

Damages Claims Against American Public School Districts for Violations of the Individuals with Disabilities in Education Act (IDEA): Lessons from *Gonzaga University v. Doe*

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Introduction

One of the leading vehicles for pursuing damages claims for violations of federal law is section 1983 of the *Civil Rights Act* of 1871. Section 1983 provides legal and equitable remedies for 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws'.¹ As federal courts have consistently noted, section 1983 creates no new federal rights. It serves only as a vehicle to compensate for rights under the U.S. Constitution and federal statutes that have been abridged.²

The U.S. Supreme Court first decided in 1961 in *Monroe v. Pape*³ that public entities could be liable in damages for violations of constitutional rights. Almost twenty years later, the Court held in *Maine v. Thiboutot* (Thiboutot)⁴ that claimants could also pursue damage claims for violations of federal statutes. Since *Thiboutot*, the Court has reviewed section 1983 claims for alleged violation of federal statutes, with mixed results.⁵

Public school districts in the United States are subject to the provisions of numerous federal statutes, generally because the schools receive federal funds. Compliance with the terms of federal statutes triggers concern among school districts as to whether violations of statutory provisions will subject the districts to liability under section 1983. Public school districts are required to comply with numerous federal statutes, some of which, such as the *Individuals with Disabilities in Education Act* (IDEA),⁶ already carry a heavy financial cost. Under IDEA, schools are not only responsible for the cost of related and support services necessary for students with disabilities to benefit from a free appropriate public education (FAPE) in the least restrictive environment (LRE), but can also be liable for expenses associated with non-compliance, particularly parent reimbursement,⁷ compensatory education,⁸ and attorney fees.⁹ If, in addition to these IDEA expenses, damages might also be awarded under section 1983, school boards have reason to be concerned.

At the present time, federal courts of appeal in the United States are split as to whether IDEA confers a private cause of action under section 1983. The Second,¹⁰ Third,¹¹ and Fifth¹² Circuits have held that a IDEA damages lawsuit is possible under section 1983 while the Fourth,¹³ Sixth,¹⁴ Seventh,¹⁵ Eighth,¹⁶ and Tenth¹⁷ Circuits have held that plaintiffs may not ordinarily bring suit under section 1983 for violations of IDEA. Despite this conflict among federal circuits under section 1983 claims, the Supreme Court has not accepted a decision involving the IDEA for review as it has in other areas.¹⁸

However, the Supreme Court in its 2001 term rendered a decision, *Gonzaga University v. Doe* (Gonzaga),¹⁹ involving section 1983 claims under the *Family Educational Rights and Privacy Act* (FERPA) that may have application to IDEA. The purposes of this article are to review the Supreme Court's decision in *Gonzaga* and examine its application to IDEA.

Facts of the Case and State Court Decisions

A student, John Doe, in the teacher education program at Gonzaga University was investigated by two employees in the School of Education (Roberta League, Susan Kyle) concerning allegations that he had sexually assaulted a female student, Jane Doe.²⁰ Without Jane Doe ever filing a complaint with the University regarding the alleged assault, the two University employees conducted their own investigation that included statements made by a friend of Jane Doe (Julia Lynch), later largely denied by Jane Doe at trial, and statements made by Jane Doe to two faculty members (William Sweeney, Janet Buraclow), also largely denied at trial.²¹ During the investigation, one of the employees contacted an investigator for the Office of the Superintendent of Public Instruction (OSPI) who was left with the impression that Jane Doe was a credible person and was prepared to make a statement about the alleged ‘date rape’.²² As a result of the investigation, the Dean of the School of Education refused to sign an affidavit supporting John Doe’s application for student teaching, concluding that there was ‘sufficient evidence of a serious behavioral problem’.²³ Without the affidavit, John Doe was unable to secure a teaching certificate from the Office of Public Instruction to teach in the State of Washington.

John Doe sued Jane Doe, Lynch, League and Kyle, and Gonzaga University for defamation, negligence, invasion of privacy, breach of educational contract, and under section 1983 for violating FERPA’s nondisclosure provision²⁴ by releasing his name to OSPI. Following Jane Doe’s countersuit against the plaintiff for sexual assault, Jane and John Doe settled their lawsuit, which left extant only the claims against the other defendants. A state court jury returned a verdict for plaintiff against these defendants based on all five causes of action for \$855,000 plus \$300,000 for punitive damages for a total of \$1,155,000. Of that total amount, \$150,000 plus the \$300,000 punitive damages were allocated by the jury for a violation of FERPA rights.²⁵

On appeal to a Washington appeals court, the jury verdict was reversed as to all of the plaintiff’s legal claims except defamation, and ordered a new trial on that claim. Regarding the section 1983 claim involving FERPA, the court held that FERPA ‘does not create individual rights privately enforceable under 42 U.S.C. § 1983’.²⁶ The court reasoned that FERPA required schools to have in place system-wide plans pertaining to education records but did not meet one of the requirements for an enforceable right under section 1983, namely that the statute be intended to benefit plaintiff.²⁷

On appeal, the Supreme Court of Washington reversed the court of appeals and reinstated the jury award, except for the \$50,000 negligence award. Regarding FERPA, the Supreme Court found that a section 1983 claim could be brought under FERPA because the statute met all three criteria established by the U.S. Supreme Court in *Wilder v. Va. Hospital Association*.²⁸ In *Wilder*, the Court declared the three questions to be asked in determining whether a federal statute creates an enforceable right under section 1983: (1) whether the provision in question was intended to protect the plaintiff; (2) whether the right protected by the statute is so ‘vague and amorphous’ that its enforcement would strain judicial competence; and (3) whether the statute imposes a binding obligation on the state.²⁹ The State Supreme Court addressed the first question by noting that the statute was intended to benefit students, that is, the group represented by plaintiff. The Court referenced the purpose of FERPA to assure students access to their education records and to protect student privacy rights in those records.³⁰ Second, FERPA is not so ‘vague and amorphous’ as to not be enforceable.³¹ And, third, the statute creates a binding obligation because educational institutions must have student consent before releasing education records or face the loss of federal funds.³² Without, up to this point, a U.S. Supreme Court decision regarding a section 1983

claim under FERPA, the State Supreme Court turned to decisions of Federal Circuit Courts of Appeal that had upheld claims under section relating to FERPA.³³

Supreme Court Decision

The U.S. Supreme Court granted certiorari³⁴ to resolve conflicts among federal courts³⁵ and reversed the State Supreme Court in a 7-2 decision.³⁶ It limited its decision to the issue of section 1983 liability under FERPA, a question that it had reserved in a case decided earlier the terms, *Owasso Independent School District v. Falvo* (Owasso).³⁷ In *Owasso*, the Court had addressed a student's section 1983 damages claim under FERPA that a school district's use of peer grading violated the Act's confidentiality for education records. Although the Court ruled against the student's claim, it did so solely based on its statutory interpretation of FERPA under a well-established principle that the Court will not resolve cases on constitutional grounds if a statutory ground is available.³⁸ The Court held that classroom grades generated as a result of peer grading were not 'education records' within FERPA, leaving unresolved the question whether schools could be liable for section 1983 damages for violations of FERPA.

The Court in *Gonzaga* addressed the merits of this constitutional question. Writing for the majority, Chief Justice Rehnquist noted that FERPA had been enacted pursuant to Congress' spending power³⁹ and he followed recent decisions of the Court that '[had] rejected attempts to infer enforceable rights from Spending Clause statutes'.⁴⁰ Past Court decisions that had granted enforceable rights under spending power statutes dealt with overcharges⁴¹ and reimbursements⁴² that 'conferred specific monetary entitlements upon the plaintiffs'.⁴³ However, based on more recent decisions, the Court found no such individual entitlements where the alleged rights at stake did not involve money rights for individuals.⁴⁴

The Court attempted to eliminate some of the ambiguity as to whether a person could 'enforce a statute under section 1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect' by declaring that only 'rights' can be enforced under section 1983.⁴⁵ The analysis in determining whether a statute confers individually enforced rights is no different than deciding whether a statute creates a private cause of action.⁴⁶ Because section 1983 confers no rights of its own and enforces only those individual rights secured elsewhere, the initial inquiry, as in private causes of action, is 'whether a statute confers any right at all'.⁴⁷ '[W]here the text and structure of a statute provide no indication that Congress intend[ed] to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action'.⁴⁸ Because the Court decided that FERPA conferred no individual rights, it did not reach the question whether, if a right were to exist, Congress had rebutted the presumption of private enforceability.⁴⁹

FERPA's nondisclosure provision creates no enforceable rights because it 'is two steps removed from the interests of individual students and parents ...'.⁵⁰ By that the Court meant that FERPA speaks only to the responsibilities of the Secretary of Education to provide funds and that of educational institutions to not have a policy or practice in violation of FERPA. As a result of this distance from individual entitlements, FERPA has an "'aggregate' focus" ... [on] institutional policy and practice"⁵¹ rather than the "unmistakable focus on the benefited class [of students]".⁵² Language in FERPA that refers to individual consent to disclose education records occurs "in the context of describing the type of 'policy or practice' that triggers a funding prohibition," language that does not "make out the requisite congressional intent to confer individual rights enforceable by § 1983."⁵³

The Court found further support for its conclusion of no enforceable rights in FERPA's provision that the Secretary of Education is to 'deal with violations',⁵⁴ a mandate met by the creation of a Family Policy Compliance Office (FPCO).⁵⁵ Congress' creation of an administrative remedy whereby students can file complaints with FPCO, followed by investigation, findings of fact, and notification of violations with specific steps that the institution must take to comply, removed FERPA from comparison with cases where the Supreme Court has found private section 1983 claims because of the lack of 'any federal review mechanism'.⁵⁶ Had Congress not intended this administrative remedy to forestall efforts by disgruntled students to seek enforcement of FERPA in court, the Court opined that Congress would not have created a centralized review process. Thus, Congress must not have intended that FERPA be enforced through private suits 'before thousands of federal and state court judges'.⁵⁷

Breyer Concurring

Justice Breyer, joined by Justice Souter, formed the sixth and seventh votes in *Gonzaga*. Although their votes were not necessary for a majority, they made additional comments that provide insight into the interpretation of FERPA. Justice Breyer agreed with the majority's conclusion that section 1983 does not create enforceable rights under FERPA, but opined that the majority opinion swept too broadly in presuming that Congress intended no statute to create a right unless the right is 'set forth "unambiguously" in the statute's "text and structure."'”⁵⁸ However, he believed that the majority was correct in finding no right in FERPA because, as suggested in *Owasso*, the term, 'education record', 'leaves schools uncertain as to just when they can, or cannot, reveal various kinds of grading'.⁵⁹ As a result, Congress probably intended to make FERPA's administrative remedy the exclusive one in order to have uniform and consistent interpretations and 'to avoid the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action for damages'.⁶⁰

Justice Stevens Dissenting

Justice Stevens, joined by Justice Ginsburg in the dissent, expressed concern about the majority's creation of 'a new category of second-class statutory rights'.⁶¹ He found that FERPA's nondisclosure provision formulates an individual 'right of parents to withhold consent and prevent the unauthorized release of education record information by an educational institution ...'”⁶² a right that 'plainly' meets the requirements of being 'directed to the benefit of individual students'. In addition, this right 'is binding on States "couched in mandatory, rather than precatory terms,"' and 'is far from "vague and amorphous."'”⁶³

The dissent doubted the clarity of the majority's line that distinguishes between prior decisions that have found enforceable rights and those that have not. Justice Stevens found that

the sort of rights-creating language idealized by the Court has *never* been present in our § 1983 cases ... None of our four most recent cases involving whether a Spending Clause statute created rights enforceable under § 1983 – *Wright, Wilder, Suter, and Blessing* – involved the sort of 'no person shall' rights-creating language envisioned by the Court.⁶⁴

To support its claim that FERPA creates an enforceable individual right, the dissent found that the enforcement mechanism created by Congress ‘falls far short of the ... comprehensive administrative scheme’ that would preclude enforceability under section 1983.⁶⁵ The dissent found that ‘FERPA provides no guaranteed access to a formal administrative proceeding or to federal judicial review’ and ‘leaves to administrative discretion the decision whether to follow up on individual complaints’.⁶⁶ The dissent would find no section 1983 liability only where there is a comprehensive enforcement scheme such as existed for the *Education for the Handicapped Act* (predecessor to IDEA). In *Smith v. Robinson*⁶⁷ the Court declared that the Act provided for “‘carefully tailored” administrative proceedings followed by federal judicial review’.⁶⁸

Analysis and Implications

Gonzaga clearly prohibits section 1983 claims under FERPA’s nondisclosure provision. For students who believe they have suffered injury as a result of an educational institution’s improper disclosure of confidential information, the only remedy for damages is under State law. Although the plaintiff in *Gonzaga* lost a significant portion of the damages award (\$450,000) when his section 1983 claim was denied, he was not left completely empty handed. Regarding his State claims, the Supreme Court of Washington reversed only the damages award for negligence (\$50,000) while, at the same time, upholding the damages awards for defamation (\$500,000), invasion of privacy (\$100,000), and breach of educational contract (\$55,000).⁶⁹ Thus, while *Gonzaga* can be classified as a victory for educational institutions in that statutory tort damages are not available under section 1983 for disclosure violations of FERPA, the case also contains an implicit warning. Plaintiffs may still have viable claims under state law for improper disclosure of student confidential information.

Gonzaga will probably have a direct effect on the number of lawsuits filed to seek private remediation for federal statutory violations. The majority’s application of a two-part test (intent of Congress to create private enforceable rights and the presence of a comprehensive administrative enforcement scheme) should diminish the number of lawsuits filed. The majority in *Gonzaga* found no private claim because Congress had not unambiguously created a right to sue and because Congress had created a sufficiently comprehensive administrative enforcement scheme. The implication of *Gonzaga* is that both congressional creation of a right and the absence of an administrative enforcement scheme would have to be satisfied before a claimant would have a private cause of action. The dissent in *Gonzaga* (and to some extent the concurring justices) took the opposite approach. A private cause of action could exist if one of the two elements were not met. Thus, a private cause of action would exist if Congress had declared that a statute created rights, or if an administrative scheme had not been created or was not sufficiently comprehensive. The majority was simply not willing to go this route and refused to burden the federal judiciary with private lawsuits involving federal statutes unless Congress clearly intended that federal courts were to have a part.

The extent to which *Gonzaga* applies to IDEA is not clear. IDEA represents a national quasi-affirmative action statute. The much-discussed-and-debated concept of affirmative action has come to mean in American jurisprudence that a benefit may be available to a person because the person fits within a particular category.⁷⁰ IDEA qualifies in part as an affirmative action statute. The Act requires that public school districts provide appropriate related services and appropriate placements to children who have been determined to have a disability; however, those services and placements are required only to the extent that they are necessary to provide a student with a free appropriate public education. As the Supreme Court opined in the landmark case, *Hedrick*

Hudson District Board of Education v. Rowley,⁷¹ a public school district has no obligation to provide special education services to a disabled student as long as the student is receiving some educational benefit from his/her classroom instruction.⁷²

The standard set by IDEA that each child will be provided a free appropriate public education (FAPE)⁷³ in the least restrictive environment (LRE)⁷⁴ has no defences for a school district regarding the cost of the services.⁷⁵ School districts have a statutory duty to locate and evaluate children for purposes of determining whether they are in need of special education.⁷⁶ Once a child's evaluation indicates that a disability exists, the burden is on the school district to provide whatever services are necessary to meet FAPE and LRE. Although the presumption under IDEA is that students with disabilities will be included in classes with regular students, school districts may have to fund expensive placements off school premises.⁷⁷

Whether *Gonzaga* applies to IDEA depends upon the interpretation of the Court's two-part test. Private causes of action for damages for violations of federal statutes do not exist unless Congress, in passing legislation, unambiguously has created an enforceable private right that benefits the class of individuals seeking to sue under it. Congress' intent not to create such a private right can be manifested under the second part of the test in terms of the comprehensiveness of the administrative enforcement scheme. In the case of FERPA, the *Gonzaga* majority looked to the language of the statute as well as the Act's administrative enforcement scheme to find that Congress had not intended to create private rights under section 1983. FERPA's enforcement scheme 'buttressed' the Court's conclusion that 'FERPA's nondisclosure provisions fail[ed] to confer enforceable rights ...'⁷⁸

In assessing whether IDEA supports a section 1983 claim, one must begin with *Smith v. Robinson*. In *Smith*, the Supreme Court held that attorney fees were not available for a section 1983 action under IDEA because IDEA's comprehensive enforcement scheme did not allow for section 1983 claims and resulting attorney fees under section 1988.⁷⁹ However, Congress amended IDEA in response to *Smith* by passing the *Handicapped Children's Act of 1986* (HCA)⁸⁰ which provided for 'reasonable attorney fees' where the parents of a child are the prevailing party.⁸¹ HCA served to reinforce the comprehensiveness of IDEA's enforcement scheme by emphasizing that new remedies under the statute required congressional, not judicial, action. However, the Act also included the following provision:

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution or other federal statutes protecting the rights of children and youth with disabilities except that before the filing of a civil action under such laws seeking relief that is available under this subchapter [of IDEA] ...⁸²

Whether this provision suggests that IDEA rights can be pursued under section 1983 is a matter of dispute among the federal circuits.

Federal circuits that have held that section 1983 claims are available under IDEA have variously expressed their rationale that HCA overruled *Smith*⁸³ or that HCA reinstated Congress' original intention for IDEA that had been misinterpreted by the Supreme Court in *Smith*.⁸⁴ In effect, Congress by enacting HCA was rejecting the Court's interpretation of IDEA in *Smith* with the result that 'parents may continue to allege violations of 42 U.S.C. § 1983 ...'⁸⁵ However, the circuits that have denied section 1983 claims under IDEA have taken a much more restrictive interpretation of HCA. In *Charlie F. v. Board of Education*,⁸⁶ the Seventh Circuit

interpreted the language in HCA, ‘relief that is available under’,⁸⁷ to mean that a person enforcing IDEA ‘must use IDEA’s administrative system, even if he invokes a different statute’.⁸⁸ Thus, since IDEA does not provide for damages, a person cannot circumvent the statute by seeking damages under another statute like section 1983. Similarly, in *Sellers v. School Board*,⁸⁹ the Fourth Circuit held that IDEA demonstrated Congress’ intent to enforce the statute’s ‘comprehensive remedies ... solely through the mechanisms established by the statute’.⁹⁰ Based on its close reading of HCA, the court opined that it ‘reveal[ed] no intent [by Congress] that parties be able to bypass the remedies provided in IDEA by suing instead under section 1983 for an IDEA violation’.⁹¹ Although the court in *Sellers* conceded that HCA had overruled much of *Smith*’s holding, the statute’s reference to ‘other statutes protecting the rights of children and youth with disabilities’⁹² could not refer to section 1983 because section 1983 ‘mentions neither disability nor youth’.⁹³

The divergence regarding interpretation of section 1983 claims under IDEA raises the question as to whether *Gonzaga* is likely to resolve the conflict. One place to begin is to consider the similarities between FERPA and IDEA.

Both FERPA and IDEA were unique federal statutes when adopted in 1974 and 1975⁹⁴ because they were the first laws, as a matter of public policy, to create uniform, national entitlements for parents regarding the education of their children. FERPA for the first time gave parents access to their children’s education records on a uniform national basis. The Act limited student access only to education records and expressly excluded access to a variety of records, such as personal teacher records that are not revealed to others,⁹⁵ law enforcement records ‘maintained by a law enforcement unit of the educational agency or institution’,⁹⁶ and student employment records.⁹⁷ Even with these limitations, FERPA represented a significant right for K-12 students and their parents. Prior to FERPA, parent access to education records at best depended on state-created common law rights.⁹⁸

If one views FERPA against this backdrop of fragmented parent access to education records as dependent on state law, FERPA arguably provided parents a right that may not have existed in some states. However, this is not the issue at stake in *Gonzaga*. FERPA also provides that educational institutions cannot disclose material from education records without consent of parents (or students). It is this disclosure provision that the *Gonzaga* majority held does not create enforceable rights, despite Justice Stevens’ vigorous dissent.⁹⁹

The majority in *Gonzaga* is correct when it declared that the non-disclosure provisions of FERPA ‘entirely lack the sort of ‘rights-creating’ language critical to showing the requisite congressional intent to create new rights’.¹⁰⁰ What is not clear is whether the Court was limiting its opinion only to that section of FERPA or to the entire Act. While it is true that the non-disclosure provisions do not use the word, ‘right’, it is also clear that the ‘access’ provisions do. FERPA provides parents ‘the right to inspect and review the education records of their children’¹⁰¹ and provides that ‘students or a person applying for admission’ can waive ‘his right of access’ to certain confidential statements.¹⁰² The disclosure part of FERPA contains no such express ‘rights’ language. Thus, the ambiguity arises. Does The Supreme Court’s decision in *Gonzaga* mean that FERPA as a whole creates no rights at all, or should the Court’s opinion be limited only to the non-disclosure part of the Act? For example, would a parent or student who is denied access to an education record have a section 1983 action because the language of access is couched as a ‘right’?¹⁰³

As a practical matter, there are no reported cases where students or parents have had to sue in order to gain access to student education records.¹⁰⁴ Even if such cases existed, one would have a difficult time constructing a measure of damages. Justice Stevens may be correct when, in

his dissent, he gives a broad interpretation to the majority opinion by observing that ‘the Court asserts that FERPA – not just 1232(g) [the nondisclosure provision] – ‘entirely lack[s]’ rights-creating language’.¹⁰⁵ Whether Justice Stevens’ interpretation is an accurate characterization of the majority opinion will have to await further litigation.

When one moves from FERPA to IDEA it is clear that the statutes have a number of similarities. Like FERPA, IDEA is a funding statute that ties the reception of federal funds to a state plan that meets the purposes of IDEA.¹⁰⁶ In addition, IDEA provides a number of parent entitlements in the educational process. Parents must be members of the teams that determine an individualized education program (IEP) for their children¹⁰⁷ and are entitled to a number of procedural safeguards, as well as administrative due process hearings.¹⁰⁸ Among the procedures to which students and their parents are entitled are ‘examin[ation] of all records relating to such child and participat[ion] in meetings with respect to the identification, evaluation, and educational placement of the child’.¹⁰⁹ In addition, parents are entitled to notice whenever schools propose, or refuse, changes in a child’s program.¹¹⁰ Enforcement of IDEA, like FERPA, is vested in a government office. In the case of IDEA, it is the Office of Special Education Services (OSEP) in the Department of Education.¹¹¹ Also, like FERPA, failure of states to meet the requirements of IDEA can lead to the withholding of federal funds.¹¹²

Whether IDEA has the kind of ‘rights-creating language’ that the *Gonzaga* majority could not find in FERPA is problematic. Perhaps because of its intensely prescriptive content,¹¹³ IDEA contains relatively few explicit references to the rights of parents and students.¹¹⁴ However, the larger issue is whether the prescriptive language itself creates rights that can be litigated under section 1983. In light of the Court’s decision in *Gonzaga* does a section 1983 claim depend on the express statutory use the terms ‘right’ or ‘rights?’ If these terms occur sparingly in only certain parts of the statute (as is the case in both FERPA and IDEA), how will that occurrence affect interpretation of the statute as a whole? These questions remain unanswered under both FERPA and IDEA after *Gonzaga*.

However, IDEA affords another possible basis for a section 1983 claim that was not present for FERPA. Could section 1983 claims be pursued under HCA? When Congress passed HCA did it intend to fit all of the prescriptive language of IDEA within ‘rights, procedures, and remedies’ that could be remediated under a section 1983 damages claim? Clearly, the federal circuit courts that have held section 1983 applicable to IDEA have found a damages remedy available whenever a school district fails to satisfy the requirements of the statute, including providing appropriate services or placement and failing to provide parents with the procedural safeguards enumerated in IDEA.¹¹⁵ Those courts not permitting section 1983 claims for violation of IDEA rely on the comprehensive remedial system created to enforce the statute.¹¹⁶

IDEA has a much more elaborate and comprehensive enforcement system than the one in FERPA. Parents under IDEA are entitled to administrative due process hearings at the expense of the school district and can appeal adverse decisions to the Federal District Courts. The dissent in *Gonzaga* argued for section 1983 liability under FERPA, in part because the enforcement office for FERPA has considerable discretion in investigating complaints and holding hearings.¹¹⁷ The enormous number of cases generated each year involving interpretation of IDEA at the state administrative levels and in federal courts belie any reluctance by administrative agencies or courts to become involved in the enforcement process.¹¹⁸ It is precisely this kind of comprehensive enforcement system that would support the position that Congress intended no private enforceable section 1983 damages claims under IDEA. The Tenth Circuit, in denying damages under section 1983 for IDEA violations in *Padilla v. School District No. 1*,¹¹⁹ captured this sentiment when it

observed that the Supreme Court in two post-*Smith* and post-HCA decisions¹²⁰ noted that IDEA is an example ‘of an exhaustive legislative enforcement scheme that precludes § 1983 causes of action’.¹²¹

The two Supreme Court decisions referred to in *Padilla (Blessing v. Freestone)*¹²² and *Wright v. Roanoke Redevelopment and Housing Authority*¹²³) provide some insights into how future courts might interpret section 1983 liability under IDEA in light of *Gonzaga*. In *Blessing*, a unanimous Court held that mothers eligible for state child support services under Title IV-D of the *Social Security Act* did not have a section 1983 claim when the state child support agency allegedly did not take adequate steps to obtain child support payments for them.¹²⁴ The Court had no difficulty in finding that the statutory standard of ‘substantial compliance’ by states with the federal statute ‘was not intended to benefit individual children and custodial parents, and therefore it does not constitute a federal right. Far from creating an *individual* entitlement to services, the standard is simply a yardstick for the Secretary to measure the systemwide performance of a State’s Title IV-D program’.¹²⁵

In *Wright*, a 5-4 Court held that tenants in federally- funded public housing could sue under section 1983 to recover monies paid for utilities to local housing authorities that allegedly exceeded the amount paid for ‘rent’ specified in Housing and Urban Development (HUD) regulations. The majority opined that the ‘legislative history [for the *Public Housing Act*] was devoid of any express indication that exclusive enforcement authority was vested in HUD’.¹²⁶ Neither, as the Court observed, were ‘the remedial mechanisms provided sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a § 1983 cause of action for the enforcement of tenants’ rights secured by federal law’.¹²⁷ The four dissenting justices in *Wright* (three of whom formed part of the majority in *Gonzaga*)¹²⁸ found that the law allowed for a comprehensive enforcement scheme for disputes involving utilities allocations and residents’ leases through state lawsuits.¹²⁹ In effect, the dissenting justices declared that Congress intended to create no private section 1983 claims because it allowed for state breach of lease lawsuits.

Of course, an obvious observation of *Blessing* and *Wright* is that both mentioned IDEA as an example of a comprehensive enforcement system that supports congressional intent not to create private claims.¹³⁰ That observation, however, was dictum. Whether the Supreme Court would reach the same result on the merits if IDEA were at issue remains to be seen.

In terms of predicting how the Supreme Court might respond to section 1983 claim under IDEA, it is worth noting the voting patterns of the justices. Of the four cases relied on by the Court in *Gonzaga* that have been decided in the past ten years (*Suter*, *Blessing*, *Wilder*, and *Wright*), the first two found no section 1983 claim while the latter two did. *Blessing* was unanimous while Chief Justice Rehnquist authored *Suter* with Justices White, Brennan, and Marshall in dissent. Regarding *Wilder* and *Wright* where a section 1983 claim was held to exist, each was a 5-4 decision. Chief Justice Rehnquist and Justices O’Connor, Scalia and Kennedy dissented in *Wilder*. Chief Justice Rehnquist and Justices O’Connor, Powell and Scalia dissented in *Wright*. The five justice core that held there was no section 1983 claim under FERPA in *Gonzaga* were Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas.

These five Justices in *Gonzaga* considered that FERPA manifested no congressional intent to create section 1983 rights. The *Gonzaga* majority found that Congress had not conferred individual rights under FERPA in an ‘unambiguous’ manner.¹³¹ This majority, in an IDEA case, could apply the same ‘unambiguous’ standard to determine that Congress had created no private enforceable rights. The majority’s emphasis on the ‘unambiguous’ standard is no recent judicial

happenstance. The standard flows from a statute's being enacted by Congress pursuant to its spending power. Spending power statutes function much like contracts between the federal and state governments. States cannot accept federal funding conditions unless they are accurately apprised of the requirements being imposed by the federal government. As the Supreme Court observed in *Suter*, '[t]he legitimacy of Congress' power to legislate under the spending power rests on whether the State voluntarily and knowingly accept[ed] the terms of the contract'.¹³²

In addition, IDEA's administrative enforcement system that is more comprehensive than FERPA's would seem to argue against Congress' creation of private rights enforceable under section 1983. Even the two dissenting Justices in *Gonzaga* suggest that IDEA's comprehensive enforcement scheme augurs for no private section 1983 claims.¹³³

The sticking point in determining whether Congress unambiguously intended to authorize section 1983 claims under IDEA will continue to involve the interpretation of HCA. In a future case, the *Gonzaga* majority could determine that Congress, in passing HCA, was not 'unambiguous' as to whether HCA identified IDEA rights that could be enforced through section 1983.¹³⁴ In other words, the Court could find that the terms in HCA referring to 'rights, procedures, and remedies ... under other federal statutes' are ambiguous both as to the rights to be enforced and the statutes in which those rights occur. If congressional intent must be 'unambiguous', it seems very possible that HCA does not rise to the requisite level of clarity to permit section 1983 claims.

Conclusion

The Supreme Court in *Gonzaga* has succeeded in creating a clear two-part test regarding section 1983 claims under federal statutes but the application of that test will require some refinement. Courts must examine each federal statute to determine Congressional intent with regard to permitting damages claims. Part of that examination includes a review of a statute's administrative enforcement scheme. The more comprehensive the scheme, the more likely that Congress did not intend to permit damage claims, absent unambiguous language to the contrary.

The Court has yet to clarify whether a right can exist under one part of a statute but not under another. Thus, one is left with the open question whether the absence of references to 'rights' in one part of a statute means that the entire statute permits no damages claims. In the case of FERPA, the Court has yet to clarify whether the absence of rights under the statute's non-disclosure provision means that a section 1983 cause of action could not be fashioned under the Act's access provision.

The confusion regarding the meaning of section 1983 claims under *Gonzaga* carries through into its application to IDEA. Federal circuits are currently divided as to whether section 1983 claims are possible under IDEA. The five circuits¹³⁵ that have not permitted claims are not likely to change after *Gonzaga*. However, the three federal circuits¹³⁶ that permit section 1983 claims under IDEA will need to reconsider their decisions in light of *Gonzaga*. One perspective might be that the lack of unanimity among the circuits is itself evidence of ambiguity concerning congressional intent. With even the dissent in *Gonzaga* agreeing that IDEA has a comprehensive enforcement scheme, one will have a difficult time arguing that Congress intended to permit section 1983 damages claims.

However, unless the three circuits reverse themselves, schools in those circuits will be the victims of geographical disparity. Liability for violations of IDEA will be a factor, not of national policy, but of the serendipity of the circuit in which a school district is located. When

one considers that both section 1983 and IDEA are federal laws, one could hope for a uniform national policy. If divisions in the federal circuits persist regarding section damages claims under IDEA, the Supreme Court may have to grant certiorari to resolve the conflict.

Until the Court resolves the issue of section 1983 damages under IDEA, many school districts will face the possibility of lawsuits anytime they violate the provisions of the statute. As reflected in *Gonzaga*, the amount of damages for a statutory violation can be substantial.¹³⁷

Endnotes

1. 42 U.S.C. § 1983.
2. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979) (“[O]ne cannot go into court and claim a violation of § 1983 – for § 1983 by itself does not protect anyone against anything.”) See also, *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 [32 Educ. L. Rep. 1185] (1986) (compensatory damages can be awarded under section 1983 for injuries resulting from violations of rights but not for the value of the right itself).
3. 365 U.S. 167 (1961) (city could be liable in damages under section 1983 for search of a home without search warrant and detention of homeowner at police station without charges being filed without arrest warrant).
4. 448 U.S. 1 (1980) (Court held that state could be sued where it had denied plaintiff’s eligibility for benefits under Social Security).
5. Cf. *Pennhurst State Sch. and Hospital v. Halderman*, 451 U.S. 1 (1981) (Court held that Developmentally Disabled Assistance and Bill of Rights Act of 1975 did not create in favor of the mentally retarded any substantive rights to “appropriate treatment” in the “least restrictive” environment”) and *Suter v. Artist M.*, 503 U.S. 347 (1992) (the Adoption Assistance and Child Welfare Act did not create a section 1983 claim against the Illinois Department of Children and Family Services which allegedly had failed to provide services to children who were subjects of neglect, dependency, or abuse petitions) with *Wright v. Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418 (1987) (Court held that nothing in the Housing Act or the Brooke Amendment evidenced that Congress intended to preclude a private § 1983 cause of action for the enforcement of tenants’ rent-ceiling rights secured by federal law, and a regulatory provision for a “reasonable” allowance for utilities was not too vague and amorphous to confer on tenants an enforceable “right” within meaning of § 1983) and *Wilder v. Va. Hospital Ass’n*, 496 U.S. 498 (1990) (health care providers could sue the state under the Medicaid Act and the Boren Amendment to that Act where the state had not provided reimbursement rates that were “reasonable and adequate” to meet the costs of “efficiently and economically operated facilities”).
6. 20 U.S.C. § 1401 *et seq.*
7. See *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 [86 Ed.Law Rep. 41] (1993) (public school district that had not provided FAPE to a student was required to reimburse parents for unilateral placement of student in a residential school in another state).
8. See *M.C. v. Central Regional School Dist.*, 81 F.3d 389 [108 Ed. Law Rep. 522] (3d Cir. 1996) (school district responsible to provide special education services beyond the maximum limit of 21 years in IDEA if FAPE had not been provided; standard for district is what school personnel knew or should have known regarding a student’s needs).

9. See *J.C. v. Regional Sch. Dist. No. 10*, 115 F.Supp.2d 297 [147 Ed.Law Rep. 935] (D.Conn. 2000) (attorney fees allowable where parent is prevailing party).
10. See *Mrs. W. v. Tirozzi*, 832 F.2d 748 [42 Ed.Law Rep. 727] (2d Cir. 1987) (parents had section 1983 cause of action). *But see*, *County of Westchester v. New York*, 286 F.3d 150 [163 Ed.Law Rep. 602] (2d Cir. 2002) (IDEA does not permit private actions by counties because they are not specifically authorized in the statute).
11. See *W.B. v. Matula*, 67 F.3d 484 [104 Ed.Law Rep. 28] (3d Cir. 1995).
12. See *Angela L. v. Pasadena Indep. Sch. Dist.*, 918 F.2d 1188 [64 Ed.Law Rep. 350] (5th Cir. 1990) (although only an action to recover attorney fees under IDEA [20 U.S.C. 1415(e)(4)(B)], the court asserts in dictum that section 1983 remedies are available following Congress' passage of the Handicapped Children's Protection Act of 1986 [20 U.S.C. 1415(f)]). *Id.* at 1193, fn. 3.
13. See *Sellers v. School Bd.*, 141 F.3d 524 [125 Ed.Law Rep. 1078] (4th Cir. 1998).
14. See *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382 [79 Ed.Law rep. 389] (6th Cir. 1992) (damages not available under section 1983).
15. See *Charlie F. v. Board of Educ.*, 98 F.3d 989 [113 Ed.Law Rep. 559] (7th Cir. 1996).
16. See *Heidmann v. Rother*, 84 F.3d 1021 (8th Cir. 1996). *Heidmann* arguably overruled a prior decision, *Digre v. Roseville Indep. Sch. Dist.*, 841 F.2d 245 [45 Ed.Law Rep. 523] (8th Cir. 1988), that held that HCA had reversed *Smith* and permitted section 1983 claims for IDEA violations. However, the decision in *Heidmann* is reached without referring to *Digre*. To compound the ambiguity, *see also*, *Westendorp v. Indep. Sch. Dist. No. 273*, 131 F.Supp.2d 1121 [151 Ed.Law Rep. 861] (D.Minn. 2000) that follows *Digre* and not *Heidmann* (student recovered under section 1983 for IDEA violation and was entitled to attorney fees as prevailing party under section 1988).
17. See *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268 [149 Ed.Law Rep. 368] (10th Cir. 2000).
18. See *e.g.*, *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 122 S.Ct. 2559 (2002) where the Court granted certiorari to clarify a prior decision in *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 [101 Ed.Law Rep. 37] (1995) as to whether suspicionless random drug testing as held to be constitutional when applied to athletes constituted an illegal search under the Fourth Amendment when applied to non-athletes in other extracurricular activities; federal circuits had disagreed as to whether *Vernonia* applied to other extracurricular activities. Cf. *Todd v. Rush County Schs.*, 133 F.3d 984 [125 Ed.Law Rep. 18] (7th Cir. 1998) (random drug testing of students in extracurricular activities permissible) *with* *Earls v. Board of Educ. of Tecumseh Pub. Schs.*, 242 F.3d 1264 [151 Ed.Law Rep. 752] (10th Cir. 2001) (application of *Vernonia* to non-athletic violated Fourth Amendment because not sufficient reason stated to support random testing).
19. 992 P.2d 545 [141 Ed.Law Rep. 359] (Wash.Ct.App. 2000), *rev'd in part*, 24 P.3d 390 [154 Ed.Law Rep. 963] (Wash. 2001), *rev'd and remanded*, 122 S.Ct. 2268 [165 Ed. Law Rep. 458](2002).
20. The allegations concerning sexual misconduct involved statements allegedly made by Lynch that alleged aberrant sex acts and requests for multiple sex partners, allegations that Lynch at trial largely did not remember making. See *Doe v. Gonzaga Univ.*, 992 P.2d at 550.
21. Jane Doe who was no longer a party to the lawsuit refused to attend the trial and

participated only through a videotape deposition submitted by plaintiff that “essentially denied both that John Doe had sexually assaulted her, and that she had made most of the statements that Gonzaga had attributed to her.” *Id.* at 551.

22. The investigator was within OSPI that had the responsibility for issuing teaching certificates to persons who had graduated from teacher education programs. Jane Doe denied that she had ever used that term, “date rape,” with regard to plaintiff. *Id.* at 550, 551.
23. *Id.* at 551. Washington State required that the dean of the school of education in which a prospective teacher was completing a program to contact several faculty members and submit an affidavit that he/she and the faculty members had “no knowledge that the applicant has been convicted of any crime and [have] no knowledge that the applicant has a history of any serious behavioral problems.” WAC 180-75-082(3). Subsequent to the start of this litigation, the state modified its certification process by requiring not only the dean’s affidavit but also a teacher candidate’s moral character affidavit. WAC 180-79A-155.
24. *See* 20 U.S.C. § 1232g(b)(1).
25. *Gonzaga*, 992 P.2d at 552.
26. *Id.* at 556.
27. *Wilder v. Va. Hospital Association*, 496 U.S. 498, 509 (1990).
28. *Wilder*; *supra* note 25.
29. *Id.*
30. *Doe v. Gonzaga Univ.*, 24 P.3d at 400, quoting 120 Cong. Rec. 39,862 (1974).
31. *Id.* at 401.
32. *Id.*, citing to 20 U.S.C. § 1232g(b)(1).
33. *See e.g., Falvo v. Owasso Indep. Sch. Dist.*, 233 F.3d 1203 [149 Ed.Law Rep. 662] (10th Cir. 2000), *rev’d on other grounds*, 534 U.S. 426 [161 Ed.Law Rep. 33] (2002).
34. 122 S.Ct. 865 (2002).
35. *Cf. Gundlach v. Reinstein*, 924 F.Supp. 684 (E.D.Pa. 1996), *aff’d* 114 F.3d 1172 (3d Cir. 1997) (FERPA creates no enforceable rights) *with Falvo v. Owasso Indep. Sch. Dist.*, 233 F.3d 1203 (10th Cir. 2000), *rev’d on other grounds*, 534 U.S. 426 (2002); *Brown v. Oneonta*, 106 F.3d 1125 [116 Ed.Law Rep. 98](2d Cir. 1997) (release of education records in violation of FERPA is actionable under section 1983).
36. Chief Justice Rehnquist wrote the decision for the Court in which Justices O’Connor, Scalia, Kennedy, and Thomas joined. Justice Souter wrote a concurring opinion in which Justice Breyer joined. Justice Stevens wrote a dissenting opinion in which Justice Ginsburg joined.
37. 534 U.S. 426, 430-31 (2002).
38. *See National Labor Relations Board v. Bishop of Chicago*, 440 U.S. 490, 500 (1979) (“an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.”)
39. The Spending Power is found in U.S. Constitution, Art. I, sec. 8, para. 1 (“The Congress shall have the power to lay and collect taxes, duties, imposts and excises, to pay debts

and provide for the common defense and general welfare of the United States ...”) For an interpretation of the Spending Power, See *U.S. v. Butler*, 297 U.S. 1, 65-66 (1936). FERPA was enacted to condition the receipt of federal funds by “any educational agency or institution” requiring that it have “a policy or practice of [not] permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents.” 20 U.S.C. § 1232g(f). At age 18, the rights of parents are extended only to students. 20 U.S.C. § 1232g(a)(2)(d).

40. *Gonzaga*, 122 S.Ct. at 2274.
41. See *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987) (interpreting the Public Housing Act regarding the failure of the federal agency responsible for enforcing the Act to create a procedure for tenants to complain about violations of rent ceilings).
42. See *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498 (1990) (Court permitted health care institutions to sue for reimbursement where states had failed to provide administrative means for enforcing a money entitlement provision in the Medicaid Act).
43. *Gonzaga*, 122 S.Ct. at 2274.
44. See *Suter v. Artist M.*, 503 U.S. 347 (1992) (state did not have a plan under the Adoption and Assistance Child Welfare Act of 1980 to make reasonable efforts to keep children out of foster homes); *Blessing v. Freestone*, 520 U.S. 329, 343, 340 (1997) (Social Security Act requirement that states ensure timely payments of child support considered to be “simply a yardstick for the Secretary to measure the statewide performance of a State’s ... program” dealing with “the aggregate services provided by the State” and not “the needs of any particular person.”)
45. *Gonzaga*, 122 S.Ct. at 2275.
46. See e.g., *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (Title IX confers an implied privately enforced right because the statute provides: “No person in the United States shall, on the basis of sex ... be subjected to discrimination ...”) 20 U.S.C. § 1681(a) (emphasis added).
47. *Gonzaga*, 122 S.Ct. at 2276.
48. *Id.* at 2277.
49. See *id.* at 2276, note 4. See also, *Smith v. Robinson*, 468 U.S. 992, 1004-05 [18 Ed.Law Rep. 148] (1984) (EHA [IDEA] was exclusive remedy for addressing claims regarding providing services to handicapped children, and, therefore, plaintiffs had no claim under Equal Protection Clause).
50. *Gonzaga*, 122 S.Ct. at 2277.
51. *Id.* at 2278, quoting from *Blessing*, 520 U.S. at 343.
52. *Id.* at 2277, 2278.
53. *Id.* at 2278.
54. 20 U.S.C. § 1232g(g).
55. 34 C.F.R. §§ 99.60(a) and (b).
56. *Gonzaga*, 122 S.Ct. at 2279. For cases without this federal review mechanism, see *Wright* and *Wilder*, *supra* notes 38 and 39.

57. *Gonzaga*, 122 S.Ct. at 2279.
58. *Id.* (Breyer, J., concurring), citing to the majority opinion, *id.* at 2273, 2278..
59. *Id.* at 2280.
60. *Id.*
61. *Id.*
62. *Id.* at 2281. The dissent also finds rights in other aspects of FERPA. For example, the statute refers to “the privacy rights of students” and “the rights of privacy or students and their families,” with at age 18, “the rights accorded to the parents of the student” thereafter extended to the student. 20 U.S.C. § 1232g(a)(2),(a)(2)(c),(a)(2)(d).
63. *Gonzaga*, 122 S.Ct. at 2281, quoting from *Blessing*, 520 U.S. at 340-41.
64. *Id.* at 2283 (emphasis in original). For citations to the cases, *see supra* notes 38, 39, 41.
65. *Id.*
66. *Id.*
67. 468 U.S. 992 [18 Ed.Law Rep. 148] (1984).
68. *Gonzaga*, 122 S.Ct. at 2283, quoting from *Smith*, 468 U.S. at 1009.
69. *See Doe v. Gonzaga Univ.*, 24 P.3d at 396, 404.
70. Affirmative action has been held by the Supreme Court to apply to rectifying the effects of a state maintained racially segregated school system. *See Green v. County Sch. Bd. of New Kent County, Va.*, 391 U.S. 430 (1968). Higher education quotas based on race are a kind of affirmative action that have met with differing treatment by federal circuit courts. *Cf. Hopwood v. Texas*, 78 F.3d 932 [107 Ed. Law Rep. 552] (5th Cir. 1996) (public university law school’s admissions program which set aside specific number of seats for minority applicants violated equal protection) *with Grutter v. Bollinger*, 288 F.3d 732 [164 Ed.Law Rep. 610] (6th Cir. 2002) (law school admissions program that did not create specific number of seats for minorities by did establish “critical mass” approach to admitting underrepresented applicants did not violate Title VI of the Civil Rights Act or the Equal Protection Clause). In employment, where voluntary affirmative action plans are permitted as long as they do not violate equal protection, the Supreme Court has cast doubt on race classifications in making employment decisions by imposing a strict scrutiny standard in reviewing the use of such classifications. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) and *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).
71. 458 U.S. 176 [5 Ed.Law Rep. 34] (1982).
72. Plaintiff Rowley was not entitled to a sign language interpreter because the Court found that she had been provided with other “sufficient supportive services to permit the [her] to benefit from the [classroom] instruction ... ” *Id.* at 189.
73. 20 U.S.C. § 1401(8). The term “free appropriate education” means special education and related services that:
 - (a) Have been provided at public expense, under public supervision and direction, and without charge;
 - (b) Meet the standards of the State educational agency;
 - (c) Include an appropriate preschool, elementary, or secondary school education in the State involved; and

- (d) Are provided in conformity with the individualized education program required under section 1414(d) of this title.
74. 20 U.S.C. § 1412(5)(A).
75. *Cf.* the nondiscrimination disability statutes, Rehabilitation Act of 1973 [29 U.S.C. § 794(a), generally referred to as section 504] and the Americans with Disabilities Act (ADA) [42 U.S.C. § 12101 *et seq.*], that both exempt educational institutions from compliance where such compliance would represent “undue hardship.” Section 504, 34 C.F.R. §104.12(c); ADA, 42 U.S.C. § 12112.
76. The IDEA regulations require that public school districts identify, locate, and evaluate all children with disabilities, including those at home and in nonpublic schools. 34 C.F.R. §§ 300.125; 451(b).
77. *See e.g., Clevenger v. Oak Ridge Sch. Bd.*, 744 F.2d 514 [20 Ed. Law Rep. 404] (6th Cir. 1984) (school board required to pay \$88,000 per year for parent’s choice for a residential placement, even though the school had proposed a placement that cost \$55,000. Based on past history that the school’s choice had not worked, the court reasoned that “it would be the wiser course to spend more on a program that has a chance to work rather than less on one that has not chance at all.”) *Id.* at 517.
78. *Gonzaga*, 122 S.Ct. at 2278.
79. 42 U.S.C. § 1988(b) provides that prevailing parties in section 1983 actions are entitled to reasonable attorney fees.
80. 20 U.S.C. § 1415.
81. 20 U.S.C. § 1415(i)(2)(B).
82. 20 U.S.C. § 1415(f).
83. *See W.B. v. Matula*, 67 F.3d at 494.
84. *See Mrs. W. v. Tirozzi*, 832 F.2d at 755.
85. *Angela L.*, 918 F.2d at 1193, fn. 3.
86. 98 F.3d 989 (7th Cir. 1996).
87. 20 U.S.C. § 1415(f).
88. *Charlie F.*, 98 F.3d at 990.
89. 141 F.3d 524 (4th Cir. 1998).
90. *Id.* at 529.
91. *Id.* at 530.
92. 20 U.S.C. § 1415(f).
93. *Sellers*, 141 F.3d at 530.
94. IDEA when first enacted in 1975 was known as the Education of All Children Handicapped Act (EACHA), later shortened to the Education of the Handicapped Act (EHA), and most recently the Individuals with Disabilities in Education Act (IDEA).
95. 20 U.S.C. § 1232g(a)(4)(B)(i).
96. 20 U.S.C. § 1232g(a)(4)(B)(ii).
97. 20 U.S.C. § 1232g(a)(4)(B)(iii).
98. *See e.g., Van Selen v. McCleary*, 211 N.Y.S.2d 501 (1961) (parent had right of access to

child's school records based an *in loco parentis* concept; parent rights flowed from "the relationship with the school authorities as a parent who under compulsory education granted to them the education authority over his child.") *Id.* at 512.

99. See *Gonzaga*, 122 S.Ct. at 2281 (Stevens, J., dissenting). Justice Stevens argument for statutory rights regarding disclosure of information is disingenuous. He refers to language in FERPA granting rights of access for students and parents, but then realizes that a right of access does not confer a "blanket approach" to finding a right in the disclosure part of the statute. He cannot find language referring to a right in the disclosure part of the statute and relies on plaintiff's paraphrase of the statute. His "right of parents to withhold consent and prevent the unauthorized release of education record information by an educational institution ..." comes not from the statute but from plaintiff's brief. See 20 U.S.C. § 1232g(b).
100. *Id.* at 2277.
101. 20 U.S.C. § 1232g(a)(1)(A).
102. 20 U.S.C. § 1232g(a)(1)(D).
103. Such an interpretation of a statute finding rights in one part but not others has been recognized by the Supreme Court. See *Blessing*, 520 U.S. at 342, citing to *Wright* for the position in that case where the Court "did not ask whether the federal housing legislation generally gave rise to rights; rather, [it] focused [its] analysis on a specific statutory provision limiting "rent" to 30 percent of a tenant's income." See *Wright*, 479 U.S. at 430.
104. The only access case involves a student attempt to access medical records at a law school, However, medical records are not education records under FERPA. See *Gundlach v. Reinstein*, 924 F.Supp. 684 [109 Ed. Law Rep. 1194] (E.D.Pa. 1996).
105. *Id.* at 2282, quoting from majority opinion, *id.* at 2277 (Stevens, J., dissenting).
106. See 20 U.S.C. § 1412 (a state's plan, among other items, must demonstrate that it can provide a free appropriate education to students with disabilities).
107. See 20 U.S.C. § 1414(d)(1)(B)(i).
108. See generally, 20 U.S.C. § 1415.
109. 20 U.S.C. § 1415(b)(1).
110. 20 U.S.C. § 1415(b)(3)(A) and (B).
111. 20 U.S.C. § 1402(a).
112. See *Commonwealth of Va. V. Riley*, 106 F.3d 559 [116 Ed.Law Rep. 40] (4th Cir. 1997) where the court of appeals reversed an order of the Department of Education to withhold funds from the Commonwealth because it was not providing educational services to expelled students where the expulsion was not related to the disability. Congress changed the result in this case in its 1997 amendments by requiring that all educational institutions must continue to provide educational services to all expelled students, regardless of whether the expulsion is related to the disability.
113. IDEA prescribes numerous responsibilities for local educational authorities (LEAs). For example, LEAs "shall" secure parent consent before the initial evaluation [20 U.S.C. § 1414(a)(1)(C)(i)], "shall" reevaluate each student at least once every three years [20 U.S.C. § 1414(a)(2)(A)], "shall" follow certain procedures in evaluating a student [20 U.S.C. §

1414(b)(2),(3)], and “shall” have an IEP in effect for each student at the beginning of the school year [20 U.S.C. § 1414(d)(2)(A)].

114. *See e.g.*, 20 U.S.C. § 1414©(4)(A)(ii) (in terms of an IEP team’s determination that a child no longer has a disability, parents have “the right . . . to request an assessment to determine whether the child continues to be a child with a disability”). *See also*, 20 U.S.C. § 1415(h) where parents have a number of rights attendant to a due process hearing, including right to counsel, right of cross-examination and to compel witnesses, a verbatim record, and findings of fact and decisions.
115. *See W.B. v. Matula* where plaintiffs had a section 1983 claim for failure of the school district to evaluate and for not providing appropriate services.
116. *See Sellers v. School Bd.*, 141 F.3d at 531.
117. *See Gonzaga*, 122 S.Ct. at 2283 (Stevens, J., dissenting). For the procedures, *see* 34 C.F.R. §§ 99.63-99.67.
118. *See e.g.*, Perry Zirkel and Anastasia D’Angelo, “Special Education Case Law: An Empirical Trends Analysis,” 160 *Ed.Law Rep.* 731 (2002).
119. 233 F.3d 1268 (10th Cir. 2000).
120. *See Blessing*, 520 U.S. at 347-48; *Wright*, 479 U.S. at 423-24.
121. *Padilla*, 233 F.3d at 1273.
122. 520 U.S. 329 (1997).
123. 479 U.S. 418 (1987).
124. To oversee this complex federal-state enterprise, Congress created the Office of Child Support Enforcement (OCSE) within the Department of Health and Human Services (HHS).
125. *Blessing*, 520 U.S. at 343 (emphasis in original).
126. *Wright*, 479 U.S. at 425.
127. *Id.*
128. The four dissenting justices were O’Connor, Powell, and Scalia, and Chief Justice Rehnquist.
129. *Wright* 479 U.S. at 440.
130. *See Blessing*, 520 U.S. at 347, 348; *Wright*, 479 U.S. at 423, 424.
131. *See Gonzaga*, 122 S.Ct. at 2273, quoting from *Pennhurst*, 45 U.S. at 28.
132. *Suter*, 503 U.S. at 356.
133. *Gonzaga*, 122 S.Ct. at 2283 (Stevens, J., dissenting).
134. For differences among the circuits regarding the appropriate interpretation of HCA, *see supra* notes 80-90 and accompanying text.
135. *See supra* notes 13-17.
136. *See supra* notes 10-12.
137. For the jury award in *Gonzaga*, *see supra* note 25 and accompanying text.