Removing Remedies, Removing Rights; the Future of 1983 Claims for Violations of the IDEA in the Wake of Gonzaga v. Doe

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Removing Remedies, Removing Rights: The Future of 1983 Claims for Violations of the IDEA in the Wake of Gonzaga v. Doe
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Congress signed the Individuals with Disabilities Education Act ("IDEA") into law with the express intent that individuals with disabilities receive a free and appropriate public education that is designed to meet their individual needs.¹ When a child with a disability does not receive an education in accordance with the provisions of the IDEA, their parents or guardians may use administrative procedures outlined in the IDEA to ensure that a school complies with the Act's goals.² Sometimes, however, merely requiring the school to change its noncompliant behavior or repay parents the educational costs that they were forced to expend in the appropriate education of their child is not enough.³ In circumstances where parents believe the limited scope of remedies construed to be available under the IDEA is inadequate,⁴ the use of 42 U.S.C. 1983 ("§ 1983"),⁵ among other laws,⁶ has garnered special appeal. The courts, however, have split on the issue of whether 42 U.S.C. §1983 is available to plaintiffs seeking to

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¹ 20 U.S.C. §§ 1400-1419 (1994 & Supp. V 1999). The IDEA was originally enacted as the Education for All Handicapped Children Act (EHA) Pub. L. No. 94-142, 89 Stat. 773 (1975). This Note will refer to PL 94-142 primarily as the IDEA, regardless of the title in use at the time the relevant decision or statute was passed.
³ See School Committee of Town of Burlington v. Department of Education, 471 U.S. 359, 369 (1985) (affirming that injunctive relief and reimbursement of certain unjustly incurred educational expenses are included within the broad grant of remedies conferred by Congress.)
⁴ See generally Smith v. Robinson, 468 U.S. 992, 1020 (1984). Although not expressing an opinion on the matter, the Supreme Court noted that, "Courts generally agree [that] damages are...available under the EHA only in exceptional circumstances."
⁵ 42 U.S.C. § 1983 is a statutory vehicle that allows plaintiffs whose Constitutional or federal rights are violated to sue for a remedy in federal court. This Note will hereafter intermittently refer to 42 U.S.C. 1983 as Section 1983.
⁶ 20 U.S.C. § 1415 (I) (1994 & Supp. V 1999). Congress amended § 1415 of the IDEA in 1986 to add, "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 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter." Following this amendment, plaintiffs have sued for remedies that had been held unavailable by alleging concurrent violations of §504 of the Rehabilitation Act and 42 U.S.C. 1983 among others.
allege a statutory violation of the IDEA.⁷

This Note will explore whether § 1983 is available under the IDEA and to what extent a recent Supreme Court decision, Gonzaga v. Doe,⁸ may influence the current circuit court split on the issue. Part I provides a brief overview of the Individuals with Disabilities Education Act and its nexus with the current controversy over whether a claim for a violation of the IDEA may be made under §1983. Part II discusses the various decisions reached by the circuit courts in addressing this question. Part III examines 42 U.S.C. § 1983 and the treatment it has received by the Supreme Court up and through its decision in Blessing v. Freestone. Part IV analyzes a frequently litigated IDEA provision in light of the Supreme Court's §1983 jurisprudence and concludes that § 1983 is available to plaintiffs suing for statutory violations of the IDEA. Part V evaluates the circuit court decisions that have found §1983 to be unavailable and discusses possible analytical errors these courts may have made in reaching their decisions. Part VI considers the holdings of the latest § 1983 Supreme Court case, Gonzaga v. Doe, and the possible significance this decision may have in directing future decisions regarding the applicability of § 1983 for violations of the IDEA. Finally, part VII concludes that, although § 1983 should have been readily perceived by the circuits as available to plaintiffs suing upon statutory violations of the IDEA prior to Gonzaga, that decision now casts doubt onto this conclusion.

⁷ The First, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have implied that plaintiffs may, theoretically, sue for violations of the IDEA. The Second and Thirds Circuits have explicitly so held, and the Sixth and Eighth Circuits have implied such a holding should one of several conditions be met. Two Circuits, the Tenth and Fourth, have rejected the idea that plaintiffs may use §1983 to sue for statutory violations of the IDEA.

I. THE CIRCUIT SPLIT

A. Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act 9 (IDEA) seeks to ensure that children with disabilities receive a free and appropriate education, 10 individualized to meet each child’s unique educational needs. Under the IDEA, every student with an eligible disability 11 is entitled to an individualized program of special education 12 and related services within the least restrictive environment 13. These goals are achieved as the result of each state’s implementation of the IDEA in exchange for federal funding. 14

Although every state is now obligated 15 to provide a free, appropriate public education (“FAPE”) to students within their state who have disabilities, it was the unwillingness 16 or financial inability 17 of states to adequately provide for the educational needs of these students that originally led to the creation of the IDEA 18. Prior to the enactment of the IDEA 19 in 1975,

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9 See supra note 1 and accompanying text.
11 Id. § 1401(3)(A)(i).
12 Id. § 1414(d). The IDEA requires that each student with a disability have in place individualized educational programming (IEP) that is decided upon, assessed by, and facilitated through an individualized education program team. IEP teams are comprised of the student (if appropriate), the student’s parents or guardians, special and regular educators, a representative from the local educational agency, related service personnel, and other persons who have knowledge or special expertise regarding the child.
13 Id. § 1412(a)(5). A child is educated in the least restrictive environment when they are educated to the maximum extent appropriate with their nondisabled peers. Students may not be segregated and placed in alternate schools, classes, or settings that are not equally occupied by their nondisabled peers unless education with supplementary aids and supports cannot be achieved satisfactorily.
14 Id. at § 1412(a).
15 New Mexico Assoc. for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982). New Mexico was the last state to opt to accept federal funding in exchange for implementing IDEA.
16 See infra notes 21 and 23 and accompanying text.
17 S. REP. NO. 94-168 (1975), reprinted in 1975 U.S.C.A.N. 1431. The Senate noted that despite 36 court cases in the states recognizing the rights of the handicapped to an appropriate education and an effort by the states to comply, lack of financial resources have prevented states from implementing these various decisions.
18 See Notes 21 and 23 Infra regarding two court cases that proved pivotal in creating a flurry of litigation that eventually led to congressional interest in investigating the education of students with disabilities; See generally Edwin Martin, et al., The Legislative and Litigation History of Special Education, 6(1) SPECIAL EDUCATION FOR STUDENTS WITH DISABILITIES, (Spring 1996), available at http://www.futureofchildren.org/usr_doc/vol6nol ART2.pdf>.
19 See supra note 1. The IDEA was originally entitled the Education for All Handicapped Children Act.
more than half of all children with disabilities had special educational needs which were not being met.\textsuperscript{20} One reason that these educational needs were not met was because state legislation prevented students with disabilities from attending public schools.\textsuperscript{21}

Congress, in its findings, noted that over one million such children had not received any form of public education.\textsuperscript{22} Of the children who did attend school, many of the schools they attended were private, far from home, and at a cost to their parents.\textsuperscript{23} Seeking to ensure that the goals they effectuated in the IDEA were safeguarded and made available to each individual student, Congress incorporated procedural safeguards and impartial due process procedures into its enactment of the IDEA.\textsuperscript{24}

To remain eligible for federal funding under the IDEA, a state must provide the Secretary of Education with an annual plan that details policies and procedures it has effectuated in accord with the provisions of the IDEA\textsuperscript{25}. One such required procedure is that parents and students have notice of, and access to, the IDEA's safeguards.\textsuperscript{26} Procedural safeguards ensure students a free and appropriate public education by securing their parents with the right to be an informed participant\textsuperscript{27} in its development and implementation. Should this right be denied, the procedural safeguards also provide parents with the opportunity to have this denial impartially reviewed\textsuperscript{28}.

\textsuperscript{21} See, e.g., Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania, 343 F. Supp. 279, 282-83 (1972). Plaintiffs contested a state law that effectively barred children with mental retardation from public classrooms by requiring that all students possess the mental capacity of a five year old prior to being admitted.
\textsuperscript{22} 20 U.S.C. § 1400 (c)(2)(E); See also Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C., 1972) wherein the Court held that denying plaintiffs, students with disabilities, an equal educational opportunity due to school budget constraints to be a violation of the 14th Amendment's equal protection clause.
\textsuperscript{23} Id. § 1400 (c)(2)(C) (Supp. V 1999).
\textsuperscript{24} Id. § 1400 (c)(2)(C).
\textsuperscript{25} Id. § 1412 (a).
\textsuperscript{26} Id. § 1412 (a)(6).
\textsuperscript{27} Id. § 1415 (b)(1),(3),(4).
\textsuperscript{28} See id. at §§ 1415 (e) (Mediation); 1415(f) (impartial due process hearing); 1415(g) (appeal of the impartial due process hearing), 1415(j)(2) (a civil action); 1415 (k)(6)(A)(i) (manifestation determination hearing).
and rectified\(^{29}\).

Generally, the IDEA procedural safeguards mandate that parents: (1) be informed of any possible changes in the identification, evaluation, instruction, and placement of their child\(^{30}\) and be given the opportunity to participate in individualized educational planning meetings regarding these changes\(^{31}\); (2) be able to examine the educational records of their child;\(^{32}\) and (3) seek impartial review of any educational decisions or actions which the parent believes to be a violation of the IDEA.\(^{33}\) In regard to the last of these, the IDEA provides parents and students the opportunity to seek redress of the IDEA violations in both administrative and judicial settings.\(^{34}\)

Children with disabilities, and their parents, may seek redress for a violation of the IDEA through a series of steps. First, a parent must be offered the opportunity to settle the dispute via mediation.\(^{35}\) If the parent chooses not to utilize mediation, an impartial due process hearing must be provided.\(^{36}\) An impartial due process hearing is an administrative hearing that is conducted by the local educational agency. The decision of the reviewing officer is final unless appealed. Families and schools have many of the same rights and responsibilities in a due process proceeding as they would in a civil action. For example, parents may choose to be represented by legal counsel, require certain persons be present, and cross-examine witness.\(^{37}\) Should the due process hearing conducted by the local educational agency result in a decision that the parent

\(^{29}\) Id. at §1415(i)(2)(B)(3); §1415(i)(3)(B); §1415(l)

\(^{30}\) Id. at §1415 (b)(3).

\(^{31}\) Id. at §1415 (b)(1).

\(^{32}\) Id.

\(^{33}\) Id. at §1415(f).

\(^{34}\) Id. at §1415(f). The right to bring a civil action is conditioned upon the exhaustion of all administrative procedures.

\(^{35}\) Id. at §1415 (e)(2)(A)(i).

\(^{36}\) Id. at §1415(f).

\(^{37}\) Id. § 1415 (h)(1)-(2).
believes to be incorrect, they may appeal this decision to the state. An appeal to the state educational agency results in an impartial review of the record and a second decision either reversing or affirming the findings of the local educational agency. Should the state again hold adversely to the parent and student, this decision may be appealed to either a state or district Court.

The safeguards and due process procedure established through the IDEA have allowed many families to ensure that Congress’s goal of providing a free and appropriate education to students with disabilities is a living reality for their child. An early and continuing problem, however, is whether parents and students who have been harmed by the local educational agency’s violation of IDEA have adequate remedies available to them under the IDEA. The IDEA does not speak to the relief that may be found appropriate at the administrative proceeding. At the judicial level, however, the IDEA specifies that courts may grant “such relief as the Court determines is appropriate.” An early case examining the appropriateness of one form of requested relief, attorney’s fees, is Smith v. Robinson. The decision in Smith and Congress’ response to it forms the heart of the debate as to whether 42 U.S.C. § 1983 might be available to plaintiffs suing for statutory violations of the IDEA.

B. Smith v. Robinson and the 1986 Amendments to IDEA

Thomas Smith, a child with cerebral palsy, received what was agreed to be a free and appropriate public education at a day program conducted by a hospital in his hometown. For one year, the school district partially funded the tuition the program required in order for Thomas to attend. The following year, however, the school refused to provide any financial assistance and

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38 Id. §1415(g).
39 Id. §1415(i)(2).
40 Id. §1415(i)(2)(B)(3).
the Smiths began to pursue their due process rights under the IDEA. Four years after their struggle began, the Rhode Island Supreme Court found for the Smiths and granted injunctive relief.\(^{42}\)

Though gratified by the Court's ruling, the Smiths also wanted to be reimbursed for the attorney's fees they expended in their four-year struggle to assure Thomas the rights guaranteed to him under the IDEA. Although the IDEA did not explicitly provide for attorney's fees, section 504 of the Rehabilitation Act and section 1988 of the Civil Rights Act of 1964 did. Filing in federal Court, the Smiths argued that their claims, though addressed under the IDEA, were equally actionable and formed a substantial basis for finding a remedy under § 504 and § 1988. Because both of these statutes allow for attorney's fees, the Smiths argued that the Court should award attorney's fees in their case. The First Circuit Court denied their claims and the Smiths appealed.

The United States Supreme Court, affirming the decision of the First Circuit, held that the Smiths were not entitled to attorney's fees under the IDEA, § 504 of the Rehabilitation Act, or § 1988 of the Civil Rights Act. According to the Supreme Court, the IDEA provided the "exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education."\(^{43}\) The comprehensive administrative procedures promulgated under the IDEA, according to the Court's opinion, were indicative of Congress' intent that the IDEA should provide the sole remedy and procedure for addressing complaints such as those presented in Smith.\(^{44}\) As a result, the Smiths and other plaintiffs seeking remedies available under statutes such as § 504 and § 1988 who present facts which would allow them relief under the IDEA, were barred from seeking relief by recourse to any statute other than the IDEA.

\(^{42}\) See Smith v. Cumberland School Committee, 703 F.2d 4 (1st Cir. 1983).
\(^{44}\) Id.
On August 5, 1986, Congress passed the Handicapped Children's Protection Act ("HCPA") and effectively superseded the Supreme Court’s decision in Smith v. Robinson.

The HCPA amended the procedural safeguards available under the IDEA to include a provision that allows a court to award attorney’s fees. In addition, Congress added a separate provision to clarify that nothing within the procedural safeguards section should be construed as limiting the rights, procedures, and remedies available under the Constitution, Title V of the Rehabilitation Act, or any other Federal statute that seeks to protect the rights of children with disabilities. The only exception to this rule, the new provision notes, is the requirement that plaintiffs must first exhaust all administrative procedures before filing a civil action. While the first of these amendments has caused a little stir, it is the second amendment, concerning a plaintiff’s rights, remedies, and procedures under the Constitution and as established by federal law, that has caused the largest disagreement among the courts.

The remedies available under the IDEA have been narrowly construed by the courts. Attorney’s fees, the relief sought in the Smiths’ second suit, were initially held unavailable under the IDEA because the statute did not explicitly provide for them. Under what is termed the “American Rule,” attorney’s fees may not be awarded unless they are provided for in the statute sued upon. Other remedies, such as compensatory and punitive damages, have also been

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46 See, e.g., Fontenot v. Louisiana Bd. of Elementary & Secondary Educ., 805 F.2d 1222, 1223 (5th Cir.1986) and Mrs. W. v. Tirozzi, 832 F.2d 748, 754 (2d Cir.1987) (holding that Congress effectively overruled the Supreme Court’s decision in Smith v. Robinson).
48 Id. § 1415 (i).
50 See Part II infra.
widely interpreted as unavailable under the IDEA’s grant of “appropriate” relief. The lack of a damages remedy under the IDEA has led many plaintiffs to rely on Congress’ second and less clear provision in HCPA, that nothing within the safeguards section of the IDEA should be construed as limiting the remedies available to children with disabilities to seek damages outside of IDEA, or under other federal laws. 42 U.S.C. § 1983 is one statute that plaintiffs have relied upon, with results varying by circuit, to receive an award for damages.

II. Understanding the Split in the Circuits

The circuits are divided as to whether §1983 is available to plaintiffs suing for a violation of the IDEA. The Second and Third Circuits have explicitly held that §1983 may be used to sue for violations of the IDEA. The Tenth and Fourth Circuits, on the other hand, have held that §1983 is not available to plaintiffs who are claiming a violation of IDEA. The remaining circuits have implied, but not explicitly held, that §1983 is available in limited circumstances to plaintiffs suing for violations of the IDEA.

The Second and Third Circuits rely upon the HCPA amendment to the IDEA and its legislative history to find that §1983 is available to plaintiffs alleging violations of IDEA. The Third circuit, in *W.B. v. Matula*, held that the mother of a child with disabilities was entitled to a suit using §1983 to recover for procedural and substantive violations of the IDEA. The mother in *Matula* repeatedly requested that the school evaluate her child for special education services. The school failed to evaluate the child and, in so doing, failed to further provide him with the FAPE guaranteed by the IDEA to children with disabilities. Without specifically finding that the

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52 See, e.g., Anderson v. Thompson, 658 F.2d 1205, 1209 (7th Cir. 1981). One of two early cases to first analyze §1415 of the IDEA and conclude that it does not permit an award of damages. These early cases established judicial precedent that damages are not available under the IDEA.
54 Mr. & Mrs. B. v. Tirozzi, 832 F.2d 748 (2d Cir. 1987) and W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995) (holding § 1983 to be available to plaintiffs suing for violations of the IDEA).
55 See infra note 61 and accompanying text.
56 67 F.3d 484, 493-94 (3d Cir. 1995).
IDEA conferred the plaintiff with enforceable rights, the Court held that Congress had specifically sought to allow access to §1983 when it enacted the HCPA in response to the Supreme Court’s holding in *Smith v. Robinson*.

The Tenth and Fourth Circuits have found the reasoning of the Second and Third Circuits uncompelling. The Tenth Circuit’s *Sellers v. The School Board of the City of Manassas* exemplifies the reasoning employed by these circuits in holding § 1983 to be unavailable to plaintiffs suing for statutory violations of the IDEA. The *Sellers* Court relied on four sources in drawing its conclusion that §1983 was unavailable: (1) the language of the HCPA amendment; (2) the legislative history; and (3) *Pennhurst v. Halderman*’s holding that obligations imposed upon states pursuant to federal spending legislation must be unambiguously stated if they are to be enforced.

First, the Court held that the 1986 amendment to IDEA did not explicitly preserve a plaintiff’s right to § 1983. Instead, the statute references protecting access to ‘other’ statutes that protect the rights of children with disabilities. Reasoning that § 1983 is a statute of general enforcement, the Court held that Congress was not referring to § 1983 when it enacted HCPA, a statute that referred, at least in part, to statutes enacted singularly to protect the rights of the disabled. Second, reviewing the legislative history, the Court found that the senate report which the plaintiffs relied upon to explicitly preserve use of §1983 could equally be interpreted to simply preserve a plaintiff’s right to sue for Constitutional rather than statutory violations using §1983. Finally, the Court relied upon *Pennhurst v. Halderman* to hold that the ambiguous

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57 141 F.3d 524 (10th Cir. 1998).
58 *Id.* at 530.
59 *Id.* at 531.
nature of the 1986 amendment precluded its enforcement against the states.\textsuperscript{60}

Implying that plaintiffs may, theoretically, sue under §1983 for violations of IDEA are the First, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits. Each of these Circuits has limited a plaintiff’s access to §1983 based upon the plaintiff either failing to exhaust the administrative remedies available to them\textsuperscript{61} or the fact that they are suing for money damages; a remedy widely held unavailable under the IDEA.\textsuperscript{62} Theoretically then, it appears that a plaintiff who has exhausted their administrative remedies in the first case, or is suing for relief other than damages in the second instance, should be able to use §1983 to sue for a violation of the IDEA.

The reasoning of the Seventh Circuit in \textit{Charlie F. v. Board of Education of Skokie School District} 68 is representative of the circuits which limit a plaintiff’s access to §1983 based upon whether or not the administrative remedies available under IDEA were appropriately exhausted.\textsuperscript{63} The plaintiff, Charlie, was a fourth grade boy who had panic attacks and attention deficit disorder (ADD). His teacher “invited her pupils to express their complaints about Charlie—and they all too willingly obliged, leading to humiliation, fistfights, mistrust, loss of confidence and self-esteem, and disruption of Charlie’s educational progress.”\textsuperscript{64} Following Charlie’s move to another school, his parents initiated a suit under § 1983 for the violation of Charlie’s right to a FAPE. Seeing as how Charlie was receiving a FAPE at the time the suit was filed, his parents sought only damages as relief. Since damages were not available under the

\textsuperscript{60} \textit{Id.; Pennhurst State School and Hospital v. Halderman}, 451 U.S. 1 (1981) provides that spending clause legislation, in order to be enforceable against the states, must affirmatively and unambiguously set forth rights and obligations.

\textsuperscript{61} See \textit{Kate Frazier v. Fairhaven School Committee}, 276 F.3d 52 (1st Cir. 2002); \textit{Charlie F. v. Board of Education of Skokie School District}, 98 F. 3d 989 (7th Cir. 1996); \textit{Robb v. Bethel School District #403}, 308 F.3d 1047 (9th Cir. 2002); \textit{N.B. v. Alachua County School Board}, 84 F.3d 1376 (11th Cir. 1996).

\textsuperscript{62} See \textit{Crocker v. Tennessee Secondary School Athletic Association}, 980 F.2d 382 (6th Cir. 1992); \textit{Bradley v. Arkansas Department of Education}, 301 F.3d 952 (8th Cir. 2002).

\textsuperscript{63} 98 F.3d 989 (7th Cir. 1996).

\textsuperscript{64} \textit{Id.} at 990.
IDEA, his parents claimed that they were exempt from the exhaustion requirement of §1415(l).\(^{65}\)

The Seventh Circuit held that Charlie was not able to sue under §1983 for a violation of the IDEA without first exhausting the administrative procedures available under the IDEA. Although injunctive relief may no longer have been appropriate, the Court found that the administrative procedures available under the IDEA could still provide Charlie with appropriate relief in the form of school-funded counseling. Conceding that it is conceivable that the services available under the IDEA might prove less than satisfactory, and that damages in the end, may be the “only balm,”\(^{66}\) the Court held that this decision still cannot be fairly made without first going through the administrative procedures available under the IDEA.\(^{67}\)

The Sixth and the Eighth Circuits, in addition to requiring exhaustion of administrative remedies, have held that §1983 is not viable for those plaintiffs seeking monetary damages. The Sixth Circuit in *Crocker* v. *Tennessee Secondary School Athletic Association* held that although §1983 provided the plaintiff with an action that would otherwise have been foreclosed, “[s]election 1983 did not provide a right to damages where none existed before.”\(^{68}\) Similarly, citing the analysis in *Crocker*, the Eighth Circuit in *Heidemann* v. *Rother* held that claims based upon violations of IDEA may not be pursued in a §1983 action “because general and punitive damages for the types of injuries alleged by the plaintiffs are not available under the IDEA.”\(^{69}\)

The different approaches taken by the circuit courts in deciding whether §1983 is available to plaintiffs suing for violations of IDEA is indicative of the courts’ confusion as to what circumstances require the withdrawal of the §1983 remedy. Over the past twenty years the

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\(^{65}\) 20 U.S.C. § 1414(f) (Supp. V 1999) ("except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (f) and (g) will be exhausted to the same extent as would be required had the action been brought under this part.")


\(^{67}\) *Id.*

\(^{68}\) 980 F.2d 382, 387 (6th Cir. 1992).

\(^{69}\) 84 F.3d 1021, 1033 (8th Cir. 1996).
Supreme Court has refined a test to determine when § 1983 should be made available to plaintiffs suing for enforcement of their federal statutory rights. Application of this test to the IDEA appears to resolve the question as to which of the approaches employed by the circuit courts is the correct one. An examination of the development of the §1983 test is necessary in making this decision.

III. 42 U.S.C. § 1983

Section 1983 has its roots in what is arguably our nation’s earliest struggle for equality. Enacted in 1871 as part of § 1 of the Ku Klux Klan Act, § 1983 was originally created to enforce the Fourteenth Amendment’s equal protection clause.70 In the post-Civil War era in which §1983 was passed, state officers and courts were either unable or unwilling to stop African Americans from being deprived of their newly ratified civil rights.71 Congress’s enactment of §1983 provided plaintiffs with a direct federal cause of action while altering “the relationship between the States and the Nation with respect to the protection of federally created rights.”72 In allowing plaintiffs a means of bypassing state courts in order to have their federal rights vindicated, Congress created a means of ensuring that rights created under the Constitution and federal laws would not be trounced by state entities acting “under color” of state law. 42 U.S.C. §1983 provides, in relevant part, that:

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

71 Mitchum v. Foster, 407 U.S. 225, 240 (1972) (“state courts were being used to harass and injure individuals, either because the state courts were powerless to stop the deprivations [of citizens 14th Amendment rights] or were in league with those who were bent upon abrogation of federally protected rights.”)
72 Id.
law, suit in equity, or other proper proceeding for redress.\textsuperscript{73}

Despite its broad aspirations, 42 U.S.C. §1983 retained a relatively dormant status for decades after its enactment.\textsuperscript{74} It was not until the 1960’s that suits under §1983 grew in popularity. This increase was largely due to two Supreme Court decisions that expanded the scope of §1983: \textit{Monroe v. Pape}\textsuperscript{75} and \textit{Maine v. Thiboutot}.\textsuperscript{76}

\textit{Monroe v. Pape}, a suit involving unlawful police entry and arrest, expanded the definition of what it means to act “under color of law.” Prior to \textit{Monroe} this element of §1983 had been defined as to include only those actions in which state actors had violated federal rights pursuant to official state policy.\textsuperscript{77} In effect, this narrow construction of “under color of law” allowed state actors to violate federal and Constitutional rights as long as the state had established a law that prohibited the conduct engaged in. It was irrelevant, under this early interpretation, that the practice of the state agency may have been contrary to the official policy, that the law itself may have provided so little in way of remedies as to be ineffective, or that the law went unenforced.\textsuperscript{78} \textit{Monroe} expanded the definition of “under color” to include those actions in which the state actor violated Constitutional or federal rights while acting \textit{contrary} to official state policy. As a result, states were no longer able to claim immunity for actions which violated federal and Constitutional rights by merely referencing a state statute that prohibited the behavior engaged in.\textsuperscript{79}

While \textit{Monroe} enlarged the class of defendants subject to suit under §1983, it was not

\begin{footnotes}
\textsuperscript{75} 365 U.S. 167 (1961).
\textsuperscript{76} 448 U.S. 1, (1980).
\textsuperscript{78} Id.
\textsuperscript{79} Monroe v. Pape, 365 U.S. 167, 183 (1961). “It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.”
\end{footnotes}
until the Supreme Court decided *Maine v. Thiboutot*\(^80\) that plaintiffs could clearly use §1983 to sue for violation of rights secured under statutes whose primary purpose was other than to establish civil rights. Lionel Thiboutot, the father of eight children including three from a prior marriage, sued for violation of his statutory rights as secured under the Social Security Act. Although legally responsible for all eight children, the Maine Department of Human Services refused to consider five children in computing the Aid to Families with Dependent Children benefits to which he was entitled.\(^81\) The Supreme Court of Maine found in favor of Thiboutot, finding that §1983 allows protection from violation of rights secured by the Constitution “and laws”. The Supreme Court of the United States affirmed and held that the clear language of §1983 protected violations of rights secured under all laws, not simply those secured under civil rights statutes.\(^82\)

Following the holdings in *Monroe* and *Thiboutot*, the door to §1983 litigation appeared, at first, to have been swung wide. Subsequent Supreme Court cases, however, sought to narrow the apparent availability of §1983 to enforce any type of federal right.\(^83\) In *Golden State Transit Corp. v. Los Angeles*,\(^84\) the Supreme Court clarified that plaintiffs seeking redress under §1983 must claim a violation of a federal right, not merely a violation of federal law. The test for determining whether a statute gives rise to a federal right, and hence, a plaintiff’s valid use of §1983, has most recently been summarized by the Supreme Court in *Blessing v. Freestone*:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so “vague and amorphous” that its enforcement would strain judicial competence. Third, the statute must

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\(^{80}\) 448 U.S. 1, (1980).

\(^{81}\) Id. at 2.

\(^{82}\) Id. at 6-7.

\(^{83}\) See *Golden State Transit Corp. v. Los Angeles*; *Wright v. City of Roanoke Redevelopment & Housing Authority*; *Wilder v. Virginia Hospital Ass’n*; and *Suter v. Artist M.* as discussed hereafter.

\(^{84}\) 493 U.S. 103 (1989).
unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.\footnote{Blessing, 520 U.S. 329, 340-41 (citations omitted).}

If a statute fails to meet a single element of the Blessing test, the statute fails to confer a federal right that is enforceable under §1983.\footnote{Id. at 341.}

A statute meeting all of the elements of the Blessing test may still not be enforceable through §1983, however. If a statute demonstrates, either expressly or implicitly, that Congress intended to foreclose a plaintiff’s use of §1983, it may not be used to enforce the provisions of the statute. The Supreme Court has found access to §1983 to have been foreclosed in two cases: Middlesex County Sewerage Authority v. National Sea Clammers Ass’n\footnote{453 U.S. 1 (1981).} and Smith v. Robinson.\footnote{468 U.S. 992, 1011 (1984).}

The plaintiffs in Sea Clammers sought to enforce environmental protection laws against the defendant Sewerage Authority based upon an implied right of action. The defendant was alleged to have damaged fishing grounds by dumping raw sewage on the coast of New York and New Jersey in violation of several environmental protection laws. The Supreme Court, after first finding that the comprehensive structure and legislative history behind each statute precluded the implying of a private right of action, examined the statutes, \textit{sua sponte}, to discern whether a claim might be made under §1983.\footnote{453 U.S. 1, 19 (1981).} Finding that each of the statutes contained comprehensive enforcement mechanisms, the Court held that when “remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under §1983.”\footnote{Id. at 20.}

In dissent, Justices Stevens and Blackmun noted that although the Court may presume
intent by Congress to foreclose remedial avenues other than those specifically provided for in the statute, this presumption of foreclosure can be rebutted by “express statutory language or clear references in the legislative history.”91 Both statutes contain savings clause provisions which preserve the right of plaintiffs to pursue a remedy provided in any statute or under common law. While the majority concluded that the savings clause provisions “do not refer at all to a suit for redress of a violation of these statutes—regardless of the source of the right of action asserted,”92 the dissent concluded that Congress could only have been more clear in its intent to preserve §1983 had it replaced the words “any statute” with “§1983.”93

A majority of the Supreme Court in Smith v. Robinson similarly found the comprehensiveness of the administrative and judicial provisions set forth in IDEA to be indicative of Congressional intent to foreclose a plaintiffs use of §1983. In Smith, the Court found that a plaintiff who utilized §1983 would be able to circumvent the careful remedial procedures set forth in the statute.94 Such circumvention, the Court held, would defeat the purpose of a large part of the statute and was therefore clearly not an outcome desired by Congress.95 As discussed earlier,96 however, it remains disputed whether Congress intended to supersede this holding in Smith when it amended 20 U.S.C. § 1415 to include a savings clause. The savings clause which Congress added provided that nothing within the procedural safeguards section of the Act was to be construed as limiting the rights, procedures, and remedies available under the Constitution, Title V of the Rehabilitation Act, or any other Federal statute that seeks to protect the rights of children with disabilities.

91 Id. at 28.
92 Id. at 19.
93 Id. at 29.
95 Id.
96 See supra Section I.B.
The Supreme Court has not examined the issue of whether an action to remedy a violation of IDEA can be brought under §1983 since Congress amended the IDEA in 1986. The uncertainty over whether Congress, in amending the IDEA, sought to assure plaintiffs recourse to the remedies available through §1983 has resulted in a splintering of the federal circuits\(^7\). As the Supreme Court has thus far refused to grant certiorari to clear the confusion\(^8\), a re-examination of the IDEA's susceptibility to a §1983 claim is appropriate.

IV. Application of the Supreme Court's §1983 Test to the IDEA

The analysis of whether a federal statute is susceptible to a cause of action under §1983 is two fold. First, the provision in question must be determined to confer a federal right upon an individual.\(^9\) Second, if the provision within the statute confers a federal right, it must be determined whether Congress intended to foreclose access to §1983 by implicit or explicit means.\(^10\) If the provision both confers a federal right, and Congress has not acted to preclude the use of §1983, that statute is enforceable through §1983.

The Supreme Court has admonished that "only when the complaint is broken down into manageable analytic bites can a Court ascertain whether each separate claim satisfies the various criteria we have set forth for determining whether a federal statute creates right."\(^11\) As a result, an analysis of whether a provision of IDEA satisfies the first prong of this two-part test requires examining whether a right is conferred by a particular provision and not whether the statute as a whole conveys rights. For purposes of this analysis, I shall examine the most litigated provision of IDEA: whether IDEA guarantees a free and appropriate public education to individuals with

\(^7\) See, supra Note 7 and accompanying text.
\(^9\) Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 106 (1989) ("First, the plaintiff must assert the violation of a federal right.")
\(^10\) Blessing v. Freestone, 520 U.S. 329, 341 (1997) (discussing how congress may expressly or impliedly foreclose access to §1983).
\(^11\) Id.
A plaintiff suing for a violation of the IDEA under § 1983 must assert the violation of a federal right and demonstrate that the use of § 1983 has not been either explicitly or implicitly foreclosed. The Supreme Court summarized the three part inquiry in determining whether a provision in a statute confers a federal right upon the plaintiff as: (1) whether the provision is intended to benefit the plaintiff; (2) whether or not the right is so “vague and amorphous” as to prevent judicial enforcement; and (3) whether the statute imposes a binding obligation on the states. 102

A statutory provision has been found to have been intended to benefit the plaintiff in two circumstances: when the language of the statute is "phrased in terms of the persons benefited"103 and when the "provision in question was intended to benefit the putative plaintiff."104 While the former requirement has been used to find an implied right of action as well as §1983 claims, the latter requirement has only been used in determining §1983 claims. The distinction between the two requirements is subtle and best explained by example.

In Cannon v. University of Chicago the Supreme Court explained that the determination of whether a provision is intended to benefit the plaintiff depends on whether the statute was enacted for the benefit of a particular class of which the plaintiff is a member as opposed to the benefit of the public at large.105 This determination, the Court held, could best be made by looking to the explicit “rights- or obligation-creating language” of the statute. The Court found that Title IX’s provision that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under

102 Id. at 340-41.
any education program or activity receiving Federal financial assistance" was clearly enacted to benefit a particular class of individuals—women. As a result, the provision was held to have been intended to benefit the plaintiff.

In *Wilder v. Virginia Hospital Ass'n*, by contrast, the Supreme Court found a provision of the Boren Amendment to the Medicaid Act to meet the §1983 requirement that the statute benefit the plaintiffs. The provision in question required a state plan for medical assistance “to reimburse providers using rates (determined in accordance with methods and standards developed by the State ...) which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate.” The state plan requirement, the Supreme Court noted, was “phrased in terms benefitting health care providers” and therefore met the §1983 requirement.

The dissent in *Wilder* objected to the fact that the majority “looked beyond the unambiguous terms of the statute.” Citing the title of the statute, “State plans for medical assistance,” the dissent noted that the requirement that states reimburse providers using reasonable rates was just one in a series of conditions for receiving funds for medical assistance. The dissent further found that the “absence in the statute of any express focus on providers as a beneficiary class of the provision” further buttressed the conclusion that the providers were not the beneficiaries of the statute.

The provision of a FAPE can easily be held to benefit individuals with disabilities under the requirement posed by the majority in *Wilder*. More difficult to meet, however, is the dissent’s

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107 Id. at 502.
108 Id. at 510.
109 Id. at 526.
110 Id. at 527.
111 Id.
requirement that the provision possess rights- or obligation-creating language. Section 1412 (a) provides that:

“A state is eligible for assistance under this part... if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions: (1) Free appropriate public education. (A) In general. A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.”

The explicit language of the provision is much like the statute in *Wilder*. A distinguishing characteristic, however, clearly sets it apart: the title of the subsection and each of the conditions it imposes on the state are in furtherance of providing “Assistance for Education of All Children with Disabilities.” While the language in *Wilder* merely referenced payment to providers as one of many conditions to receive funds for the broad “medical assistance” the provision of FAPE is one of many intended to further the goal of providing an education to all children with disabilities. Clearly then, Congress used obligation-creating language to further the rights of children with disabilities to a FAPE.

While looking to the statutory provision to infer an intent to benefit the plaintiff can be helpful in deciding whether congress intended an enforceable right, the explicit grant of a right to enforce is even more persuasive. Section 1415 provides clear evidence of Congress’s intent to benefit students with disabilities: “the parents...shall have an opportunity for an impartial due process hearing;” and “shall have the right to bring a civil action.” It would be nonsensical to grant a right of enforcement to a class of individuals unless those individuals are intended to benefit from the rights they can enforce.

Finally, the intent to benefit students with disabilities is evident in the context of the

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113 Id. §1415 (f)(1).
114 Id. §1415 (i)(2)(A).
statute as a whole. The Boren Amendment, which the Court in *Wilder* held as benefiting the providers of Medicaid services, was part of a larger statute whose purpose was to provide medical assistance to indigent people.\(^{115}\) The provision requiring states to provide FAPE to individuals with disabilities,\(^{116}\) on the other hand is part of a larger statute the purpose of which is to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.”\(^{117}\) The clear focus on individuals with disabilities as a benefited class similarly buttresses the conclusion that Congress intended the provision of a FAPE to benefit them.

The second element necessary in determining whether a statutory provision confers a federal right is whether or not the asserted right is so “vague and amorphous” that its enforcement would strain judicial competence. In *Wright v. City of Roanoke Redevelopment and Housing Authority*\(^{118}\), the plaintiffs brought suit to enforce a Housing and Urban Development (HUD) regulation based upon the Housing Act. The regulation required that the defendant charge no more for rent than a specified percent of a family’s income.\(^{119}\) A “reasonable” allowance for utilities was included as rent. The defendants responded that a “reasonable” allowance for utilities was too vague a provision to be an enforceable right. The Supreme Court disagreed noting that the HUD regulations, which carried the force of law, were sufficiently specific and definite: they set forth guidelines by which the states should establish utility allowances and they required a notice and comment period for tenants prior to any change in the allowances.\(^{120}\)


\(^{118}\) Id. at 420.

\(^{119}\) Id. at 431-432.
Wilder the Court elaborated to explain that allowing states the flexibility to choose among a variety of means by which to calculate the allowance did not render the provision so vague that it couldn’t be enforced by a Court. 121

The requirement that states provide students with disabilities a free and appropriate public education is not so “vague and amorphous” as to strain judicial competence. First, states are clearly required to provide a FAPE to students with disabilities. Section 1412 (a)(1)122 conditions a states receipt of federal funding under IDEA on that state having policies and procedures in place to ensure that children are provided a FAPE. Further, section 1413 provides that a State Educational Agency may not disburse federal funds to any school that fails to ensure a child is provided their rights under IDEA, including a FAPE.123 These provisions are unambiguous in their requirement that FAPE must be both procedurally and actually provided to children with disabilities.

Second, the term ‘free appropriate public education’ is not so vague that a judge would be unable to enforce the provision. FAPE is defined as: “...special education and related services that...(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meets the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program...”124 To be enforceable, the provision of FAPE must be ascertainable by a judge.125 A judge may readily ascertain

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123 Id. §1413 (i)(1).
124 Id. § 1401 (8).
125 A maxim of administrative regulation is that administrative policies are best left to the administrative bodies familiar with them. Courts, on the other hand, should only review for compliance with established policy. The application of this maxim to judicial review of IDEA violations was first struck down in Board of Education v. Rowley, 458 U.S. 176, 205 (1982), the first Supreme Court decision to address the role of the courts in IDEA suits. According to Rowley, “we think the fact that it [judicial review]is found in § 1415, which is entitled ‘Procedural
whether a given education is ‘free’ and ‘public’. More difficult to ascertain, however, is whether that education is appropriate.

The first step a judge may take in determining whether an education is appropriate is to analyze whether it meets the clear language of the statute. The statutory definition provides that an appropriate education consists of special education and related services that are developed or determined necessary as the result of an individualized education program. Additionally, the educational program created must meet the standards of the State educational agency and extend to all levels of schooling: Preschool, Elementary, and Secondary.\textsuperscript{126} An educational program failing to meet any of these requirements is clearly not appropriate. It is, however, still possible for a plan to be ‘inappropriate’ and yet comply with the procedures outlined in this definition.

An inquiry into what is meant by ‘appropriate’ cannot be satisfactorily achieved by relying solely on the statutory definition: The very definition of FAPE relies on the word ‘appropriate.’\textsuperscript{127} That IDEA does not define ‘appropriate’ is no reason to assert that the provision of a FAPE is ‘vague and ambiguous,’ however. Had Congress attempted to define ‘appropriate,’ it would have resulted in an effect other than that which Congress intended in drafting this statute: a universal approach to the education of students with disabilities as opposed to an individualized one. The second step in analyzing whether an education is appropriate, therefore, requires looking at the structure of the statute as a whole in order to determine what Congress intended by ‘appropriate’.

The provisions of the IDEA provide sufficient guidance in determining what the outer safeguards,’ is not without significance’ “[we think this]demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.” Even with de novo judicial review that is largely limited to questions of procedural compliance, “The fact that § 1415(e) requires that the reviewing court ‘receive the records of the [state] administrative proceedings’ carries with it the implied requirement that due weight shall be given to these proceedings.” In sum, concerns that judge’s are free to create their own educational policy are misplaced.\textsuperscript{126} 20 U.S.C. § 1401 (8) (Supp. V 1999). \textsuperscript{127} Id. §1401 (8)(C). (“include an appropriate...education in the State involved.”)
boundaries of an ‘appropriate’ education look like:\textsuperscript{128} it is an education that both parents and teachers believe will result in an educational benefit;\textsuperscript{129} It is based on the needs and abilities of a child as determined by nondiscriminatory testing;\textsuperscript{130} It is goal-oriented and measurable;\textsuperscript{131} It includes all necessary services that might enable a child to benefit from specially designed instruction;\textsuperscript{132} and it may be conducted in the home, a classroom, or other setting.\textsuperscript{133} As was true of the regulations that provided guidance in the state’s determination of what constituted ‘reasonable’ in Wright, the provisions of IDEA provide ample guidance to a judge seeking to ascertain whether an ‘appropriate’ education has been provided.\textsuperscript{134}

The final element necessary to determine whether a provision confers a federal right is whether the statute unambiguously imposes a binding obligation upon the state. The Supreme Court has held spending legislation to be much in the way of a contract: the terms must be unambiguously stated in order to be enforced.\textsuperscript{135} In \textit{Pennhurst v. Halderman} the Supreme Court found that the Bill of Rights provision in the Developmentally Disabled Assistance and Bill of Rights Act did not unambiguously impose a binding obligation on the state. In making its determination the Court looked to both the statutory language and the type of legislation it was a part of. First, noting that the provision in question was merely a ‘finding’ by Congress and not a requirement, the Court held that the asserted rights indicated a simple federal preference rather than a federal mandate.\textsuperscript{136} Next, the Court held that the statute did not provide for a withholding

\textsuperscript{128} See generally, note 125 supra.
\textsuperscript{129} \textit{Id.} \textsection 1414(d).
\textsuperscript{130} \textit{Id.} \textsection 1414(b) (3). Students are to be tested using nondiscriminatory or biased devices in order to evaluate the individual needs and determine appropriate strategies for addressing those needs.
\textsuperscript{131} \textit{Id.} \textsection 1414(d).
\textsuperscript{132} \textit{Id.} \textsection 1401(22).
\textsuperscript{133} \textit{Id.} \textsection 1401(25).
\textsuperscript{134} \textit{479 U.S. 418, 431-32} (1987).
\textsuperscript{136} \textit{Id.} at 19.
of federal monies if the state failed to comply with the Bill of Rights provision.¹³⁷ A provision in spending clause legislation that neither confers funds based solely upon compliance or withdraws funds for the same reason, Pennhurst held, is not ‘binding’ upon the state. Finally, the Court noted that the Act’s stated purpose was to merely “assist” the states rather than fund the provision of new substantive rights.¹³⁸

The provision requiring states to provide children with disabilities a free and appropriate education is mandatory rather than precatory. The clear and unambiguous terms of spending legislation, once federal funding is accepted, are binding upon the state. Unlike Pennhurst, the provision of federal funding in IDEA is explicitly conditioned upon a state’s adoption of a policy that ensures students with disabilities a free and appropriate education.¹³⁹ A state cannot easily claim that the obligation to provide a free, appropriate public education was unknowingly thrust upon them. The requirement of FAPE is equally unambiguous: the boundaries of what determine a free and appropriate education, as discussed previously, are readily ascertainable from the structure of the statute.

The procedural safeguards provisions of the IDEA also make clear that the adoption of a policy requiring FAPE is mandatory. Should a child not receive a FAPE, their parent or guardian may seek administrative and judicial redress through the statutorily mandated procedures. Further, the HCPA amendment specifically provides that students and parents with disabilities will not be limited in the remedies they might seek as a result of the IDEA.¹⁴⁰ Clearly, the requirement of FAPE is mandatory and binding upon states that choose to accept

¹³⁷ Id. at 16-18.
¹³⁸ Id. at 18.
¹⁴⁰ Id. § 1415 (i) (“Nothing in this title 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.”)
federal funds under the IDEA.

Once a plaintiff has demonstrated that the statutory provision in question meets the three requirements of the Blessing test\(^\text{141}\), a presumption exists that §1983 is available to them. This presumption may only be rebutted by a showing that Congress, in fact, intended to foreclose access to §1983. Courts can determine Congressional intent to foreclose a remedy under § 1983 either "expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."\(^\text{142}\) Congress has only found statutory provisions to be so comprehensive as to foreclose access to §1983 in two cases: Sea Clammers and Smith v. Robinson.\(^\text{143}\)

The Court in Smith found two factors to be relevant in holding that Congress had sought to foreclose a plaintiff's access to §1983 when the underlying violation was one that fell within the ambit of rights provided under the IDEA. First, the Court found that the Act provided a carefully tailored means of administrative review that included access to a judicial proceeding upon exhaustion of these initial remedial means.\(^\text{144}\) Second, the Court noted that a petitioner could by-pass these initial administrative means by claiming a Constitutional violation of a right enforceable through the IDEA and initiating a suit under §1983.\(^\text{145}\)

The Court in Sea Clammers similarly found access to §1983 to have been foreclosed by comprehensive enforcement mechanisms. The Court found that the remedial devices available through the statutes at issue would be by-passed if use of §1983 was permitted.\(^\text{146}\) When specific remedies were provided for in the statute and a claim for damages was not one of them, the

\(^{142}\) Id. at 341.
\(^{143}\) See Part III, infra.
\(^{144}\) 468 U.S. 992, 1011 (U.S. 1984).
\(^{145}\) Id. at 1012-13.
\(^{146}\) 453 U.S. 1, 20 (1981) ("It is hard to believe that congress intended to preserve the §1983 right of action when it created so many specific statutory remedies")
Court in *Sea Clammers* held that a separate suit for damages under §1983 was not what Congress intended.\(^{147}\) A savings clause in one of the statutes specified that the injunctive relief provided therein was not to be construed as preventing any other relief under “any other statute.” This clause, Justices Stevens and Blackmun noted in dissent, should be construed as including access to §1983.\(^{148}\) The majority Court, however, held that “any other statute” does not include §1983 since the underlying claim would still be based on the statute within which the savings claim was found.\(^{149}\)

Congress did not intend to foreclose a plaintiff’s access to §1983 for purposes of suing for a violation of IDEA. Although courts may rely on the comprehensiveness of the remedies provided in a statute in determining whether Congress intended to foreclose access to §1983, this reliance is only justified if Congress has not clearly spoken. In amending the IDEA, Congress clearly sought to reverse the Supreme Court’s holding that §1983 may not be used to address violations of the IDEA:

> 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, or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsection (b)(2) and (c) shall be exhausted to the same extent as would be required had the action been brought under this part.\(^{150}\)

The legislative history of the Handicapped Children’s Protection Act buttresses the conclusion that Congress, in amending the IDEA, intended to make clear that individuals with disabilities should have access to §1983 for violations of IDEA. In noting the above provision, a Joint Explanatory Statement clarifies, “[B]oth the Senate bill and the House amendment

\(^{147}\) *Id.*

\(^{148}\) *Id.* at 29.

\(^{149}\) *Id.* at 21.

authorize the filing of civil actions under legal authorities other than part B of the EHA to the same extent as would be required under that part... It is the conferees intent that actions brought under 42 U.S.C. 1983 are governed by this provision.” \[151\] Further, Congress stated that this amendment was designed to “reestablish statutory rights repealed by the U.S. Supreme Court in Smith v. Robinson” and to “reaffirm, in light of this decision, the viability of Section 504, 42 U.S.C. 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children.” \[152\] When Congress speaks with a clear voice, there is no need to infer intent. The clear language of the HCPA amendment and its legislative history make clear that Congress did not intend to withdraw a plaintiff’s access to §1983 when it enacted the IDEA.

V. Critique of the Circuit Split

Section 1983 is available to plaintiffs suing for violations of the IDEA. Circuit courts that explicitly hold otherwise have incorrectly reasoned that Congress intended to foreclose access to §1983 by providing an elaborate administrative procedure that allows for redress.

The Fourth and Tenth Circuits have held §1983 to be foreclosed based upon four findings: (1) The procedures and remedies available under the IDEA are so comprehensive as to indicate an intent by congress to preclude enforcement by way of §1983; (2) The 1985 amendment to IDEA did not preserve the use of §1983; (3) If legislative history might be construed as preserving access to §1983, such a construction is solely limited to access of §1983 for violations of Constitutional rights; and (4) that the ambiguity regarding the availability of §1983 in the HCPA precludes its enforcement against the states. \[153\] These findings are incorrect.

In determining that Congress intended to foreclose access to §1983 for statutory violations of the IDEA by providing a comprehensive, administrative scheme, the Fourth and

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\[153\] Sellers, 141 F.3d 524, 530-31 (10th Cir. 1998).

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Tenth Circuits chose to discount the actual wishes of Congress as expressed in the HCPA. When a court has established that a statute creates enforceable rights, a rebuttable presumption of the availability of §1983 arises.154 Courts need only look beyond this presumption when it is not clear whether Congress intended to foreclose access to §1983. The Court in Smith acknowledged this canon of interpretation when it noted that it would have found §1983 to be an available remedy if Congress had “specifically indicated that it did not intend to limit the judicial remedies otherwise available to a handicapped child.”155 The HCPA amendment, in response to Smith, provides, “Nothing in this title shall be construed to restrict or limit the rights, procedures and remedies available under ...federal statutes protecting the rights of handicapped children...”156

The Fourth and Tenth Circuits chose to look beyond Congress’ clear response to Smith, however, and have instead held that Congress failed to preserve the use of §1983 by not expressly providing for it in the HCPA.157 Relying upon the fact that the amendment expressly provides for the preservation of rights remedies and procedures under the Constitution, the Rehabilitation Act, and “other Federal statutes protecting the rights of handicapped children...”158 the Fourth and Tenth Circuits find the absence of §1983 to be telling. Further, they note that “other statutes protecting the rights of disabled children cannot naturally be read to include 42 U.S.C. § 1983, a statute which speaks generally, and mentions neither disability nor youth.”159 This reasoning is faulty in several respects.

First, requiring Congress to affirmatively provide for §1983 is to “invert the established presumption that a private remedy is available under §1983 unless Congress has affirmatively

157 Sellers, 141 F.3d 524, 530 (4th Cir. 1998); Padilla, 233 F.3d 1268, 13 (10th Cir. 2000).
158 Id.
159 Id.
withdrawn the remedy."\textsuperscript{160} Second, even though Congress need not affirmatively provide for the use of §1983, the HCPA does in fact provide for §1983 when it affirms the availability of “other Federal statutes”\textsuperscript{161} that protect the rights of children with disabilities. Congress, in specifying the Constitution and the Rehabilitation Act, was merely listing sources that confer enforceable rights to children with disabilities. To include § 1983 in this grouping, a statute conferring no substantive rights, would have been anomalous. Instead, Congress concluded the sentence with the disjunctive “or”\textsuperscript{162} followed by “other Federal statutes protecting the rights of handicapped children and youth…”\textsuperscript{163} Section 1983, a statute created to protect and enforce civil rights, clearly matches this description. This assertion is bolstered by the 1997 amendment to the IDEA where Congress amended its list of rights-creating sources to include the Americans with Disabilities Act (ADA). Had Congress meant to merely encompass other rights-creating statutes when it preserved “other Federal statutes”, the addition of the ADA would have been mere surplusage.

Next, the Fourth and Tenth Circuits assert that the legislative history of the HCPA amendment is consistent with their interpretation that §1983 is not available for statutory violations of the IDEA. House Conference Report 99-687 provides, “It is the conferees’ intent that actions brought under 42 U.S.C. 1983 are governed by this provision.”\textsuperscript{164} Rather than construing this statement in its most natural fashion, the Tenth and Fourth Circuits have unduly limited the legislative history to comport with their interpretation of the HCPA amendment: that any reference to §1983 could only refer to an intent by Congress to preserve a plaintiff’s access

\textsuperscript{162} Sellers, 141 F.3d 524, 530 (4th Cir. 1998). The Sellers Court, in analyzing the HCPA amendment, fails to note the importance of the disjunctive connecting the sources conferring federal rights and “other” statutes, incorrectly phrasing the analysis as follows, “But while section 1415(f) explicitly preserves remedies under the Constitution, the Rehabilitation Act, and specified “other” statutes, it simply fails to mention Section 1983.” (emphasis added).
\textsuperscript{163} Id.
to the rights and remedies of the Constitution, not as a vehicle for remedying statutory violations of the IDEA. The Circuit courts' narrowing of the clear conference report statement is not supported by either the legislative history or the statutory language; the opinions of the circuits similarly fail to provide support for their narrowing of the conferees' clear statement. Such unsupported opinions should be entitled to little, if any, weight.

Finally, the Fourth Circuit points to Pennhurst's clear statement rule to support its holding that §1983 is not available to plaintiffs suing for statutory violations of the IDEA. Pennhurst requires obligations that are imposed pursuant to the spending power to be unambiguously stated in order to be held enforceable. The Fourth Circuit, finding the language of HCPA to be ambiguous in its response to Smith, construed this holding to likewise prevent the use of §1983 in suits based upon statutory violations of IDEA. A crucial difference that the Fourth circuit overlooks, however, is that the issue in Pennhurst was whether an implied right of action might be found to enforce alleged rights that were phrased in precatory rather than mandatory terms. Second, even had the language of HCPA not been plain, the issue in Pennhurst is quite distinguishable from that in the debate of whether §1983 is available for statutory violations: Pennhurst concerns the grave issue of holding a state responsible for ensuring an ambiguously imposed substantive right after that state has unwittingly agreed to accept federal funding in exchange for fulfilling the obligations laid out in the federal statute. Quite differently, whether or not §1983 is available to plaintiffs is not purely an issue of whether substantive rights exist, but rather whether rights plainly set forth in the statute may be enforced by application of a civil rights statute. Additionally, as the application of §1983 to federal laws commenced prior to the implementation of IDEA, it is unlikely that a state can claim that it

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166 See Maine v. Thiboutot, 448 U.S. 1, 2 (1980).
lacked notice of the enforceability of substantive federal rights by means of §1983 when it accepted federal funding.

Still, the Fourth Circuit claims that it is Congress’s duty to affirmatively set forth a plaintiff’s right to use §1983 since the Court in Smith ruled that other laws were not available to plaintiffs who had claims that might properly be addressed by the remedies set forth in the IDEA. Even had the holdings of Pennhurst been applicable to the issue of whether §1983 is available, the intent of Congress to allow suits for statutory violations of the IDEA under §1983 is clear. As discussed previously, HCPA’s use of a disjunctive between the sources from which an enforceable right can be found and the statutes that merely serve to protect those substantive rights clearly indicates Congressional intent to allow the use of §1983.

VI. What Gonzaga v. Doe Adds

A relatively recent Supreme Court case, Gonzaga v. Doe, has the potential to shift the foregoing conception of the IDEA and its relation to §1983 claims. John Doe, the plaintiff in Gonzaga v. Doe, was a graduating student in the college of education at Gonzaga University. Upon graduating from Gonzaga, Doe intended to teach at an elementary school in Washington. In order to obtain certification to teach in Washington, Doe was required to provide an affidavit from his graduating school that attested to his good moral character. One of the defendants, Roberta League, held the position of certification specialist at John Doe’s college. League learned from another student that Doe had engaged in sexual misconduct with another student. Upon further investigation, the defendant decided that she would not grant Doe the required affidavit. The defendant then proceeded to call the state certification agency, identify the plaintiff by name, and discuss the allegations that prompted her decision with the agency. Doe brought suit under §1983 against the University and League, alleging that the defendants acted in
violation of the Family Educational Rights and Privacy Act (FERPA) by releasing his educational information without his or his parents' consent.\textsuperscript{167}

The Washington trial court, following half of the circuit courts, found in favor of Doe and awarded relief based upon Doe's §1983 claim. The Washington Court of Appeals, however, chose to follow the other half of the circuits in regard to whether FERPA granted rights enforceable by way of §1983, and reversed the trial court decision.\textsuperscript{168} The Washington Supreme Court, in turn, reversed the appellate court finding, noting that while FERPA as a whole does not create enforceable rights, the FERPA provision relied upon by the plaintiff was amenable to enforcement under §1983. Noting both the conflict in the circuits regarding whether §1983 was available to causes of action based on violations of FERPA as well as the ambiguity of its own previous §1983 decisions, the Supreme Court granted certiorari.\textsuperscript{169}

\textit{a. Holdings of Gonzaga}

Writing for the Court, Chief Justice Rehnquist rejected the plaintiff's assertion that the FERPA provision at issue\textsuperscript{170} conferred individually enforceable rights. The Chief Justice made three key findings in reaching this decision. First, he noted that the Court has only rarely found spending clause legislation to confer enforceable rights.\textsuperscript{171} Second, the Chief Justice held that in order to bring an action under §1983, Congress must have unambiguously intended to provide the plaintiff with an enforceable right.\textsuperscript{172} Third, and relatedly, the Chief Justice held that the inquiry used to determine whether an enforceable right exists in an implied right of action suit

\textsuperscript{167} 536 U.S. 273, 276 (2002) (relaying the facts of the case).
\textsuperscript{168} Id. at 278.
\textsuperscript{169} Id.
\textsuperscript{170} 20 U.S.C. §1232g(b)(1). “No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein...) of students without the written consent of their parents to any individual, agency or organization.”
\textsuperscript{171} Gonzaga, 536 U.S. 273, 280.
\textsuperscript{172} Id. at 283.
should also be used to determine whether a plaintiff may sue under §1983.  

Chief Justice Rehnquist began by noting that only twice since *Pennhurst* had the Court found spending clause legislation to give rise to enforceable rights.  

Distinguishing those provisions which gave rise to enforceable rights in *Wilder* and *Wright* from the provision in FERPA, the Chief Justice noted that the former explicitly conferred monetary entitlements upon the plaintiffs while the latter merely stated a condition that the Secretary of Education was obligated to enforce. Additionally, the Chief Justice noted that in its more recent decisions, those of *Suter* and *Blessing*, the Court had “rejected attempts to infer enforceable rights from Spending Clause statutes.” Emphasizing the restrictive holdings of *Pennhurst* and *Suter*, Chief Justice Rehnquist reiterated that Congress must unambiguously confer an individual right, not merely provide the Secretary with a standard by which to measure a state’s compliance.

The Chief Justice next responded to the plaintiff’s argument that prior Supreme Court decisions had found rights enforceable by §1983 when Congress had simply demonstrated an intent to benefit the plaintiff. Admitting that past opinions might suggest that “something less than an unambiguously conferred right is enforceable by §1983,” Chief Justice Rehnquist

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173 *Id.*; If a court finds a statute to create an implied right of action, a plaintiff may sue for violations of that statute despite being granted no express right of action. The test for determining whether an implied right of an action may be found was most succinctly stated in *Cort v. Ash*, 422 U.S. 66, 78 (1975): “First, is the plaintiff one of the class for whose especial benefit the statute was enacted,” - that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? This test was modified in *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)(citations omitted) to also require that Congress “display[ ] an intent to create not just a private right but also a private remedy.” Application of the implied rights inquiry to the §1983 inquiry significantly raises the bar on what plaintiffs must prove to establish standing.


175 *Id.* at 280.

176 *Id.* at 279.

177 *Id.* at 281.

178 *Id.* at 281.

179 *Id.* at 282.

180 *Id.* at 320.
stated that the Court "now reject[s] the notion that our cases permit anything short of an
unambiguously conferred right to support a cause of action brought under §1983."\textsuperscript{181}

Further responding to the plaintiff's concerns that a "more 'rigorous' inquiry would
conflate the standard for inferring a private right of action under § 1983 with the standard for
inferring a private right of action from the statute itself,"\textsuperscript{182} Chief Justice Rehnquist held that
"our implied right of action cases should guide the determination of whether a statute confers
rights enforceable under §1983."\textsuperscript{183} As a result, he continued, the tests for determining whether a
private right of action can be implied and whether a statutory violation may be enforced through
§1983 "overlap in one meaningful respect – in either case we must first determine whether
Congress intended to create a federal right."\textsuperscript{184}

Analyzing the FERPA statute under the clear and unambiguous standard articulated by
the Chief Justice, the majority found that the provision created state obligations to an aggregate
of its citizens and did not contain the individual rights-creating language required to support an
action under §1983.\textsuperscript{185} Further, it noted that FERPA explicitly authorized the Secretary of
Education to enforce the statute and that the Secretary, in turn, created an office to investigate
individual complaints.\textsuperscript{186} Such administrative procedures, the Court held, "squarely distinguish
this case from Wright and Wilder where an aggrieved individual lacked any federal review
mechanism...and further counsel against our finding congressional intent to create individually
enforceable private rights."\textsuperscript{187}

Concurring in the judgment but questioning the majority's textual emphasis was Justices

\textsuperscript{181} Id. at 321.
\textsuperscript{182} Id. at 320.
\textsuperscript{183} Id. at 321.
\textsuperscript{184} Id.
\textsuperscript{185} Id. at 287.
\textsuperscript{186} Id. at 289.
\textsuperscript{187} Id. at 290.
Breyer and Souter. Breyer found that the broad language of the FERPA provision provided too little guidance to schools about the nature of their obligations to be considered enforceable.\textsuperscript{188} He agreed with the majority that an evaluation of multiple factors, as expressed in Chief Justice Rehnquist’s opinion, pointed to a lack of intent by Congress to allow private enforcement actions.\textsuperscript{189} Justice Breyer disagreed, however, with the majority’s reliance on, what he characterized to be a purely textual test to determine congressional intent: “I would not, in effect, pre-determine an outcome through the use of a presumption – such as the majority’s presumption that a right is conferred only if set forth ‘unambiguously’ in the statute’s ‘text and structure.’”\textsuperscript{190}

Justice Stevens, with whom Justice Ginsberg joins, wrote a two part dissenting opinion. In part one, Justice Stevens analyzes the FERPA provision according to the three part test articulated in \textit{Blessing v. Freestone} and finds that it creates an enforceable right. In part two Justice Stevens questions the majority’s decision to import the implied right of action inquiry into the §1983 analysis.

Justice Stevens first breaks from the majority in deciding how to analyze the provision at issue. While the majority focused solely on the provision at issue, Justice Stevens notes that a ‘blanket approach’ to questions of enforceability by §1983 is not appropriate.\textsuperscript{191} Instead, he draws his findings from reading the provision in light of the entire statute. Justice Stevens quickly finds the majority’s assertion that FERPA “‘entirely lacks’ rights-creating language”\textsuperscript{192} to be erroneous. On the contrary, the statute is replete with specific references to ‘rights.’ Justice Stevens next takes issue with the majority’s findings that the provision speaks only to an

\textsuperscript{188} \textit{id.} at 292.
\textsuperscript{189} \textit{id.}
\textsuperscript{190} \textit{id.} at 291.
\textsuperscript{191} \textit{id.} at 294.
\textsuperscript{192} \textit{id.} at 296.
aggregate and cannot, therefore, convey individual rights.\footnote{Id. at 295.} By focusing on the contingent phrase “so long as” in the statutory provision, Justice Stevens finds that §1232g(b) doesn’t simply outright ban a practice, rather it conditions a practice on an individual student’s parents action.\footnote{Id.} Because it is the individual student’s parents who must perform the action, Justice Stevens finds the provision to be individually focused. Even were it not, however, Stevens asserts that the simple fact that a provision conditions relief on a policy or practice is not preclusive of an individual right to enforcement.\footnote{Id.}

Turning to the factors outlined in the Blessing test, Justice Stevens notes that the right at issue in FERPA “plainly meets the standards we articulated...for establishing a federal right.”\footnote{Id. at 295.} Additionally, Stevens notes, the right claimed in the FERPA provision is even more clear and unambiguous than those rights held to be enforceable by §1983 in both Wright and Wilder.\footnote{Id. at 295.} Stevens finishes his §1983 analysis by examining FERPA to determine whether Congress intended to specifically withdraw the remedy of §1983. Holding that Congress demonstrated no such intent, he first concludes that FERPA creates a privately enforceable right and then directs his attention to the §1983 analysis employed by the majority.

In part two of the dissent, Justice Stevens criticizes the majority’s importation of the implied right of action inquiry into the §1983 context. First, he observes that the separation of powers concerns that warrant a more searching review of whether Congress intended to create a privately enforceable right are not present in the §1983 context.\footnote{Id. at 295.} While implied right of action cases “reflect a concern...that Congress rather than the courts control the availability of remedies

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for violations of statutes, the fact that Congress specifically authorized private actions in enacting §1983 alleviates the Court of that concern.

Justice Stevens next notes that the use of implied right of action precedent in the §1983 context results in the new requirement that Congress must specifically intend to make the right enforceable under §1983. This is unavoidable, Justice Stevens contends, given that past implied rights decisions “do not necessarily cleanly separate out the ‘right’ question from the ‘cause of action’ question.” Such a new requirement, he adds, conflicts directly with the established presumption that §1983 is available to all plaintiffs filing suit for violation of a federal right.

In conclusion, Stevens observes that the Court’s decision to meld the ‘is there a right’ inquiry with the ‘is it enforceable’ inquiry, as demonstrated in its question of whether “Congress nonetheless intended private suits to be brought...” and its reliance on implied right of action decisions, places an unwarranted higher burden on the plaintiff.

b. Implications for the Circuit Split

The Gonzaga decision may greatly affect the way §1983 claims based on violations of the IDEA are decided. Circuits that have found §1983 to be available to plaintiffs suing for violations of the IDEA have based their decision on the 1986 amendment to the IDEA and its legislative history. Circuits ruling against the use of §1983 for statutory violations of the IDEA hold that the amendment doesn’t explicitly reference §1983 and that any discussion regarding §1983 in the legislative history pertains only to the pursuit of Constitutional claims that mirror those that might be brought under the IDEA. Both sides of the debate have primarily analyzed

199 Id.
200 Id. at 301.
201 Id. at 301.
202 Id. at 302.
203 Id.
the availability of §1983 under the second part of the §1983 inquiry: whether or not Congress foreclosed the use of §1983. The decision in *Gonzaga*, however, may prompt courts to begin analyzing §1983 claims based upon the IDEA under the newly modified first part of the §1983 inquiry: whether Congress unambiguously conferred a “right to support a cause of action brought under § 1983.”

Courts that have analyzed whether §1983 is available for claims based upon statutory violations of the IDEA have not analyzed whether the statutory provision at issue conveys enforceable rights. It is likely that a majority of these courts have relied upon the Supreme Court’s statement in *Smith*, that “the Act establishes an enforceable substantive right to a free appropriate public education required by the statute,” to be conclusive as to whether IDEA creates an enforceable right to a FAPE. As the dissent in *Gonzaga* noted, however, the majority’s conflation of the implied right of action inquiry with the §1983 inquiry sub silentio overrules cases such as *Wilder* and *Wright* where the provisions at issue, like the provisions in the IDEA, “did not ‘clearly and unambiguously’ intend enforceability under § 1983.”

The majority opinion in *Gonzaga* announced that “Since *Pennhurst*, only twice have we found spending legislation to give rise to enforceable rights.” The two decisions the Court then cites does not include *Smith v. Robinson* among them. If *Pennhurst* was decided three years before *Smith* and yet *Smith* is not included in the Supreme Court’s exceptions, it seems safe to conclude that the Supreme Court does not consider itself to have held the IDEA, a statute created pursuant Congress’ spending power, to have given rise to enforceable rights. The Supreme Court

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204 *Id.* at 283.
206 As noted earlier, a majority of the federal court cases filed allege violations of a FAPE.
208 *Id.* at 280 (2002).
“is bound by holdings, not language”\(^{209}\) and “questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”\(^{210}\) If \textit{Smith} did not hold the IDEA to create substantive enforceable rights in the §1983 context and the test for determining whether an enforceable right exists has changed with the advent of \textit{Gonzaga}, it appears likely that the Supreme Court, and lower courts, can evaluate anew whether the IDEA’s provisions confer enforceable rights.

Many of the IDEA’s most litigated provisions are troublingly similar to those in the disputed FERPA provision.\(^ {211}\) The FERPA provision at issue in \textit{Gonzaga} conditions federal funding upon a finding that the educational agency does not have a “policy or practice of permitting the release of education records of students…”\(^ {212}\) Similarly, the IDEA conditions funding upon a finding that the state has in effect “policies and procedures” to ensure that it meets each of the following conditions: …[a] Free Appropriate Public Education.”\(^ {213}\) Also similar to the FERPA provision at issue in \textit{Gonzaga}, the majority of the IDEA’s provisions lack the clear rights-creating language that the majority in \textit{Gonzaga} held to be key in finding rights to be enforceable under §1983. If, as Justice Breyer contends, the majority opinion requires the text and structure of the statute to squarely provide the plaintiff with an enforceable right, only §1415, a provision that allows suit based upon the violation a student’s right to a FAPE, may be able to pass the \textit{Gonzaga} test. Evaluated as part of spending clause legislation, however, this lone provision may equally be jeopardized as the result of \textit{Gonzaga}.

The majority in \textit{Gonzaga} takes pains to emphasize that statutes passed pursuant to

\(^{210}\) Webster v. Fall, 266 U.S. 507, 511 (1925).
\(^{211}\) See, e.g., notes 187 and 188 infra.
Congress’ spending power are especially disfavored in the §1983 context.214 The IDEA, like FERPA, is a spending clause statute. The majority in Gonzaga stresses that the two suits that have been allowed since Pennhurst, both of which were premised on violations of spending clause statutes, were only allowed because “Congress spoke in terms that ‘could not be clearer.'” Responding to the plaintiff’s assertion that “this line of cases” establishes a federal right as long as Congress intended that the statute benefit the plaintiff, the Supreme Court, states that, “we now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under §1983.” This heightened requirement, that a statute must expressly state a right to a cause of action under §1983, is not expressed in any other context in the remainder of the Court’s opinion.

One interpretation that can be drawn from this statement might be that it applies only to the type of cases being discussed in that particular section of the provision--Spending Clause legislation. If true, spending legislation, perhaps because it “is much in the nature of a contract,” must expressly state that § 1983 is available to plaintiffs filing suit upon these statutes. No clause in the IDEA, including §1415, expressly states that § 1983 is available to plaintiffs suing for violations of the IDEA.

Prior to Gonzaga, the majority of the circuits held that § 1983 was available to plaintiffs seeking redress for violations of the IDEA. The two circuits that clearly opposed such a finding, the Tenth and Fourth, based their decisions on a misinterpretation of the statutory language

214 See, e.g. Gonzaga, 536 U.S. 273, 279-281 (2002). (“Since Pennhurst only twice have we found spending legislation to give rise to enforceable rights” and “Our most recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes.”)
215 Id. at 280 (2002).
216 Id. at 282 (referring to §1983 decisions of rights alleged in spending clause statutes)
217 Id. at 283.
218 Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981). (refusing to find an enforceable right where the alleged right was not clear enough to be enforced as part of a contract). The Supreme Court, however did not explain its reasoning in Gonzaga.

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contained in the HCPA. Upon a broad reading of Gonzaga, however, the Tenth and Fourth circuits may now successfully shift their analysis to the first part of the § 1983 inquiry and continue to hold that § 1983 is not available for statutory violations of the IDEA. Gonzaga, in sum, has great potential to reverse the current circuit court split over whether § 1983 is available.

VII. Conclusion

The Supreme Court’s decision in Gonzaga has the potential to prevent parents of students with disabilities from suing under § 1983 for violations of the IDEA. In the absence of § 1983, parents and students will be forced to rely upon the administrative procedures\textsuperscript{219} and remedies\textsuperscript{220} provided by local and state educational agencies. Although the federal government may withhold federal funding for violations of the IDEA, the severity of this remedy and the consequences it has on the intended beneficiaries of the statute, will likely prevents its use.

Congress is, of course, at liberty to amend the IDEA to clarify that § 1983 is available to plaintiffs. Requiring Congress to specifically provide for § 1983 does little, however, except to delay the ability of parents and children whose rights have been violated to obtain the appropriate relief they deserve and make Congress take additional, needless steps to reaffirm its original intent. It does not better enable states to make informed decisions when evaluating spending legislation because states accept Spending Clause legislation against the backdrop of § 1983.\textsuperscript{221} It does not further the goal of preventing federal commandeering of the states by way of private suits for money damages;\textsuperscript{222} the IDEA explicitly requires exhaustion of state

\textsuperscript{219} Individuals who are not made aware of their right to the administrative remedies under the IDEA until after those remedies are no longer sufficient or available will, however, have no means of redress.

\textsuperscript{220} If the current case law does not provide an adequate remedy, however, parents and students will be left without redress.

\textsuperscript{221} Pennhurst, 451 U.S. 1, 17 (1981) (“By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.”)

administrative procedures. Finally, it does not further separation of powers concerns since Congress crafts legislation against the backdrop of § 1983. The only thing that it may do quite well is alleviate the burden currently placed on courts to determine whether every provision of every statute confers an enforceable right. It is not immediately apparent, however, that the convenience enjoyed by the courts will be enough to outweigh the intermediate harm suffered by plaintiffs suing, without adequate remedy, for violations of Spending Clause statutes.