Robinson, 468 U.S. 992, 1004 n.9 (1984)).

30. *Id.* (citing *Wright*, 479 U.S. at 423 (1987)).

31. *Id.* (citing Blessing v. Freestone, 520 U.S. 329, 341 (1997)). The Court has found a comprehensive administrative scheme precluding enforceability under § 1983 in two cases: *Smith v. Robinson*, 468 U.S. 992, 1009 (1984), in which the Court noted that IDEA provided for "carefully tailored" administrative proceedings followed by federal judicial review, and *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981), in which the Court noted that the two environmental protection statutes cited had "unusually elaborate enforcement provisions" which precluded any finding of implied legislative authorization of additional remedies.

32. *Smith*, 468 U.S. at 1008-09 (noting that a statutory remedy precludes Constitution-based § 1983 claims that are virtually identical to the statutory claims if Congress intends such a result).

33. *See infra* Part III.B.1 (discussing whether IDEA's comprehensive remedial scheme precludes enforcement under § 1983).

34. Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989) (holding that neither the State nor its officials in their official capacities could be sued for damages in state

not sue state educational agencies.[35] One exception exists where a plaintiff seeking injunctive relief may sue state officials.[36] On the other hand, the Court has determined that municipalities and municipal governmental institutions are persons for purposes of § 1983.[37] Consequently, plaintiffs may sue local school districts for monetary, declaratory, or injunctive relief.[38] If, however, a local school district is considered to be "an arm of the State" rather than a separate political subdivision, it may be immune from suit.[39]

Despite finding that municipalities are generally liable, the Court has limited the potential liability. It has stated that municipalities may only be sued for their own unconstitutional or illegal policies or customs; they cannot be sued for the acts of their officers, agents, or employees based upon a theory of vicarious liability.[40] Thus, since the plaintiff has to prove that the municipality itself is somehow liable, suing a school district under § 1983 is complicated. To establish liability, plaintiffs must show that the municipality, through policy or custom, caused the deprivation of a federal right.[41] Although the Court has not specifically addressed how to establish the existence of a policy or custom sufficient to impose § 1983 liability, five bases for claims have emerged.[42] These are: (1) actions by a municipal legislative body, such as a city council;[43] (2)

---

court under § 1983); Quern v. Jordan, 440 U.S. 332 (1979) (holding that the Eleventh Amendment bars § 1983 suits against state governments in federal court).

35. *E.g.*, L.C. v. Utah State Bd. of Educ., 188 F. Supp. 2d 1330 (D. Utah 2002) (holding that the Utah State Office of Education and the Utah State Board of Education, and their officials, are immune from suit under the Eleventh Amendment).

36. *Will*, 491 U.S. at 71 n.10.

37. Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) (holding that a municipality could be classified as a person under § 1983).

38. *Id.* at 690.

39. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81 (1977) (holding that state's Eleventh Amendment immunity was not available to school board and outlining the factors to be used in determining whether a governmental entity is an arm of the state); *e.g.*, Rosa R. v. Connelly, 889 F.2d 435 (2d Cir. 1989) (holding that a school district was not an arm of the state in Connecticut and was therefore not immune from suit).

40. *Monell*, 436 U.S. at 691.

> [T]he language of § 1983 . . . compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.

Id.

41. *Id.* at 691-70.

42. CHEMERINSKY, *supra* note 18, at 447.

43. *E.g.*, City of Newport v. Fact Concerts Inc., 453 U.S. 247 (1981) (holding that

actions by agencies or boards that exercise authority delegated by the municipal legislative body, such as school boards;[44] (3) actions by those with final decision-making authority in the municipality, such as superintendents or principals;[45] (4) a policy of inadequate training or supervision,[46] such as a school district's failure to train its employees to prevent sexual abuse;[47] and (5) a custom, such as a practice that despite not being official policy, is widespread and pervasive.[48] In response to being sued, municipalities may not rely on good faith or qualified immunity as a defense.[49] Moreover, municipalities may not assert state law immunities.[50] They are, how-

---

a city council's cancellation of a concert in violation of the First Amendment is an act of official government policy, constituting proper basis for compensatory damages under § 1983 *but not* punitive damages).

44. *E.g.*, *Monell*, 436 U.S. at 694 (holding that regulations adopted by the Department of Social Services and the Board of Education "unquestionably involve[ ] official policy").

45. *E.g.*, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 736-37 (1989) (noting that the identification of individuals whose actions represent the official policy of the local government is a question to be determined by the trial judge prior to trial); Pembaur v. City of Cincinnati, 475 U.S. 469, 484 (1986) (holding that an order by the county prosecutor to break down a doctor's door constituted the city's official policy); see also CHEMERINSKY, *supra* note 18, at 450. In making the determination whether an official has final decision-making authority, the crucial question is "whether under state or local law, including relevant customs or practices, the person has policy-making authority for the city." *Id.*

46. *E.g.*, City of Canton v. Harris, 489 U.S. 378, 388 (1989) (explaining that demonstrating a policy of inadequate training requires proof of "deliberate indifference" to the rights of persons for § 1983 municipal liability). For a discussion of the difficulty of establishing school board liability in this respect, see Gail Paulus Sorenson, *School District Liability for Federal Civil Rights Violations Under Section 1983*, 76 EDUC. L. REP. 313 (1992).

47. *E.g.*, Thelma O. v. Bd. of Educ., 934 F.2d 929, 934 (8th Cir. 1991) (finding that a school district can be liable for failing to train its employees to prevent or terminate sexual abuse). In addition, plaintiffs could establish that a supervisor's inaction is sufficient to constitute a policy or custom that caused the injury. *See* William D. Valente, *School District and Official Liability for Teacher Sexual Abuse of Students Under 42 U.S.C. § 1983*, 57 EDUC. L. REP. 645 (1990).

48. The Supreme Court has not specified this method of establishing municipal liability, but other courts have. *E.g.*, Jane Doe "A" v. Special Sch. Dist., 901 F.2d 642, 646 (8th Cir. 1990) ("For the District to be held liable on the basis of custom, there must have been a pattern of 'persistent and widespread' unconstitutional practices which became so 'permanent and well settled' as to have the effect and force of law." (citing *Monell*, 436 U.S. at 691)).

49. Owen v. City of Independence, 445 U.S. 622, 638 (1980) (holding that firing a police chief without due process in good faith did not protect the municipality from liability under § 1983).

50. Howlett v. Rose, 496 U.S. 356 (1990) (finding that state sovereign immunity does not extend to municipalities in a state court § 1983 action); *see also* Alden v. Maine, 527 U.S. 707, 726-29 (1999) (reaffirming that municipalities do not enjoy the sovereign immunity of the State).

ever, immune to claims for punitive damages.[51]

In addition to suing municipalities, plaintiffs may also sue individuals.[52] Often, these defendants are named in both their official and individual capacities.[53] A claim against state or local officials in their official capacities is essentially a suit against the entity itself.[54] Therefore, like states, state officials cannot be sued in their official capacities because of Eleventh Amendment immunity.[55] However, a claim against state or local officials in their individual or personal capacities is a suit against specific persons and may result in monetary recovery directly from those persons.[56]

To establish personal liability, plaintiffs must "show that the official, acting under color of state law, caused the deprivation of a federal right."[57] Defendants sued in this capacity "may assert personal immunity defenses such as objectively reasonable reliance on existing law" or qualified immunity.[58] Qualified immunity protects public employees from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[59] Therefore, a parent of a student with disabilities could establish liability by showing that a school employee ignored clearly established rights of which a reasonable person would have known.[60]

---

51. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) (holding that it would be unfair to punish a city's taxpayers because of city officials' wrongdoing).

52. This is important because the Eleventh Amendment (in the state context) and the difficulty of proving that official policy caused the violative conduct (in the municipal context) often protect governmental entities from liability. CHEMERINSKY, *supra* note 18, at 459.

53. *E.g.*, Bradley v. Arkansas Dep't of Educ., 301 F. 3d 952 (8th Cir. 2002) (naming defendant individually and in his official capacity).

54. Brandon v. Holt, 469 U.S. 464, 471-73 (1985) (finding that a suit against defendant in an official capacity results in liability against the entity only).

55. *See supra* note 34.

56. Hafer v. Melo, 502 U.S. 21, 30 (1991) (outlining distinctions between personal capacity claims and official capacity claims).

57. *Id.* at 25 (quoting Kentucky v. Graham, 473 U.S. 159, 166 (1985)).

58. *Id.*

59. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that presidential aides are entitled only to qualified immunity, not absolute immunity). *See also* Wood v. Strickland, 420 U.S. 308, 315 (1975) (stating that qualified, good faith immunity extends to school board members and school administrators in a damages suit under § 1983).

60. Goleta Union Elementary Sch. Dist. v. Ordway, 166 F. Supp. 2d 1287, 1299 n.9, 1301 (C.D. Cal. 2001) (finding that the director of student services violated a clearly established right under IDEA when she agreed to transfer the student without an evaluation based on a telephone call from the parent, therefore subjecting the director to individual liability for damages); Doe. v. Withers, 20 IDELR 422 (D.W. Va. 1993) (awarding $15,000 in damages in a § 1983 suit against a history teacher who refused to implement a student's IEP).

Moreover, individual officials may also be liable under a theory of supervisory liability.[61] As in the context of municipal liability, supervisory liability is not based upon a theory of *respondeat superior*, but on a supervisor's acts or omissions.[62] In order to prevail against supervisory officials in this context, plaintiffs generally must show direct participation or inaction based on a failure to remedy, gross negligence, or deliberate indifference.[63] Consequently, parents may bring a claim against a special education program director based on supervisory liability even if that person had no contact with their child. However, defendants sued in these individual or personal capacity suits may also rely on qualified or good faith immunity as a defense.[64]

As delineated in § 1983, defendants may be held liable in "an action at law, suit in equity, or other proper proceeding for redress."[65] Thus, courts may award injunctive, declaratory, and monetary relief,[66] as well as attorney's fees.[67] Furthermore, the Supreme Court has determined that punitive damages may also be

---

61. *E.g.*, Schnell v. City of Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969) (finding that police officials failed to prevent officers from committing acts in violation of plaintiffs' rights and are therefore proper defendants in § 1983 action). For a discussion of the nature of supervisory liability in § 1983 claims, see Kit Kinports, *The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases*, 1997 U. ILL. L. REV. 147 (1997).

62. *E.g.*, Slakan v. Porter, 737 F.2d 368, 372 (4th Cir. 1984) (stating that "liability in this context is not premised on *respondeat superior* . . . but on a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict").

63. *E.g.*, Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 254 (2d Cir. 2001) (outlining circumstances under which supervisory liability may be found); Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995) (establishing various standards allowable to establish supervisory liability including direct participation in wrongdoing, failure to remedy wrong after informed of it, grossly negligent supervision, creation of policy that led to violations, or deliberately indifferent failure to act on information about constitutional violations).

64. Anderson v. Creighton, 483 U.S. 635, 638-39 (1987) (holding that government officials are provided with qualified immunity to shield them from civil damages liability "as long as their actions could reasonably have been thought consistent with the rights that they are alleged to have violated").

65. 42 U.S.C. § 1983 (2000).

66. For a discussion of § 1983 generally, and damage awards in particular, see Daniel J. Lynch, Note, *Compensatory Damage Awards in Section 1983 Actions Based on Federal Statutory Violations*, 34 WAYNE L. REV. 1373 (1988).

67. Attorney's fees are awarded pursuant to the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988(b) (2000). It allows for the award of reasonable attorneys' fees to the prevailing party in cases brought under various federal civil rights laws, including § 1983.

available in § 1983 suits, but only in suits against individuals[68] where the official acted with a malicious intent or deliberate disregard of the plaintiff's rights.[69]

In all circumstances, the plaintiff bears the burden of establishing causation by showing a direct link between the defendant's conduct and the alleged deprivation of the plaintiff's rights.[70] Even if the plaintiff meets this burden, damages are not available for the deprivation of the right itself; a plaintiff can only recover compensatory damages for actual injury.[71] Consequently, plaintiffs must plead actual injuries, such as medical and psychiatric expenses, lost earnings, and damages due to pain and suffering and emotional distress.[72] Because the Court has stated that the purpose of damages awards is "to protect persons from injuries to particular interests," damage awards are shaped by the interest protected.[73] In addition, the level of damages awarded in § 1983 actions is determined according to principles derived from the common law of torts.[74]

Generally, § 1983 is a complex yet potentially powerful tool for plaintiffs. Part of its allure lies in the fact that bringing a § 1983 claim in conjunction with a statute may allow plaintiffs to obtain damages and other relief not available for a claim based on the statute alone. Section 1983 does not create any substantive rights. Instead, it provides a cause of action to enforce rights found elsewhere. In the context of special education, IDEA supplies those rights.

B. *Individuals with Disabilities Education Act*

In the early 1970s, two federal district court cases heightened public awareness of the educational plight of disabled children.[75] In

---

68. City of Newport v. Fact Concerts, Inc., 453 U.S. 246 (1981) (holding that punitive damages are not available in a suit against a municipality).

69. Smith v. Wade, 461 U.S. 30, 56 (1983) (holding that punitive damages are available when the official'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").

70. Canton v. Harris, 489 U.S. 378, 385 (1989).

71. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986) (noting that a plaintiff can only recover compensatory damages for actual injury suffered as a result of the violative conduct).

72. Carey v. Piphus, 435 U.S. 247, 264 (1978) (stating that "mental and emotional distress caused by denial of due process itself is compensable under § 1983").

73. *Id.* at 254.

74. *Id.* at 258-59 (stating that compensation principles may be derived from tort law).

75. The cases are *Mills v. District of Columbia Board of Education*, 348 F. Supp.

both cases, the courts found that public schools were denying children with disabilities access to an education either by excluding them altogether, or by expelling them without giving parents notice or an opportunity for a hearing.[76] Soon after these "landmark" decisions, Congress investigated the status of children with disabilities and found that state educational systems were not fully meeting the special education needs of the more than eight million children with disabilities.[77] Public school systems excluded more than one million of these children, and many other children participated unsuccessfully in regular school programs because their disabilities were undetected.[78] Frequently, children who did receive an adequate education did so at significant distance from their home and at great expense to their parents.[79]

Both bodies of Congress proposed legislation to address this demonstrated failure to meet the needs of children with disabilities.[80] This legislation, the precursor to IDEA, was entitled the Education for All Handicapped Children Act ("EAHCA"), sometimes referred to as P.L. (Public Law) 94-142.[81] Signed into law in 1975, passage of the Act was a turning point in the education of children with disabilities. It offered significant federal funding to states for the direct aid of these students.[82] In 1986, Congress

---

866 (D.D.C. 1972), and *Pennsylvania Ass'n of Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972) (commonly referred to as "PARC"). At that time, school laws in Pennsylvania and the District of Columbia allowed denial of entry to children whose IQ's were below seventy until the children reached age eight. Once they entered school, the schools dismissed many of these children because they could not learn how to read. The courts held that students with disabilities have a constitutional right to a free public education and outlined basic procedures school districts must follow before excluding them or placing the children in programs separate from regular education students. *See* ALEXANDER, *supra* note 12, at 440.

76. *Mills*, 348 F. Supp. 866; *PARC*, 343 F. Supp. 279.

77. 20 U.S.C. § 1400(c)(2)(A) (2000).

78. *Id.* § 1400(c)(2)(C) & (D).

79. *Id.* § 1400(c)(2)(E).

80. ALEXANDER, *supra* note 12, at 444.

81. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 788 (1975) (codified as amended at 20 U.S.C. §§ 1400-1487 (2000)).

82. Unfortunately, this promise of funding has never come to fruition; the funds are "everywhere conceded to be inadequate to meet the expectations of the Act." HUEFNER, *supra* note 12, at 21. In the original legislation, Congress authorized funding to reach 40% of the national average per pupil expenditure. During the early years, the funding reached 12% of the national average, but in the 1980s, it dropped to approximately 8%. In fiscal year 1997 and 1998, it rose considerably, but never reached even its former level of 12%. *Id.* (citing U.S. DEP'T OF EDUC., TWENTIETH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT III-43 (1998)).

passed one of the most important amendments, the Handicapped Children's Protection Act.[83] Four years later, Congress renamed the statute the Individuals with Disabilities Education Act, replacing the term handicap with the term disability.[84] In 1997, Congress added numerous and substantive amendments to IDEA.[85]

1. How IDEA Works

The overarching goal of IDEA is to guarantee that all children with disabilities[86] have available to them a FAPE,[87] which emphasizes special education[88] and related services[89] and is individualized[90] to meet each child's unique needs. In addition, IDEA

---

83. Pub. L. No. 99-372, 100 Stat. 796 (1986). This amendment is pivotal in determining whether compensatory damages are available under § 1983. *See infra* Part II.A (discussing the passage of the Handicapped Children's Protection Act).

84. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901, 104 Stat. 1103, 1141-51.

85. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997). Commonly referred to as IDEA '97, changes were aimed at increasing school readiness and graduation rates, raising outcome expectations, improving safety in schools, promoting partnerships with parents, and improving the professional skills of the teaching force. The amendments also expanded disciplinary provisions, which have generated much controversy. HUEFNER, *supra* note 12, at 25-27.

86. To be eligible for IDEA services, students must be between the ages of three to twenty-one and fall into one of the following categories: specific learning disability; speech or language impairment; mental retardation; serious emotional disturbance; other health impairment; orthopedic impairment; hearing impairment; visual impairment; autism; or traumatic brain injury. 20 U.S.C. § 1401(3)(A)(i)-(ii) (2000). The Department of Education regulations also use all thirteen of these disability categories. 34 C.F.R. § 300.7(a)(1) (2002).

87. 20 U.S.C. § 1400(d)(1)(A) (2000). As interpreted by the Supreme Court, FAPE generally requires that the necessary special education and related services be personalized and of "some educational benefit." Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200-01 (1982).

88. "The term 'special education' means specially designed instruction, at no cost to parents, that meets the unique needs of a child with a disability." § 1401(25) (2000). Not limited to traditional special education classes, it may include such things as one-on-one tutoring, programs in residential facilities, and adapting the content, methodology, or delivery of instruction. 34 C.F.R. § 300.26(b)(3).

89. 20 U.S.C. § 1401(22) (2000). Related services include transportation or developmental, corrective, and other supportive services that are necessary to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.24. Because of the cost of these services, many of them, such as transportation, school health services, psychotherapy, and services in a residential setting are quite controversial. *E.g.*, Irving Ind. Sch. Dist. v. Tatro, 468 U.S. 883, 895 (1984) (holding that clean intermittent catheterization was a related service under IDEA).

90. 20 U.S.C. § 1400(d). The individualized education program (IEP) is central to IDEA because it helps to determine appropriate placement, measure progress, and facilitate communication between the school and the family. *Id.* § 1414(d)(1)(A). A team, which includes special and regular educators, parents, a representative of the local educational agency, and the student (where appropriate), generates and reviews

requires that local educational agencies place children in the least restrictive environment ("LRE")[91] that will provide each child with an appropriate education. To achieve these goals, IDEA provides assistance to states, localities, and other educational agencies.[92] This assistance comes primarily in the form of funds to states with federally-approved plans.[93]

In order to receive the funds, a state must demonstrate to the Secretary of Education that it has in effect a plan that ensures all children with disabilities have the right to a FAPE.[94] Each state must also develop a plan for compliance with IDEA's other requirements.[95] These requirements begin on the local level with identification and evaluation of students,[96] and parental participation in the development of an individualized education plan ("IEP") for each student.[97] Beyond this, educational agencies have to comply with the provisions of § 1415 that guarantee access to due process procedures for parents or guardians who wish to challenge a child's IEP.[98]

2. The Safeguards of IDEA's Section 1415

By creating § 1415's procedural safeguards, Congress provided protection that surpasses the minimal requirements of notice and an opportunity to respond.[99] Section 1415(a) provides: "Any State . . . or local educational agency that receives assistance . . . shall establish and maintain procedures in accordance with this section to

---

IEPs at least annually. *Id.* § 1414(d)(1)(B). The increased attention to measurable goals and outcomes under IDEA '97 may spawn increased litigation regarding IEP goals and progress. HUEFNER, *supra* note 12, at 164.

91. 20 U.S.C. § 1412(a)(5). LRE refers to the setting closest to the regular education classroom in which FAPE can be delivered, which may be but is not necessarily the regular education classroom. HUEFNER, *supra* note 12, at 257.

92. 20 U.S.C. § 1400(d)(1)(C).

93. *Id.* § 1411.

94. *Id.* at § 1412(a)(1)(A).

95. *Id.* at § 1412(a)(2).

96. *Id.* at §1412(a)(3). This is often referred to as the "child find" provision.

97. *See id.* § 1414(d)(1)(B)(i); *see also supra* note 90 (discussing IEPs).

98. 20 U.S.C. § 1415.

99. The decisions in *PARC* and *Mills* influenced the development of these provisions. Mills v. D.C. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972); *PARC*, 343 F. Supp. 279 (E.D. Pa. 1972). In both cases, the courts held that formal written notice and a formal hearing were required before removing students with disabilities from school. *See supra* note 75 and accompanying text. All students are entitled to minimal procedural due process before being suspended or expelled from school. Goss v. Lopez, 419 U.S. 565, 581 (1975) (holding that students must receive at least oral notice and if charges are challenged, an informal opportunity to give their side of the story).

ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of [FAPE] by such agencies."[100] The section goes on to outline procedures that generally include: notice and an opportunity to participate in the development of the student's program; notification of the procedures to resolve conflicts and grievances; a fair and impartial hearing process; an opportunity for appeal and judicial review; and if necessary, an award of appropriate relief.[101] Because courts may enforce § 1415's procedures, they are essential to ensuring that disabled children receive the education statutorily guaranteed to them.

In practical terms, § 1415 requires that a school notify parents of its procedural safeguards.[102] Parents must also have the opportunity to examine all of their child's records.[103] In addition, they have the right to participate in meetings about the identification, evaluation, placement, or provision of FAPE to their child, and to obtain an independent educational evaluation ("IEE").[104] Schools must also provide written notice to parents within a reasonable time before they initiate or change the identification, evaluation, educational placement, or provision of FAPE to a child.[105] Essentially, these provisions require schools to communicate frequently with parents and seek their consent in devising appropriate educational programs for for their children.[106]

If a parent does not agree with the steps the school is taking, § 1415 outlines a means to resolve disputes. Parents are entitled to initiate an impartial due process hearing whenever they have a complaint alleging a school district's noncompliance with IDEA.[107] Voluntary mediation provisions,[108] as well as the right to file a complaint with the state educational agency,[109] are also included in IDEA to aid in the resolution of disputes. If parents choose the

---

100. 20 U.S.C. § 1415(a).

101. *Id.* § 1415(b); *see also id.* § 1415(d)(2) (outlining what must be included in a procedural safeguards notice available to parents).

102. *Id.* § 1415(d). School personnel must provide parents with a full written explanation of the safeguards on the following occasions: initial referral, each notification of an IEP meeting, reevaluation, and receipt of a request for a due process hearing. HUEFNER, *supra* note 12, at 172.

103. 20 U.S.C. § 1415(b)(1).

104. *Id.*

105. *Id.* § 1415(b)(3).

106. *See id.* § 1414(a)(1)(C); *see also* 34 C.F.R. § 300.505 (2002) (outlining when informed parent consent is required).

107. 20 U.S.C. § 1415(f) (2000).

108. *Id.* § 1415(e).

109. 34 C.F.R §§ 300.660-61; HUEFNER, *supra* note 12, at 181-83.

hearing option, an impartial hearing officer, who is neither an employee of the agency involved in the care of the student nor has any other conflict of interest, conducts the hearing.[110] Any party to a hearing has the right to be accompanied and advised by counsel.[111] The party may also present evidence, and confront, cross-examine, and compel attendance of witnesses.[112] During the pendency of an administrative or judicial proceeding, the child generally stays in the current educational placement, although there is an exception for students who are subject to disciplinary action.[113] In addition, the requirement that schools provide FAPE to all eligible children extends to children whom the school has suspended or expelled, although, there are also exceptions to this requirement.[114] Finally, there is a requirement of parents; they must provide prior notification to the school if they unilaterally seek to place their child in a private school at public expense.[115]

IDEA further provides for judicial remedies to protect disabled children's educational rights. If a local educational agency ("LEA") conducts the initial hearing, the parents may appeal to the state educational agency ("SEA").[116] However, in addition, any party aggrieved by the findings or decision made in the initial administrative hearing or appeal may bring a civil action.[117] With respect to relief, the statute authorizes any state court of competent jurisdiction or any federal district court to grant such relief as it determines is appropriate.[118] In conjunction, if the parent is the prevailing party, they may be entitled to an award of attorney's fees.[119] While Congress clearly created a cause of action for parents, it failed to elucidate the meaning of "appropriate relief."[120] A large part of the controversy over whether compensatory damages are available results from this question of what constitutes appropriate relief.

---

110. 34 C.F.R § 300.508.
111. 20 U.S.C. § 1415(h)(1).
112. *Id.* § 1415(h)(2).
113. *Id.* § 1415(j); Honig v. Doe, 484 U.S. 305 (1988) (holding that special education students could not be suspended for more than ten days without parental consent or a court order if their misbehavior related to their disability). Section 1415(j) is commonly referred to as the "stay-put" provision.
114. 20 U.S.C. § 1415(k) (2000).
115. *Id.* § 1412(a)(10)(C).
116. *Id.* § 1415(g).
117. *Id.* § 1415(i)(2)(A).
118. *Id.* § 1415(i)(2)(A) & (B).
119. *Id.* § 1415(i)(3)(B).
120. *Id.* § 1415(i)(2)(B)(iii).

3. Appropriate Relief

Section 1415(i)(2)(B) specifically provides that the court "shall grant such relief" as it "determines is appropriate."[121] Plaintiffs rely on this "appropriate relief" provision to seek a range of remedies. Likewise, courts interpret the provision in several ways due to its broad language. Consequently, courts award the following types of relief:

1) declaratory or injunctive relief, such as an order to keep a district from changing a student's placement or one requiring an improved IEP;[122]
2) tuition reimbursement for a private placement paid for by parents;[123]
3) an extension of compensatory educational services past the child's twenty-first birthday or beyond the regular school year to offset the temporary denial of a FAPE;[124] and
4) an award of reasonable attorney's fees to a prevailing party.[125]

While the most common remedy under IDEA is declaratory or injunctive relief,[126] each of the above has become quite common today.[127] However, it remains unclear whether 1415(i)(2)(B) allows

---

121. *Id.*

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

123. Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 (1985) (holding that parents can be reimbursed for the reasonable cost of unilateral placement when FAPE is not available in a public setting and parent's placement is proper); *see also* Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 12-15 (1993) (holding that FAPE requirements do not apply to private placement). Such reimbursement is not the same thing as monetary damages. Hall v. Knott County Bd. of Educ., 941 F.2d 402, 407 (6th Cir. 1991) (declaring that reimbursement claims should not be characterized as "damages"). IDEA '97 now authorizes such reimbursement. 20 U.S.C. § 1412(a)(10)(C).

124. *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 (1st Cir. 1993). Compensatory education could also include extended school year (ESY) services or additional tutoring.

125. 20 U.S.C. § 1415(i)(3)(B) (2000). This provision was part of the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796. One of Congress' chief aims in passing the amendment was to authorize the awarding of reasonable attorney's fees to prevailing parties. *See infra* note 150 and accompanying text.

126. *E.g.*, Taylor v. Honig, 910 F.2d 627, 628 (9th Cir. 1990) (asserting that injunctive relief such as ordering an appropriate placement for a child is the ordinary remedy under the IDEA).

127. *See generally* Jean M. Bond, Casebrief, *Making Up for Lost Time: The Third Circuit's Use of Remedies for Violations of the Individuals with Disabilities Education Act*, 46 VILL. L. REV. 777 (2001) (discussing available remedies in the Third Circuit); Allan G. Osborne, Jr., *Remedies for a School District's Failure to Provide Services Under IDEA*, 112 EDUC. L. REP. 1 (1996) (outlining available remedies).

for an award of compensatory damages. Historically, courts have held that damages are not available under IDEA unless a school district's failure to comply with IDEA is flagrant.[128] More recently, some courts have determined that compensatory damages are appropriate relief even for non-flagrant violations of IDEA.[129] The majority of courts, however, have decided that § 1415(i)'s appropriate relief language does not authorize an award of compensatory damages.[130] Consequently, parents have used a later provision of § 1415 as the basis for compensatory damages pursuant to § 1983.

II. SECTION 1415(L): THE HEART OF THE CONTROVERSY SURROUNDING WHETHER COMPENSATORY DAMAGES ARE AN AVAILABLE REMEDY UNDER SECTION 1983

In response to the seeming unavailability of compensatory damages under IDEA's §1415(i)'s "appropriate relief" language, parents have pursued compensatory damages pursuant to § 1983. These suits rely on § 1415(l)—originally codified as § 1415(f)—a provision that Congress added to § 1415 in 1986.[131] Because

---

128. *E.g.*, Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981) (holding that damages are not appropriate relief absent exceptional circumstances because IDEA's purpose to educate is not furthered by such an award, and awarding damages has a potentially chilling effect on the development of innovative educational approaches). *See generally* Allen G. Osbourne, Jr. & Charles J. Russo, *Are Damages an Available Remedy When a School District Fails to Provide an Appropriate Education under IDEA?*, 152 EDUC. L. REP. 1, 2 (2001) (discussing the development of this area of law).

129. *E.g.*, W.B. v. Matula, 67 F.3d 484, 494-95 (3d Cir. 1995); *see also* sources cited *infra* note 163 and accompanying text. *See generally* David Stewart, *Expanding Remedies for IDEA Violations*, 31 J.L. & EDUC. 373 (2002) (arguing that monetary damages are available and appropriate); Kara W. Edmunds, Note, *Implying Damages Under the Individuals with Disabilities Education Act:* Franklin v. Gwinnett County Public Schools *Adds New Fuel to the Argument*, 27 GA. L. REV. 789 (1993) (arguing in favor of compensatory damages); Stephen C. Shannon, Note, *The Individuals With Disabilities Education Act: Determining "Appropriate Relief" In A Post-*Gwinnett *Era*, 85 VA. L. REV. 853 (1999) (arguing in favor of compensation for prevailing parents in an IDEA action for the time and effort spent litigating on behalf of their child). *But see* Seligmann, *supra* note 8 (arguing that monetary damages are neither available nor appropriate).

130. *E.g.*, Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147, 152 (N.D.N.Y. 1997) (holding that "IDEA does not provide for compensatory money damages"), *aff'd*, 181 F.3d 84 (1999), *aff'd*, 208 F.3d 204 (2000); *see also infra* note 165. For a discussion on the availability of punitive damages, see Stephanie L. Gill, Comment, *Punitive Damages: Flying in the Face of the Individuals with Disabilities Education Act?*, 100 DICK. L. REV. 383 (1996).

131. Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796. Section 1415(l) was originally § 1415(f); it was renumbered as part of IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37. This Note will refer to this provision as § 1415(l) for the sake of consistency.

§ 1415(l) allows parents to seek remedies under other statutes, this provision most influences the interaction of § 1983 and IDEA.

A. *The Origins of Section 1415(l)*

Congress added § 1415(l) through an amendment to IDEA called the Handicapped Children's Protection Act (HCPA).[132] Congress enacted the HCPA largely in response to the Supreme Court's decision in *Smith v. Robinson,*[133] which primarily addressed the awarding of attorney's fees and determining whether IDEA was the exclusive mechanism for vindicating a disabled child's educational rights.[134] In *Smith*, the school committee placed eight-year-old Tommy Smith, who suffered from multiple handicaps including cerebral palsy, into a hospital's day program. The school committee then refused to pay for his continued education.[135] The lower court found that the school committee denied Tommy Smith a FAPE by failing to provide a full hearing before terminating funding for his special education program. The court ordered the school committee to pay the full cost of his attendance.[136] As part of the suit, Tommy's parents asserted claims for constitutional violations under § 1983 for what were basically statutory violations of IDEA. They also sought an award of attorney's fees, relying on 42 U.S.C. § 1988(b),[137] which the lower court granted.[138] On appeal, the First Circuit reversed the district court's decision concerning attorney's fees and the Smiths appealed to the Supreme Court.[139]

The Smiths argued that as the prevailing party asserting substantial but unaddressed constitutional claims cognizable under § 1983, they were entitled to attorney's fees.[140] School and state officials argued that the Smiths were attempting to "circumvent the lack of . . . [an] attorney's fees" provision in IDEA by "adding surplus constitutional claims."[141] The Court concluded that for claims

---

132. *Id.*
133. 468 U.S. 992 (1984).
134. *Id.* at 994.
135. *Id.* at 995.
136. *Id.* at 1000.
137. *See* Maher v. Gagne, 448 U.S. 122, 130-31 (1980). The *Smith* Court cited *Maher* in acknowledging the general rule that plaintiffs who prevail in § 1983 claims, or who assert a "substantial but unaddressed" § 1983 claim and prevail on other grounds are entitled to attorney's fees under 42 U.S.C. § 1988(b). *Smith*, 468 U.S. at 1000.
138. *Smith,* 468 U.S. at 1000.
139. *Id.*
140. *Id.* at 1004.
141. *Id.* at 1005.

based on either IDEA, § 504, or the Fourteenth Amendment's Equal Protection Clause, IDEA was "the exclusive avenue through which the child and his parents or guardian can pursue their claim."[142] Consequently, because there was no provision for attorney's fees, a suit for violation of IDEA did not allow attorney's fees under other federal statutes.[143] The Court also noted that IDEA "is a comprehensive scheme . . . to aid the States in complying with their constitutional obligations" to educate disabled children.[144] "Allowing a plaintiff to circumvent [IDEA's] available remedies" by relying on § 1983 "would be inconsistent with that . . . scheme."[145]

The dissent in *Smith* concluded that § 1983 must be read together with IDEA to determine whether a § 1983 claim is available.[146] Arguing that the aspects of § 1983 that do not conflict with IDEA should be preserved, the dissent characterized the majority's decision as a repeal of § 1983 to the extent that it covered the Smiths' claims.[147] The dissent concluded by inviting Congress to act.[148]

In response to the Supreme Court's decision in *Smith*, Congress introduced the Handicapped Children's Protection Act ("HCPA") in February of 1985.[149] Congress stated that the primary purposes of the Act were "to authorize the award of reasonable attorneys' fees to certain prevailing parties [and] to clarify [IDEA's] effect . . . on rights, procedures and remedies under other laws relating to the prohibition of discrimination . . . ."[150] The provision of attorney's fees created some controversy because of concern that it would encourage litigation, thereby overburdening financially strapped school districts.[151] In fact, IDEA does not authorize a hearing officer to award attorney's fees, so the parent must generally go to court to collect them.[152] Despite this concern,

---

142. *Id.* at 1013.
143. *Id.* at 1009-13.
144. *Smith*, 468 U.S. at 1009.
145. *Id.* at 1012.
146. *Id.* at 1023 (Brennan, J., dissenting).
147. *Id.* at 1025 (Brennan, J., dissenting).
148. *Id.* at 1031 (Brennan, J., dissenting).
149. S. REP. NO. 99-112, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1799 (referring to the decision and quoting the dissent's challenge to act).
150. Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796.
151. 132 CONG. REC. H4841-01 (daily ed. July 24, 1986) (statements of Rep. Bartlett).
152. 20 U.S.C. § 1415(i)(3)(B-F).

this is an important provision because it gives parents with limited financial resources access to court.

Congress also addressed the clarification of IDEA's relationship to other laws. "Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of handicapped children and youth . . . ."[153] When Congress later reauthorized IDEA in 1997, it added specific reference to the Americans with Disabilities Act ("ADA").[154]

Section 1415(l) also includes an exhaustion requirement.[155] Before seeking relief under another law that is also available under IDEA, the plaintiff must generally exhaust all available IDEA hearing and appeals procedures.[156] In essence, Congress does not want parents to circumvent the extensive procedural protections of IDEA.[157] However, courts have ruled that plaintiffs need not exhaust administrative remedies when not required by IDEA, such as when seeking those proceedings would be futile.[158]

It is important to note that nothing in § 1415(l) currently states that it restricts the ability of parents to seek remedies pursuant to the ADA, § 504, or the Constitution. This indicates that IDEA is not the exclusive remedy available to disabled children and overturns *Smith*'s broad ruling that IDEA precludes independent but overlapping statutory or constitutional claims. In addition, damages remedies for violations of statutory or constitutional rights

---

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

154. *Id.* The addition of the ADA was made as part of IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37, 98.

155. This "exhaustion requirement" is becoming a more frequent subject of litigation. For an up-to-date discussion of IDEA's exhaustion requirement see Susan G. Clark, *Administrative Remedy Under IDEA: Must It Be Exhausting?*, 163 EDUC. L. REP. 1 (2002), and Mary C. Stablein, Note, *An IDEA Gone Out of Control:* Covington v. Knox County School Board, 45 HOW. L.J. 643 (2002).

156. 20 U.S.C. § 1415(l) (2000). These procedures typically include a hearing before an impartial hearing officer and may require an appeal to the state review board before filing a claim in court.

157. S. REP. NO. 99-112, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1799.

158. *Id.* The Ninth Circuit has established a test for application of the futility exception. Witte v. Clark County Sch. Dist., 197 F.3d 1271, 1276 (9th Cir. 1999) (holding that exhaustion was excused where parent sought direct judicial relief under § 504 and the ADA pursuant to § 1983 because IDEA's available remedies were not sufficient to address past physical injuries), *petition for cert. filed*, 71 U.S.L.W. 3429 (U.S. Dec. 10, 2002) (No. 02-890).

may be available pursuant to § 1983.[159] As a result, if a school district violated IDEA and the Constitution, for example, § 1415(l) would not limit the ability of the parents to seek compensatory damages for the constitutional violation .

Section § 1415(l) does not, however, mention § 1983. Therefore, the question remains whether this provision overturns *Smith*'s more narrow holding that IDEA provides a comprehensive remedial scheme and forecloses recourse to § 1983 as a remedy for IDEA violations. In the years since the passage of this amendment, "this silence has perplexed the courts and generated, to some degree, a split of opinion among the Courts of Appeals regarding the relationship between § 1983 and IDEA."[160] Although Congress intended the HCPA to clarify its position concerning the relationship between IDEA and other laws and remedies,[161] it failed with respect to § 1983.

B. *The State of the Law Today*

An examination of decisions by the United States Courts of Appeals in this area of law is bewildering. The Third Circuit issued the leading opinion holding that a plaintiff may bring a § 1983 compensatory damages claim for violation of rights guaranteed by IDEA.[162] Other circuits have not directly addressed the issue, but their opinions are often interpreted as supporting a § 1983 compensatory damages award.[163] The Seventh Circuit has issued inconsis-

---

159. For example, although the Supreme Court has not ruled on whether § 504 provides a monetary damages remedy against recipients of federal aid, most lower courts have held that damages would be available if the violation resulted from bad faith or gross misjudgment. *See, e.g.*, Sellers v. Sch. Bd. of Manassas., 141 F.3d 524 (4th Cir. 1998); Monahan v. Nebraska, 687 F.2d 1164, 1171 (8th Cir. 1982); Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147, 152 (N.D.N.Y. 1997), *aff'd*, 181 F.3d 84 (2d Cir. 1999); *see also* HUEFNER, *supra* note 12, at 112 (discussing remedies under § 504); Zirkel, *supra* note 13 (discussing § 504 and the ADA). With respect to constitutional claims, the Supreme Court has held that a § 1983 claimant may recover compensatory damages as long as the claimant proves actual injury. Carey v. Piphus, 435 U.S. 247 (1978).

160. Andrew S. v. Sch. Comm. of Greenfield, 59 F. Supp. 2d 237, 242 (D. Mass. 1999).

161. *See supra* note 150 and accompanying text.

162. W.B. v. Matula, 67 F.3d 484, 494 (3d Cir. 1995) (allowing plaintiff to pursue § 1983 compensatory damages claims for IDEA violations).

163. Technically, the Second Circuit has not yet addressed the issue, but recent decisions within the Circuit have allowed claims. M.H. v. Bristol Bd. of Educ., 169 F. Supp. 2d 21, 28-29 (D. Conn. 2001) (allowing plaintiff to bring a § 1983 compensatory damages claim and listing other cases). Furthermore, a previous Second Circuit opinion has been widely read to indicate support for claims. Mrs. W. v. Tirozzi, 832 F.2d 748,

tent opinions, apparently still forming its position.[164] Still other circuits have held that plaintiffs may bring § 1983 claims based on violation of IDEA, but compensatory damages are altogether unavailable or available only in exceptional situations.[165] In contrast, the Fourth and Tenth Circuits have held that plaintiffs cannot bring § 1983 actions for compensatory damages resulting from violations of IDEA.[166] Due to the unsettled nature of case law, frequent arguments have surfaced in support of both sides.

1. In Favor of Awarding § 1983 Compensatory Damages

In *W.B. v. Matula*, the plaintiff sought damages for a persistent refusal on the part of school officials to evaluate, classify, and provide her child with the necessary educational services.[167] The student suffered from Tourette's Syndrome, an obsessive-compulsive

759 (2d Cir. 1987) (holding § 1983 claims are allowed under EHA, the predecessor to IDEA). The Fifth Circuit also appears to support § 1983 claims. Angela L. v. Pasadena Indep. Sch. Dist., 918 F.2d 1188, 1193 n.3 (5th Cir. 1990) (clarifying its position in the footnote). The Ninth Circuit has not yet addressed the issue, but recent decisions within the circuit favor claims. *E.g.*, Goleta Union Elementary Sch. Dist. v. Ordway, 166 F. Supp. 2d 1287, 1293 (C.D. Cal. 2001) (allowing claim and indicating other cases). Similarly, there are no cases on point from the D.C. Circuit, but a lower court decision appears to allow § 1983 claims. Walker v. District of Columbia, 157 F. Supp. 2d 11, 30 (D.D.C. 2001) (stating that compensatory damages are an extraordinary remedy and suggesting a four part test for plaintiffs to prove that they are warranted). The language of an Eleventh Circuit case could also be read to allow § 1983 claims where exhaustion could be excused. N.B. v. Alachua County Sch. Bd., 84 F.3d 1376, 1378 (11th Cir. 1997) (dismissing the § 1983 damages claim for failure to exhaust IDEA administrative remedies).

164. In *Charlie F. v. Board of Education of Skokie School District*, 98 F.3d 989, 991 (7th Cir. 1996), the court stated that plaintiffs must exhaust IDEA's administrative remedies even if they wanted a form of relief (compensatory damages) that IDEA did not supply. This has been interpreted as disallowing § 1983 compensatory damages claims. *But cf.* Marie O. v. Edgar, 131 F.3d 610, 622 (7th Cir. 1997) (holding that Congress did not intend to foreclose resort to § 1983 but actually provided for its availability to enforce IDEA).

165. The Sixth and Eighth Circuits seem to allow § 1983 claims for violations of IDEA, but the circuits disallow damages and are, therefore, often cited as disallowing claims. Bradley v. Ark. Dep't of Educ., 301 F.3d 952 (8th Cir. 2002); Heidemann v. Rother, 84 F.3d 1021 (8th Cir. 1996); Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 980 F.2d 382 (6th Cir. 1992); Wayne County Reg'l Educ. Serv. Agency v. Pappas, 56 F. Supp. 2d 807 (E.D. Mich. 1999).

166. Padilla v. Sch. Dist. No. 1, 233 F.3d 1268, 1274 (10th Cir. 2000) (finding § 1983 unavailable); Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 529 (4th Cir. 1998) (same). The First Circuit has not yet ruled on this issue, however, two district court decisions fall within the Fourth Circuit's reasoning.); Smith v. Me. Sch. Admin. Dist. No. 6, 2001 WL 420361 (D. Me. 2001) (Recommended Decision on Defendant's Motion for Summary Judgment); Andrew S. v. Sch. Comm. of Greenfield, 59 F. Supp. 2d 237, 241 (D. Mass. 1999).

167. W.B. v. Matula, 67 F.3d 484, 487 (3d Cir. 1995).

disorder, and Attention Deficit Hyperactivity Disorder ("ADHD"), and he experienced great difficulty in first and second grade without services.[168] Despite resistance by school officials, the mother eventually succeeded in having her son evaluated and provided with special education services.[169] The plaintiff mother sought money damages for the period preceding the school district's compliance with IDEA's requirements.[170] The Third Circuit, relying on an examination of legislative history and the absence of limiting language in IDEA, held that "[i]n enacting § 1415([l]), Congress specifically intended that IDEA violations could be redressed by § 504 and § 1983 actions."[171] Moreover, the court held that the traditional presumption in favor of a federal court's power to order all appropriate relief applies; therefore, a § 1983 damages action is allowed for violations of IDEA.[172]

This court, along with others on this side of the controversy,[173] essentially assert that nothing in the text or history of the relevant statutes expresses a congressional intent to limit relief in any way.[174] In addition, there is a presumption in favor of the power of federal courts to award any appropriate relief.[175] Despite this stance, these courts have been reluctant to grant money damages.[176] This reluctance is reflected by a warning issued in *Matula*, "We caution that in fashioning a remedy . . . a district court may wish to order educational services . . . or reimbursement . . . rather than compensatory damages for generalized pain and suffering."[177] This recognition of a right to compensatory damages, yet hesitation to award them, stands in contrast to the clear refusal asserted by the Fourth and Tenth Circuits.

---

168. *Id.* at 489-90.

169. *Id.*

170. *Id.* at 490.

171. *Id.* at 494.

172. *Id.* at 495 (referring to the Supreme Court's decision in Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 70-71 (1992) (stating 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)). *See* discussion *infra* Part III.B.2.

173. *See supra* note 163 and accompanying text.

174. W.B. v. Matula, 67 F.3d 484, 494 (3d Cir. 1995).

175. *Id.*

176. *E.g.,* Walker v. District of Columbia, 157 F. Supp. 2d 11, 30-31 (D.D.C. 2001) (stating that compensatory damages are an extraordinary remedy and suggesting a four part test for plaintiffs to prove that they are warranted); *see infra* note 269.

177. *Matula*, 67 F.3d at 495.

2. Against Awarding Section 1983 Compensatory Damages

In *Sellers v. School Board of Manassas*,[178] the Fourth Circuit held that a plaintiff could not bring a compensatory damages claim pursuant to § 1983 for an alleged violation of IDEA. In *Sellers*, the plaintiff was an eighteen year-old boy who had recently been diagnosed as learning disabled and emotionally disturbed.[179] He and his parents sought compensatory damages under IDEA, arguing that the school should have known that he required special education services in grade school.[180] In denying their damages claim, the court conceded that although HCPA, which created § 1415(l), did effect a legislative reversal of much of the *Smith* holding, it did not afford the plaintiff a right to demand compensatory damages.[181] Since IDEA provides a comprehensive remedial scheme for violations of its requirements, students and parents may not rely on § 1983 to sue for violations of IDEA.[182] Permitting recovery of general damages through § 1983 would subject school boards to potential liability "exponentially greater" than any liability for tuition reimbursement that they currently face.[183] The vague language of § 1415(l) does not place them on notice of such open-ended liability.[184]

In *Padilla v. School District No. 1*,[185] the Tenth Circuit joined the *Sellers* court in holding that § 1415(l) left intact *Smith*'s implication that IDEA may not provide the basis for § 1983 claims based on violation of IDEA. It also noted that since Congress passed HCPA, the Supreme Court has cited *Smith* and the IDEA as examples of an exhaustive legislative enforcement scheme that precludes § 1983 causes of action.[186] These courts, along with the other courts on this side of the controversy,[187] essentially assert that § 1415(l) overrules much, but not all, of the Supreme Court's decision in *Smith*. Claims under § 1983 for ADA, § 504, or constitutional violations may be permissible, but § 1983 claims based on violations of

178. 141 F.3d 524 (4th Cir. 1998).
179. *Id.* at 525.
180. *Id.* at 525-26.
181. *Id.* at 530.
182. *Id.* at 529.
183. *Sellers*, 141 F.3d at 532.
184. *Id.*
185. 223 F.3d 1268 (10th Cir. 2000).
186. *Id.* at 1273 (referring to the Supreme Court's decisions in *Blessing v. Freestone*, 520 U.S. 329, 347-48 (1997), and *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 423-24 (1987)).
187. *See supra* note 165-66.

IDEA are not. Neither the text nor the legislative history clearly authorizes such claims, and there are strong policy reasons against doing so.

3. Avoiding the Issue

IDEA's exhaustion requirement has enabled some courts to avoid addressing whether a § 1983 damages claim is permissible for a violation of IDEA.[188] As mentioned, parents often bring multiple claims in special education cases.[189] When parents sue under other statutes, such as the ADA or § 504, for alleged violations that could have been brought under IDEA, courts have held that the parents must first exhaust IDEA's administrative remedies.[190] In so holding, many of these courts never reach the issue of the relationship between IDEA and § 1983 compensatory damages claims, only adding to the perplexity surrounding the question. The Supreme Court had an opportunity to hear this issue in the *Sellers* case in October 1998, but it denied certiorari.[191]

III. Are Compensatory Damages under Section 1983 for Violation of IDEA Available and Appropriate?

A close examination of the language of § 1415(l), along with an exploration of its legislative history and other means of statutory interpretation, fails to provide clear guidance as to whether courts should recognize § 1983 compensatory damages claims for violation of IDEA. Consequently, it is necessary to examine additional arguments to reach a conclusion.

A. *Section 1415(l)'s Language, Legislative History, and Structure: A Lack of Clarity*

In any circumstance requiring statutory interpretation, an examination of the text is the first step.[192] If the plain meaning of the

188. *See supra* notes 155-58. *E.g.*, Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 56 (1st Cir. 2002) (holding that a student may not bring suit for money damages under § 1983 without exhausting IDEA's administrative remedies, thereby not reaching the issue of whether a § 1983 damages claim is permissible).

189. *See supra* notes 11-12.

190. *E.g.*, N.B. v. Alachua County Sch. Bd., 84 F.3d 1376, 1378-79 (11th Cir. 1996) (dismissing the § 1983 damages claim for failure to exhaust IDEA administrative remedies).

191. Sellers v. Sch. Bd. of Manassas, 141 F.3d 524 (4th Cir. 1998).

192. *See, e.g.*, Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (asserting that the Court's "first step in interpreting a statute is to determine whether the language at

text is clear, the inquiry stops there.[193] If the statute is ambiguous, courts frequently turn to legislative history and other canons of statutory construction to discern legislative intent.[194]

1. The Text of the Statute

Section 1415(l) states: "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities . . . ."[195] Certainly, the language of the statute indicates that IDEA provisions are not the exclusive avenue through which remedies are available to students with disabilities. In addition, the text of the statute indicates no limit on the applicability of "other Federal laws" that may be used to protect handicapped children, and § 1983 certainly falls within the "other Federal laws" category. Therefore, courts and commentators alike argue that the plain language of the statute must be read to permit § 1983 actions for violation of IDEA.[196]

Yet, the language of the statute lacks any specific reference to § 1983.[197] This is arguably significant because Congress amended the IDEA in 1997 to add a specific reference to another federal statute, the ADA.[198] Furthermore, as a statute of general application, § 1983 mentions neither disability nor children. Therefore, other courts and commentators argue[199] that it should not be con-

---

issue has a plain and unambiguous meaning with regard to the particular dispute in the case").

193. *Id.* (stating that "the inquiry must cease" if the meaning is clear).

194. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 288 (2001) (stating that the search for Congress's intent could begin and end with the text and structure of the statute).

195. 20 U.S.C. § 1415(l) (2000).

196. *E.g.*, Marie O. v. Edgar, 131 F.3d 610, 621 (7th Cir. 1997) (asserting that Congress responded to *Smith* by enacting this amendment allowing § 1983 claims); Stewart, *supra,* note 129.

197. 20 U.S.C. § 1415(l).

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

20 U.S.C. § 1415(l). *See supra* note 153-54 and accompanying text.

199. *E.g.*, Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 530 (4th Cir. 1998) (not-

sidered a "[f]ederal law [ ] protecting the rights of children with disabilities."[200] As such, the meaning of the text of the statute is, at best, ambiguous. Consequently, other methods of inquiry are required to settle this debate.

2. The Legislative History

Legislative history is another common method courts use in determining legislative intent and, thereby, the meaning of a statute.[201] While considering HCPA, the amendment that created § 1415(l), both branches of Congress[202] discussed the purpose of the proposed amendment and the Supreme Court's decision in *Smith*.[203] The House Report included mention of § 1983, while the Senate's comments focused on § 504 and the recovery of attorney's fees. The House Report stated that "since 1978, it has been Congress' intent to permit parents to pursue the rights of handicapped children through IDEA, § 504 and § 1983 . . . . Congressional intent was ignored by the U.S. Supreme Court when . . . it handed down its decision in *Smith v. Robinson*."[204] The Senate Report stated, "[T]he Supreme Court, in *Smith* . . . determined that Congress intended that the [IDEA] provide the exclusive . . . remedies in special education cases covered by that act. The effect . . . was to preclude parents from bringing special education cases under section 504 . . . and recovering attorney's fees available under section 505 of that act . . . ."[205] In its introductory stages, then, general congressional intent seemed to favor overruling both the broad and specific holdings of *Smith*.

After debate in both the House and the Senate, the joint Conference Committee adopted the language of the Senate bill.[206] The Conference Report stated that "[w]ith slightly different wording, both the Senate bill and the House amendment authorize the filing

---

ing the lack of specific reference to § 1983 and pointing out the lack of specific reference to § 1983).

200. 20 U.S.C. § 1415(l) (2000).

201. *See, e.g.*, Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) (using legislative history to examine a statute). *But see* Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 204 n.26 (1982) (rejecting an argument based on legislative history because it was "too thin a reed on which to base an interpretation").

202. S. REP. NO. 99-112, at 1 (1985); H.R. REP. NO. 99-296, at 4 (1985).

203. Smith v. Robinson, 468 U.S. 992 (1984); *see* discussion *supra* Part II.A.

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

205. S. REP. NO. 99-112, at 1 (1985).

206. H.R. CONF. REP. NO. 99-687, at 7 (1985).

of civil actions under legal authorities other than" IDEA.[207] This language serves to clarify both branches' intent to overturn *Smith*'s broad ruling that IDEA precludes overlapping, but independent, statutory or constitutional claims. The report continued, "The House recedes,"[208] meaning that the committee adopted the language of the Senate bill, which included no specific textual reference to § 1983. However, the report went on to state, "It is the conferees' intent that actions brought under 42 U.S.C. 1983 are governed by this provision." [209]

This is significant for a number of reasons. First, the Conference Committee adopted the wording of the Senate bill, which did not include any specific reference to § 1983. This indicates that perhaps the Senate never intended to include § 1983 in the text of the statute. If true, this omission seems to indicate a lack of intent on the part of at least one branch of Congress. Second, this "oblique reference"[210] indicates that Congress was disinclined to entitle plaintiffs to the full remedies available under § 1983 for every violation of IDEA. If Congress intended to include § 1983 claims for IDEA violations, it could have made the point clear by simply including § 1983 in the text of the statute when it was finalizing the wording of the amendment in conference. Instead, through an omission seemingly devoid of explanation, it chose not to. Finally, at least one commentator has suggested that the absence in the legislative history of any debate concerning the ramifications of creating a damages claim under § 1983 for violation of IDEA is perhaps most significant.[211] If Congress intended to "create a new and powerful damage remedy for IDEA claims" there should have been as much debate over it as there was concerning the attorney's fees provision that was the main thrust of the amendment.[212]

Despite these seemingly inconclusive arguments, some courts have relied on these statements as an explicit indication of congressional intent in § 1415(l): "Far from inferring a congressional intent to *prevent* § 1983 actions predicated on IDEA then, we conclude that Congress explicitly *approved* such actions."[213] Other courts

---

207. *Id.*

208. *Id.*

209. *Id.*

210. Andrew S. v. Sch. Comm. of Greenfield, 59 F. Supp. 2d 237, 244 (D. Mass. 1999).

211. Seligmann, *supra* note 8, at 506.

212. *Id.*

213. *E.g.*, W.B. v. Matula, 67 F.3d 484, 494 (3d Cir. 1995).

have held that the legislative history supports a narrower interpretation: "When construed in their most natural form, the excerpts demonstrate the unremarkable proposition that Congress intended section 1415([l]) to restore the ability of disabled children and their parents to utilize section 1983 to protect constitutional rights."[214] However, at least one court criticized this narrow interpretation and pointed out that nothing in the legislative history indicates that Congress intended for § 1983 to apply only to "constitutional violations."[215] In addition, a narrow interpretation would mean that Congress amended IDEA to give plaintiffs the right to bring constitutional claims under §1983; a right they already possessed.[216] In conclusion, an exploration of legislative history fails to provide clear congressional intent to authorize § 1983 compensatory damage claims for violations of IDEA.

3. The Purpose and Structure of the Statute

Courts also consider a statute's purpose and structure in attempting to construe its language.[217] In so doing, courts attempt to interpret the meaning of the statute so as not to conflict with its purpose and structure.[218] Congress enacted IDEA to provide access to a FAPE for children with disabilities. Thus, its purpose is to meet students' educational needs. In order to ensure this purpose, Congress developed elaborate procedural mechanisms and comprehensive remedies. Accordingly, courts have stated that the law was designed to preserve the right to a FAPE, not provide a forum for tort-like claims; furthermore, § 1983 damages are inconsistent with IDEA's elaborate statutory scheme.[219] One court has pointed out that the Supreme Court has made references to IDEA in this vein: "In *Wright*, the Court noted that EHA [IDEA's predecessor] itself 'provided for private judicial remedies, thereby evidencing congres-

214. *E.g.*, Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 531 (4th Cir. 1998) (discussing § 1415(f), though the language to which the Court refers is currently enacted at § 1415(l)).

215. Goleta Union Elementary Sch. Dist. v. Ordway, 166 F. Supp. 2d 1287 (C.D. Cal. 2001).

216. *Id.* at 1295.

217. Crandon v. United States, 494 U.S. 152, 158 (1990) (stating that in determining the meaning of a statute, the Court "look[s] not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy").

218. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284 (1998) (stating that in the absence of clear congressional intent, the Court should not develop a remedial scheme "at odds with the statutory structure and purpose").

219. *E.g., Sellers*, 141 F.3d at 531.

sional intent to supplant the § 1983 remedy.'"[220] On the other hand, because IDEA is a statute designed to provide increased protection to children with disabilities, it seems inconsistent with the statute's purpose to deny those children the protection of § 1983.[221]

In sum, neither the text nor the legislative history of § 1415(l) clearly authorizes an award of compensatory damages under § 1983. Other canons of statutory construction also fail to resolve the question. In view of the lack of clear evidence to support either side in this debate over the proper interpretation of § 1415, it is necessary to consider alternative arguments.

B. *Alternative Arguments Concerning the Availability of Section 1983 Damages Claims for Violation of IDEA*

Not surprisingly, there are many arguments on both sides of the issue.[222] Three arguments in particular seem to be most compelling. The first concerns whether or not IDEA's comprehensive remedial scheme precludes resort to § 1983. The second addresses the application of the *Franklin* presumption to the question of whether compensatory damages are appropriate pursuant to § 1983. The third argument deals with the potential financial implications for school districts of allowing compensatory damages claims.

1. IDEA's Comprehensive Remedial Scheme and Preclusion of Enforcement Under Section 1983

As discussed, combining § 1983 with a federal statute in order to sue a school district or its personnel is not a simple task.[223] Courts must begin by determining whether Congress intended a statute to provide a private right of action.[224] This question is not at issue in IDEA cases because the statute confers an express right.[225] However, this right alone does not guarantee a plaintiff the availa-

220. Padilla v. Sch. Dist. No. 1, 233 F.3d 1268, 1273 (10th Cir. 2000) (citing Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 427 (1987)).

221. *See* Thomas A. Mayes & Perry A. Zirkel, *Disclosure of Special Education Students' Records: Do the 1999 IDEA Regulations Mandate That Schools Comply with FERPA?*, 8 J.L. & POL'Y 455, 475 (2000) (arguing that IDEA's overarching structure undercuts the argument in support of an IDEA exception to FERPA).

222. For a cataloguing of the traditional arguments concerning the award of compensatory damages in this context, see Edmunds, *supra*, note 129, at 802-16.

223. *See supra* Part I.A.

224. Gonzaga Univ. v. Doe, 122 S. Ct. 2268 (2002) (holding that FERPA's confidentiality provisions do not create a private right of action enforceable under § 1983).

225. 20 U.S.C. § 1415(l) (2000).

bility of compensatory damages claims pursuant to § 1983. The Supreme Court has stated that determining whether a statutory violation may be enforced through § 1983 requires a "different inquiry" than determining whether a private right of action exists.[226]

Aiding potential plaintiffs is the "general rule" that once a plaintiff demonstrates that a statute confers an individual right of action, it is presumptively enforceable by § 1983.[227] However, the Supreme Court has held that a state may rebut this presumption by showing that Congress "specifically foreclosed a remedy under § 1983,"[228] either expressly[229] or "impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."[230] Given no express congressional mandate, the issue is whether IDEA's enforcement mechanisms are so comprehensive as to be considered incompatible with an action under § 1983.

Some courts and commentators have argued that IDEA is just such a scheme.[231] This argument is premised on the fact that IDEA establishes extensive rights and remedies for students with disabilities. These rights include the right to: (1) receive written prior notice; (2) give or withhold consent at specific times; (3) access their child's educational records; (4) obtain an independent educational evaluation; (5) present a complaint to initiate a due process hearing; (6) mediate their complaint; (7) file a complaint with the SEA; (8) have a due process hearing; (9) have the results of that hearing reviewed; (10) appeal the final decision to court; (11) have their child "stay put" while proceedings are pending; and (12) receive attorney's fees.[232] Despite the fact that IDEA does not specify the remedies available for violation of these rights, courts[233] have developed a battery of remedies. These include declaratory and injunctive relief, reimbursement for tuition and related services, com-

---

226. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 508 n.9 (1990).

227. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 70-71 (1992) (holding that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief" for violation of a federal right).

228. *Gonzaga*, 122 S. Ct. at 2276 n.4 (citing Smith v. Robinson, 468 U.S. 992, 1005 n.9 (1984)).

229. *Id.* (citing Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 423 (1987)).

230. *Id.* (citing Blessing v. Freestone, 520 U.S. 329, 341 (1997)).

231. *E.g.*, Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 529 (4th Cir. 1998) (arguing that because of IDEA's comprehensive provisions, Congress would have specifically mentioned § 1983 if it had intended to allow monetary damages through § 1983).

232. HUEFNER, *supra* note 12, at 172-85.

233. *See supra* Part I.B.2. (discussing the availability of judicial review).

pensatory education, and reasonable attorney's fees.[234] Arguably, these rights and remedies taken together adequately protect the educational needs of students with disabilities, and render compensatory damages pursuant to § 1983 unnecessary.

Courts and commentators espousing this view also point out that the Supreme Court appears to agree. In *Smith*, the Court characterized IDEA as having a remedial scheme comprehensive enough to supercede § 1983.[235] Courts and commentators on the other side argue that it was precisely that ruling which compelled Congress to amend IDEA.[236] They argue that § 1415(l) specifically overruled *Smith*, making all federal statutes available, including § 1983.[237] "The ultimate question, in respect to whether private individuals may bring a lawsuit to enforce a federal statute, through 42 U.S.C. § 1983 or otherwise, is a question of congressional intent."[238] Accordingly, this leads back to the original question: When Congress created IDEA's elaborate enforcement scheme, did it intend to preclude resort to § 1983? This is necessarily followed by a second question: When Congress amended IDEA, creating § 1415(l), did it intend to create new rights enforceable under § 1983? The Supreme Court has recently stated that "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms."[239] If that was Congress' intent, it could certainly have been more clear about it.

It is worth noting that the Supreme Court has only found a comprehensive administrative scheme precluding enforceability under § 1983 in two cases.[240] This would seem to indicate that the Supreme Court is hesitant to preclude resort to all available remedies. This is the premise of the next argument.

---

234. *See supra* Part I.B.3. (discussing these remedies).

235. *E.g.*, Padilla v. Sch. Dist. No. 1, 233 F.3d 1268, 1273 (10th Cir. 2000) (arguing that Smith's narrow implication that IDEA's comprehensive remedial framework forecloses a § 1983 remedy is still viable); *accord* Charlie F. v. Bd. of Educ. of Skokie, 98 F.3d 989, 993 (7th Cir. 1996).

236. Stewart, *supra* note 123, at 378 (arguing that preclusion is an incorrect interpretation of congressional intent, especially in light of the amendment of § 1415(l)); *see supra* Part I.B.

237. W.B. v. Matula, 67 F.3d 484, 494 (3d Cir. 1995).

238. Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2279 (2002) (Breyer, J., concurring).

239. *Id.* at 2279 (majority opinion).

240. *See* sources cited *supra* note 31.

2. Presumption in Favor of All Appropriate Relief: What is Appropriate?

The Supreme Court's 1992 decision in *Franklin v. Gwinnett County Public Schools*[241] provides another important argument in this debate. *Franklin* involved a female high school student's allegations of sexual harassment by a male teacher.[242] After finding an implied right of action under Title IX,[243] the Court applied a contract-law analogy to find a damages remedy available.[244] This contract-law analogy contends that Congress' power to legislate under the spending power requires that the funding recipient know and accept the conditions of the "contract."[245] In a later case, the Court also used this contract-law analogy to define the scope of conduct for which a recipient may be held liable to a third-party beneficiary.[246]

In addition to the availability of a damages remedy, the Court established what is commonly considered the *Franklin* presumption. In light of congressional silence concerning damage remedies, the Court laid down the general rule that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."[247] Courts holding that compensatory damages can be awarded under § 1983 for violation of IDEA rely in large part on this general rule.[248] These courts reason that all reme-

---

241. 503 U.S. 60, 70-71 (1992) (holding that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute").

242. A male teacher-coach sexually abused the young woman. The Court accepted the coercive sexual activity as "sexual harassment," a form of sexual discrimination prohibited by Title IX. *Id.* at 62-63.

243. Because Title IX provides no explicit provision, the court implied a right of action for money damages. *Id.* at 65. *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 709 (1979) (finding an implied right of action in Title IX for private parties).

244. *Franklin*, 503 U.S. at 74-76.

245. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (characterizing spending clause legislation as "much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions").

246. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999) (finding liability for intentional conduct which violated the clear terms of Title IX). *But see* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) (finding no liability for conduct unknown to any official where statute implies that only violation brought to attention are actionable); *Pennhurst*, 451 U.S. at 24-25 (1981) (finding no liability for failure to comply with the unclear language describing a statute's purpose).

247. *Franklin*, 503 U.S. at 70-71.

248. *E.g.*, W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995); Cappillino v. Hyde Park Cent. Sch. Dist., 40 F. Supp. 2d 513, 515 (S.D.N.Y. 1999); Emma C. v. Eastin, 985 F.

dies, including compensatory damages pursuant to § 1983, are available absent direction to the contrary by Congress. Again, this leads back to an examination of the text and legislative history of the IDEA to determine whether there was congressional intent to disallow these monetary damages. These courts find no such congressional intent.[249]

One commentator has suggested that the most compelling argument against the *Franklin* presumption is the Spending Clause Conditions Doctrine.[250] That is, the IDEA established conditions for receipt of federal funds; these conditions should be clearly stated if the recipients are going to be held to them.[251] Courts and commentators arguing that compensatory damages are not available under § 1983 for violation of IDEA rely on this reasoning. If § 1415(l) is going to be interpreted to mean that compensatory damages claims under § 1983 are allowed, this would significantly increase the potential liability facing school districts. One court stated that "without a much clearer mandate from Congress, no such profound alteration in the relationship between school officials and disabled students and their families can be inferred in a statute enacted pursuant to Congress' spending power."[252]

A recent Supreme Court decision may change the debate over if and how *Franklin* applies to the issue of whether compensatory damages under § 1983 are available for violation of IDEA. The Supreme Court recently appraised its *Franklin* decision in *Barnes v. Gorman*.[253] In *Barnes*, the plaintiff was a paraplegic who suffered serious injuries while being transported in a police van that was not equipped to accommodate him. He was awarded compensatory and punitive damages under the ADA and § 504.[254] Applying the general rule of *Franklin*, the Eighth Circuit held that punitive damages were available.[255] The Supreme Court reversed. It noted that

---

Supp. 940 (N.D. Ca. 1997); *see* Shannon, *supra* note 129, at 866-70 (discussing *Matula*'s reliance on *Franklin*).

249. *Matula*, 67 F.3d at 494-95; *Capillino*, 40 F. Supp. 2d. at 514-15; *Eastin*, 985 F. Supp. at 943-45.

250. Seligmann, *supra* note 8, at 512.

251. *Id.*; Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 531-32 (4th Cir. 1998) (citing *Pennhurst*, 451 U.S. at 1).

252. Andrew S. v. Sch. Comm. of Greenfield, 59 F. Supp. 2d 237, 245 (D. Mass. 1999).

253. 122 S. Ct. 2097 (2002) (citing *Davis*, 526 U.S. at 642 and *Franklin*, 503 U.S. at 74-74).

254. The jury awarded him over $1 million in compensatory damages and $1.2 million in punitive damages. *Id.* at 2100.

255. Gorman v. Easley, 257 F.3d 738 (8th Cir. 2001).

although *Franklin* did recognize a presumption in favor of any appropriate relief, it did not describe the scope of "appropriate relief."[256]

The Court applied the same contract-law analogy to determine the scope of available remedies under Spending Clause statutes. The Court stated that a remedy is only appropriate relief if the recipient is on notice that by accepting the funds, it is subjecting itself to liability.[257] "A funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract."[258] Because punitive damages are generally not available for breach of contract, the Court ruled that they were not available in this case.[259] The Court's finding also rested on its characterization of a punitive damages remedy as one of "indeterminate magnitude" which could produce liability exceeding the level of federal funding.[260] This reasoning could be used to support the claim that compensatory damages should not be available: If compensatory damages pursuant to § 1983 were available for violations of IDEA, claims could easily exceed school district's levels of federal funding.[261]

On the other hand, the Court went on to state, "When a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is 'made good' when the recipient *compensates* . . . a third-party beneficiary . . . for the loss caused by that failure." [262] This reasoning could be used to support the argument that compensatory damages should be awarded for violation of IDEA—especially when they are the only option for making the plaintiff whole. This may be especially true if, as stated by the Court in *Barnes*, a school district is considered to be on notice that

256. *Id.* at 2097 ("We take up this question today.").

257. *Id.* at 2101 (citing *Franklin*, 503 U.S. at 73.)

258. *Id.*

259. *Id.* at 2102. Drawing a final distinction between punitive and compensatory damages, the Court stated that punitive damages are not compensatory. *Id.* at 2103. This ruling would seem to indicate that punitive damages are not within the scope of the "appropriate relief" contemplated by *Franklin*'s general rule and, therefore, that punitive damages are not available for violation of IDEA.

260. *Barnes*, 122 S.Ct. at 2102 (citing *Gebser*, 524 U.S. at 290).

261. *See infra* Part III.B.3 (discussing the financial ramifications of compensatory damages awards).

262. *Barnes*, 122 S. Ct. at 2102.

traditional contract remedies, including compensatory damages, are appropriate relief should it violate the conditions of the contract.

3. The Primary Policy Argument: Financial Ramifications

There are a number of policy arguments concerning whether § 1983 compensatory damages awards are appropriate for violation of IDEA,[263] but one of the more prominent arguments concerns the potential financial impact compensatory damage awards would have upon schools. Commentators have suggested that this cost is perhaps the main policy concern of courts that have refused to permit § 1983 damages awards.[264] In light of the costs associated not only with losing suits, but also defending them, this concern deserves serious consideration.[265]

Those in favor of awarding damages argue that courts should not deny a remedy to students who have already been denied the protections promised by IDEA.[266] They also assert that awarding damages will not create turmoil in our nation's educational system.[267] Instead, awarding damages will strengthen compliance with IDEA by "compel[ling] recalcitrant school systems to protect and implement the educational rights of children with disabilities."[268]

---

263. For example, the Sixth and Eighth Circuits have ruled that § 1983 claims may be based on violations of IDEA, but have disallowed damages. They reason that most courts have held that compensatory damages are not "appropriate relief" under IDEA's § 1415(i)(2). As such, granting compensatory damages for violation of IDEA pursuant to § 1983 is granting relief that is otherwise unavailable under IDEA. *See, e.g.*, Heidemann v. Rother, 84 F.3d 1021 (8th Cir. 1996) (holding that because compensatory damages were not available under IDEA, they are not made available by § 1983); Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 980 F.2d 382 (6th Cir. 1992) (same).

264. *See* Shannon, *supra* note 129, at 865 (arguing in favor of compensation for prevailing parents in an IDEA action for the time and effort spent litigating on behalf of their child).

265. Courts arguing against an award of compensatory damages make this argument. *E.g.*, Kelly K. v. Framingham, 633 N.E.2d 414, 418-19 (Mass. App. Ct. 1994) ("Were courts to entertain claims . . . the limited financial resources available to benefit children with special educational needs could be diverted from the programs the legislation was intended to protect.").

266. Edmunds, *supra*, note 129, at 802-07 (identifying arguments in favor of compensatory damages, such as the importance of remedies as an essential component of a private enforcement model; the creation of an attitude favoring compliance; the need to actively guarantees a free appropriate public education; and the existence of three doctrinal bases permitting such an award).

267. Stewart, *supra,* note 129, at 379 (arguing that monetary damages are appropriate and should be available).

268. Seligmann, *supra* note 8, at 512 (arguing against awarding compensatory damages) (citing Gary S. Gildin, *Dis-qualified Immunity for Discrimination Against the Disabled*, 1999 U. ILL. REV. 897, 898 (1999); Sheila K. Hyatt, *The Remedies Gap: Com-*

Nevertheless, even courts recognizing the availability of compensatory damages pursuant to § 1983 hesitate to actually award them. One court, in recognizing a compensatory damages remedy, characterized it as "extraordinary."[269] Even the most widely cited case in support of this proposition, *Matula*, contains cautionary language: "[I]n fashioning a remedy for an IDEA violation, a district court may wish to order educational services . . . or reimbursement . . . rather than compensatory damages for generalized pain and suffering."[270] The fact that there are no currently-reported cases where courts have actually granted "an award of retrospective, tort-type damages" illustrates the extent of courts' hesitation to apply this remedy.[271]

The hesitation displayed by these courts is understandable. As one court put it, "The Court is mindful that a damages remedy for IDEA violations will have significant policy implications."[272] One of the more significant challenges that awarding damages would pose is the measurability of such damages, particularly when plaintiffs are seeking recovery for injuries such as emotional distress or pain and suffering.[273] In his concurring opinion in *Barnes*, Justice Souter recognized this challenge: "I realize . . . that the contract-law

---

pensation and Implementation Under The Education for All Handicapped Children Act, 17 N.Y.U. REV. L. & SOC. CHANGE, 689, 727 (1989-90) (suggesting that compensatory damages have a deterrent effect); Laura F. Rothstein, *Special Education Malpractice Revisited*, 43 EDUC. L. REP. 1249, 1262 (1988)).

269. Walker v. District of Columbia, 157 F. Supp. 2d 11, 30 (D.D.C. 2001) (stating that compensatory damages are an extraordinary remedy and suggesting a four part test for plaintiffs to prove that they are warranted). Under *Walker,* plaintiffs must prove by a preponderance of the evidence: 1) that the district violated the IDEA; 2) that exceptional circumstances exist, such as that the conduct was persistently egregious and prevented the plaintiff from securing equitable relief under IDEA; 3) that the municipality has a custom or practice that is the moving force behind the alleged IDEA violations (as is any § 1983 action); and 4) that the normal remedies offered under IDEA—specifically compensatory education—are inadequate to compensate the plaintiff for the harm allegedly suffered. *Id.* at 53.

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

271. Seligmann, *supra* note 8, at 534 n.347 (stating that the issue has generally been considered at the dispositive motion stage or in the context of exhaustion).

272. *E.g.*, Goleta Union Elementary Sch. Dist. v. Ordway, 166 F. Supp. 2d 1287, 1296 (C.D. Cal. 2001).

273. Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 528 (4th Cir. 1998) ("... IDEA lacks any particular standard by which a court could evaluate what amount of compensatory or punitive damages is appropriate .... Absent any such standards, the range of possible monetary awards would be vast ...."). *But see Ordway*, 166 F. Supp. 2d at 1296 (arguing that the definition of "appropriate education" in *Bd. of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 201 (1982) addresses the concern that IDEA lacks any definitive standards by which to evaluate an appropriate compensatory damages award).

analogy may fail to give such helpfully clear answers to other questions that may be raised by actions for private recovery under Spending Clause legislation, such as the proper measure of compensatory damages." [274] This unresolved issue, coupled with the open question as to whether a suit can be brought in the first place, will likely result in increased litigation on this issue.[275]

Although the supposed "explosion" in education litigation reached a "plateau" in the 1980s, special education litigation remains a notable exception to this trend.[276] It has experienced dramatic growth over the last few decades. While the rate of growth has declined, the overall numbers have yet to recede.[277] In addition, the group of students covered by IDEA continues to increase significantly. In the past decade, the number grew from approximately 4.3 million in 1990-91 to 5.6 million in 1999-00.[278] This represents an increase of 30%. In contrast, the growth in the population of school age children was roughly 10%, while the growth in school enrollment was only 14%.[279]

At the same time, although Congress has authority under IDEA to provide up to 40% of the national average per pupil expenditure to assist in educating students with disabilities, recent data indicates that the federal government provides only 12%.[280] Generally, states contribute 50-60% of the funding and local governments contribute the remaining 30-40%.[281] IDEA funding is simply not adequate for state and local governments to carry out their responsibilities to educate the growing number of children with disabilities.[282] Furthermore, significant demands will be

274. Barnes v. Gorman, 122 S. Ct. 2097, 2103 (2002) (Souter, J., concurring).

275. *E.g.,* Candice Sang-Jasey & Linda D. Headley, *Attorney's Fees and Damages in Special Education Cases*, 212-Dec N.J. LAW. 38, 40 (December 2001) ("Those families interested in pursuing monetary damages should strongly consider invoking all of the civil rights statutes mentioned earlier. This is an extremely volatile field of law now, with remedies appearing and disappearing on a regular basis.").

276. Perry A. Zirkel, *The "Explosion" In Education Litigation: An Update*, 114 EDUC. L. REP. 341, 349 (1997).

277. *Id.*

278. U.S. DEP'T OF EDUC., TWENTY-THIRD ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT II-21 (2001), *available at* http://www.ed.gov./offices/OSERS/OSEP/Research.

279. *Id.*

280. *See supra* note 82; Joetta L. Sack, *Schools Grapple with Reality of Ambitious Law*, EDUC. WEEK, Dec. 6, 2000.

281. For example, in Connecticut, the "local districts pay for roughly $40,000-$50,000 of a student's annual cost, and the state pays for the rest." *Costly Special Education Services*, HARTFORD COURANT, Aug. 11, 2001.

282. Sack, *supra* note 280. *See generally* Bridget Flanagan & Chand J. Graff, *Fed-*

placed on schools in the months ahead as Congress has just reauthorized the Elementary and Secondary Education Act of 1965,[283] through the No Child Left Behind Act of 2001. The $26.5 billion that Congress authorized for the 2002 fiscal year alone will minimize the chance of any additional funding for IDEA.[284] In fact, "[t]he Administration opposes any proposal for mandatory IDEA funding within the context of the ESEA reauthorization."[285]

In the end, it is a matter of weighing competing interests. On the one hand, permitting damages suits against schools for failing to provide students with the services they deserve may have a deterrent effect, serving to strengthen compliance with IDEA. On the other hand, there will undoubtedly be a cost to the system in doing so,[286] especially in light of courts' apparent uncertainty concerning how to fashion an appropriate compensatory damages award in the IDEA context. Inadequate funds and increasing demands are stark realities for the schools that serve our children. Opening the door to further litigation in special education will not improve an already difficult situation.[287]

CONCLUSION

Special education cases frequently involve multiple defendants and various substantive claims. Students with disabilities often sue under § 504 and the ADA, as well as constitutional and state tort law. IDEA, with its extensive rights and due process provisions,

---

eral Mandate to Educate Disabled Students Doesn't Cover Costs, FED. LAW., Sept. 2000, at 23 ("The public would be even more surprised—and dismayed—to learn that federal and state lawmakers have not seen fit to fully fund these services . . . .").

283. Pub. L. 89-10, 79 Stat. 27 (1965).

284. *Congress Passes Sweeping Education Law*, NEA TODAY (Nat'l Educ. Ass'n), Mar. 2002, at 14 (stating "[i]f you're still catching your breath from that one [passage of IDEA in 1975], sit down as you read about the newly amended and reauthorized Elementary and Secondary Education Act").

285. Testimony of Secretary of Education Rod Paige before the House Committee on Education and the Workforce, Oct. 4, 2001, *available at* http://www.ed.gov/speeches/10-2001/011004.htm.

286. *See* Andrew S. v. Sch. Comm. of Greenfield, 59 F. Supp. 2d 237, 245 (D. Mass. 1999) (stating that the Supreme Court, "[w]hile . . . reject[ing] a 'cost-based standard as the sole test for determining the scope' of the IDEA, . . . [does] recognize that 'the potential financial burdens imposed on participating States may be relevant to arriving at a sensible construction of the IDEA'" (citing Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 73 (1991))).

287. *See, e.g.*, Flanagan & Graff, *supra* note 282 at 27 ("Unfortunately, instead of resolving problems with the IDEA, the 1997 amendments and new regulations will undoubtedly result in more litigation, diverting even more scarce public funds from the classroom to the courtroom.").

generally serves as the primary basis for these suits. Because IDEA specifies rights, but not remedies, courts have developed remedies over time, including compensatory education and reimbursement for tuition and related services. Litigation at the forefront, however, seeks monetary damages for harm such as pain and suffering or economic injury. Since these damages remain largely unavailable, especially under § 1415(i)'s appropriate relief language, parents frequently seek them pursuant to § 1983. Given the lack of clarity with respect to the proper interpretation of § 1415(l), it is not surprising that courts have split on whether compensatory damages are allowed under § 1983. This confusion is only heightened by the Supreme Court's refusal to hear this issue and Congressional failure to take action to clarify the situation.[288]

A proper interpretation of § 1415(l) supports the conclusion that it does not clearly authorize § 1983 compensatory damages awards. Even assuming their availability under the *Franklin* presumption does not necessarily make compensatory damages appropriate. In the final analysis, although allowing compensatory damages awards under § 1983 may deter intentional violations of IDEA, it will come at great expense to school districts and the children that IDEA intends to serve.

Rebecca L. Bouchard

288. *See, e.g.*, Allan G. Osborne, Jr., *Can Section 1983 Be Used To Redress Violations of the IDEA?*, 161 EDUC. L. REP. 21, 32 (2002) (stating that "the issue will remain unsettled until either Congress acts to clear up the ambiguity in section 1415 or the Supreme Court renders a decision in an appropriate case").