1-1-1983

AVAILABILITY OF ATTORNEY FEES IN SUITS TO ENFORCE THE EDUCATIONAL RIGHTS OF CHILDREN WITH HANDICAPS

Ivan E. Bodensteiner

Follow this and additional works at: http://digitalcommons.law.wne.edu/lawreview

Recommended Citation
I. INTRODUCTION

Children with handicaps have three primary sources of federal substantive rights relating to their education: the fourteenth amendment to the United States Constitution;¹ the Education for All Handicapped Children Act (EAHCA);² and the Rehabilitation Act of 1973.³ These sources are manifestations of judicial and legislative concern for the welfare of persons with handicaps and they articulate the scope of the child with handicaps' right to an education while delineating to some extent the remedies available when those rights are violated. Attorneys play an important role in vindicating the rights of persons with handicaps, but professional legal advocacy is not without cost. Because the "American Rule" generally precludes an award of attorney fees absent statutory authorization,⁴ the availability of such awards to plaintiffs who successfully enforce the federal substantive rights of children with handicaps is an issue of great significance.

¹ U.S. CONST. amend XIV.
⁴ Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245 (1975). There are other exceptions to the American Rule. Thus, although fee awards can be based on contracts or the bad faith of a litigant, and can be awarded out of a common fund, these theories are generally not applicable to litigation on behalf of children with handicaps. The bad faith exception can, of course, be utilized in any type of litigation, but because its availability depends on the conduct of the opposing party it does not attract attorneys to this type of litigation. Alyeska recognized the inherent power of courts to award fees when court orders are willfully disobeyed or when a party has acted vexatiously, wantonly, or for oppressive reasons either prior to or during the course of litigation. 421 U.S. at 258-59. See also Roadway Express, Inc. v. Piper, 447 U.S. 752, 765-67 (1980).
This article will examine each of the federal substantive rights relating to the education of children with handicaps in order to determine the availability of an award of attorney fees to successful plaintiffs. Initially, suits against public educational institutions based on the fourteenth amendment with a cause of action under section 1983, title 42 of the United States Code, will be discussed in view of the provisions of the Civil Rights Attorney’s Fees Awards Act of 1976 as codified in the same title under section 1988. The article will next explore the use of section 1988 to secure attorney fees in a successful action brought under the EAHCA, which does not expressly provide for an award of attorney fees. Section 505(b) of the Rehabilitation Act of 1973, which authorizes an award of attorney fees to prevailing parties, will then be discussed in light of the recent judicial limitations imposed on section 504 by the Supreme Court of the United States. Finally, this article will demonstrate that as a matter of litigation strategy, plaintiffs should normally assert substantive claims under all three of these provisions so as to afford themselves the greatest opportunity to secure an award of attorney fees.

II. AUTHORIZATION FOR FEE AWARDS UNDER EACH OF THE FEDERAL LAWS PROTECTING THE EDUCATIONAL RIGHTS OF THE HANDICAPPED

A. The Fourteenth Amendment

It is generally recognized that the development of the educational rights of children with handicaps began with lower court decisions based on the fourteenth amendment. This was acknowledged by the Supreme Court in *Board of Education v. Rowley*, its first decision interpreting the EAHCA:

Both the House and the Senate reports attribute the impetus for the Act and its predecessors to two federal court judgments rendered in 1971 and 1972. As the Senate Report states, passage of the Act “followed a series of landmark court cases establishing in

7. See 20 U.S.C. § 1415(e)(2) (1976). While this section does provide for “such relief as the court determines is appropriate,” *id.* efforts to include fees in this authorization have not been highly successful. See infra notes 154-58 and accompanying text.
law the right to education for all handicapped children."11

Since the passage of the EAHCA and the regulations12 implementing section 504 of the Rehabilitation Act as it relates to the educational rights of children with handicaps, several courts have recognized that children with handicaps seeking equal educational opportunities present substantial constitutional questions under the fourteenth amendment.13 This argument has been enhanced by the recent Supreme Court decision in Plyler v. Doe,14 which held that even though undocumented aliens are not to be treated as a suspect class and that education is not a fundamental right, discrimination in education is not to be "considered rational unless it furthers some substantial goal of the State."15

Even if children with handicaps, like undocumented aliens, do not constitute a suspect class, because education is involved the same intermediate level of scrutiny should be applied to equal protection claims in cases brought by children with handicaps. Therefore, whenever a child with handicaps claims a denial of equal educational opportunity, it is possible to state a substantial constitutional claim under the equal protection clause. Whenever a child with handicaps claims a lack of procedural safeguards, there should be a substantial constitutional claim under the due process clause.

Assuming that children with handicaps can state a substantial claim under the fourteenth amendment, they have a cause of action under section 1983. Yet because both the fourteenth amendment

14. 102 S. Ct. 2382, 2398 (1982). It should be noted that Plyler involved a total exclusion from education and, therefore, differs from San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Texas' school finance scheme does not violate the fourteenth amendment). Because of the special educational needs of children with handicaps, cases brought on their behalf are more closely analogous to the total exclusion in Plyler than the "variation in the manner in which education is provided . . . " 102 S. Ct. at 2398, found to be constitutional in Rodriguez.
15. Id. at 2398.
and section 1983 require state action or action under color of state law, the constitutional claims will be available only in suits against public schools and their officials. The importance of the availability of a substantial constitutional claim, which should be asserted through section 1983, lies in the fact that it can trigger an award of attorney fees pursuant to section 1988, regardless of whether the court actually decides the merits of the constitutional claim. So, for example, if plaintiff prevails under the EAHCA, an issue that should be resolved first in order to avoid the constitutional issue if possible, fees can still be recovered under section 1988.

Application of the legislative history, which accompanied the 1976 amendment to section 1988, is demonstrated by several cases, including some involving special education. It also applies where the plaintiff prevails through a settlement rather than full litigation.

16. Lugar v. Edmondson Oil Co., 102 S. Ct. 2744, 2750 (1982). In Lugar, the Court stated: "[i]t is clear that in a § 1983 action brought against a state official, the statutory requirement of action 'under color of state law' and the 'state action' requirement of the fourteenth amendment are identical." Id.


19. This is made clear in the House Report accompanying the 1976 amendment to section 1988 which states:

To the extent a plaintiff joins a claim under one of the statutes enumerated in ... [the Fees Act] with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. ... In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the nonconstitutional claim is dispositive. ... In such cases, if the claim for which fees may be awarded meets the substantiality test ..., attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a common nucleus of operative fact.


20. Id.

21. Compare Oldham v. Ehrlich, 617 F.2d 163, 168 (8th Cir. 1980); Lund v. Affleck, 587 F.2d 75, 76-77 (1st Cir. 1978); Kimbrough v. Arkansas Activities Ass'n, 574 F.2d 423, 426-27 (8th Cir. 1978); Bond v. Stanton, 555 F.2d 172, 174 (7th Cir. 1977), cert. denied, 438 U.S. 916 (1978) with Reel v. Arkansas Dep't of Corrections, 672 F.2d 693, 697-98 (8th Cir. 1982) (plaintiff lost constitutional claim but won on pendent state claim and was denied fees).


Once it is established that a case is within the coverage of section 1988, the decisions interpreting that section are very favorable to prevailing plaintiffs. For example, a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." A plaintiff does not have to prevail on all issues raised or achieve all of the benefits sought, but can prevail through a settlement or consent decree or simply serve as the catalyst for change brought about without a settlement or consent decree, and fees can be awarded against state agencies or state officials in their official capacities. Furthermore, public interest attorneys employed by funded organizations should be awarded fees and at the same rate as private counsel. Although there are different methods for computing the amount of a fee award, the hourly rate should generally be comparable to that prevailing in the community for other complex federal litigation.

These points suggest that section 1988 is a very attractive provision for prevailing plaintiffs where it is available, for example, when a plaintiff states a substantial constitutional claim. A more difficult question is whether a section 1988 recovery is available to a plaintiff who is without a substantial constitutional claim and who prevails under one of the federal statutory provisions.

24. While section 1988 authorizes an award of fees to the prevailing party, the legislative history makes it clear that there is a dual standard, and prevailing defendants are entitled to fees "only where a plaintiff's lawsuit was brought in bad faith in that it was clearly frivolous, vexatious or brought for harassment purposes." E.R. Larson, Federal Court Awards of Attorney's Fees 87 (1981) [hereinafter cited as Larson]. For the legislative history supporting this proposition, see id. at 86-91. For court decisions supporting the dual standard, see id. at 91-97.


30. Id. at 115-53.

31. Id. at 155-240.

32. It is not the purpose of this article to discuss the issues which arise in determining whether a plaintiff has prevailed, the method of computing the amount of a fee award, or the procedures for obtaining an attorney's fee award as these matters are more than adequately addressed in other writings. See, e.g., Larson, supra note 24; California Rural Assistance, Inc., Federal Litigation Attorneys' Fees: A Legal Services Practice Manual (1981); Derfner, One Giant Step: The Civil Rights Attorney's Fees Awards Act of 1976, 21 St. Louis U.L.J. 441 (1977); Symposium: Attorney's Fees, 2 W. New Eng. L. Rev. (1979).
B. The Education for All Handicapped Children Act

The most likely source of fees for a plaintiff prevailing under the EAHCA is section 1988. This section authorizes fee awards to prevailing plaintiffs in cases which enforce various federal civil rights statutes. The EAHCA is not, however, one of the Acts mentioned in section 1988. Therefore, fees are available under section 1988 only if the EAHCA can be enforced through one of the general civil rights provisions, such as section 1983. Thus, the initial question that must be addressed is whether the EAHCA can be enforced through section 1983.

After the Supreme Court decision in Maine v. Thiboutot, it seemed clear that section 1983 could be used to enforce any federal statute in suits against persons acting under color of state law. In Thiboutot, plaintiffs brought an action in state court to enforce section 602(a)(7) of the Social Security Act and used section 1983 as the basis for the cause of action. After prevailing on the merits, plaintiffs sought fees under section 1988. The Court held that plaintiffs should be awarded fees because a cause of action had properly been asserted under section 1983. In a relatively short opinion, the Court relied on the “plain language” of section 1983—“rights . . . secured by the Constitution and laws . . . .” After examining the language, the Court stated: “Given that Congress attached no modifiers to the phrase [“and laws”], the plain language of the statute undoubtedly embraces respondents’ claim that petitioners violated the Social Security Act.”

---


35. The discussion here will focus on section 1983. Section 1985(3), 42 U.S.C. § 1985(3) (Supp. IV 1980), is another possibility but, because neither section 1983 nor section 1985(3) provide substantive rights and both serve only as a conduit to enforce other rights, the issues are similar under both.


37. Id. at 11.


39. 448 U.S. at 3.

40. Id. at 10-12.

41. Id. at 4 (emphasis by the Court).

suggest, therefore, that section 1983 could be used to enforce the EAHCA since it too is a federal statute.\textsuperscript{43}

It did not take the Supreme Court long to retreat from the apparently broad, clear ruling in Thiboutot. First in \textit{Pennhurst State School and Hospital v. Halderman}\textsuperscript{44} and then in \textit{Middlesex County Sewerage Authority v. National Sea Clammers Association},\textsuperscript{45} the Court substantially confused the issue.

The Court, however, has recognized two exceptions to the application of § 1983 to statutory violations. In \textit{Pennhurst} we remanded certain claims for a determination (i) whether Congress had foreclosed private enforcement of that statute in the enactment itself, and (ii) whether the statute at issue there was the kind that created enforceable "rights" under § 1983.\textsuperscript{46}

The second exception is not troublesome because a plaintiff cannot prevail in a section 1983 action where the substantive provision sought to be enforced conveys no rights, whether it is the constitution or a federal statute. This is because section 1983 does not provide any substantive rights but serves only as a conduit or cause of action for enforcing substantive rights.\textsuperscript{47}

Analytically, it is unfortunate that the Supreme Court characterized that as an exception because a ruling that plaintiff does not have enforceable rights under a federal statute is a ruling on the merits, and the case should be dismissed for failure to state a claim,\textsuperscript{48} rather than on the grounds that section 1983 cannot be utilized to enforce a statute which establishes no substantive rights in the plaintiff. This is comparable to the situation in which plaintiff states a cause of action under section 1983 to enforce the fourteenth amendment but the court decides there has been no violation of the fourteenth amendment. Such a plaintiff has stated a claim under section 1983 but simply loses on the merits.\textsuperscript{49}

\begin{itemize}
\item \textsuperscript{43} The Court specifically held in \textit{Thiboutot} that section 1988 covers statutory as well as constitutional claims. 448 U.S. at 9.
\item \textsuperscript{44} 451 U.S. 1, 28 (1981) (section 1983 may not provide a cause of action in all situations where a plaintiff attempts to enforce federal statutory rights).
\item \textsuperscript{45} 453 U.S. 1 (1981).
\item \textsuperscript{46} \textit{Id.} at 19. The question was addressed by the Court even though the plaintiffs did not assert a section 1983 claim. \textit{Id.}
\item \textsuperscript{48} FED. R. CIV. P. 12(b)(6).
\end{itemize}
The first *Pennhurst* exception mentioned in *National Sea Clammers*,\(^{50}\) where Congress forclosed private enforcement of section 1983 in the enactment itself, is very troublesome. Rarely, if ever, does Congress expressly indicate that section 1983 cannot be invoked to enforce a particular statute. Like the cases raising the question whether a right of action or certain remedies should be implied under federal statutes,\(^{51}\) this exception requires the courts to attempt to ascertain congressional intent in an area where there is little information that can be of assistance.

Not surprisingly, a substantial amount of time is consumed litigating the preliminary question of whether a right of action and certain remedies should be implied under federal statutes.\(^{52}\) The Court has suggested that "[w]hen Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights."\(^{53}\) Few would dispute that it would be "far better" if Congress did expressly address remedies when it creates rights; however, it is unrealistic to expect such clarity from Congress in what is often very controversial legislation. Efforts to set out the technicalities and details of enforcement in every piece of legislation considered by Congress could lead to endless debates and stall or prevent the passage of important legislation. While deploring the amount of time spent on the implied right of action issue, the Court in *National Sea Clammers* has needlessly required the lower courts to undertake the same time-consuming inquiry with respect to each federal statute which plaintiffs attempt to enforce through section 1983.\(^{54}\)

In both of these situations the inquiry into congressional intent

---

50. 453 U.S. at 19.
51. For a recent Supreme Court decision addressing the implied right issue, see Merrill Lynch, Pierce, Fenner & Smith v. Curran, 102 S. Ct. 1825 (1982). In Cort v. Ash, 422 U.S. 66 (1975), the Court established four criteria for determining whether to imply a private right of action. Id. at 78. Subsequent decisions, however, have made it clear that the focus is on the intent of Congress. Merrill Lynch, Pierce, Fenner & Smith v. Curran, 102 S. Ct. at 1839. See also id. at 1839 n.60.
52. An indication of the amount of time spent on this question is given by Justice Powell: "My research . . . indicates that in the past decade there have been at least 243 reported circuit court opinions and 515 district court opinions dealing with the existence of implied causes of action under various federal statutes." Merrill Lynch, Pierce, Fenner & Smith v. Curran, 102 S. Ct. 1825, 1855 n.17 (1982) (Powell, J., dissenting).
54. 453 U.S. at 19-21.
could easily be avoided. Several years ago in Bell v. Hood, the Court stated:

[W]hen federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded and the federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Strict application of Bell would make it clear to Congress that the courts will assume that Congress intends a remedy where it creates a right and further assume that Congress intends the courts to exercise the full range of their remedial powers unless expressly restricted by Congress. Instead of requiring Congress to address enforcement and remedy in each piece of legislation, Congress would have to face these questions only when it wants to change the general rule, that is, where there is a right there is a remedy.

Similarly, it should be assumed, as suggested in Thiboutot, that section 1983 means what it says and all federal statutes can be enforced through section 1983 unless Congress expressly indicates to the contrary. This is consistent with the test established in Carlson v. Green for suits under the Constitution: The defendant must demonstrate that Congress has provided an alternative, equally effective remedy that was explicitly intended to substitute for recovery directly under the Constitution. Yet the Supreme Court in Pennhurst and National Sea Clammers has decided to ignore the plain language of section 1983 and impose a needless obligation on the lower courts each time a plaintiff seeks to enforce a federal statute through section 1983.

Under Supreme Court decisions, not only do the lower courts have to attempt to determine whether Congress intended a private right of action, but where the answer is affirmative, they must then determine which remedies Congress intended. This bifurcated inquiry is demonstrated by the decision in Transamerica Mortgage Advisors, Inc., v. Lewis. After finding an implied right of action under

55. 327 U.S. 678 (1946).
57. 446 U.S. 14 (1980).
58. Id. at 18-19; see also, Note, Preclusion of Section 1983 Causes of Action by Comprehensive Statutory Remedial Schemes, 82 COLUM. L. REV. 1183 (1982).
the Investment Advisers Act of 1940, the Court concluded that it is limited to equitable relief.

An example more analogous to the attorney fee situation is found in Lieberman v. University of Chicago. There, the court raised the question of whether damages are available under title IX of the Education Amendments of 1972. The question arose after the Supreme Court held in Cannon v. University of Chicago that there is an implied right of action under title IX. Relying on its own conclusion that title IX was passed pursuant to the spending power of Congress, the court in Lieberman adopted the Pennhurst guidelines “for construing implied rights and remedies in the context of funding legislation.”

Applying the contract analysis of Pennhurst, the Lieberman court agreed with the lower court finding that damages are not available under title IX. The Seventh Circuit reasoned that absent express congressional language establishing a damage remedy, the schools could not possibly be agreeing to damage actions in their acceptance of the federal funds which trigger the application of title

64. 441 U.S. 677 (1979).
65. Id. at 717.
66. The Pennhurst guidelines can be summarized as follows:

[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract", . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously . . . . 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.

451 U.S. at 17 (citations omitted). Remedies for violations of funding conditions are discussed generally in Note, Injunctive Relief From State Violations of Federal Funding Conditions, 82 Colum. L. Rev. 1236 (1982).

67. 660 F.2d at 1187. Even if title IX was passed under the spending power, its reach "is at least as broad as the regulatory powers of Congress." Fullilove v. Klutznick, 448 U.S. 448, 475 (1980). One of the regulatory powers is provided by section 5 of the fourteenth amendment which certainly gives Congress the power to prohibit sex discrimination in education, even absent federal funds. U.S. Const. amend. XIV, § 5. If Congress could have achieved its objective under section 5, then Fullilove suggests that Congress' acting under the spending power is not a limitation on the scope of the legislation. 448 U.S. at 475-78.

68. 660 F.2d at 1187-88.
IX. Because the court characterized title IX as part of a bill designed to assist educational institutions in "acute financial distress," it concluded that Congress did not intend to subject such institutions to "potentially massive financial liability" that might exceed the federal funds. In essence, the court suggested that Congress could not have intended to impose additional financial burdens on schools accepting the federal funds when the purpose of the Act was to relieve some of the financial burdens.

One of the leading cases addressing the question whether a plaintiff prevailing under the EAHCA can recover compensatory damages and attorney fees also arose in the Seventh Circuit. In *Anderson v. Thompson,* the court held that section 615(e) of the EAHCA, which provides district courts with the power to "grant such relief as the court determines is appropriate," does not provide for damages unless exceptional circumstances exist. An unlimited damage remedy was found to be inconsistent with the legislative intent in passing the EAHCA. Two exceptional circumstances were recognized: First, where parents make alternate arrangements to those offered by the school system in order to avoid a serious risk of injury to the child's physical health; and second, where the school system acts in bad faith in failing to make available the procedural protections of the EAHCA which could result in an appropriate placement. In so holding, the *Anderson* court has suggested that parents should be allowed to recoup the cost of the alternative arrangements.

Because the plaintiffs in *Anderson* sought attorney fees under section 1988, the court had to address the question of whether section 1983 could be used as a conduit to attorney fees under section

69. Id.

70. Id. Even if one accepts the *Penhurst* contract analysis for purposes of determining whether funding legislation provides rights, 451 U.S. at 47-51, 53-55 (White, J., dissenting), it is not clear that this analysis supports the exclusion of damages under statutes such as title IX which do create such rights. Entities which accept federal funds should be aware that damages can be assessed for breach of the "contract."

71. 658 F.2d 1205 (7th Cir. 1981).


73. Id.

74. 658 F.2d at 1209-14.

75. Id.

76. Id. at 1213-14.

77. Id. For cases relying on *Anderson,* but finding that exceptional circumstances have not been demonstrated, see Doe v. Anrig, 692 F.2d 800, 811-12 (1st Cir. 1982); Mark R. v. Board of Educ., 546 F. Supp. 1027, 1030-32 (N.D. Ill. 1982).
This, of course, required a determination of whether section 1983 can be used to enforce the EAHCA. Relying on Pennhurst, the Anderson court stated that “despite Thiboutot, section 1983 is not applicable in situations ‘where the governing statute provides an exclusive remedy for violations of the Act.’ ” The EAHCA does not expressly indicate that it provides an exclusive remedy. To determine whether the statutory remedy under the EAHCA was intended to be exclusive, the Anderson court looked to Brown v. General Services Administration and Great American Federal Savings and Loans Association v. Novotny. These cases direct the courts to an examination of the legislative history and the structure of the statute to determine whether Congress intended it to be exclusive. As with the implied right of action inquiry, the courts are left to struggle with the question of congressional intent in situations where there is frequently no indication of that intent.

Addressing the EAHCA, the court in Anderson indicated that the statute, “like the statutes at issue in Brown and Novotny, contains an elaborate administrative and judicial enforcement system.” Next, the court indicated that “Congress when enacting the EAHCA also believed that the rights it was creating had heretofore been inadequately protected under federal law.” This reason is somewhat suspect. Clearly, the EAHCA was a recognition that the rights of children with handicaps were not being adequately protected by the states and local schools. But certainly Congress was not suggesting

---

78. The court summarily concluded that the “EAHCA does not itself provide for attorney’s fees.” 658 F.2d at 1217. See infra notes 154-58 and accompanying text.
79. 658 F.2d at 1214-15. While the Seventh Circuit addressed the availability of section 1983 in order to determine whether fees could be awarded under section 1988, if section 1983 is available to enforce the EAHCA, then a plaintiff should be able to seek damages under section 1983 even if the EAHCA itself does not provide for such damages. It could be argued that section 1983 is available, but only to the extent that it is not inconsistent with the EAHCA. But see Calhoun v. Illinois State Bd. of Educ., 550 F. Supp. 796 (N.D. Ill. 1982). Thus, if a court finds that damages are not available under the EAHCA, it then would not allow them under section 1983.
80. Id. at 1215 (citations omitted).
83. See supra note 51 and accompanying text.
84. See supra notes 51-70 and accompanying text. While the task is similar, it will be suggested that the test is different. See infra notes 124-30 and accompanying text.
85. 658 F.2d at 1216.
86. Id.
that the right of children with handicaps to an equal educational opportunity had not been established. To the contrary, the legislative history of the EAHCA makes it apparent that Congress was acting to assist the states in complying with the court decisions establishing the right of children with handicaps to an equal educational opportunity under the fourteenth amendment.87

Finally, the court found the most compelling reason for its conclusion that the EAHCA provides the exclusive remedy to be “that the relief it provides is inconsistent with section 1983 relief.”88 According to the court, the two are inconsistent because section 1983 provides for damages whereas the court had already concluded that the EAHCA does not provide for damages absent exceptional circumstances. In summary the court stated:

[T]he availability of a private right of action under the EAHCA, the detailed statutory administrative and judicial scheme, the fact that Congress intended the EAHCA to create new rights, and the absence of a traditional damage remedy, together compel our conclusion that the judicial remedy provided in the EAHCA was intended to be exclusive.89

There are several grounds on which to challenge the result reached in Anderson. First, the legislative history does not support the conclusion that “Congress intended the EAHCA to create new rights.”90 To the contrary, Congress passed the EAHCA primarily to provide financial assistance to the states to help them comply with existing constitutional rights as found by several decisions.91 While the EAHCA created new rights in the sense that it made financial assistance available and provided a federal statutory basis for the right to an equal educational opportunity, Congress clearly recognized that this right already existed under the fourteenth amendment.92

Second, the fact that the statute establishes a “detailed statutory administrative and judicial scheme”93 in no way implies that Con-

88. 658 F.2d at 1216.
89. Id. at 1217.
90. Id.
91. See supra note 87.
92. Id.
93. 658 F.2d at 1217.
gress intended to exclude section 1983 actions. It is just as logical to conclude that Congress established this scheme because it wanted to ensure that the states set up an administrative enforcement mechanism to eliminate the necessity for every aggrieved person to file a lawsuit.\textsuperscript{94} Administrative proceedings are generally more accessible to parents and children, particularly those who cannot afford the services of an attorney. Certainly the fact that a federal statute mandates a state administrative procedure in no way suggests that section 1983 should not be available. Nothing in the legislative history of the EAHCA suggests that Congress intended to preclude section 1983 actions. Every indication is that Congress was attempting to increase enforcement of the rights of children with handicaps. This is made clear in the Senate Committee report:

The Committee wishes to clarify, however, that it does not intend the existence of such an entity [for insuring compliance in the states] to limit the right of individuals to seek redress of grievances through other avenues, such as bringing civil action in Federal or State courts to protect and enforce the rights of handicapped children under applicable law.\textsuperscript{95}

The existence of a state administrative procedure was not determinative in \textit{Thiboutot}. The Social Security Act expressly requires the states to make an administrative hearing process available to recipients who wish to contest agency action.\textsuperscript{96} The EAHCA differs from the Social Security Act in that the former provides for judicial review of the agency decision in either federal or state court. In contrast, the Social Security Act is silent on this topic. Judicial review of the agency decision, however, is available in most states under an administrative procedure act. Therefore, the only real difference between the EAHCA and the Social Security Act is that the former provides for judicial review of the state administrative proceedings

\textsuperscript{94} This was recognized by the Senate Committee:
It should not, however, be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy. It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school. S. 6 takes positive necessary steps to ensure that the rights of children and their families are protected.


\textsuperscript{96} \textit{See} 42 U.S.C. § 602(a)(4) (1976); 45 C.F.R. § 205.10 (1982).
in a federal court, as well as a state court. The judicial remedy provided by section 615(e)(2) of the EAHCA is clearly in the nature of judicial review rather than an original action. It seems rather tenuous to conclude that Congress, simply by making judicial review of the state agency proceedings available in federal court as well as state court, intended to preclude section 1983 actions to enforce the EAHCA when such actions are available to enforce the Social Security Act.

There is evidence in the legislative history that Congress expressly provided a judicial remedy in section 615(e)(2) of the EAHCA not because it wanted to preclude an action under section 1983, but rather because it wanted to assure that judicial review of state agency action could be obtained in a federal court. The House Committee expressed concern about the lack of enforcement in the states even though most of them make education for children with handicaps mandatory. Absent the provision in section 615(e)(2), such federal court review of state agency action would not have been possible. Further, by limiting the judicial proceeding to review of agency action, it is less likely that Congress even considered the remedy question because compensatory damages are normally not available in state administrative proceedings. This being true, there would be no reason to submit evidence relating to damages to the administrative hearing officer and, therefore, the record being reviewed by the court would not include evidence relating to damages. In federal court the seventh amendment to the United States Constitution assures a jury trial in actions seeking compensatory dam-

---

97. Specifically, the statute states:

    Any party aggrieved by the findings and decisions made [by the state educational agency] . . . shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph, the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.


98. H. REP. No. 332, supra note 87, at 10 (legislation without "meaningful provisions for actual enforcement, has proven to be of limited value").

99. De novo actions under section 1983 would have been available to enforce the EAHCA but Congress was seeking to improve nonjudicial enforcement and the availability of judicial review tends to improve agency proceedings.

100. The EAHCA provision mandating the administrative procedures does not address the remedy question. See 20 U.S.C. § 1415 (1976).
ages. While section 615(e)(2) allows the court to "hear additional evidence at the request of a party," there is no evidence that Congress intended jury trials under section 615(e)(2). Quite simply, requiring a state administrative remedy and providing for judicial review of the agency proceedings in no way suggests that Congress intended to preclude section 1983 actions for damages.

The policy reasons advanced in Anderson, supporting the conclusion that damages are not available under the EAHCA, are not convincing for a number of reasons. First, the concerns expressed are partially served by the doctrine of qualified immunity, which applies in section 1983 actions seeking damages from school officials for violations of the EAHCA. Difficulty in diagnosing children with handicaps and uncertainty about some of the handicapping conditions may provide a basis for a qualified immunity defense. As expressed by the Supreme Court in its most recent decision on this topic, Harlow v. Fitzgerald, "we therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The determination of whether clearly established rights were violated can usually be made on a motion for summary judgment. Therefore, school officials making a "good faith effort to provide a child with an appropriate education ... " would not be "exposing themselves to monetary liability for incorrect placements. . . ." School corporations or entities, however, are not protected by this immunity. It is, however, not at all clear why school corporations should be insulated from damages when they violate the rights of children with handicaps under the EAHCA. Concern about the


102. See supra notes 71-77 and accompanying text.


104. 658 F.2d at 1213.

105. 102 S. Ct. 2727 (1982).

106. Id. at 2738.

107. Id. at 2737-39.

108. 658 F.2d at 1213.

109. Id.

school system's lack of available funds for education\textsuperscript{111} could insulate the schools from any damage action, not just those under the EAHCA. This is directly contrary to the Supreme Court's decision in \textit{Owen v. City of Independence},\textsuperscript{112} which holds that municipal entities are responsible for damages caused by actions of officials taken pursuant to the policy of the municipality.\textsuperscript{113} Because respondeat superior liability is not available, school corporations would be liable only where the violations are caused by official policy.\textsuperscript{114}

Another argument supporting a damage award for violations of the EAHCA flows from the language of section 615(e)(2) itself. It states that the court "shall grant such relief as [it] determines is appropriate."\textsuperscript{115} On its face, this would seem to allow any relief, including damages. The court in \textit{Anderson}, however, concluded that the term "appropriate," when viewed in its context in section 615(e)(2), "was generally intended to be restricted to injunctive relief. . . ."\textsuperscript{116} In arriving at this conclusion, the court relied on the failure to demonstrate a congressional intent to create a damage remedy.\textsuperscript{117}

The problem with this analysis is that it requires plaintiff to demonstrate evidence of a congressional intent to provide for damages, whereas under \textit{National Sea Clammers}, the test should be whether the defendant can demonstrate that Congress intended to preclude damages under section 1983.\textsuperscript{118} The court in \textit{Anderson} admits that the "legislative history of the [EAHCA] is silent on the question of whether a damage remedy was intended."\textsuperscript{119} This being the case, it must be presumed that section 1983 and the remedies it provides are available.

In \textit{National Sea Clammers}, the Court was looking for factors tending "to demonstrate congressional intent to preclude the remedy of suits under § 1983."\textsuperscript{120} Although the Court did not require an express indication of congressional intent, it did require a showing of such an intent rather than simply the absence of an intention to

\textsuperscript{111} 658 F.2d at 1212-13.
\textsuperscript{112} 445 U.S. 622 (1980).
\textsuperscript{113} \textit{Id.} at 644-50.
\textsuperscript{114} \textit{Id.} at 655 n.39; see also Monell v. Department of Social Servs., 436 U.S. 658, 690-95 (1978).
\textsuperscript{116} 658 F.2d at 1211.
\textsuperscript{117} \textit{Id.} at 1211-12.
\textsuperscript{118} 453 U.S. at 20.
\textsuperscript{119} 658 F.2d at 1211.
\textsuperscript{120} 453 U.S. at 20.
make damages available. Justice Stevens, in dissent, suggested that the Court improperly placed the burden on the section 1983 plaintiff. After stating that “the question is not whether Congress ‘intended to preserve the § 1983 right of action,’ but rather whether Congress intended to withdraw that right of action,” Justice Stevens indicated that the dispute involved more than semantics.

Justice Stevens is correct in this assertion. The proper application of National Sea Clammers is demonstrated by the decision in Ryans v. New Jersey Commission for the Blind, where the court compared the inquiry under National Sea Clammers to that involved in determining the existence of an implied private right of action.

121. Id. at 27 n.11 (Stevens, J., dissenting).
122. Id. at 27.
123. Specifically, Justice Stevens stated:
As the Court formulates the inquiry, the burden is placed on the § 1983 plaintiff to show an explicit or implicit congressional intention that violations of the substantive statute at issue be redressed in private § 1983 actions. The correct formulation, however, places the burden on the defendant to show that Congress intended to foreclose access to the § 1983 remedy as a means of enforcing the substantive statute. Because the § 1983 plaintiff is invoking an express private remedy that is, on its face, applicable any time a violation of a federal statute is alleged, . . . the burden is properly placed on the defendant to show that Congress, in enacting the particular substantive statute at issue, intended an exception to the general rule of § 1983. A defendant may carry this burden by identifying express statutory language or legislative history revealing Congress' intent to foreclose the § 1983 remedy, or by establishing that Congress intended that the remedies provided in the substantive statute itself be exclusive.

125. Id. at 848. In addressing the issue of private rights of action, the court in Ryans stated:
A court will not presume to find a private right of action in a statute silent as to remedy unless there is some evidence to indicate that the legislature impliedly intended one to exist. In determining the exclusivity question, on the other hand, the court must presume a § 1983 right of action to exist unless there is evidence in the underlying statute which suggests an intent on the part of Congress to foreclose such an action. It is quite possible to find in the same statute, therefore, the absence of any intention on the part of Congress to either create an implied right of action or to preclude the assertion of a § 1983 action. In such a case, as in Thiboutor, an individual aggrieved under the terms of the statute would be entitled to bring a § 1983 action against state officials but not private parties.

Id. (citations omitted) (emphasis in original).
In so doing, the court concluded that title I of the Rehabilitation Act of 1973 does not provide an implied right of action but can be enforced through section 1983 after exhaustion of the administrative remedies provided by the Act.

The reasoning and analysis of Ryans is more important than its result. The holding was less difficult than cases involving the EAHCA because title I of the Rehabilitation Act of 1973, while requiring state administrative procedures, contains no judicial remedies. Thus, the Ryans court found the situation more analogous to Thiboutot than National Sea Clammers.

In order to determine whether it would be inconsistent with the EAHCA to allow enforcement actions pursuant to section 1983, it is necessary to address the practical ramifications of allowing such actions. First, since section 1983 provides for damages, it would allow an additional remedy which Anderson held was available directly under the EAHCA only in two exceptional circumstances. Although damages would be available under section 1983, school officials could raise qualified immunity as an affirmative defense. Injunctive relief is also available under section 1983, but this is available directly under the EAHCA as well. Finally, section 1983 would make it possible for prevailing plaintiffs to seek attorney fees under section 1988.

It can be demonstrated that the availability of section 1983 is not at all inconsistent with the EAHCA.

In a case in which a child with handicaps challenges the adequacy of the educational opportunity made available, the first step

---

127. 542 F. Supp. at 846; see also Jones v. Illinois Dep't of Rehabilitation Servs., 504 F. Supp. 1244, 1248-51 (N.D. Ill. 1981), aff'd in part, rev'd and remanded in part. 689 F.2d 724 (7th Cir. 1982) (plaintiff obtained all the relief sought under section 504 of the Rehabilitation Act of 1973, thus the court did not decide whether title I could be enforced through section 1983).
128. The recent holding of the Supreme Court in Patsy v. Board of Regents, 102 S. Ct. 2557 (1982), that a section 1983 plaintiff does not have to exhaust state administrative remedies absent a congressional intent to require such exhaustion, id. at 2566, was distinguished by the Ryans court because Congress had made "express provision for a state administrative scheme, [and] its intent to require exhaustion of that scheme may readily be inferred." 542 F. Supp. at 850 n.13.
129. Similar approaches are suggested in Wartelle & Louden, supra note 46, at 540-42; Comment, supra note 123, at 457-66; Note, supra note 58, at 1199-1205.
130. 542 F. Supp. at 848-49.
131. See supra notes 71-77 and accompanying text.
would normally be the administrative proceedings mandated by section 615 of the EAHCA. Exhaustion of these remedies would not be required where it would be futile or where the administrative remedy would be inadequate. Assuming that the matter is not satisfactorily resolved at the administrative level, the child with handicap could seek judicial review in federal court pursuant to section 615(e)(2). Under Anderson, relief based on this claim would normally be limited to injunctive relief.

The child with handicaps could also assert a claim under section 1983, alleging violations of the EAHCA and seeking not only injunctive relief, but also compensatory damages and attorney fees. The court could conduct a bifurcated proceeding. If plaintiff seeks relief in the nature of a preliminary injunction, the judicial review portion of the case could be decided promptly, with or without additional evidence, and the section 1983 claim for damages could subsequently be submitted to a jury. In the latter aspect of the case, the school officials could, or course, assert a qualified immunity defense. The congressional purposes in mandating the state administrative proceedings through section 615 of the EAHCA would be satisfied by plaintiff's filing of an administrative complaint before proceeding in federal court. If plaintiff prevails in the administrative proceedings, injunctive relief would no longer be necessary but the plaintiff may still bring a section 1983 action seeking compensatory damages for violation of rights secured by the EAHCA.

The courts are divided on the question of whether section 1983 is available to enforce the EAHCA. Several of the decisions hold-


135. 658 F.2d at 1210.

136. It would normally be advantageous for the plaintiff to assert claims under the fourteenth amendment and the Rehabilitation Act of 1973 as well.


ing that section 1983 is not available rely on Anderson.\textsuperscript{139} Those de­
cisions not citing Anderson do not advance any new arguments. A ques­tion not answered by Anderson is whether a plaintiff can use section 1983 to enforce rights under the EAHCA when a state re­
uses to provide the administrative remedy mandated under section 615 of the EAHCA.

That issue is currently pending before the Seventh Circuit in Doe v. Koger.\textsuperscript{140} In Koger, the district court found that defendants violated the EAHCA by expelling a child with handicaps in accordance with normal disciplinary procedures “without first determining, by [EAHCA] procedures, whether his propensity to disrupt was the result of his inappropriate placement.”\textsuperscript{141} The court did not indicate whether it was enforcing the EAHCA through section 615(e)(2) or through section 1983. It subsequently denied, however, the plain­
tiff’s request for fees under section 1988 on the basis of Anderson.\textsuperscript{142}

Because the judicial proceedings authorized by section 615(e)(2) are in the nature of judicial review of the state agency’s determina­
tion and because defendants in Koger refused to utilize the adminis­
trative procedures mandated by section 615, it is not clear that a plaintiff who seeks an injunction requiring the state to conduct pro­
cedings under section 615 to determine the relationship between the disruptive behavior and the handicap can proceed under section 615(e)(2).\textsuperscript{143} Assuming that the answer is negative, such a plaintiff would be without a judicial remedy for a clear violation of the


\textsuperscript{140} 480 F. Supp. 225 (N.D. Ind. 1979), appeal docketed, No. 82-1805 (7th Cir. May 19, 1982). The author is the attorney of record on appeal.

\textsuperscript{141} Id. at 229; see also Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982); S-I v. Turlington, 635 F.2d 342 (5th Cir.), cert. denied, 454 U.S. 1030 (1981); Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978).

\textsuperscript{142} See supra notes 78-89 and accompanying text.

\textsuperscript{143} It may be that this is a situation where exhaustion is not required because it would be futile or there is not an adequate administrative remedy. See supra note 134 and accompanying text. The state, however, may have a suitable administrative process but contends that school disciplinary proceedings are not covered by section 615 of the EAHCA. For a discussion of disciplinary exclusions under the EAHCA, see Note. Disci­
plinary Exclusion of Handicapped Students: An Examination of the Limitations Imposed
EAHCA unless section 1983 is available. States could avoid enforcement of the EAHCA by simply refusing to establish the administrative procedures mandated by section 615.

At least one court of appeals has suggested that section 1983 is available to enforce the EAHCA in this situation. In *Hymes v. Harnett County Board of Education*, the court awarded fees under section 1983 because "no judicial relief route is provided in the EAHCA, to prevent an alteration in the educational placement of a child, pending administrative determination (and any appeal therefrom to the courts)." The situation in *Hymes* is very similar to *Koger* in that the litigation sought "to obtain restoration to the regular school program" pending the outcome of administrative proceedings.

Concerning the applicability of section 615(e)(2), the court in *Hymes* stated that the EAHCA provides no jurisdictional basis for a suit to enforce the right to remain in status quo prior to the completion of the administrative process. The court reemphasized that section 615(e)(2) limits the jurisdictional provisions of EAHCA to actions of any party aggrieved by the findings and decisions in an administrative hearing conducted by the state or local educational agency.

*by the Education for All Handicapped Children Act of 1975, 51 Fordham L. Rev. 168 (1982).*

144. 664 F.2d 410 (4th Cir. 1981).

145. *Id.* at 413. See also *Tatro v. Texas*, 516 F. Supp. 968 (N.D. Tex. 1981). In *Tatro*, the court concluded that a section 1983 action was available as long as the plaintiff had exhausted administrative remedies under section 615(e). The court stated that "[w]hatever may be the role of § 1983 where the attack is upon the adequacy of procedures themselves, this court sees no role for § 1983 here." *Id.* at 984.

146. 664 F.2d at 411.

147. Specifically, the court in *Hymes* stated:

If the current educational placement at that time had remained the normal classroom program, EAHCA appears to mandate that the child should have been allowed to remain in the program pending the outcome of state or local administrative proceedings. 20 U.S.C. § 1415(e)(3). Yet the EAHCA provides no jurisdictional basis for a suit to enforce the right to remain in *status quo* [sic] prior to completion of the administrative process. 20 U.S.C. § 1415(e)(2) limits the jurisdictional provisions of EAHCA to actions of any party aggrieved by the findings and decision in an administrative hearing conducted by the state or local educational agency. Obviously, no such findings and decision were extant at the time the reinstatement relief was sought in federal court and gained through a negotiated settlement between the parties.

Here, in fact, the child had already been removed from the normal classroom program placement. In that stance, he had, under EAHCA, even less access to any jurisdiction of the federal court.

*Id.* at 412 n.2.
agency. Under this rationale, section 1983 should be available to enforce the EAHCA in some circumstances even if the Anderson decision is correct in holding that section 1983 is generally not available.

Courts have been struggling with the application of Pennhurst and National Sea Clammers in cases involving plaintiffs' attempts to use section 1983 to enforce federal statutes other than those relating to the educational rights of children with handicaps. Most decisions have avoided the more difficult question by concluding that the plaintiff either has no rights under the substantive federal statute or did not state a violation of the statute. Other courts have considered the comprehensiveness of the remedy and the inconsistency with the federal substantive statute to preclude the use of section 1983 to enforce a federal statute. Yet another court summarily concluded, relying on Thiboutot and Cuyler v. Adams, that a plaintiff could use section 1983 to enforce the Interstate Agreement on Detainers. These cases provide little help in deciding the issue discussed here; rather, they simply confirm the uncertainty which was unnecessarily created by the decisions in Pennhurst and National Sea Clammers.

A second argument in favor of an award of attorney fees under

---

148. Id.
the EAHCA relies on the following language of section 615(e)(2):
"[i]n any action brought under this paragraph the court shall . . .
grant such relief as the court determines is appropriate."153 As noted
earlier, the court in Anderson concluded that this language does not
generally authorize a damage remedy.154 The court also concluded,
very summarily, that the "EAHCA does not itself provide for attorney's
fees . . . ."155 If "such relief as the court determines is appro­
priate" does not include damages, it is even less likely that it
provides for an award of attorney fees.

The legislative history is silent on this question and there appear
to be no reported decisions, other than Anderson, on point. It is clear
that attorney fees, however, are not available unless a case falls
within one of the exceptions to the "American Rule"156 which gener­
ally prohibits an award of fees.157 While one of the exceptions is
where Congress provides for fees by statute, this seems to apply only
where Congress has made "specific and explicit provisions for the
allowance of attorneys' fees . . . ."158 Absent any authority on
point, it would seem fair to say that a recovery of fees based on the
language of section 615(e)(2) is highly unlikely.

C. The Rehabilitation Act of 1973

In contrast to the EAHCA, the Rehabilitation Act of 1973 ex­
plicitly provides for attorney fees. It was amended in 1978 to add

154. See supra notes 71-77 and accompanying text. Although the court in Anderson
found that a limited damage award might be appropriate in two exceptional circum­
stances, it is not clear whether the court found this to be expressly authorized by the
statute or whether it is implied under the statute. 658 F.2d at 1210-14. In Miener v.
Missouri, 673 F.2d 969 (8th Cir.), cert. denied, 103 S. Ct. 215 (1982), the court stated that
"[a]lthough some courts have assessed the availability of damages under a Cort v. Ash
analysis, e.g., Loughran v. Flanders, 470 F. Supp. 110 (D. Conn. 1979), we eschew this
approach in favor of the narrower focus adopted in Anderson . . . ." Id. at 979.

The "narrower focus" apparently refers to the question of whether Congress in­
tended damages to be included in "appropriate" relief. Several courts have agreed that
damages are not available under the EAHCA. Davis v. Maine Endwell Cent. School
Dist., 542 F. Supp. 1257, 1261 (N.D.N.Y. 1982); Reineman v. Valley View Community
1982).

155. Anderson v. Thompson, 658 F.2d at 1217.
156. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260-62
(1975).
157. Id. at 260.
158. Id. The court cited several statutes in which Congress did make such specific
and explicit provisions. Id. at 260-61 n.33.
new section 505 which provides: "In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 159 Although the act refers to the discretion of the court, the language is almost identical to that in section 1988 under which a prevailing plaintiff is entitled to fees as a matter of course unless special circumstances would render an award unjust. 160 Because of the similarity in language and the legislative history, courts generally have recognized that fee awards under section 505(b) "are governed by the same considerations controlling in section 1988 actions." 161 The legislative history clearly supports these cases.

Both the House Report 162 and the Senate Report 163 refer to the failure of section 504 to provide for attorney fees as an omission. The Senate Report refers to testimony which notes the unavailability of section 1988 and suggests the need for the same coverage. 164 Remarks made on the floor of the Senate are more explicit. Senator Cranston, 165 author of the attorney fee provision in section 505, stated:

I emphasize that it is intended that interpretation of the attorney's fee provision in the committee bill be analogous to interpretations of . . . [section 1988]. The legislative history and expressions of legislative intent with respect to . . . [section 1988] are applicable to the new section 505(b). Thus, for example, the discussion of "prevailing party" and "reasonable fees" found in the Senate Committee Report to accompany H.R. 15460 (H. Rept. No. 95-1558), in particular pages 6 to 9, would be applicable whenever there is judicial consideration of the handicapped attorney's fees provision contained in proposed section 505(b). 166

Senator Cranston went on to highlight several points in stressing

160. LARSON, supra note 24, at 33-83.
161. Jones v. Illinois Dep't of Rehabilitation Servs., 689 F.2d 724, 730 n.8 (7th Cir. 1982); see also Disabled in Action v. Mayor & City Council of Baltimore, 685 F.2d 881, 885 n.4 (4th Cir. 1982); United Handicapped Fed'n v. Andre, 622 F.2d 342, 345-48 (8th Cir. 1980).
164. Id.
165. In Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976), the Court indicated that "a statement of one of the legislation's sponsors . . . deserves to be accorded substantial weight in interpreting the statute." Id. at 564.
the similarity. First, he indicated that a prevailing plaintiff should recover fees "unless special circumstances would render such an award unjust." 167 Second, a party prevailing through a consent judgment or other settlement would be entitled to fees. 168 Third, since the authorization of fees under section 505(b) was based on the power of Congress under section 5 of the fourteenth amendment, it was anticipated that fees would be awarded against local and state governmental officials in their official capacity. 169 Senator Cranston's statements were repeated, nearly verbatim, by Senator Stafford when he was commenting on the conference bill that ultimately passed. 170 Finally, Senator Cranston, in the discussion of the conference bill, emphasized the continuing applicability of his earlier remarks concerning attorney fees. 171

It is quite apparent, therefore, that section 505(b) is just as favorable to prevailing plaintiffs as section 1988. A number of courts have awarded fees under section 505(b) to prevailing plaintiffs in special education cases. 172 Courts in other special education cases have awarded fees under both section 1988 and section 505(b). 173 Fees have also been awarded under section 505(b) in a variety of cases concerning the rights of persons with handicaps in areas other than elementary and secondary education. 174

Although cases dealing with the elementary and secondary education rights of children with handicaps are often brought under both the EAHCA and the Rehabilitation Act of 1973, it is not un-

167. Id. at 30,347.
168. Id.
169. Id.
170. Id. at 37,507-08 (statement of Sen. Stafford).
171. Id. at 37,509 (statement of Sen. Cranston).
common for a court expressly to decide only the EAHCA claim. As discussed in the previous section, the availability of fees to prevailing plaintiffs under the EAHCA is not at all clear and, therefore, prevailing plaintiffs prefer to seek fees under section 505(b). A problem arises, however, when the court either does not indicate which statute it is relying upon in ruling for the plaintiffs or rules in favor of the plaintiff on the EAHCA claim without deciding the Rehabilitation Act claim. In such a situation, the prevailing plaintiffs can advance two arguments in support of a request for fees under section 505(b).

The first, and most desirable argument, is that the regulations implementing section 504 provide essentially the same rights to elementary and secondary school children as the EAHCA and, therefore, plaintiffs who prevail under the EAHCA automatically are entitled to fees under section 505(b). This overlap or close relationship between the EAHCA and section 504 has been recognized by the courts. For example, in *Kaelin v. Grubbs* the court stated:

Section 504 of the Rehabilitation Act . . . complements the Handicapped Children Act. Section 504 bars discrimination against handicapped persons by programs or activities receiving federal financial assistance. Many of the procedural protections provided in the Handicapped Children Act are also contained in Section 504's implementing regulations . . . . Specifically, the regulations provide that plenary due process procedures govern the identification, evaluation, and educational placement of a handicapped child. . . .

175. Compare Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979) with Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981), where the court did not have to consider an award of fees under section 505(b) because a section 504 claim was not alleged in the complaint. *Id.* at 1217 n.20.

176. 45 C.F.R. § 84.1-6 (1982).

177. 682 F.2d 595 (6th Cir. 1982).

The elementary and secondary education portion of the regulations implementing section 504 supports the decisions which interpret section 504 as coextensive with the EAHCA. While section 504 was passed prior to the effective date of the relevant amendments to the EAHCA, the implementing regulations were not adopted by HEW until it was ordered to do so by a federal court; this was after the passage of the 1975 amendments to the EAHCA. In adopting the section 504 regulations, HEW was obviously concerned with the procedural rights of students with handicaps in states which chose not to accept federal funding under the EAHCA. This is evident from the commentary to the regulation.

This commentary further indicates that the subpart dealing with elementary and secondary education "generally conforms to the standards established for the education of handicapped persons in [several cases] as well as in the [EAHCA]."

If the EAHCA and section 504 are indeed coextensive, as suggested by the cases cited previously and the regulations implementing section 504, then a plaintiff prevailing under the EAHCA should automatically be entitled to fees under section 505(b), regardless of whether the court explicitly rules on the section 504 claim.

* funding available under the EAHCA, see New Mexico Ass'n for Retarded Citizens v. New Mexico, 495 F. Supp. 391 (D.N.M. 1980), rev'd and remanded, 678 F.2d 847 (10th Cir. 1982) (“[e]vidence of the State’s alleged [s]ection 504 violations must be evaluated by the trial court in light of the Supreme Court’s determination [in Southeastern Community College v. Davis, 442 U.S. 397 (1979)] that the statute and its regulations are designed to prohibit discrimination rather than require affirmative action”).

179. 45 C.F.R. §§ 84.31-.39 (1982).
180. See supra note 178 and accompanying text.
182. The commentary to the regulation states:
Under § 84.36, a recipient must establish a system of due process procedures to be afforded to parents or guardians before the recipient takes any action regarding the identification, evaluation, or educational placement of a person, who, because of handicap, needs or is believed to need special education or related services. This section has been revised. Because the due process procedures of the EHA, incorporated by reference in the proposed section 504 regulation, are inappropriate for some recipients not subject to that Act, the section now specifies minimum necessary procedures: notice, a right to inspect records, an impartial hearing with the right to representation by counsel, and a review procedure. The EHA procedures remain one means of meeting the regulation's due process requirements, however, and are recommended to recipients as a model.

45 C.F.R. § 84, app. A ¶ 125 (1982); see also 45 C.F.R. § 84.36 (1982).
184. See supra note 178.
185. See supra note 176.
This is consistent with the situation where a non-fee statutory claim is joined with a substantial constitutional claim and fees are sought under section 1988. As indicated previously, the legislative history suggests that the plaintiff who prevails on the non-fee claim should be awarded fees without requiring the court to reach the constitutional question.\footnote{See supra notes 18-22 and accompanying text.} Several cases have relied on this legislative history.\footnote{See supra note 21.} It must be recognized that this analogy to cases with statutory and constitutional claims has its limitations because the strong policy against unnecessarily deciding constitutional issues does not apply to cases presenting two statutory claims.\footnote{See Turillo v. Tyson, 535 F. Supp. 577, 586 n.12 (D.R.I. 1982).} Nevertheless, judicial economy certainly argues against requiring the courts to rule on a statutory claim that is relevant only to the attorney fee issue. This is particularly true in this situation because, even if a court concludes that the EAHCA and section 504 are not coextensive, where a plaintiff prevails under the EAHCA, the section 504 claim is certainly substantial.

An alternative is to require the court to rule on both the EAHCA and section 504 claims. While it seems to run contrary to considerations of judicial economy, there is some support in the legislative history to section 1988 for this alternative.\footnote{See supra note 21.} In passing section 1988, Congress anticipated that some cases would include both fee and non-fee statutory claims.

To the extent a plaintiff joins a claim under one of the statutes enumerated in \[the fees act\] with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees.\footnote{H.R. REP. No. 1558, 94th Cong. 2d Sess. 4 n.7 (1976) (citation omitted).} The legislative history cites \textit{Morales v. Haines},\footnote{349 F. Supp. 684 (N.D. Ill. 1972), aff'd in part, vacated and remanded in part, 486 F.2d 880 (7th Cir. 1973).} but it does not actually support the conclusion reached. In \textit{Morales}, the district court ruled in favor of plaintiff on his constitutional claim and the appellate court remanded the case for a determination of the statutory
claims\textsuperscript{192} because of the request for damages and attorney fees.\textsuperscript{193} The court, therefore, had to decide the statutory claims for purposes of relief other than attorney fees.\textsuperscript{194}

As a matter of policy, where the plaintiff prevails under the EAHCA and a claim for the same relief under section 504 is at least substantial, fees should be awarded under section 505(b) without a formal ruling on the section 504 claim. Where the court views the section 504 claim as questionable,\textsuperscript{195} then it should proceed and decide the merits of the section 504 claim unless fees are awarded under section 1988.

III. Conclusion

Plaintiffs in suits to enforce the elementary and secondary educational rights of children with handicaps have three federal sources of substantive rights: the fourteenth amendment to the United States Constitution;\textsuperscript{196} the EAHCA;\textsuperscript{197} and section 504 of the Rehabilitation Act of 1973.\textsuperscript{198} The strongest of these three in terms of substantive rights is the EAHCA and, unfortunately, it presents the greatest difficulty in seeking an award of attorney fees. Plaintiffs prevailing under either the Constitution or section 504 are in a very good position to recover fees under sections 1988 and 505(b). Therefore, in most situations plaintiffs should assert claims under all three provisions.

A claim under the fourteenth amendment is both the most difficult to win on the merits and the least likely to be decided by the court. It is not necessary, however, to prevail on this claim in order to recover fees under section 1988.\textsuperscript{199} To the extent that plaintiffs can convince the court that the fourteenth amendment claim is substantial, fees can be awarded under that section. The substantiality of the fourteenth amendment claim will usually be addressed by the court when deciding defendant's motion to dismiss for failure to

\textsuperscript{192} Morales v. Haines, 486 F.2d 880 (7th Cir. 1973). These included claims under 42 U.S.C. §§ 1982, 1983 as well as under the Fair Housing Act, 42 U.S.C. §§ 3604, 3612. Id. at 881.

\textsuperscript{193} Morales v. Haines, 486 F.2d 880, 882 (7th Cir. 1973).

\textsuperscript{194} It is not clear why the constitutional claim was decided before the statutory claims.

\textsuperscript{195} This would usually occur in a situation where the court is concerned about the questions raised in Monahan v. Nebraska, 687 F.2d 1164, 1169-71 (8th Cir. 1982).

\textsuperscript{196} See supra note 1.

\textsuperscript{197} See supra note 2.

\textsuperscript{198} See supra note 3.

\textsuperscript{199} See supra text accompanying notes 10-32.
state a claim. Under the standards set forth by the Supreme Court in *Hagans v. Lavine*, the constitutional claim should normally survive a motion to dismiss. Assuming there is a constitutional basis for the relief sought in the complaint, denial of the motion to dismiss should assure an award of attorney fees under section 1988 if the plaintiff ultimately prevails on a statutory claim.

Concerning the statutory claims under the EAHCA and section 504, it is generally advisable for plaintiff to pursue relief under both. That is, in seeking relief—whether in the form of a request for a preliminary injunction, a motion for summary judgment, or at trial—plaintiff should attempt to pursue these two claims as one. The goal is, of course, to have the court rule in favor of plaintiff on the basis of both the EAHCA and section 504. If this is accomplished, then plaintiff is entitled to fees under either section 1988, because of the substantial constitutional claim, or section 505(b), because of the successful claim under section 504.

It is entirely possible that the court will want to avoid ruling on the section 504 claim because of the potential problems suggested by the Supreme Court in *Southeastern Community College v. Davis*.

When this happens, plaintiff should pursue relief on the merits under the EAHCA and, only after prevailing under that statute, address the fee issue. Again, if there is a substantial constitutional claim under the fourteenth amendment, plaintiff should recover fees without resort to section 505(b). On the other hand, if there is not a substantial constitutional claim, then plaintiff will have to ask the court to rule on the section 504 claim solely for the purpose of awarding fees or seek fees pursuant to section 1988 on the theory that the EAHCA can be enforced through section 1983.

In order to preserve all options relating to attorney fees, plaintiff should exhaust state administrative remedies under the EAHCA, assuming adequate remedies are available and exhaustion would not be futile. Section 615 of the EAHCA expressly requires resort to state mandated administrative remedies before bringing an action in court; courts, however, have recognized the normal exceptions to the exhaustion requirement.

---

haustion prior to bringing a section 504 claim in court,\textsuperscript{203} if it is necessary to exhaust these remedies under the EAHCA, there is generally no reason not to exhaust all available administrative remedies and raise all claims.

Exhaustion is not required in a section 1983 action to enforce the fourteenth amendment.\textsuperscript{204} Assuming administrative proceedings are pursued, all legal claims should be raised before the administrative agency. This not only precludes a later assertion by the defendants that only some claims were exhausted, it also lays the groundwork for an award of fees for the time spent in pursuing administrative proceedings.\textsuperscript{205}

Plaintiffs prevailing in cases to enforce the educational rights of children with handicaps should normally be allowed to recover fees under either section 1983 or section 505(b). Yet, because the EAHCA does not itself provide for fees and because the availability of section 1983 to enforce the EAHCA is uncertain, the issue is not as clear, nor as simple as advocates of children with handicaps would prefer.

\textsuperscript{203} See, e.g., Miener v. Missouri, 673 F.2d 969, 978 (8th Cir.), cert. denied, 103 S. Ct. 215 (1982). The court cited cases on both sides of the exhaustion issue. Id. at 978-79 n.10.
