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TABLE OF CONTENTS

I. Introduction .............................................. 565
II. Section 1983 and the EAHCA ............................. 570
   A. Independent Section 1983 Grounds for Relief ........ 570
   B. Relief for Violation of EAHCA Substantive Rights ... 572
   C. Damages, Jury Trials, and Attorneys’ Fees .......... 572
      1. Damages and Compensatory Education .......... 573
      2. Jury Trial .................................... 577
      3. Attorneys’ Fees ................................ 578
III. The Validity of Section 504 Regulations ............... 580
IV. Section 504 and the EAHCA ............................... 586
   A. Overlapping Provisions ............................. 587
   B. Expansion of Rights and Protections Under Section 504 ........................................... 588
      1. Increased Protections for Those Covered by the EAHCA? Tatro and Rowley .................... 588
      2. Miscellaneous Additional Protections .......... 592
         a. Physical Setting ............................. 592
         b. Regulatory Monitoring ....................... 592
         c. Damages .................................... 595

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Educational rights of handicapped students are created and protected primarily by the Education for All Handicapped Children Act (EAHCA). The EAHCA provides extensive, detailed procedural and substantive educational rights and protections to handicapped children and their parents. The key provision of the EAHCA is that each handicapped child is entitled to a free and appropriate public education (FAPE).

A free appropriate public education is defined as special education and related services provided in conformity with requirements of the EAHCA. Congress provided extensive procedural protections to insure that school authorities provide handicapped children with a FAPE. The centerpiece of the EAHCA is the

I. INTRODUCTION

Educational rights of handicapped students are created and protected primarily by the Education for All Handicapped Children Act (EAHCA). The EAHCA provides extensive, detailed procedural and substantive educational rights and protections to handicapped children and their parents. The key provision of the EAHCA is that each handicapped child is entitled to a free and appropriate public education (FAPE). A free appropriate public education is defined as special education and related services provided in conformity with requirements of the EAHCA. Congress provided extensive procedural protections to insure that school authorities provide handicapped children with a FAPE. The centerpiece of the EAHCA is the
requirement that the local educational agency (LEA) develop, at least annually, an individualized educational program (IEP) for each handicapped child. The IEP is to state the child's present level of educational functioning and articulate both long- and short-term educational goals and objectives.

Section 504 of the Rehabilitation Act of 1973 also affects educational rights of the handicapped. Section 504 is broad and general in coverage, while the EAHCA is narrow and specific. Section 504 prohibits discrimination generally and covers not just educational institutions, nor simply public institutions, since it covers all handicapped and all programs or activities receiving federal assistance. There is, however, significant overlap between the two statutes.

Regulations promulgated by the Department of Education implementing section 504 provide detailed procedural and substantive obligations which local educational agencies are obligated to follow. In many instances, the regulations explicitly mirror the EAHCA and the regulations promulgated under it. In fact, the relationship of section 504 and the EAHCA was recognized by the Department of Education.

As the regulations being developed under section 504 . . . are in the process of

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8. Indeed, New Mexico, at one time the only state to have opted out of the EAHCA, discovered that it would have to follow much of the EAHCA in order to avoid discrimination under § 504. New Mexico Ass'n for Retarded Citizens v. New Mexico, 495 F. Supp. 391 (D.N.M. 1982), rev'd in part, 678 F.2d 847 (10th Cir. 1982). The New Mexico Legislature participated in the EAHCA funding after it became clear that § 504 would require compliance with federal requirements without the corresponding funding of the EAHCA. R. Salomone, EQUAL EDUCATION UNDER LAW 140 n.46 (1986).
being finalized at the same time these proposed regulations [for the EAHCA] are being published, every effort will be made to have the final regulations be consistent in concept, policy, and, wherever possible, consistent with the language of the final 504 regulations.12

Given the apparent overlap of section 504 and the EAHCA, actions were brought to vindicate educational rights under both acts. Several advantages were readily apparent in bringing an action under section 504 for protections that were also available under the EAHCA. One of the significant differences was that attorneys’ fees were available under section 504 but not under the EAHCA until late 1986.13 Further, section 504 does not have the extensive administrative procedures which must be exhausted prior to bringing a law suit.14

In addition to section 504, suits were brought concurrently under 42 U.S.C. § 198315 on claims covered by the EAHCA.16 Section 1983 claims were brought on the assumption that failure to provide services consistent with the requirements of the EAHCA was a deprivation of a right guaranteed by federal statute.17

Section 1983, unlike section 504, provided few additional protections, since it had no separate implementing regulations. Section 1983, however, provided three important advantages: attorneys’ fees;18 damages;19 and no administrative remedy to exhaust.20 The fact that violations of section 504 or section 1983 could result in the award of attorneys’ fees guaranteed that suits alleging underlying violations of the EAHCA would also allege violations of sections 504 and 1983.21

The lower courts split on the issue of whether the EAHCA was the exclusive remedy or whether actions covered by the EAHCA could

13. See infra notes 22-32 and accompanying text.
16. E.g., Jose P. v. Ambach, 669 F.2d 865 (2d Cir. 1982).
17. See, e.g., Quackenbush v. Johnson City School Dist., 716 F.2d 141 (2d Cir. 1983).
also be brought concurrently under sections 1983 and 504.\textsuperscript{22} The United States Supreme Court in 1984 addressed the issue in \textit{Smith v. Robinson}.\textsuperscript{23} The Court held that "Congress intended the [EAHCA] to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education."\textsuperscript{24}

In \textit{Smith}, the discussion focused on the availability of attorneys’ fees by way of a section 1983 or section 504 claim. The rationale used by the Court was similar for precluding both the section 1983 and 504 claims. The Supreme Court held that the EAHCA and its lack of an attorneys’ fees provision, as well as its detailed administrative requirements, could not be circumvented by filing suit under sections 504 or 1983. In the language of the Court:

Even assuming that the reach of § 504 is coextensive with that of the [EAHCA], there is no doubt that the remedies, rights, and procedures Congress set out in the [EAHCA] are the ones it intended to apply to a handicapped child’s claim to a free appropriate public education. We are satisfied that Congress did not intend a handicapped child to be able to circumvent the requirements or supplement the remedies of the [EAHCA] by resort to the general antidiscrimination provision of § 504.\textsuperscript{25}

\textit{Smith} interestingly left open the possibility of suits under either section 1983 or 504 where the respective statute provided protection in addition to that offered by the EAHCA.\textsuperscript{26}

Considering the section 1983 action, the Court in \textit{Smith} found the due process and equal protection claims raised by the plaintiffs to be virtually identical to the EAHCA claims that were raised. The Court, however, did not rule out relief under section 1983 when the violation alleged was not the substantial equivalent to an underlying EAHCA claim. In fact, the Court raised, but left undecided, the issue of "whether the procedural safeguards set out in the [EAHCA] manifest Congress’ intent to preclude resort to § 1983 on a due process challenge."\textsuperscript{27}

Similarly, \textit{Smith} recognized that where section 504 provided greater substantive protection, suit could be brought under section 504:

We emphasize the narrowness of our holding. We do not address a situation where the [EAHCA] is not available or where § 504 guarantees substantive rights greater than those available under the [EAHCA]. We hold only that

\begin{flushright}
\textsuperscript{22} Compare Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1578-79 (11th Cir. 1983); Quackenbush v. Johnson City School Dist., 716 F.2d 141 (2d Cir. 1983)(§ 1983 remedies available) with Department of Educ. v. Katherine D., 727 F.2d 809 (9th Cir. 1983)(EAHCA provides exclusive remedies); Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981).
\textsuperscript{24} Id. at 1009.
\textsuperscript{25} Id. at 1019.
\textsuperscript{26} See infra text accompanying note 28.
\end{flushright}
where, as here, whatever remedy might be provided under § 504 is provided
with more clarity and precision under the [EAHCA], a plaintiff may not cir-
cumvent or enlarge on the remedies available under the [EAHCA] by resort to
§ 504.28

Congress reacted to Smith by enacting the Handicapped Children’s
Protection Act of 1986,29 amending the EAHCA and providing for the
award of attorneys' fees.30 In addition to the award of attorneys' fees,
however, Congress also provided that the EAHCA would not be the
“exclusive avenue” and a cause of action under sections 1983 and 504
was again possible for educational rights of the handicapped.31

The attorneys' fees provisions of the amendments were widely
known and quickly acted upon by lawyers.32 The reaffirmation of the
role of sections 504 and 1983, however, appears to have received little
attention.33 Given the resurrection of sections 1983 and 504, this Arti-

28. Id. at 1021.
30. For a discussion of the attorneys’ fees provisions of the Act see Guernsey, The
School Pays The Piper, But How Much? Attorneys’ Fees In Special Education
Cases After The Handicapped Children’s Protection Act Of 1986, 23 WAKE FOREST
31. 20 U.S.C. § 1415(f) (Supp. IV 1986). The amended EAHCA now provides:
Nothing in this chapter shall be construed to restrict or limit the rights,
procedures, and remedies available under the Constitution, title V of the
Rehabilitation Act of 1973 [§ 504], or other Federal statutes . . . except
that before the filing of a civil action under such laws seeking relief that
is also available under [the EAHCA], the procedures . . . of this section
shall be exhausted to the same extent as would be required had the ac-
tion been brought under . . . [the EAHCA].
Id.
33. The silence with which this provision was received is illustrated by numerous
cases dismissing § 1983 or § 504 claims after the amendment was passed. See, e.g.,
(CRR) 559-332 (9th Cir. Mar. 9, 1988); Association for Retarded Citizens of Ala.,
Inc. v. Teague, 830 F.2d 158 (11th Cir. 1987); Barwacz v. Michigan Dep’t of Educ.,
Supp. 1108 (W.D. Pa. 1987)(§ 1983 claims dismissed on basis of Smith v. Robin-
This lack of attention is consistent with the general lack of understanding of the
relationship between § 504 and the EAHCA. In the House Report supporting
the then proposed Handicapped Children’s Protection Act of 1986, in reference to the
ability to file complaints under § 504 as well as the EAHCA, it was written
"[s]everal witnesses testified regarding the need to clarify the availability of these
Some of the lack of attention to the amendment itself, however, may result from
confusion over the effective date of the amended EAHCA. Congress specifi-
cally provided that the attorneys' fees provisions would have partial retroactive
effect. Attorneys' fees were to be available in all actions brought after July 3,
1984 or pending on July 4, 1984. Handicapped Children’s Protection Act of 1986,
which were concluded over two years prior to the amendment. The absence of
Article will address the interrelationship of the three statutes. The Article concludes that despite the significant similarity between section 504 and the EAHCA, an act of Congress which many referred to simply as an attorneys' fee bill has provided additional substantive educational rights. In fact, it will be suggested that when Congress set out to kill *Smith v. Robinson*, it may have wounded two other Supreme Court cases interpreting the EAHCA: *Board of Education v. Rowley* and *Irving Independent School District v. Tutro*.

II. SECTION 1983 AND THE EAHCA

When viewing the interplay of section 1983, three areas of inquiry must be addressed. First, section 1983 claims may be based on independent violations which exist outside the relief afforded by the EAHCA. Second, it must be questioned whether section 1983 provides independent grounds for asserting rights specifically contained in the EAHCA and to which relief could be granted under the EAHCA. Third, several practical issues of how section 1983 changes special education litigation must be addressed.

A. Independent Section 1983 Grounds for Relief

Section 1983 claims, completely independent of the underlying EAHCA claim, are illustrated by a number of court decisions which followed *Smith v. Robinson*. It should be remembered that dicta in *Smith* left open the possibility of an independent due process claim. At one point the Court stated "[o]n the other hand, unlike an independent equal protection claim, maintenance of an independent due process challenge to state procedures would not be inconsistent with

such a specific provision has led courts to hold that the reinstatement of the § 504 and § 1983 claims was not to be retroactive. E.g., *Silano v. Tirozzi*, 651 F. Supp. 1021, 1025 (D. Conn. 1987). Courts, such as *Silano*, however, have held that § 504 and § 1983 are not only unavailable for claims litigated to completion between July 4, 1984 and the amendment in August, 1986, but § 504 and § 1983 are unavailable for claims which were pending at the time of the amendment. *Id.* (absence of retroactive language in light of attorneys' fees retroactivity, congressional language that no intent to be retroactive, and manifest injustice all indicate § 1983 and § 504 inapplicable to claims pending at time of enactment); *Taylor v. Board of Educ.*, 649 F. Supp. 1253, 1259 (N.D.N.Y. 1986).

Several other courts have held that the absence of a specific retroactivity provision does not preclude assertion of § 504 or § 1983 claims in suits which were pending at the time of the amendment. See, e.g., *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987) ("a court is required to apply the law in effect when it renders as decision, absent congressional directive to the contrary"). Accord *Edward B. v. Rochester N.H. School Dist.*, [1986-87 Dec.] Educ. Handicapped L. Rep. (CRR) 558:176 (D.N.H. Nov. 20, 1986)(no injustice in applying amended act to pending suit).

34. 458 U.S. 176 (1982).
the EAHCA's comprehensive scheme." The Court, apparently by way of example, stated:

And, while Congress apparently has determined local and state agencies should not be burdened with attorney's fees to litigants who succeed, through resort to procedures outlined in the [EAHCA] . . . there is no indication that agencies should be exempt from a fee award where plaintiffs have had to resort to judicial relief to force the agencies to provide them the process they were constitutionally due.\(^{37}\)

Following Smith, lower courts adopted the Supreme Court's dicta and held that various actions by local and state agencies constituted independent violations of section 1983. Not surprisingly, one of the first cases involved facts nearly identical to the example used by the Supreme Court. In Manecke v. School Board,\(^{38}\) the Eleventh Circuit Court of Appeals addressed a claim brought under sections 1983 and 504. In Manecke, plaintiffs filed suit alleging the school board failed to provide them with a due process hearing on the issue of an educational placement for their daughter. Plaintiffs further alleged that this failure required them unilaterally to place their daughter in a residential facility. The district court dismissed both the section 1983 and 504 claims. However, after discussing Smith, the Eleventh Circuit panel stated that "[w]here, as here, the local educational agency deprives a handicapped child of due process by effectively denying that child access to the heart of the [EAHCA] administrative machinery, the impartial due process hearing, an action may be brought under § 1983."\(^{39}\)

Procedural violations other than failure of authorities to hold a due process hearing were also recognized as grounds for relief under section 1983. In Rose v. Nebraska,\(^{40}\) plaintiff brought suit under sections 1983 and 504. Plaintiff claimed that, in violation of the due process clause of the fourteenth amendment, the hearing procedures used by the state did not provide for an impartial hearing. The district court in Rose granted an injunction and eventually awarded attorneys' fees for work done in securing the injunction. The Eighth Circuit held that Smith should be read as recognizing that independent procedural claims are subject to section 1983. Citing the Supreme Court's references in Smith that due process claims might appropriately be brought under section 1983, the court held "that a § 1983 suit and a fee award are appropriate when a plaintiff claims that he is being denied due process."\(^{41}\)

The Fifth Circuit also addressed the issue following Smith. In


\(^{37}\) Id.

\(^{38}\) 762 F.2d 912 (11th Cir. 1985).

\(^{39}\) Id. at 919.

\(^{40}\) 748 F.2d 1258 (8th Cir. 1984). See also Stark v. Walter, [1984-85 Dec.] Educ. Handi

\(^{41}\) Rose v. Nebraska, 748 F.2d 1258, 1263 (8th Cir. 1984).
Teresa P. v. Alief Independent School District,\textsuperscript{42} the parents alleged procedural violations "in notice, evaluation, consent, development of individualized educational plans, timing of meetings, and expulsion from services."\textsuperscript{43} Relying on Smith, the court held that "attorney's fees [premised on a violation of section 1983] may be appropriate in EAHCA cases where procedural due process claims were effectively raised and maintained."\textsuperscript{44}

The protection afforded in actions such as these is critical to the ability of the EAHCA to function. The administrative proceedings mandated by the EAHCA would be ineffective protection since the LEA has precluded use of the administrative process.

\textbf{B. Relief for Violation of EAHCA Substantive Rights}

If failure to provide access to procedural protections was the only area where the amended EAHCA allowed concurrent suits under section 1983, nothing affecting the relationship of section 1983 and the EAHCA would have been changed by the 1986 amendment. These actions could be brought under Smith.\textsuperscript{45} The question becomes whether rights under section 1983 are also coextensive with the substantive protections of the EAHCA. In other words, may suit be brought under section 1983 on the basis that a proposed IEP will not provide a FAPE? Or, may a suit be brought under section 1983 attacking the qualifications of the evaluation team or the validity of the testing tools?

The answer would seem to be yes. A failure to provide any of the rights, either procedural or substantive, under the EAHCA should allow suit to be brought under section 1983. The Supreme Court has repeatedly held that section 1983 allows recovery for claims based solely on violations of federal statutes.\textsuperscript{46}

\textbf{C. Damages, Jury Trials, and Attorneys' Fees}

The availability of section 1983 has a practical impact on including litigation in special education in at least three areas: availability of

\textsuperscript{42} 744 F.2d 484 (5th Cir. 1984).
\textsuperscript{43} Id. at 491.
\textsuperscript{44} Id.
\textsuperscript{45} See supra text accompanying note 28.
damages (including compensatory educational services); jury trials; and attorneys' fees independent of the EAHCA attorneys' fees provisions.

1. Damages and Compensatory Education

As a general rule, absent egregious due process violations or endangerment of a child's health, general monetary damages are unavailable under the EAHCA. The ability to bring suit under section 1983, however, opens up the possibility of receiving compensatory damage awards, since damages clearly may be awarded under section 1983 and probably under section 504.

Damage issues must be addressed in light of two forms of damages: first, general monetary awards; and second, the provision of compensatory educational services. A third type of damages, reimbursement for a private placement when a parent has unilaterally placed their child in a private placement when it is subsequently determined that the LEA's proposed placement was inappropriate, has been specifically approved by the United States Supreme Court in Burlington School Committee v. Massachusetts Department of Education.

Concern that section 1983 would open up civil rights litigation to general compensatory and punitive damages is at least one concern underlying several decisions holding that a particular civil rights act is the exclusive avenue to obtain relief. One of the first cases decided after the amendment to the EAHCA recognized this possibility. In Jackson v. Franklin County School Board, a student and his mother brought suit under the EAHCA and section 1983. In Jackson, the child was suspended for three days and, as a result of delinquency

47. E.g., Anderson v. Thompson, 658 F.2d 1205, 1213-14 (7th Cir. 1981).
48. See Carey v. Piphus, 435 U.S. 247 (1978). Damages against the state in federal court, however, are barred by the eleventh amendment. Edelman v. Jordan, 415 U.S. 651 (1974). To recover damages in federal court, therefore, suit must be brought against the local school district or the local educators. Id. at 667 n.12 ("a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment"); Fay v. South Colonie Cent. School Dist., 802 F.2d 21 (2d Cir. 1986) (damages could not be obtained against state defendant, but damages may be awarded against local school division). See generally Gilliam v. Omaha, 524 F.2d 1013 (8th Cir. 1975). Damages awarded under § 1983 must be truly compensatory and not based on the abstract value or worth of the constitutional or statutory right violated. Memphis Community School Dist. v. Stachura, 106 S. Ct. 2537 (1986).
51. See, e.g., Day v. Wayne County Bd. of Auditors, 749 F.2d 1199 (6th Cir. 1984) (Title VII of the Civil Rights Act of 1964 is exclusive remedy).
52. 806 F.2d 623 (5th Cir. 1986). See also Board of Educ. v. Diamond, 806 F.2d 987, 996 (3d Cir. 1986).
charges having been brought, was sent to a state hospital for evaluation and treatment. Upon release from the hospital, the LEA indicated that the child should not return to school since there was only one month remaining and exams would soon start. The following September the LEA informed the mother that the child could not return to school prior to development of an IEP and that development of an IEP would have to wait until the delinquency matter was resolved. Following the parents' filing of a complaint with the state department of education and a law suit under section 1983, the LEA held an IEP conference. The LEA proposed a residential placement but the mother rejected the placement recommendation. Plaintiffs did not challenge the recommendation, but sought monetary damages, challenging the denial of educational services for the final month of the 1984 school year and for the first two months of the next school year.\(^{53}\)

The court held that failure of the LEA to convene a conference was a "per se violation of the [EAHCA],"\(^{54}\) and that the child's "due process rights, as contemplated by the Fourteenth Amendment and as specifically enumerated by the [EAHCA], were violated by Franklin County School officials' failure to provide notice and a hearing concerning his continued exclusion from school."\(^{55}\) The court remanded the case to determine the extent to which the LEA's actions were the cause of any loss to the child and "what damages, either monetary, or in the form of remedial educational services ... would be appropriate."\(^{56}\) Even though the court clearly recognized the right to monetary damages, it stated "although monetary relief is available, remedial educational services may be more valuable than any pecuniary damages that could be awarded."\(^{57}\)

53. The court seemed to assume that the provision making § 1983 and § 504 available is retroactive. Jackson v. Franklin County School Bd., 806 F.2d 623, 627-28 (5th Cir. 1986). As it points out in a footnote, however, in response to the argument that Smith v. Robinson applied when the suit was originally filed:

   [E]ven had Congress not amended the [EAHCA], we believe James' § 1983 claim was proper. The Court's holding in Smith was limited to equal protection claims, whereas [the child here] sought relief for a deprivation of his due process rights. ... [T]he Court explained:

   [T]here is no indication that agencies should be exempt from a fee award where plaintiffs have had to resort to judicial relief to force the agencies to provide them the process they are constitutionally due.

    \(Id.\) at n.7.

54. \(Id.\) at 628.

55. \(Id.\) at 631.

56. \(Id.\) See also Fay v. South Colonie Cent. School Dist., 802 F.2d 21 (2d Cir. 1986)(upon appropriate proof, compensatory damages could be had for the LEA's failure to provide required notices).

57. Jackson v. Franklin County School Bd., 806 F.2d 623, 632 (5th Cir. 1986). It should be emphasized that for many situations there will not be monetary damages. As the court pointed out in Jackson, compensatory educational services will be better suited to meet the needs of the plaintiff. See generally Comment, Com-
The *Jackson* court's reference to remedial services indicates what is perhaps the most important aspect of section 1983 availability. Compensatory educational services are designed to provide remedial educational programming to make up for the time when the school system was responsible for providing educational services but failed to do so.\textsuperscript{58}

Courts have split on the availability of compensatory educational services under the EAHCA.\textsuperscript{59} The basic argument against compensatory educational services was that the EAHCA did not allow the award of retrospective monetary damages.\textsuperscript{60} Compensatory education, it was argued, is prospective in nature, requires the expenditure of money, and therefore constitutes a damage award. Such damage awards were (1) not contemplated by the EAHCA, and (2) as against state defendants, in violation of the eleventh amendment.\textsuperscript{61} In addition, it was argued that since *Rowley* did not require maximization of educational benefit, where a child has already received some educational benefit, the *Rowley* standard has been met and there is no requirement for compensatory education.\textsuperscript{62}

The early arguments in favor of compensatory educational services were (1) that the relief sought was prospective and therefore did not constitute damages,\textsuperscript{63} and (2) since it was prospective in nature, the eleventh amendment prohibition against state defendants did not apply.\textsuperscript{64} More recently analogy has been made to *Burlington School District v.税务局*, \textit{supra note 47} and accompanying text.


\textsuperscript{60} See supra note 47 and accompanying text.

\textsuperscript{61} *Alexopulos v. San Francisco Unified School Dist.*, 817 F.2d 551 (9th Cir. 1987); *Alexopulos v. Riles*, 784 F.2d 1408 (9th Cir. 1986)(relying on original *Miener* opinion); *Powell v. DeFore*, 699 F.2d 1078 (11th Cir. 1983)(per curiam); *Miener v. Missouri*, 673 F.2d 969, 979 (8th Cir. 1982), rev'd, 800 F.2d 749 (8th Cir. 1986).

\textsuperscript{62} *Timms v. Metropolitan School Dist.*, 718 F.2d 212 (7th Cir. 1983), \textit{superseded}, 722 F.2d 1310 (7th Cir. 1983)(recognizing possible availability of compensatory education).


Committee v. Department of Education\(^6^5\) in upholding the award of compensatory education. In Burlington, the United States Supreme Court held that the EAHCA “includes the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.”\(^6^6\) Rejecting the argument that such payments constitute damages, the Court stated that it “merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP.”\(^6^7\)

A strong argument can be made that compensatory education is likewise not damages, but that it merely requires the school system to provide educational services that it would have provided all along were it meeting its requirement to provide a FAPE.\(^6^8\) Such an analysis pulls the debate away from the eleventh amendment concerns by simply defining the problem as something other than damages.\(^6^9\) Whether by analogy to Burlington, or by way of section 1983, in circumstances where compensatory education is appropriate relief, it now appears available under section 1983 if not under the EAHCA.\(^7^0\)

Finally, the availability of damages also gives a parent more flexi-
bility in unilaterally removing a child from a placement and then later obtaining reimbursement when it is established that the proposed LEA placement was inappropriate and the placement to which they removed the child was appropriate. The Supreme Court had recognized in *Burlington* that reimbursement under these circumstances was proper. Bringing an action under section 1983 should provide not only the reimbursement costs as per *Burlington*, but also costs associated with the need to find the appropriate placement. 71

2. *Jury Trial*

Under a number of theories, EAHCA claims are not subject to trial by jury. The statute specifically provides that the *court* will make a

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determination based on a preponderance of the evidence. Further, the relief available under the EAHCA is equitable in nature. It is conceivable, therefore, that the amended EAHCA may have given the option to parties to request a jury trial by bringing suit concurrently under section 1983. At least one United States district court has provided a jury trial in a suit alleging violations of section 1983 and the EAHCA.

3. Attorneys' Fees

Attorneys' fees, now available under the EAHCA, are limited to an appropriate hourly rate multiplied by the time reasonably spent on the case. However, under sections 1983 and 504, and other statutes, many courts are awarding upward adjustments or multipliers for var-

73. Compare Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983)(no jury trial under Title VI); Great American Fed. Sav. and Loan Ass'n v. Novotny, 442 U.S. 366, 372-75 (1979)(no right to a jury trial under Title VII); Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1407 n.3 (5th Cir. 1983)("[t]he inappropriateness of trial before the jury is underscored by the apparent absence of legal damages under section 504"); Shuttleworth v. Broward County, 639 F. Supp. 654, 661 (S.D. Fla. 1986)("[c]ourts have generally found that there is no right to trial by jury under § 504 . . . because the remedies under the Act are essentially equitable in nature").

An additional argument that there is no right to a jury trial under the EAHCA would be that judicial jurisdiction under the EAHCA is in the nature of a review of an administrative determination, and therefore raises questions for the court as opposed to a jury. See B. Schwartiz, Administrative Law 71-72 (2d ed. 1984). The court's review under the EAHCA, however, is greater than the typical administrative review. The requirement that the court make an independent determination based on a preponderance of the evidence, 20 U.S.C. § 1415(e) (1982), while giving due weight to the administrative proceedings, Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 205-06 (1982), makes the court's review close to a de novo hearing. See generally Guernsey, When The Teachers And Parents Can't Agree, Who Really Decides? Burdens of Proof And Standards Of Review Under The Education For All Handicapped Children Act, 36 CLEV. ST. L. REV. 67, 77-86 (1988).

Although a claim may not technically be subject to trial by jury, if the parties request a jury trial, and the court does not on its own initiative find it improper, there is no error. See Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1407 n.3 (5th Cir. 1983). See also, e.g., Ross v. William Beaumont Hosp., 678 F. Supp. 655 (E.D. Mich. 1988)(§ 504 action tried by jury).

74. S. Nahmod, supra note 20, at 34-35.
75. Dodds v. Simpson, 676 F. Supp. 1045 (D. Or. 1987). The suit also involved claimed § 504 violations. To the extent the relief sought is equitable in nature, a jury trial is inappropriate. To the extent there are both legal issues (e.g., compensatory damages) and equitable issues (e.g., injunctive relief), the legal issues should first be tried by the jury and then the equitable issues tried by the court. Ross v. Bernhard, 396 U.S. 531, 537-38 (1970).
77. Id. § 1415(e)(4)(C).
ous factors such as efficiency, economy, delay in fee payment, or contingency of success.\textsuperscript{78} Such multipliers were specifically approved under some circumstances by the Supreme Court in \textit{Blum v. Stenson}.\textsuperscript{79}

The amended EAHCA specifically states "\textit{[n]o bonus or multiplier may be used in calculating the fees under this subsection.}"\textsuperscript{80} Under some very limited circumstances, however, including those in which the school system has violated the procedural protections of the EAHCA, the functional equivalent of a multiplier may well be authorized. The amended EAHCA requires the reduction of attorneys' fees under circumstances where the parents have unduly protracted the final resolution, the amount of fees unreasonably exceeds the hourly rate prevailing in the community, or the time spent or the legal services performed were excessive.\textsuperscript{81} The amended EAHCA, however, also provides: "The provisions [authorizing the reduction of attorneys' fees] shall not apply in any action or proceeding if the court finds the State or local educational agency unreasonably protracted the final resolution of the action or there was a violation of this section."\textsuperscript{82}

The practical import of the prohibition in the amended EAHCA against reduction of attorneys' fees may well be to negate the "no bonus or multiplier" provision in the amended EAHCA in certain circumstances. The law appears to state that even when the parents unreasonably protract the resolution (with the likely result that billable hours have increased), and the parents ask for attorneys' fees beyond those prevailing in the community or for hours that were excessive, the fees shall be awarded in full if the LEA protracted the process or violated section 1415. This prohibition against reduction looks like a bonus for having had to cope with the inappropriate behavior of the LEA.\textsuperscript{83}

One court has also used the availability of attorneys' fees under section 1988\textsuperscript{84} as a means of avoiding what it felt was a difficult question. In \textit{J.G. v. Board of Education},\textsuperscript{85} the action had been filed without exhausting the administrative remedies under the EAHCA. The exhaustion requirement had been excused, but the court was uncertain whether failure to exhaust, even though excused, would preclude awarding attorneys' fees under the EAHCA. Rather than decide the issue, the court simply awarded attorneys' fees under section 1988.\textsuperscript{86}

\textsuperscript{78} H. Newberg, \textit{Attorney Fee Awards} 163 (1986).
\textsuperscript{81} Id. § 1415(e)(4)(F).
\textsuperscript{82} Id. § 1415(e)(4)(G).
\textsuperscript{83} See Guernsey, \textit{supra} note 30, at 263-66.
\textsuperscript{85} 830 F.2d 444 (2d Cir. 1987).
\textsuperscript{86} Id. at 447-48.
III. THE VALIDITY OF SECTION 504 REGULATIONS

As previously stated, section 504 is a broad statutory prohibition. Regulations promulgated under it, however, articulate very specific requirements that school systems are required to follow. Before a meaningful comparison of the requirements under section 504 and the EAHCA can be made, however, a preliminary question concerning the validity of the Department of Education's regulations under section 504 must be addressed; that is, to the extent that section 504 regulations require more than the EAHCA, do they exceed the authority Congress intended the Department of Education to exercise?

Any discussion of the validity of section 504 regulations must begin with a discussion of the Supreme Court decision in Southeastern Community College v. Davis.87 Davis involved the efforts of a hearing impaired woman to gain enrollment in a community college nurse training program. Frances Davis filed suit in federal court alleging the community college violated her rights under section 504 in failing to accept her into its nursing program and providing adjustments to its

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Section 702 of the Administrative Procedures Act provides for judicial review of administrative actions by establishing that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (Supp. IV 1986). The scope of the judicial review entails determining whether agency actions are arbitrary, capricious, an abuse of discretion, contrary to the Constitution, in excess of statutory authority, without observance of procedural requirements, or unsupported by substantial evidence. 5 U.S.C. § 706 (1988). Section 706 reads:

The reviewing court shall . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Id.
standard educational program which would allow her to benefit despite her disability. Ms. Davis' disability allowed her to understand normal speech only through lip reading.

In addressing Ms. Davis' claims of discrimination, the Court focused on section 504's "otherwise qualified" language, and concluded that Ms. Davis was not otherwise qualified. Focusing on her inability to hear speech, the Court stated that such an ability was "indispensable for many of the functions that a registered nurse performs." Further, the Court held that the accommodations that would be required for Ms. Davis to benefit from the nursing program would require such fundamental changes in the course of study that she would not "receive even a rough equivalent of the training a nursing program normally gives."

The Supreme Court placed heavy reliance on the administrative regulations in reaching its decision, holding that it "is reasonably clear that § 84.44(a) does not encompass the kind of curricular changes that would be necessary to accommodate respondent in the nursing program." Expanding on this concern with substantive changes in the program, the Court stated:

Moreover, an interpretation of the regulations that required the extensive modifications necessary to include respondent in the nursing program would raise grave doubts about their validity. If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead, they would constitute an unauthorized extension of obligations imposed by that statute.

The Court held that even if the regulation attempted to create an affirmative obligation, HEW lacked the authority to do so. However, the Court left open the door that some affirmative action might be required. Holding that the line between "a lawful refusal to extend affirmative action and illegal discrimination" was not clear, the Court stated that under certain circumstances continuing past practices could result in discrimination against qualified individuals. For example, technology might change such that "without imposing undue

89. Id. at 410. Ms. Davis suggested that she be given individual supervision whenever attending patients directly and that certain required courses be waived. Id. at 407-08.
90. Id. at 409.
91. Id. at 410. The Court also pointed out Congress' specific requirement for affirmative efforts on the part of the federal government under §§ 501(b) and 503(a) and the absence of such a specific affirmative action requirement under § 504 as an indication "that Congress understood accommodation of the needs of the handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so." Id. at 411.
92. Id at 411-12.
93. Id. at 412.
financial and administrative burdens upon a State" accommodations could be made which would allow participation by otherwise qualified individuals.\textsuperscript{94}

What \textit{Davis} left was the rule that section 504 does not require affirmative actions on the part of the recipient, unless the requested accommodations do not impose "undue financial and administrative burdens."\textsuperscript{95} The question then becomes whether the regulations applying affirmative obligations on the part of LEAs to provide educational services to the handicapped are invalid as beyond the power granted by Congress.

While decisions are not consistent in determining what an undue burden is, there are significant decisions holding that section 504 requires a great deal. Perhaps the most important case addressing the impact of \textit{Davis} on the special education regulations under section 504 is \textit{New Mexico Association for Retarded Citizens v. New Mexico}.\textsuperscript{96} At the time of this decision, New Mexico was the only state that had not accepted funds under the EAHCA and therefore was not required to follow the regulations promulgated thereunder. The suit alleged the state's treatment of handicapped students violated section 504. In holding for the plaintiffs, the district court concluded that the various therapies and diagnostic services offered by the state were insufficient and that the state inadequately funded special education programs.

The United States Tenth Circuit Court of Appeals held that the Supreme Court's suggestion in \textit{Davis} that refusal to modify an existing program might become discriminatory was applicable where "the entity's practices preclude the handicapped from obtaining system benefits realized by the non-handicapped."\textsuperscript{97} Before such a find-

\textsuperscript{94} Id. The Supreme Court's use of the phrase "affirmative action" was criticized by many commentators. The Court subsequently stated "[r]egardless of the aptness of our choice of words in \textit{Davis}, it is clear from the context . . . that the term 'affirmative action' referred to those 'changes,' 'adjustments,' or modifications to existing programs that would be 'substantial' . . . or that would constitute 'fundamental, alteration[s] in the nature of the program.'" Alexander v. Choate, 469 U.S. 287, 301 n.20 (1985) (citations omitted).

\textsuperscript{95} Southeastern Community College v. Davis, 442 U.S. 397, 412 (1979).

\textsuperscript{96} 678 F.2d 847 (10th Cir. 1982). See also, e.g., S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981)(§ 504 requires educational services and procedural protections); Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978)(inadequate educational programming for emotionally disturbed children); Howard S. v. Friendswood Indep. School Dist., 454 F. Supp. 634 (S.D. Tex. 1978)(failure to provide educational programming and procedural protections to brain damaged, emotionally disturbed child).

\textsuperscript{97} New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 853 (10th Cir. 1982). The court drew an analogy to two cases arising under Title VI of the Civil Rights Act of 1964, in which it was held that failure to provide educational programs for non-English speaking students discriminated against those students. See Lau v. Nichols, 414 U.S. 563 (1974); Serna v. Portales Mun. Schools, 499 F.2d 1147 (10th Cir. 1974).
ing, however, the district court must determine whether (1) the state's existing program precludes the handicapped from enjoying benefits realized by the nonhandicapped, (2) whether the program modifications allow the handicapped to benefit, and (3) whether the program modification would "jeopardize the overall viability of the state's educational system." 98 New Mexico Association for Retarded Citizens established the general validity of the regulations, conditioned most significantly on the financial impact to the school system.

Courts have addressed the validity of more particular requirements under the section 504 regulations since New Mexico Association for Retarded Citizens. In Yaris v. Special School District, 99 for example, suit was brought under both the EAHCA and section 504 concerning the school system's failure to provide handicapped children with more than the standard 180 days of instruction. The court held that the plain meaning of the statute indicated a violation if handicapped children are precluded from receiving the same benefits realized by nonhandicapped children. Since nonhandicapped children could attend summer school, section 504 was violated by the failure to provide summer programming for handicapped children.

The court in Yaris went on to address the section 504 regulations to determine whether they also required more than the traditional 180 days of instruction. Concluding that the regulations' requirements for individualized education required the potential for greater than 180 days of instruction, the court held that the section 504 regulations were violated. Addressing the validity of the regulations, the court cited New Mexico Association for Retarded Citizens, among other decisions, and added the interesting provision that since the state had already adopted virtually identical requirements under the EAHCA, implementation of these regulations would not require substantial adjustments. The court specifically declined to decide whether there would be a substantial adjustment if the EAHCA had not been accepted by the states. The question then becomes whether any expanded rights identified under section 504 100 are such substantial adjustments so as to fail under Davis' undue burden standard. 101

98. New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 855 (10th Cir. 1982). This three-part test, occasioned by the special circumstances involving affirmative action on the part of the recipient, would apparently be in addition to the standard analysis of a regulations validity. See supra text accompanying note 87.


100. See infra notes 137-209 and accompanying text.

101. Whether a specific educational requirement would be an undue burden has been considered a factual question to be determined on a case-by-case basis. In Sanders v. Marquette Pub. Schools, 561 F. Supp. 1361 (W.D. Mich. 1983), suit was brought under § 1983, the EAHCA, and § 504 alleging the school system failed to identify and place a child in special education programming. Addressing the § 504 claim, the court stated that Davis allowed the school system to establish that the failure
Georgia Association of Retarded Citizens v. McDaniel also addressed the 180-day limitation in a suit brought under the EAHCA and section 504. Although ultimately modified as a result of Smith v. Robinson, it also held that a policy precluding educational programming for more than 180 days violated both acts. Indeed, citing one of its own earlier decisions, the Eleventh Circuit held "[t]he Supreme Court's decision in Southeastern Community College says only that § 504 does not require a school to provide services to a handicapped individual for a program for which the individual's handicap precludes him from ever realizing the benefit of the training." Such a broad reading of Davis, of course, makes the validity of increased rights under section 504 much more likely.

Perhaps the best argument that section 504 regulations do not exceed what Congress intended, and hence are valid, is Congressional reaffirmation of section 504's application to education of the handicapped. As originally passed, section 504 was silent as to the power of federal agencies to promulgate implementing regulations. The Department of Health, Education and Welfare implemented regulations to provide special education services was the result of the burden such services would cause. "Such evidence might be data showing that funding was simply unavailable, or that the program requested by plaintiff could not have been provided without great expense and detriment to the system." Id. at 1371. The reader should be reminded that this language only concerns a § 504 claim. Under the EAHCA, unavailability of resources has generally not been a justification for refusing to provide specific types of services, and is clearly not a justification for denying all services. Clevenger v. Oak Ridge School Bd., 744 F.2d 514 (6th Cir. 1984)(cost is legitimate factor only when choosing between several appropriate options).

A few courts appear to take the position that an undue burden exists per se if the requested educational programing requires creation of a completely new service. In Turillo v. Tyson, 535 F. Supp. 577 (D.R.I. 1982), the district court held that while § 504 might require modification of an existing program, "it never compels a school system to finance a private educational placement." Id. at 588. See also Rollison v. Biggs, 567 F. Supp. 964 (D. Del. 1983); Darlene L. v. Illinois State Bd. of Educ., 568 F. Supp. 1340 (N.D. Ill. 1983). See generally Kruelle v. New Castle County School Dist., 642 F.2d 687, 695-96 (3d Cir. 1981). If modification of an existing program is requested, then apparently, an individual determination as in Sanders is made to decide whether the requested service will provide an undue financial or administrative burden.

102. 716 F.2d 1565 (11th Cir. 1983), modified in part, 740 F.2d 902 (11th Cir. 1984).
103. Id. at 1580 (quoting Camenisch v. University of Tex., 616 F.2d 127, 133 (5th Cir. 1980)). See also Tatro v. Texas, 625 F.2d 557, 564 (5th Cir. 1980) (quoting Camenisch v. University of Tex., 616 F.2d 127, 133 (5th Cir. 1980), aff'd on other grounds sub nom. Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984)); Association For Retarded Citizens In Colo. v. Frazier, 517 F. Supp. 105, 122 (D. Colo. 1981)("Davis is distinguishable . . . to the extent that it deals with the absence of a requirement to provide a substantial modification for a handicapped individual . . . for which that person's handicap precluded her from ever realizing the benefits of that program").
in 1977 only after being ordered by executive and court orders.\(^\text{104}\)
While regulations are generally recognized as probative of Congressional intent,\(^\text{105}\) promulgation of the section 504 regulations was tortured.\(^\text{106}\) The Supreme Court used this history to point out that the deference normally due the administrative agency was diminished.\(^\text{107}\) It further pointed out that "isolated statements by individual Members of Congress or its committees, all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment."\(^\text{108}\) The Court stated "these comments, none of which represents the will of Congress as a whole, constitute subsequent 'legislation' such as this Court might weigh in construing the meaning of an earlier enactment."\(^\text{109}\) Congressional action in reaffirming the applicability of section 504 to education of the handicapped, however, is itself a reflection of Congress' view of the scope of the authority to promulgate affirmative obligations. Rather than mere isolated comments that existed at the time \textit{Davis} was decided, this provision provides a logical inference that Congress intended to affirm the regulations promulgated under section 504.

Congress was aware that section 504 included no obligation to exhaust administrative remedies when it reinstated section 504's full impact on educating the handicapped.\(^\text{110}\) Rather than simply reaffirm the applicability of section 504, Congress provided that EAHCA administrative proceedings must be exhausted if there is a cause of action under both the EAHCA and section 504. Congress was enacting legislation that affected both the interpretation of section 504 and the EAHCA. It is reasonable to assume that had Congress disagreed with the administrative interpretation of section 504, it had the perfect op-

\textbf{105.} Although courts vary widely in relying on subsequent legislation to infer congressional intent, it is generally recognized that subsequent legislation is probative. In \textit{Zemel v. Rusk}, 381 U.S. 1 (1965), for example, addressing the validity of regulations promulgated under passport legislation, the United States Supreme Court said that "Congress' failure to repeal or revise ... administrative interpretation has been held to ... [be] persuasive evidence that that interpretation is the one intended by Congress." \textit{Id.} at 11. See also \textit{United States v. Bergh}, 352 U.S. 40 (1956)(failure of Congress to repeal regulations is evidence of congressional intent); \textit{Alstate Constr. Co. v. Durkin}, 345 U.S. 13, 16-17 (1953)(explicit enactment that administration interpretation would remain in effect).
\textbf{108.} \textit{Id.} at 411 n.11.
\textbf{109.} \textit{Id.} at 412 n.11.
\textbf{110.} The House report supporting the then proposed amendment stated: "The section 504 regulations were the result of extensive consideration in the regulatory process. ... Congress had the opportunity to review these regulations during oversight hearings in 1977. ... At that time, Congress explicitly approved the section 504 regulations." \textit{H.R. REP. No. 296}, 99th Cong., 1st Sess. 8 (1985).
portunity to express that disagreement.\footnote{111}

The counterbalancing argument is that Congress did not likely intend a broad brush statute like section 504 to impose a greater duty on the LEA or SEA than the highly specific EAHCA. In St. Louis Treatment Center Parents Association v. Mallory,\footnote{112} although post-Smith v. Robinson, the court assumed the inapplicability of Smith to an allegation under section 504. The court held that "[t]he Education Act sets the outer limits on what is required of a state in the area of educating the handicapped."\footnote{113} The Mallory decision is the functional equivalent of the Smith holding. If Congress intended the EAHCA to provide the outer limit, why did it feel compelled to reinstate the applicability of section 504 as a cause of action? It is logical to assume that Congress saw additional protection of some type in section 504.\footnote{114} If the EAHCA provides the outer limit, Congressional reaffirmation of section 504 would be superfluous. Therefore, Congress must have intended more or it would simply have enacted the attorneys' fees provisions.

IV. SECTION 504 AND THE EAHCA

Given the availability of section 504, the logical question remains whether section 504 fills in gaps and adds to the protections afforded by the EAHCA, or whether it merely replicates those protections.

\footnote{111. Despite the questions raised in Davis concerning the validity of § 504 regulations, the United States Supreme Court has repeatedly relied on the regulations: As we have previously recognized, these regulations were drafted with the oversight and approval of Congress, see Consolidated Rail Corporation v. Darrone, 465 U.S. 624, 634-635 and nn.14-16 ... (1984); they provide 'an important source of guidance on the meaning of § 504.' Alexander v. Choate, 469 U.S. 287, 304 n.24 ... (1985). School Bd. v. Arline, 107 S. Ct. 1123, 1127 (1987). See also South Carolina v. Baker, 108 S. Ct. 1355, 1364 n.10 (1988).

112. 591 F. Supp. 1416 (W.D. Mo. 1984), aff'd, 767 F.2d 518 (8th Cir. 1985).


114. It would be possible to argue that Congress intended § 504 to retain validity in the field as a means of filling in gaps in the EAHCA. For example, § 504 could provide the mechanism to insure that architectural barriers did not inhibit educational programming. The problem with this argument, however, is that even after Smith § 504 could be relied upon for an allegation that fell beyond the EAHCA. The Supreme Court in Smith was very explicit in stating: We emphasize the narrowness of our holding. We do not address a situation where the [EAHCA] is not available or where § 504 guarantees substantive rights greater than those available under the [EAHCA]. We hold only that where, as here, whatever remedy might be provided under § 504 is provided with more clarity and precision under the [EAHCA], a plaintiff may not circumvent or enlarge on the remedies available under the [EAHCA] by resort to § 504. Smith v. Robinson, 468 U.S. 992, 1021 (1984).}
A. Overlapping Provisions

Section 504 parallels much of the regulatory structure of the EAHCA.\textsuperscript{115} This parallel coverage is perhaps best illustrated by the individualized educational program (IEP) requirement of the EAHCA.\textsuperscript{116} The centerpiece of the EAHCA,\textsuperscript{117} the IEP is not specifically required by section 504 regulations. Its functional equivalent is,\textsuperscript{118} however, and section 504 regulations indicate that one way to meet the special education requirements under section 504 is through the IEP process of the EAHCA.\textsuperscript{119}

Other areas of parallel coverage exist. Both section 504 and the EAHCA provide for the child to be educated in the least restrictive setting. Section 504 regulations provide that a child shall be placed with nonhandicapped children to the “maximum extent appropriate to the needs of the handicapped person.”\textsuperscript{120} The section 504 regulations further require the child be placed in the “regular environment” unless it is established by the LEA that a satisfactory education cannot be achieved with supplementary aids and services.\textsuperscript{121} The EAHCA regulations similarly state that “to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped.”\textsuperscript{122} As a corollary to these individualized placement concerns, the EAHCA requires the provision of a continuum of alternative placements\textsuperscript{123} as does section 504.\textsuperscript{124}

As discussed elsewhere, the EAHCA provides extensive procedural protections.\textsuperscript{125} The section 504 regulations are less specific than the EAHCA regulations, but recognize procedural safeguards from initial evaluation through an impartial hearing with the right to counsel.\textsuperscript{126} The section 504 regulations adopt EAHCA compliance as one way to meet the section 504 requirements.\textsuperscript{127} Functionally, therefore, the procedural protections are the same.

Both the EAHCA and section 504 require testing of handicapped children.\textsuperscript{128} Section 504 requires tests to be validated, be administered

\begin{itemize}
\item \textsuperscript{115} See supra text accompanying notes 10-12.
\item \textsuperscript{117} Honig v. Doe, 108 S. Ct. 592, 598 (1988).
\item \textsuperscript{118} 34 C.F.R. § 104.33(b)(1) (1988).
\item \textsuperscript{119} Id. § 104.33(b)(2).
\item \textsuperscript{120} Id. § 104.34(a) (1988).
\item \textsuperscript{121} Id.
\item \textsuperscript{122} 34 C.F.R. § 300.550(b)(1) (1988).
\item \textsuperscript{123} Id. § 300.551.
\item \textsuperscript{124} See 34 C.F.R. § 104.33(a)-(d) (1988).
\item \textsuperscript{125} See supra note 4.
\item \textsuperscript{126} 34 C.F.R. § 104.36 (1988).
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Compare 34 C.F.R. § 104.35 (1988) with 34 C.F.R. §§ 300.531-.532 (1988).
\end{itemize}
by trained personnel, be more than a general intelligence quotient test, and be administered in a way that the handicapping condition does not impair the accuracy of the test. As in many areas, the EAHCA provides more specifics. The EAHCA makes specific references to the type of people that are to be on the evaluation team, specifically indicating, for example, that it is to be multidisciplinary.

Section 504 requires periodic reevaluations, but provides that a system of evaluation consistent with the EAHCA meets this requirement. Therefore, both would require at least triennial evaluations. While section 504 does require evaluations before any "significant change in placement," the EAHCA does not have such a requirement. However, the functional equivalent is obtained. EAHCA regulations require the triennial evaluation "or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation." If the LEA proposes to change a placement, therefore, the parents can simply request a reevaluation.

B. Expansion of Rights and Protections Under Section 504

In viewing the expansion of educational rights possible under section 504 we must identify where section 504 arguably provides rights in addition to those already protected by the EAHCA and those not otherwise covered by the EAHCA.

1. Increased Protections for Those Covered by the EAHCA?
   Tatro and Rowley

Although both section 504 and the EAHCA require the provision of a FAPE, the definition of a FAPE differs between the statutes. The EAHCA provides that "[t]he term 'free appropriate public education' means special education and related services." Section 504, however, defines appropriate education as "regular or special education and related aids and services that are... designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met."
The section 504 definition differs in two respects from the EAHCA definition. First, note the inclusion of the words "aids or services" in the section 504 regulation, while the EAHCA merely states "related services." Issues therefore exist as to whether provision of "aids" differs from provision of "services." On the same day the Supreme Court decided Smith v. Robinson, the Court also addressed the issue of related services under the EAHCA in Irving Independent School District v. Tatro.\(^1\) The Court did not have occasion to address the issue under section 504 since Smith had decided section 504 did not apply.\(^2\) According to Tatro, a related service must be a service, not equipment. Specifically, the Court held that "respondents are not asking petitioner to provide equipment that Amber needs for CIC [clean intermittent catheterization]. They seek only the services of a qualified person at the school."\(^3\)

The obligation of the LEA to provide equipment such as computers, hearing aids, and medical supplies is thrown into question by Tatro. Taken to its extreme, Tatro could provide serious limitations on the provision of special education. For example, the United States Department of Education's Office of Civil Rights (OCR) had occasion to review a complaint that a local school system violated section 504 in failing to provide a home-bound disabled student with a computer and adaptive head gear.\(^4\) The student was enrolled in a computer class which, if he had been taking the course in the regular classroom, would have included access to a computer. OCR determined that since the student would have been provided with access to a computer had he not been disabled, the LEA's failure to provide a computer and adaptive head gear in order to allow him to use the computer for homebound instruction was a violation. Critical, of course, was the LEA's provision of computers to nonhandicapped children at no cost. It is questionable, however, whether under the Tatro interpretation of the EAHCA, the adaptive head gear would be mandated since it constitutes equipment. On its face, Tatro would seem to not require the provision of the head gear. Yet even under Tatro, if the child needs the head gear in order to benefit from the instruction, it seems necessary.


139. Id. at 895.
140. Id. (citations omitted).
In practice, Tatro appears not to have been taken to this extreme. For example, it is clear that transportation services, obviously requiring a large piece of equipment, are required under the EAHCA.\textsuperscript{142} The 1986 amendment to the EAHCA now, at a minimum, provides protection to keep school districts from drawing too fine a distinction in this area.

Under section 504 and the EAHCA, therefore, the question becomes where to draw the line between nonrequired “equipment” and required related aids/services. If the head gear is necessary to take advantage of a piece of equipment otherwise provided without charge (the computer), why, in a reading class where books are provided to the nonhandicapped, are eye glasses not necessary to the visually impaired? Yet did Congress intend the schools to provide eye glasses or hearing aids?

Perhaps the analogy can be made that the head gear is similar to a book. The book is a specific piece of “equipment” necessary to receive the benefit of a specific activity within the instructional program. The specific book, however, does not benefit the student outside that classroom. Equipment such as eye glasses would likewise help that student in the reading class but would have general utility to the student beyond the particular class.

There is some attraction to this distinction. Hence, a school is required to provide a specially equipped van to transport a handicapped child to the school since transportation is necessary in order to allow the child to receive educational benefit.\textsuperscript{143} The school, however, would not be required to provide a child with an individual wheel chair which would also be used in the child’s activities outside the school system.\textsuperscript{144}

Tatro may very well be consistent with this interpretation. In Tatro, the Supreme Court’s reference to equipment was to equipment necessary to perform Clean Intermittent Catheterization (CIC). This equipment, while used during the school day, concerned a need well


\textsuperscript{144} If the equipment is required at home for educational purposes, the equipment should be provided for home use as well. See, e.g., In re Mary H., [1984-85 Dec.] Educ. Handicapped L. Rep. (CRR) 506:325 (SEA Mass. Nov. 6, 1984)(portable computer with voice synthesizer required for school and home use).
beyond the specific educational services the child was receiving at the
time. In a sense, the equipment was more in the nature of a wheel
car than head gear. Such an interpretation would for all practical
purposes make section 504 and the EAHCA coextensive regarding the
provision of equipment.\textsuperscript{145}

Additional support for this interpretation of a consistent approach
to the provision of equipment is found in the post-secondary education
regulations of section 504 which refer to “aids” again and illustrate the
types of aids required.\textsuperscript{146} The Supreme Court in \textit{Davis} relied on these
regulations to determine that “otherwise qualified” meant able to
meet the program’s requirements despite the handicap.\textsuperscript{147} The Court
specifically indicated that this meant there was no need to provide de-
vices or services of a personal nature.\textsuperscript{148} Even assuming that section
504 “aids” are limited to a definition consistent with the EAHCA’s re-
related services, the types of aids recognized and implicitly relied upon
by the Court in the section 504 post-secondary education regulations,
and by analogy to the EAHCA, are quite extensive.\textsuperscript{149}

While equipment requirements may be equivalent, section 504 ar-
arginually requires a higher level of educational benefit. Special educa-
tion is, according to the EAHCA, “specially designed instruction at no
cost to parents or guardians, to meet the unique needs of a handi-
capped child.”\textsuperscript{150} Judicial gloss provided by the United States
Supreme Court in \textit{Rowley} also provides that an appropriate education
need not maximize the child’s potential. The educational program
need only provide some educational benefit.\textsuperscript{151} Section 504 regu-
lations set a standard of meeting the educational needs of the handi-
capped “as adequately as the needs of nonhandicapped persons.”\textsuperscript{152}
Unless a school system is willing to publicly assert the proposition that
it is providing a minimal educational experience to its nonhandicapped
students, it seems that congressional action has circumvented \textit{Rowley}’s
minimal standard in those areas where the EAHCA and section 504
overlap.\textsuperscript{153} To the extent a school system professes to maximize a

\textsuperscript{145}\textsuperscript{145} Close cases will still exist under this approach. Unlike the seriously emotionally
disturbed child who may receive medication to control behavior throughout the
day, a child with Attention Deficit Disorder (ADD) may require Retilin only dur-
during the academic day. Does this mean that the school must not only administer
the drug, but also pay for the drug as a related service?

\textsuperscript{146}\textsuperscript{146} 34 C.F.R. § 104.44(d) (1988).

\textsuperscript{147}\textsuperscript{147} Southeastern Community College v. Davis, 442 U.S. 397, 406-07 (1979).

\textsuperscript{148}\textsuperscript{148} Id. at 409.

\textsuperscript{149}\textsuperscript{149} 45 C.F.R. § 84.44 (1988).

\textsuperscript{150}\textsuperscript{150} 20 U.S.C § 1401(16) (1982).

\textsuperscript{151}\textsuperscript{151} See Board of Educ. v. Rowley, 458 U.S. 176, 203 (1982); Hall v. Vance City Bd. of
Educ., 774 F.2d 629, 635 (4th Cir. 1985).

\textsuperscript{152}\textsuperscript{152} 34 C.F.R § 104.33(b) (1988).

\textsuperscript{153}\textsuperscript{153} Also look at the timing of the § 504 regulations. They were drafted prior to
\textit{Rowley}, therefore it is conceivable they intended to have a different standard.
nonhandicapped child's educational benefit, or even to provide educational services which offer more than some minimal educational benefit, it should be required under section 504 to have the same educational goal for handicapped children.

2. Miscellaneous Additional Protections

a. Physical Setting

Nothing in the EAHCA directly controls the physical setting in which the education takes place. The EAHCA does, however, authorize the award of grants to construct necessary facilities, and for removal of architectural barriers. Under section 504 there is significantly more protection affecting the physical plant in which the child's education takes place than is available under the EAHCA. The EAHCA requires that "[e]ach public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities." Section 504 also requires "equal opportunity" for participation in nonacademic or extracurricular activities. Section 504 provides some additional specificity and perhaps protection when it makes explicit the requirement that if a service is provided to nonhandicapped the service must also be provided to handicapped children. Section 504 regulations also require that those providing guidance and placement counseling for handicapped children cannot counsel them toward more restrictive career objectives than nonhandicapped children with similar interests and abilities.

b. Regulatory Monitoring

Ultimately, both the EAHCA and section 504, as they relate to educational issues, are monitored by the United States Department of Ed-

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155. Id.
157. 34 C.F.R. § 300.308(a) (1988).
158. 34 C.F.R. § 104.37(a) (1988).
159. Id. § 104.37.
ucation. The EAHCA is monitored by each state education association (SEA) which in turn is monitored by the United States Department of Education, Office of Special Education and Rehabilitative Services (OSERS). Section 504, on the other hand, is monitored by the Department of Education’s Office of Civil Rights (OCR).

As a practical matter this means that there are two federal government offices that provide interpretations of rights of handicapped students. Where the rights and protections under both statutes are the same, the opportunity for conflict in interpretation exists. Fortunately, the two offices have recently exchanged letters of cooperation which should help considerably in their interpretation of the respective rights and protections.

Failure to comply with the requirements of the EAHCA can result in withdrawal of funding received for special education. Failure to comply under section 504, however, carries a much higher potential penalty. As a general civil rights statute, failure to comply with section 504 and its regulations may result in withholding of all federal funds.

The EAHCA requires adoption by the SEA of procedures for reviewing, investigating, and acting on allegations of violations of the EAHCA. This regulation has now been, in effect, superseded by the Education Division General Administration Regulations (EDGAR) which apply to most grants and applicants of the Department of Education (DOE). EDGAR regulations require each state receiving a grant, including those receiving EAHCA funds, to adopt a complaint procedure for resolving any complaint that the state or subgrantee (in this instance an LEA) is violating a statute or regulation.

164. Termination of funding has been ordered. See, e.g., In re Missouri State Dep’t of Elementary and Secondary Educ. and the Mo. State Bd. of Educ., [1978-88 Compliance Letters] Educ. Handicapped L. Rep. (CRR) 311:98 (April 3, 1987). Before federal funds are withheld, however, a formal administrative hearing must be held. 34 C.F.R. § 100.8(c) (1987). The results of this hearing may then be reviewed by the Secretary of the Department of Education (DOE). Id. § 100.10(e). The OCR and DOE decisions are subject to judicial review. Id. § 100.11.

The importance of an additional avenue for complaint is not limited to the additional remedy of withdrawing funds. The due process procedures under both the EAHCA and § 504 can be lengthy, formal, and emotionally draining. The OCR and OSERS procedural avenues, which necessitate only a letter to initiate, serve important, if limited, functions.

165. 34 C.F.R. § 300.600 (1988).
It has also been held that the complaint procedure must have an enforcement mechanism.\(^ {167} \) SEAs have withdrawn EAHCA funding from LEAs as a result of complaints.\(^ {168} \) Prior to withdrawing funds, the SEA must provide the LEA with a hearing.\(^ {169} \) Given the SEAs' overriding responsibility, courts have held that a school system's failure to provide educational services requires the SEA to directly provide those services.\(^ {170} \) OCR has discretion to investigate individual complaints against an LEA or SEA which allege violations of section 504. The stated policy of the OCR, however, is that as long as the procedural requirements of the law are met, it will not investigate individual placement or other educational decisions unless there are extraordinary circumstances. These "extraordinary circumstances" generally include cases excluding a child from services and cases evidencing a pattern and practice.\(^ {171} \)

OCR is under court order to comply with specified time lines to conduct its compliance review. In Adams v. Bell,\(^ {172} \) the court ordered DOE to implement detailed procedures for investigating complaints. OCR complaints are handled by one of its ten regional offices. Complaints must be made within 180 days of the alleged discriminatory action.\(^ {173} \) Given the reluctance of OCR to review individual complaints concerning educational issues, the best use of OCR would be to seek systemic changes in the manner in which LEAs are conducting its responsibilities under section 504 and its regulations. This is particularly appropriate for procedural violations. A reading of OCR Complaint Letters of Findings show that the most common complaint investigated as the result of third party complaint are violations of procedural issues, such as failure of LEA and SEAs to monitor time lines appropriately,\(^ {174} \) failure to provide impartial hearing officers,\(^ {175} \)

\(^ {169} \) 34 C.F.R. § 76.783 (1987).
\(^ {173} \) 34 C.F.R. § 104.61, incorporating 34 C.F.R. § 100.7(b) (1987).
and substantive issues that represent a pattern and practice, such as standard policies limiting educational rights or withdrawal of agreed upon benefits.

c. Damages

As discussed above, damages are available under the EAHCA in only very limited circumstances, but damages are available under section 1983. While there is a split of authority as to whether compensatory damages are available under section 504, damages under section 504, as with a section 1983 claim, are barred by the eleventh amendment against the state, but apparently not against local governmental organizations, such as the LEA.

178. See supra text accompanying notes 47-71.
179. The Court in Smith v. Robinson, 468 U.S. 992 (1984), stated:

Id. at 1020 n.24. In Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984), equitable relief, including back pay, was sought under § 504 for wrongful discharge. The Court stated: "Without determining the extent to which money damages are available under § 504, we think it clear that § 504 authorizes a plaintiff who alleges intentional discrimination to bring an equitable action for backpay." Id. at 630-31. See also Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 607 n.27 (1983)(compensatory relief could be awarded in Title VI actions); Briggs, Safeguarding Equality for the Handicapped: Compensatory Relief Under Section 504 of the Rehabilitation Act, 1986 DUKE L.J. 197, 208 ("[b]ecause § 505(a)(2) ... provides that Title VI remedies are to be available to § 504 claimants, Guardians implies by analogy the existence of compensatory relief under § 504"); Flaccus, Discrimination Legislation for the Handicapped: Much Ferment and Erosion of Coverage, 55 U. CIN. L. REV. 81, 90 (1986).
180. See supra text accompanying note 48.
182. Gilliam v. Omaha, 524 F.2d 1013 (8th Cir. 1975).
d. Extracurricular Activities

Regulations promulgated under the EAHCA require an equal opportunity for handicapped children to participate in nonacademic and extracurricular activities. These activities “may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs . . . referrals . . . and employment.” The validity of this requirement has been called into question by the United States Sixth Circuit Court of Appeals. In one of the few judicial opinions addressing this requirement, the court in *Rettig v. Kent City School District,* held that since this regulation required strict equality of opportunity it was contrary to the interpretation of the EAHCA as announced by the United States Supreme Court in *Rowley.* In *Rowley,* the Court rejected a reading of the Act which measured level of educational services based on equal opportunity. The court in *Rettig,* relying on the language in *Rowley,* stated “the applicable test under *Rowley* is whether the handicapped child’s IEP, when taken in its entirety, is reasonably calculated to enable the child to receive educational benefits.” Since the child in *Rettig* was determined by the district court unable to “significantly benefit,” the court held “the school district was not obligated to provide extracurricular activities [from which the child] would receive no significant educational benefit.”

Given the ability to bring a suit under section 504 of the Rehabilitation Act of 1973 concurrently with the EAHCA, something that could not have been done when *Rettig* was decided, there is an argument that the functional equivalent of the regulation is now available by seeking relief under section 504 since section 504 does establish, at least in general, an equal opportunity requirement. For example, section 504 may preclude a student from being excluded from interscholastic athletics based solely on her handicap.

3. Expansion of EAHCA Type Rights to Those Not Previously Covered

The definition of who qualifies as a handicapped student differs be-

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184. 34 C.F.R. § 300.306(a) (1988).
185. Id. § 300.306(b).
186. 788 F.2d 328 (6th Cir. 1986).
189. Id.
190. Id. at 328.
tween the two statutes. The EAHCA provides a specific list of handicapping conditions, one or more which must exist in order to be covered by the statute.\textsuperscript{192} Section 504 regulations provide a broad definition of handicapping condition which includes a physical or mental impairment which substantially limits one or more major life activities.\textsuperscript{193} In practice, therefore, section 504 may provide education rights to children with, for example, drug or alcohol problems, while the EAHCA would not.

For example, considerable litigation is developing concerning Acquired Immune Deficiency Syndrome (AIDS) with the consensus appearing that children with AIDS are not covered by the EAHCA, but they are covered by section 504. In \textit{Thomas v. Atascadero Unified School District},\textsuperscript{194} the United States District Court for the Central District of California held that a child infected with the AIDS virus was a handicapped person within the meaning of section 504. Further, the child was otherwise qualified to attend public school. Exclusion from school therefore was a violation of section 504.\textsuperscript{195}

In \textit{Doe v. Belleville Public School District No. 118},\textsuperscript{196} suit was brought under section 504 against the school system for excluding a child with AIDS. The LEA sought to dismiss the complaint on the grounds that the child's parents had failed to exhaust administrative remedies under the EAHCA.\textsuperscript{197} The court denied a motion to dismiss and held that there was no requirement to exhaust the EAHCA administrative remedies because the child was not covered by the EAHCA. The LEA argued that the child was "other health impaired,"\textsuperscript{198} and therefore covered by the EAHCA. The district court pointed out, however, that there are three elements to the "other health impaired" classification. There must be a health impairment limiting strength, vitality, or alertness and that impairment must adversely affect educational performance. Finally, the impairment must require special education and related services. A child with AIDS does not necessarily have an adverse educational impact. Further, at many stages of the disease there is no impairment of strength, vitality,
or alertness.\footnote{199} In the area of drug dependency there is also movement to extend EAHCA type protections via section 504.\footnote{200} OSERS, interpreting the EAHCA and its regulations, has held that drug and alcohol addicted students are not “other health impaired” under the EAHCA.\footnote{201} OCR, interpreting section 504, however, has determined that they are handicapped within the meaning of section 504.\footnote{202}

The possible extension of educational rights to handicapped adults is of perhaps equal significance to extending educational rights to other types of disabilities. The EAHCA requires the provision of educational services between the ages of three and twenty-one.\footnote{203} There is also an additional requirement to provide certain “infant and toddler” services.\footnote{204} Regulations promulgated under section 504, however, define those qualified to receive a FAPE as those who are of an age that would receive education were they not handicapped, those of an age where state law requires mandatory education, or those children covered under the EAHCA.\footnote{205}

If, therefore, a local school system provides adult educational programming to the nonhandicapped, comparable adult programming should be available to the handicapped. For example, there are numerous handicapped children who could continue to receive educa-

\footnote{199. See also [1978-87 EHA Rulings/Policy Letters] Educ. Handicapped L. Rep. (CRR) 211:343 (June 29, 1984). It is also possible, of course, to have AIDS and be covered by the EAHCA because of an unrelated handicap. See Parents of Child, Code No. 670901W v. Group I Defendants, 675 F. Supp. 1072 (E.D. Okla. 1987)(defendants enjoined from prosecuting state court action seeking exclusion of emotionally disturbed child with AIDS who was placed pursuant to EAHCA).


\footnote{199. See also Rezza v. United States Dept't of Justice, 56 U.S.L.W. 2686 (E.D. Pa. 1988)(compulsive gambling may qualify as "mental impairment").


\footnote{205. 34 C.F.R. § 104.3(k)(2) (1987).}
tional benefit beyond twenty-two years of age. If the rationale of cases such as *New Mexico Association for Retarded Citizens* is carried to its logical conclusion, comparable educational services should be provided to handicapped adults under the same terms. Although the school system may argue that the handicapped person is not otherwise qualified to benefit from the adult educational program, cases such as *New Mexico Association for Retarded Citizens* and *Yaris* indicate that once the school system has undertaken the general education of the nonhandicapped, the school system must provide services to the handicapped.206

Perhaps counterintuitively, in the circumstance where section 504 appears to expand rights to those not covered by the EAHCA (for example AIDS and adult education), it seems that affirmative requirements are less likely to constitute undue burden than in circumstances where section 504 purports to provide additional benefits to those already covered by the EAHCA. Since the school system is already providing the services “it may be logically inferred that it would not have imposed an ‘undue burden’ on the defendants to provide a special educational program for the plaintiff.”207 Further, if services of a particular type are already being provided to one group of people, what is being requested is a reallocation of existing resources, not an expansion of funding.208 By the same token, these latter cases may well result in more litigation, since if there is not dual coverage with the EAHCA, there is no need to exhaust administrative remedies.209

V. CONCLUSION

While the Handicapped Children's Protection Act of 1986 completely overruled *Smith v. Robinson*, it has been seen primarily as an attorneys' fee act. The complete reinstatement of the availability of

206. In *Georgia Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1579 (11th Cir. 1983), a pre-*Smith v. Robinson* decision, the court relied on the fact that § 504 does not contain specific age limitations as one of the reasons for determining that the EAHCA did not preclude resort to § 504.

Until recently overridden by congressional action, the fact that adult education programs might not receive direct federal aid could have caused a serious problem in enforcing such a right. The United States Supreme Court had ruled that “an agency's authority under Title IX . . . is subject to the program-specific limitations of §§ 901 and 902.” Grove City College v. Bell, 465 U.S. 555, 570 (1984) (emphasis added). The similarity between Title IX and § 504 led courts to adopt this program-specific approach. See, e.g., Gallagher v. Fontiac School Dist., 807 F.2d 75 (6th Cir. 1986). Congress overturned *Grove City*, 42 U.S.C. § 2000d-4a (1988).


208. It has been suggested that in cases where there is an unequal treatment of the handicapped “[d]efendant will also have little success in relying upon cost-based defenses in such situations, for . . . the question is primarily one of allocation of available resources in an evenhanded fashion.” Wegner, *supra* note 87, at 499.

209. See *supra* text accompanying note 81.
sections 504 and 1983 as additional avenues for relief has yet to be fully realized. The amended EAHCA insured that the Supreme Court's dicta in *Smith* would control, allowing actions to be brought. The amended Act, however, also allows actions to be brought under sections 504 or 1983. Once fully utilized, the amendment to the EAHCA has the potential for affecting the delivery of educational services to the disabled in ways far more significant than simply provision of attorneys' fees.