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Dis-qualified Immunity for Discrimination Against the Disabled

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DIS-QUALIFIED IMMUNITY FOR DISCRIMINATION AGAINST THE DISABLED

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In his article Professor Gildin challenges the applicability of the qualified immunity defense in actions brought under the federal disability statutes. Specifically, he contends that the qualified immunity defense should not be available in actions for damages brought under the Rehabilitation Act, the Americans with Disabilities Act, and the Individuals with Disabilities Education Act. Although these acts are very powerful tools to protect the rights of disabled individuals, lower courts have slowly eviscerated a key enforcement mechanism—the remedy of money damages—by transferring the qualified immunity defense permitted in § 1983 actions to actions brought under these acts. In support of his thesis, Professor Gildin analyzes the text and legislative histories of these acts and argues that neither of these supports the existence of the qualified immunity defense. He also finds that there is no historical linkage between § 1983 and the disability statutes that justifies borrowing qualified immunity from § 1983. Finally, Professor Gildin argues that judges should not legislate this defense as Congress at the time it enacted the disability statutes did not intend for this defense to be available.

I. INTRODUCTION

The United States Congress has endeavored to guarantee the equal participation of the disabled in all aspects of American life through the passage of three statutes—the Rehabilitation Act of 1973,[1] the Americans with Disabilities Act (ADA),[2] and the Individuals with Disabilities in Education Act (IDEA) (hereinafter "The Acts").[3] Consistent with Chief Justice Marshall's admonition that "[t]he very essence of civil liberty certainly consists in the right of

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1. 29 U.S.C. §§ 701-7976 (1994).
2. 42 U.S.C. §§ 12,101-12,213 (1994).
3. 20 U.S.C.A. §§ 14,000-14,910 (1994 & Supp. 1998).

every individual to claim the protection of the laws, whenever he receives an injury,"[4] under these acts aggrieved individuals may bring an action for damages against an individual government official who intentionally discriminates based upon disability.[5] This damage remedy is an essential component of the trilogy of disability statutes, as it compensates the victim for the harm caused by discrimination and deters government officials from engaging in the proscribed discrimination.

The vitality of the damage remedy, however, has been imperilled by a line of lower federal court decisions permitting public officials to propound qualified immunity as a defense to suits for damages brought under the disability discrimination statutes.[6] This immunity shields individual government actors from accountability for intentional discrimination in all circumstances where it was not "clearly established" that the statutes proscribed the conduct in the particular factual circumstances presented.[7] Even where the unlawfulness of the official's act was "clearly established," damages nonetheless will not be awarded if the official proves either (a) he did not know and should not have known of the right, or (b) he did not know and should not have known that his conduct violated the right.[8]

If the defense of qualified immunity is accepted under the disability statutes, in most instances it can be expected that plaintiffs will be barred from recovering damages against government officials. In construing qualified immunity under 42 U.S.C. § 1983[9] (the 1871 Civil

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4. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

5. *See infra* Part II.

6. *See infra* Part III.

7. *See* Anderson v. Creighton, 483 U.S. 635 (1987). In *Anderson*, the Supreme Court held that to be "clearly established,"

> [the] contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (citation omitted).

8. *See* Harlow v. Fitzgerald, 457 U.S. 800, 801 (1982); Procunier v. Navarette, 434 U.S. 555 (1978).

9. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983 (1994 & Supp. 1998).

42 U.S.C. § 1983 was enacted as section 1 of the Civil Rights Act of 1871 in response to the states' inability or unwillingness to protect blacks against the unlawful activities of the Ku Klux Klan. *See* Monroe v. Pape, 365 U.S. 167, 174-75 (1961); Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U.

Rights Act from which courts have borrowed immunity for the disability discrimination statutes[10]) the United States Supreme Court has declared that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[11] Furthermore, at least one federal court of appeals has presumed "[t]hat qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their *individual capacities*."[12]

This article contends that the defense of qualified immunity may not be asserted in actions for damages brought under the Acts. Congress did not confer qualified immunity in the text of any of the disability discrimination statutes, even though at the time of their enactment Congress was well aware of how to make clear its intent to grant immunity.[13] In addition, implying immunity is contrary to the legislative history of the Acts, which plainly prescribes that the Acts are to be liberally construed to provide disabled individuals with broad remedies should they suffer discrimination.[14]

L. REV. 1, 5 (1985); Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1153-56 (1977). However, § 1983 broadly authorizes a federal civil rights action against persons acting under color of state law to redress deprivations of any right protected by the Constitution, whether the official whose action gave rise to the violation was acting in accordance with or in contravention of state or local law. *See Monroe*, 365 U.S. at 172. Individual state or local officials are personally liable for actual and punitive damages where there is an affirmative link between the official's conduct and the constitutional deprivation. *See* Smith v. Wade, 461 U.S. 30, 56 (1983); Martinez v. California, 444 U.S. 277, 285 (1980); Carey v. Piphus, 435 U.S. 247, 264-65 (1978); Rizzo v. Goode, 423 U.S. 362, 373-76 (1976). However, these officials may assert as a defense qualified, and in some instances absolute, immunity when sued for damages. *See Anderson*, 483 U.S. at 646; Mitchell v. Forsyth, 472 U.S. 511, 513 (1985); Davis v. Scherer, 468 U.S. 183, 190-97 (1984); *Harlow*, 457 U.S. at 806-08; *Procunier*, 434 U.S. at 560-66; O'Connor v. Donaldson, 422 U.S. 563, 569 (1975); Wood v. Strickland, 420 U.S. 308, 322 (1975); Scheuer v. Rhodes, 416 U.S. 232, 234-35 (1974); Pierson v. Ray, 386 U.S. 547, 557 (1967).

Local governmental entities are not vicariously liable under § 1983 for invasions of constitutional rights caused by their employees acting within the scope of employment. *See* Monell v. Department of Soc. Servs., 436 U.S. 658, 694 (1978). Instead, the local entity is liable only if the acts of the official giving rise to the violation represent governmental policy or custom. *See id.* at 690-91; Board of County Comm'rs v. Brown, 520 U.S. 397, 403 (1997); City of Canton v. Harris, 489 U.S. 378, 385 (1989); City of St. Louis v. Praprotnik, 485 U.S. 112, 121 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 471 (1986). Unlike individual officials, the local government may not invoke any immunity defense. *See* Owen v. City of Independence, 445 U.S. 622, 638 (1980).

State governmental entities may not be sued directly for either damages or equitable relief under § 1983. *See* Will v. Michigan Dep't of State Police, 491 U.S. 58, 64 (1989); Quern v. Jordan, 440 U.S. 332, 338 (1979); Alabama v. Pugh, 438 U.S. 781, 782 (1978); Edelman v. Jordan, 415 U.S. 651, 674 (1974). However, prospective injunctive relief may be obtained against a state through the fiction of suing the individual state official in her official, rather than individual, capacity if the violation was visited pursuant to a policy or custom of the state. *See* Kentucky v. Graham, 473 U.S. 159, 165 (1985).

10. *See infra* Part III.

11. Malley v. Briggs, 475 U.S. 335, 341 (1986).

12. Lassiter v. Alabama A & M Univ., 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc).

13. *See infra* Part IV.

14. *See infra* Part V.

The courts that have allowed a qualified immunity defense to be erected by government officials sued for intentional discrimination have not attempted to reconcile the defense with the text and legislative history of the Acts. Instead, without analysis the courts have reflexively extended the qualified immunity available in actions for constitutional violations filed under 42 U.S.C. § 1983.[15] Transmuting immunity from § 1983 to the disability discrimination statutes is entirely inappropriate for three reasons. First, the Acts are independent congressional measures that were not modeled after § 1983.[16] Second, the fact that qualified immunity under § 1983 originated in state common law confirms that § 1983 immunity is inapplicable to actions brought under the Acts.[17] In the era in which the disability discrimination statutes were enacted, statutes had supplanted the common law as the source of immunity in state law. Under the Supremacy Clause of the United States Constitution,[18] these state statutes cannot immunize officials who transgress the dictates of federal statutes, nor did Congress so intend. Finally, even under its broad power to fashion remedies for implied causes of action, the judiciary may not legislate a qualified immunity defense that Congress did not intend for actions under the Acts.[19]

II. The Contours of the Cause of Action for Violation of the Disability Discrimination Statutes

To assess why qualified immunity is not an appropriate defense under the Acts, it is first necessary to understand the contours of the causes of action under the Acts. Accordingly, this section will separately analyze the cause of action under each of the disability discrimination statutes, focusing upon the categories of potential defendants and the circumstances under which damages may be recovered.

A. The Rehabilitation Act of 1973

The Rehabilitation Act of 1973 was enacted to make employment and participation in society more feasible for the disabled.[20] It was not established to afford disabled individuals preferential status or to accommodate their needs in every given situation. Rather, the Act was designed to eliminate discrimination and "to assure that [disabled] individuals receive 'evenhanded treatment' in relation to [nondisabled]

15. *See infra* Part III.
16. *See infra* Part VI.A, VI.B.
17. *See infra* Part VI.C.
18. U.S. Const. art VI, cl. 2.
19. *See infra* Part VII.
20. Congress realized this purpose by creating funding for state rehabilitation programs, research and development, and the overall advancement of disabled individuals. *See* 29 U.S.C. §§ 701-7976 (1994).

individuals."[21] Section 504 of the Act strives to achieve these goals by providing that "[n]o otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, . . . be denied the benefits of . . . any program or activity receiving Federal financial assistance."[22] As the first federal statute to prohibit discrimination against individuals with disabilities, § 504 is commonly referred to as "the civil rights bill of the disabled."[23]

It is well established that individuals who have been discriminated against because of a disability have a private cause of action under § 504 of the Rehabilitation Act. The Act does not expressly provide for a private civil action. The courts, however, have implied the cause of action they deemed Congress to have intended when it enacted § 504.[24]

1. Potential Defendants

According to the text of § 504 and the case law interpreting its application, there are five groups of persons or entities against whom a private cause of action may be maintained. An individual plaintiff asserting a violation of his § 504 rights may bring suit against the federal government[25] as well as any state or local governmental entities that receive federal funding.[26] Section 504 also subjects government

21. Traynor v. Turnage, 485 U.S. 535, 548 (1988) (quoting Alexander v. Choate, 469 U.S. 287, 304 (1985)).

22. 29 U.S.C. § 794 (1994).

23. Helen L. v. DiDario, 46 F.3d 325, 330 (3d Cir. 1995).

24. The federal courts of appeals have uniformly held that a private cause of action exists. *See, e.g.*, Moreno v. Consolidated Rail Corp., 99 F.3d 782, 788 (6th Cir. 1996); Spence v. Shaw, 54 F.3d 196, 202 (3d Cir. 1995); J.L. v. Social Sec. Admin., 971 F.2d 260, 270 (9th Cir. 1992); Johnson v. U.S. Postal Serv., 861 F.2d 1475, 1477 (10th Cir. 1988); Milbert v. Koop, 830 F.2d 354, 359 (D.C. Cir. 1987); Andrews v. Consolidated Rail Corp., 831 F.2d 678, 681 (7th Cir. 1987); Jennings v. Alexander, 715 F.2d 1036, 1040 (6th Cir. 1983); Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1284-87 (7th Cir. 1977). Even though the Supreme Court has never directly addressed the issue of whether an implied private cause of action exists for violations of § 504, the Court has decided a number of cases in which its holdings touch or rest upon the existence of such a cause of action. For example, in *Consolidated Rail Corp. v. Darrone*, the Court held that at least "equitable action[s] for back-pay" were allowed for intentional discrimination under § 504. 465 U.S. 624, 630 (1984). In *Lane v. Pena*, the Court held that awards of monetary damages are not available in suits against the federal government for violations of § 504. *See* 518 U.S. 187, 193 (1996). In the dissenting opinion in *Lane,* Justice Stevens wrote,

> Lane was injured by that violation, and he is therefore entitled to maintain an action against the agency under Section 504. The parties and the Court agree that damages are an appropriate form of relief for most violations of § 504 . . . . The only issue in this case is whether Congress carved out a special immunity from damages liability for federal agencies acting in a non-funding capacity . . . .

Id. at 201; *cf.* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 71 (1992) (holding that compensatory damages are available in implied cause of action under Title IX of the Education Amendments of 1972).

25. *See, e.g.*, *Lane*, 518 U.S. 187.

26. Although current law permits it, an individual plaintiff was not always able to sue a state government for § 504 violations. In *Atascadero State Hosp. v. Scanlon*, the Supreme Court held that because Congress had not clearly and unmistakably expressed its intent to abrogate the

officials to liability in their individual capacities.[27] Additionally, private entities may be sued under § 504 so long as they qualify as programs or activities in receipt of federal funds.[28] Until recently, it was accepted that the directors, officers, and employees who were personally responsible for creating and implementing the private entity's discriminatory policies were also liable.[29] Recently, however, a number of courts have held that private individuals are not proper defendants in actions under the Rehabilitation Act.[30] Thus, whether private individuals are subject to suit under § 504 remains unclear.

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states' 11th Amendment immunity in the text of the statute, the states were not subject to suit in federal court for violations of § 504. 473 U.S. 234, 246 (1985). Congress, in response to the Court's limiting opinion, amended § 504 of the Rehabilitation Act to include a provision expressly stating that the states shall not be immune from suits in federal court for violations of § 504 by reason of the 11th Amendment. *See* 42 U.S.C. § 2000d-7 (1994).

The constitutionality of this amendment was reviewed and confirmed in two recent cases. *See* Clark v. California, 123 F.3d 1267, 1270 (9th Cir. 1997); Mayer v. University of Minn., 940 F. Supp. 1474, 1477 (D. Minn. 1996). In *Seminole Tribe of Florida v. Florida*, the Supreme Court held that Congress may abrogate the states' sovereign immunity under the 11th Amendment only if "Congress has 'unequivocally expresse[d] its intent to abrogate the immunity' . . . and . . . has acted 'pursuant to a valid exercise of power.'" 517 U.S. 44, 55 (1996) (citations omitted). Because Congress clearly expressed its intent to abrogate the states' sovereign immunity in both the Americans with Disabilities Act and in the 1986 amendments to the Rehabilitation Act and because Congress was considered to have acted pursuant to its 14th Amendment power, the courts held that the state governments were subject to suit. *See Clark*, 123 F.3d at 1269-70; *Mayer*, 940 F. Supp. at 1477-80.

27. Government officials also may be sued in their official capacity. However, such suits are only available if the plaintiff would otherwise have a cause of action against the governmental entity itself. *See, e.g.*, P.C. v. McLaughlin, 913 F.2d 1033, 1039 (2d Cir. 1990); Doe v. City of Chicago, 883 F. Supp. 1126, 1133 (N.D. Ill. 1994). In general, official capacity suits merely represent an additional way of pleading an action against an entity of which an officer is an agent. *See* Kentucky v. Graham, 473 U.S. 159, 165 (1985). For this reason, as long as the government entity receives notice and an opportunity to respond, an official capacity suit is, in all respects other than name, treated as a suit against the entity.

28. *See, e.g.*, Guertin v. Hackerman, 496 F. Supp. 593, 595-96 (S.D. Tex. 1980). In 1984, the Supreme Court limited the scope of § 504 by narrowly defining "program or activity" to include only specific programs or activities receiving federal funds. *See* Grove City College v. Bell, 465 U.S. 555, 573-74 (1984). The Court rejected the argument that the Act should apply to the entire institution, even if only a small division of it was receiving federal funds. *See id.* at 571. In 1988, Congress responded to this decision by passing the Civil Rights Restoration Act, which amended § 504. *See* Pub. L. No. 100-259, 102 Stat. 29 (1988). The 1988 amendment defined the meaning of "program or activity" so that in its application the Rehabilitation Act would prohibit discrimination throughout an entire institution as opposed to just those programs receiving federal funds.

29. *See, e.g.*, Johnson v. New York Hosp., 897 F. Supp. 83, 83 (S.D.N.Y. 1995).

30. *See* Simenson v. Hoffman, No. 95 C1401, 1995 WL 631804, at *4 (N.D. Ill. Oct. 24, 1995); Romand v. Zimmerman, 881 F. Supp. 806, 812 (N.D.N.Y. 1995); Haltek v. Village of Park Forest, 864 F. Supp. 802, 805 (N.D. Ill. 1994). This split of authority in the federal district courts is the result of a 1992 congressional amendment to the Rehabilitation Act which provided that in employment discrimination cases alleging violations of the Rehabilitation Act, the standards of the ADA would apply for the purpose of determining whether the Rehabilitation Act has been violated. *See* 29 U.S.C. § 794(d) (1995). Significantly, under Title I of the ADA, only a "covered entity," which includes an "employer," is subject to suit for discriminating against a qualified individual with a disability. *See* 42 U.S.C. §§ 12,111(2), 12,111(a) (1994). An "employer" is defined as a person engaged in an industry affecting commerce who has 15 or more employees in his employment. *See* § 12,111(5)(A). Because of this definition, a supervisory employee is not subject to suit under Title I of the ADA. *See infra* note 50.

Consequently, some courts have interpreted this amendment as exempting from Rehabilitation Act liability those employers that are not subject to the ADA. *See Romand*, 881 F. Supp. at

2. Remedies

The remedies available to a successful § 504 plaintiff originate in § 505(a)(2) of the Rehabilitation Act. Section 505(a)(2) states:

> [T]he remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et. seq.*] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under [§ 504] of this title.[31]

The courts initially restricted the remedies available under § 505(a)(2) to equitable relief, the withdrawal of federal funds from the program in violation of the Act,[32] and attorneys' fees.[33] However, in light of the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*,[34] all appropriate remedies, including damages, are now available.

In *Franklin,* the Court held that damages are recoverable in an implied cause of action under Title IX of the Education Amendments of 1972, a statute with language similar to that of § 504.[35] In so holding, the Court relied upon "[t]he general rule . . . that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."[36] Finding no congressional intent to limit recovery, federal courts have applied the presumption that all appropriate remedies, including compensatory and punitive damages, are available to redress violation of § 504 of the Rehabilitation Act.[37]

812; *Haltek,* 864 F. Supp. at 804-05. In *Haltek*, the court held that because the supervisory employee defendants did not fit the definition of "employer" as set forth by the ADA, they could not be subjected to suit under either the ADA or the Rehabilitation Act. *See id.* at 805. This holding would preclude suit against an officer or an employee of a private organization regardless of the individual's discriminatory conduct.

However, this construction of the Rehabilitation Act was rejected in *Johnson*, 897 F. Supp. at 86. The *Johnson* court found that "Congress did not intend the ADA's definition of 'employer' to restrict the previously unencumbered application of the Rehabilitation Act." *Id.* The court further held that it seemed "unlikely that Congress expanded the Rehabilitation Act's coverage to employers that do not receive federal funds, and at the same time circumscribed the Act's coverage of federal fund recipients to those that employ more than 14 workers." *Id.* Ultimately, the court concluded that an individual can be liable under the Rehabilitation Act while exempt from liability under the ADA. *See id.* Further support for the *Johnson* decision may be found in § 12,201 of the ADA, which provides: "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973." 42 U.S.C. § 12,201(a) (1994).

31. 29 U.S.C. § 794a (1994).

32. *See* 42 U.S.C. § 2000d-1 (1994).

33. The Rehabilitation Act provides that in any action or proceeding to redress a violation of a provision of the Act, "the court, in its discretion, may allow any prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 29 U.S.C. § 794a(b).

34. 503 U.S. 60 (1992).

35. *See id.* at 71.

36. *Id.* at 70-71.

37. *See* Bartlett v. New York State Bd. of Law Examiners, 156 F.3d 321 (2d Cir. 1998) ("The law is well settled that intentional violations of Title VI, and thus . . . the Rehabilitation

While damages are ordinarily recoverable for violation of the Rehabilitation Act, there is one class of defendants that may not be sued for damages. In *Lane v. Pena*, the Supreme Court held that Congress did not waive the federal government's sovereign immunity to suits seeking recovery of monetary damage awards.[38] Therefore, under no circumstances may a prevailing plaintiff recover monetary damages against the federal government, although federal officials remain individually liable for damages caused by their discriminatory conduct.

To establish a prima facie case under § 504,

> a plaintiff must show: (1) that he has a disability for purposes of the . . . Act; (2) that he was "otherwise qualified" for the benefit that has been denied; (3) that he has been denied the benefits "solely by reason" of his disability; and (4) that the benefit is part of a "program or activity receiving Federal financial assistance."[39]

To obtain equitable relief under § 504 a plaintiff need not establish a discriminatory intent.[40] However, to recover monetary damages, a plaintiff must further prove that the defendant's actions were intentional.[41]

B. The Americans with Disabilities Act

Congress expanded its effort to guarantee that individuals with disabilities will have the opportunity to participate equally and fully in American life by passing the Americans with Disabilities Act.[42] As

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Act, can call for an award of money damages."); Schultz v. YMCA of the United States, 139 F.3d 286, 290 (1st Cir. 1998) (holding that while damages are recoverable under § 504 of the Rehabilitation Act, damages are not recoverable for emotional distress absent physical or economic damage or proof of malice); Moreno v. Consolidated Rail Corp., 63 F.3d 1404, 1415 (6th Cir. 1995) (noting that Congress has never acted to limit the remedies available to § 504 plaintiffs, even though it has amended other aspects of the Act and has been aware that the presumption of the availability of all appropriate damages would apply absent its express indication to the contrary); Burns-Vidlak v. Chandler, 980 F. Supp. 1144, 1148-52 (S.D.N.Y. 1997) (holding punitive damages are recoverable under the Rehabilitation Act); *see also* Lane v. Pena, 518 U.S. 187, 190-91 (1996) (discussing the scope of available remedies under the Rehabilitation Act).

38. *See Lane*, 518 U.S. at 195-98.

39. Doe v. Pfrommer, 148 F.3d 73, 82 (2d Cir. 1998) (quoting Flight v. Gloeckler, 68 F.3d 61, 63 (2d Cir. 1995)); *see also* W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

40. *See* Ferguson v. City of Phoenix, 157 F.3d 668, 674-75 (9th Cir. 1998).

41. *See id.* at 674; Wood v. President of Spring Hill College, 978 F.2d 1214, 1219-20 (11th Cir. 1992); Carter v. Orleans Parish Pub. Schs., 725 F.2d 261, 264 (5th Cir. 1984); DeLeo v. City of Stanford, 919 F. Supp. 70, 73 (D. Conn. 1995); Tafaoya v. Bobroff, 865 F. Supp. 742, 751 (D.N.M. 1994). Furthermore, in the context of the education of disabled children, to demonstrate a violation of § 504, the plaintiff must prove either bad faith or a gross misjudgment. *See* Todd v. Elkins Sch. Dist. No. 10, No. 97-3258, 1998 U.S. App. LEXIS 8083, at *3-5 (4th Cir. Apr. 27, 1998). "Liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at *3 (quoting Youngberg v. Romeo, 457 U.S. 307, 323 (1982)). Damages for emotional distress are also most likely available only upon a showing of actual animus. *See Schultz*, 139 F.3d at 291.

42. 42 U.S.C. §§ 12,101-12,213 (1994). The ADA was enacted on July 26, 1990, and was passed by huge bipartisan majorities in both houses. *See* AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS & EMPLOYER OBLIGATIONS 1-49 to 1-50 (Jonathan R. Mook ed., 1996) (ex-

Congress stated, "society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[43] Congress also recognized that disabled individuals face extraordinary barriers and discrimination by "outright intentional . . . segregation," and often have "no legal recourse to redress such discrimination."[44] Therefore, Congress passed the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"[45] "to provide clear, strong, consistent, enforceable standards addressing . . . individuals with disabilities,"[46] and "to ensure that the Federal Government plays a central role in enforcing the standards established in [the ADA] on behalf of individuals with disabilities."[47]

While § 504 of the Rehabilitation Act bars discrimination only in programs that receive federal financial assistance, the ADA protects the disabled from discrimination in the private sector.[48] The ADA also extended the prohibition against discrimination to all state and local governmental entities, regardless of whether they receive federal financial assistance.[49] The ADA is divided into five major titles. However, Title II is the only ADA title under which qualified immunity is likely to be an issue.[50]

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plaining that the ADA passed the House of Representatives by a vote of 403-20 and the Senate by a vote of 76-8).

43. 42 U.S.C. § 12,101(a)(2). Congress also found that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." § 12,101(a)(9).

44. § 12,101(a)(4) & (5) (footnote omitted).

45. § 12,101(b)(1).

46. § 12,101(b)(2).

47. § 12,101(b)(3).

48. *See* H.R. REP. No. 101-485, pt. 2, at 54-55 (1990).

49. *See* 42 U.S.C. §§ 12,131-12,165 (1994).

50. The first three titles prohibit discrimination against individuals with disabilities with respect to employment, public services (including transportation services), public accommodations, and telecommunications. The fourth title is comprised of miscellaneous provisions including a provision explicitly abrogating the states' 11th Amendment immunity. This article, however, addresses only Title II because the issue of qualified immunity does not arise under the other titles due to limitations on remedies as well as restrictions on proceedings against certain classes of defendants.

With respect to Title I, which prohibits an employer from discriminating against a qualified individual with a disability, a majority of the courts have recently held that the statute does not provide for individual liability. *See, e.g.*, Wathen v. General Elec. Co., 115 F.3d 400, 404-05 (6th Cir. 1997); Mason v. Stallings, 82 F.3d 1007, 1009 (11th Cir. 1996); EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1281 (7th Cir. 1995); Mace v. City of Akron, 989 F. Supp. 949, 960 (N.D. Ohio 1998); Kacher v. Houston Community College Sys., 974 F. Supp. 615, 619 (S.D. Tex. 1997); Hardwick v. Curtis Trailers Inc., 896 F. Supp. 1037, 1039 (D. Or. 1995); Haltek v. Village of Park Forest, 864 F. Supp. 802, 806 (N.D. Ill. 1994). This recent shift towards rejecting individual liability is based on interpretations of the Act's definition of the term "employer." Under Title I, an "employer" is defined as a "person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks . . . and any agent of

Title II of the ADA applies to employment discrimination[51] as well as to discrimination with respect to public services, including

such person." 42 U.S.C. § 12,111(5). Predictably, the meaning and purpose of the "any agent" language was the principal focus in interpreting this statutory definition.

To determine whether the "any agent" language was indicative of a congressional intent to hold individual employees liable, the Seventh Circuit relied upon decisions construing Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA). *See AIC Sec. Investigations*, 55 F.3d at 1281. The court of appeals looked to these acts because Title VII is the origin of the term "employer" for both the ADA and the ADEA and "courts routinely apply arguments regarding individual liability to all three statutes interchangeably." *Id.* at 1280. The Seventh Circuit found that Congress included the "any agent" language to ensure that the courts would impose respondeat superior liability upon employers for the acts of their employees. *See id.* at 1281. In addition, the court concluded that the remedial scheme of the ADA as well as the threshold level of 15 employees for employer liability indicated Congress's intent to hold only the employer liable. *See id.* For these reasons, the Seventh Circuit held that a supervisory employee could not be held individually liable for violations of the Act as an agent of a designated employer. *See id.*

The court of appeals' conclusion is consistent with decisions regarding individual liability under Title VII and the ADEA. Prior to 1995, the circuit courts were divided on the issue of individual liability under these employment discrimination statutes. Currently, however, most of the circuits that have addressed this issue have held that individuals may not be liable under the Acts. For example, the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits all have rejected individual liability. *See Wathen*, 115 F.3d at 404; Gregory M. P. Davis, Comment, *More Than a Supervisor Bargains for: Individual Liability Under the Americans with Disabilities Act and Other Employment Discrimination Statutes,* 1997 WIS. L. REV. 321, 328-29 (discussing the courts' shift to rejecting individual liability under the employment discrimination statutes). Because of the common roots, it is likely that the circuits that have rejected individual liability under Title VII and the ADEA also will reject individual liability under Title I of the ADA. Because qualified immunity is a defense only to individual liability for damages, the doctrine does not appear to be relevant to Title I of the ADA.

Similarly, qualified immunity does not arise under Title III of the ADA. Title III of the ADA concerns public accommodations and services operated by private entities. It states that "no individual shall be discriminated against on the basis of a disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12,182(a). However, the Act provides only for injunctive relief as a remedy for violation of Title III. Because monetary remedies are not available, qualified immunity is inapplicable to this title. *See* Wood v. Strickland, 420 U.S. 308, 314 n.6 (1975).

51. Although Title II does not explicitly address employment discrimination, several district courts and the two circuit courts that have addressed this issue have all held that Title II prohibits employment discrimination. *See* Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816, 819 (11th Cir. 1998); Doe v. University of Md. Med. Sys. Corp., 50 F.3d 1261, 1264-65 (4th Cir. 1995); Dominguez v. City of Council Bluffs, 974 F. Supp. 732, 736-37 (S.D. Iowa 1997); Hernandez v. City of Hartford, 959 F. Supp. 125, 133 (D. Conn. 1997); Wagner v. Texas A & M Univ., 939 F. Supp. 1297, 1309 (S.D. Tex. 1996); Graboski v. Guiliani, 937 F. Supp. 258, 267-69 (S.D.N.Y. 1996); Eisfelder v. Michigan Dep't of Natural Resources, 847 F. Supp. 78, 83 (W.D. Mich. 1993); Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276, 1278 (W.D. Wis. 1993). In reaching this decision, the courts have looked to the statutory language of Title II, the relevant regulations as promulgated by the Department of Justice, and the legislative history of the ADA. *See Bledsoe,* 133 F.3d at 820-23; *University of Md. Med. Sys. Corp.*, 50 F.3d at 1264-67. However, application of the Title's prohibitions is complicated and involves cross-referencing other parts of the statute as well as the Rehabilitation Act. For instance, Title II incorporates the standards and employment regulations of Title I for entities that are large enough to be covered by Title I (those who have 15 or more employees for each working day in each of 20 or more calendar weeks), whereas the standards of § 504 of the Rehabilitation Act apply to the remaining public entities that are not covered by Title I. *See generally* Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. &

transportation. It provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from the participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[52] For purposes of the ADA, a public entity is defined as: "(a) any State or local government; (b) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (c) the National Railroad Passenger Corporation and any commuter authority."[53] Significantly, this definition has the effect of imposing nondiscriminatory standards and policies on a huge segment of society. As the Court of Appeals for the Third Circuit explained, "Title II of the ADA and its implementing regulations incorporate the nondiscrimination principles of § 504 of the Rehabilitation Act and extend them to 'a much wider array of institutions and businesses, including services provided by states and municipalities' without regard to the receipt of federal financial assistance."[54]

As with § 504 of the Rehabilitation Act, there is a private right of action for violations of Title II of the ADA. In fact, Title II expressly incorporates § 504's cause of action. It provides that "[t]he remedies, procedures, and rights set forth in section 794(a) of Title 29 [the applicable section of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title."[55]

1. Potential Defendants

Actions under Title II generally implicate the same classes of defendants as litigation under § 504 of the Rehabilitation Act, although there is no requirement under Title II that the defendant be a recipient of federal funds. Suits for violation of Title II may be brought against state and local government entities[56] as well as against government officials in their individual capacities.[57] There is one aspect of

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MARY L. REV. 1089 (1995) (discussing and examining the interrelations of the prohibitions imposed by Title I, Title II, and § 504).

52. 42 U.S.C. § 12,132.

53. § 12,131(1).

54. Raines v. Florida, 983 F. Supp. 1362, 1370 (N.D. Fla. 1997) (quoting Easley v. Snider, 36 F.3d 297, 300-01 (3d Cir. 1994)).

55. § 12,133.

56. It has been decided that in enacting the ADA, Congress abrogated the states' 11th Amendment immunity clearly and pursuant to a valid exercise of power. Therefore, states are subject to suit for violations of the statute in federal court. *See* Coolbaugh v. State of Louisiana, 136 F.3d 430, 438 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 58 (1998); Autio v. AFSCME, 157 F.3d 1141, 1141 (8th Cir. 1998) (affirmed by an evenly divided vote of the court en banc); Kimel v. State of Fla. Bd. of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998); Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 126 F.3d 589, 603 (4th Cir. 1997), *vacated in part on other grounds*, 118 S. Ct. 1952 (1998).

57. *See, e.g.*, Ferguson v. City of Phoenix, 157 F.3d 668 (9th Cir. 1998); Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995); Niece v. Fitzner, 922 F. Supp. 1208, 1218-19 (E.D. Mich. 1996);

Title II that affords lesser protection than the Rehabilitation Act. While § 504 actions could be maintained against the federal government for equitable relief but not damages, the United States government may not be sued even for equitable relief to redress Title II violations.[58]

2. *Remedies*

Because Title II of the ADA incorporates § 504's remedies, a Title II plaintiff is entitled to the full panoply of remedies, including damages.[59] There are, however, some restrictions on the damage remedy. If the Title II plaintiff is asserting an employment discrimination claim governed by the standards of Title I, the amount of damages recoverable is constrained by the limitations on recovery set forth in Title I.[60] In addition, a Title II plaintiff is precluded from receiving punitive damages from government entities for employment discrimination as Congress expressly granted public entities immunity from such judgments.[61] As was true of actions under the Rehabilitation Act, while proof of intent is not a prerequisite to equitable relief, a plaintiff must prove intentional discrimination to recover damages for violation of the ADA.[62]

Noland v. Wheatley, 835 F. Supp. 476 (N.D. Ind. 1993). In these cases, the courts entertained the defense of qualified immunity for the defendant in his individual capacity. The *Niece* court noted that "[t]here is nothing within Title II which explicitly authorizes or prohibits suits against public actors acting in their official or individual capacities." *Niece*, 922 F. Supp. at 1218. However, in ultimately deciding to hold the defendants individually liable, the court reasoned that the ADA "is a broad, remedial statute enacted to eliminate discrimination against disabled persons" and, therefore, "must be construed broadly to carry out its purpose." *Id.* at 1218-19. Similarly, in *Randolph v. Rodgers*, the court noted that neither the ADA nor the Rehabilitation Act explicitly addresses whether an individual employee could be held liable in his individual capacity. *See* Randolph v. Rodgers, 980 F. Supp. 1051, 1060 (E.D. Mo. 1997), *rev'd in part and vacated in part on other grounds*, 170 F.3d 850 (8th Cir. 1999). Interestingly, the court never made a final decision with respect to this issue. Rather, it decided the case in the alternative and held that the defendants were entitled to qualified immunity. *See id.* at 1061. For a more detailed discussion of the qualified immunity defense and the courts that have awarded it, see *infra* Part III.

58. Congress expressly excluded the federal government from the definition of "public entity." *See* 42 U.S.C. § 12,131(1).

59. *See* H.R. REP. NO. 101-485, pt.2, at 98 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 381 ("As with § 504, there is also a private right of action which includes the full panoply of remedies."); Bartlett v. New York State Bd. of Law Examiners, 156 F.3d 321, 333 (2d Cir. 1998); Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 279 (3d Cir. 1996) (monetary damages are available under the ADA).

60. Under Title I, plaintiffs may sue for both injunctive and monetary relief. With respect to the monetary relief, the amount is determined by the size of the employer pursuant to the limitations imposed by the Civil Rights Act of 1991. For example, if the employer has more than 14 employees but fewer than 101 during each of 20 or more calendar weeks, the compensatory and punitive damages cannot exceed $50,000. *See* 42 U.S.C. § 1981a(b)(3)(A) (1994).

61. *See id.*

62. *See Ferguson*, 157 F.3d at 674; *Niece*, 922 F. Supp. at 1219 n.9.

C. *Individuals with Disabilities in Education Act*

The Individuals with Disabilities in Education Act was originally passed in 1975 as the Education for All Handicapped Children Act (EAHA).[63] In 1990, Congress changed the name to the Individuals with Disabilities in Education Act in accordance with the modern trend of referring to such individuals as disabled as opposed to handicapped.[64] Even though Congress changed the statute's name, it kept intact the main provisions and purposes of the EAHA. The stated purposes of the act are:

> (1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living; (B) to ensure that the rights of children with disabilities and parents of such children are protected; and (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; (2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families; (3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and (4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.[65]

In passing the IDEA, Congress found that there were more than eight million children with disabilities in the United States.[66] Notably, more than half did not receive appropriate educational services, and at least one million were completely excluded from the public school system.[67] To realize its goal of helping disabled children, Congress requires each state receiving federal financial assistance to develop a plan under which the resident disabled children are provided with free

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63. Pub. L. No. 94-142, § 3(a), 89 Stat. 773 (1975). Before 1975, educational protections for children with disabilities were provided by the Education of the Handicapped Act, Pub. L. No. 91-230, tit. VI, 84 Stat. 175-188 (1970). *See infra* Part VI.B.

64. *See* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103.

65. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 101, 111 Stat. 37, 42.

66. *See* 20 U.S.C.A. § 1400(b) (Supp. 1998), *amended by* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 101, 111 Stat. 37, 37-42.

67. *See id.*

appropriate public education.[68] The IDEA further mandates that such education be individualized for each child.[69]

Unlike the Rehabilitation Act and the ADA, the IDEA explicitly provides any aggrieved party with a private cause of action to redress violations of the statute.[70] However, this cause of action is not immediately available. The IDEA requires a person claiming a deprivation of rights to pursue and exhaust available administrative remedies before initiating a civil suit.[71] Thus, the cause of action exists as an appeal of a final administrative decision.

1. Potential Defendants

Since the Education of the Handicapped Amendments of 1990, states have been subject to suit for violation of the IDEA.[72] The cur-

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68. *See* § 101, 111 Stat. at 60. Any state seeking to obtain federal funding pursuant to the IDEA must submit a plan that includes goals, timetables, and descriptive information concerning the facilities, personnel, and services needed to meet the goal of providing full educational opportunities for all children with disabilities. *See* § 101, 111 Stat. at 61, 81-88.

69. *See* § 101, 111 Stat. at 83-87. To ensure that each child receives individualized education, the Act requires the state to develop an individualized education program (IEP) for each disabled child. The IEP is formed by a joint effort between the child's parents and the school personnel. It describes the child's abilities and needs and prescribes a program specifically tailored to the particular child's needs. *See* § 101, 111 Stat. at 81-88.

70. *See* § 101, 111 Stat. at 92.

71. *See id.* Before the Handicapped Children's Protection Act (HCPA) was enacted in 1986, parties tried to circumvent this exhaustion requirement by filing suits under § 504 of the Rehabilitation Act or under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1994). Neither § 504 nor § 1983 requires exhaustion of administrative remedies before a suit can be filed. The HCPA precluded evasion of administrative remedies by expressly requiring parties to pursue administrative remedies under the IDEA before instituting actions under these other statutes. *See* Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, §§ 2, 3, 100 Stat. 796, 796 (amended 1997). The IDEA provides:

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

Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 101, 111 Stat. 37, 98. However, this provision does not establish the IDEA as the exclusive remedy for disabled children. As the Third Circuit explained, "[w]hile section 1415(f) [to be codified as amended as 20 U.S.C. § 1415(*l*)] requires a party to exhaust the IDEA's administrative remedies before pursuing other claims, the section makes clear that the IDEA is not the exclusive avenue through which children with disabilities can assert claims for an appropriate education." Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 763 (3d Cir. 1995).

72. *See* § 101, 111 Stat. at 47. These amendments, which added § 1403 to the IDEA, were passed in response to the Supreme Court's holding in *Dellmuth v. Muth*, 491 U.S. 223 (1989). In *Dellmuth*, the Court held that states may not be sued under the IDEA because the statutory language did "not evince an unmistakably clear intention to abrogate the State's constitutionally secured immunity from suit." *Id.* at 232. Thereafter, Congress amended the statute to expressly provide for a cause of action against the states. *See* Marie O. v. Edgar, 131 F.3d 610, 617 (7th Cir. 1997) (discussing the process by which Congress properly and unambiguously made states amenable to suit for violations of the IDEA); Emma C. v. Eastin, 985 F. Supp. 940, 946 (N.D. Cal. 1997) (holding that Congress's abrogation was done properly and pursuant to a valid exercise of its power). However, only violations that "occur in whole or in part after October 30, 1990," are

rent version of the IDEA expressly establishes that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this Act."[73] Section 1403 also precludes state educational agencies from seeking to dismiss an IDEA suit on Eleventh Amendment immunity grounds.[74] Local educational entities also are subject to suit for violations of the Act.[75] Finally, actions for violation of the IDEA may be filed against the officials of state and local agencies in their individual capacities.[76]

2. *Remedies*

The remedial provision of the IDEA, like those of § 504 of the Rehabilitation Act and Title II of the ADA, is set forth in broad, general terms. Specifically, the IDEA provides that a court "shall grant such relief as the court determines is appropriate."[77] Although this relief clause appears to be expansive and all encompassing, whether or not damages are recoverable remains unclear.

The circuits that have addressed the availability of money damages to redress violations of the IDEA are split: the United States Court of Appeals for the Third Circuit has held that monetary damages may be awarded[78] while other circuits have ruled that monetary

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affected by this abrogation amendment. *See* Joshua B. v. New Trier Township High Sch. Dist. 203, 770 F. Supp. 431, 433 (N.D. Ill. 1991). In fact, even the most recent IDEA amendments, the Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37, which constitute the most major overhaul since the statute's initial enactment, have been held to apply only prospectively. *See* Tucker by Tucker v. Calloway County, 136 F.3d 495, 501 (6th Cir. 1998); *see also* Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. by Barry F., 118 F.3d 245, 247 n.1 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 690 (1998). The courts have found that this approach "is consistent with the 'presumption against retroactive legislation that is deeply rooted in our jurisprudence.'" Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1435 (10th Cir. 1997) (quoting Hughes Aircraft Co. v. United States, 520 U.S. 939, 946 (1997)). For a more detailed discussion about the most recent IDEA amendments, see *infra* Part IV.C.

73. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 101, 111 Stat. 37, 47 (1997). This provision has been found to constitute a valid waiver of the states' 11th Amendment immunity by two district courts and at least one circuit court, all of which have held that Congress abrogated the states' 11th Amendment immunity pursuant to a valid exercise of its power under section five of the 14th Amendment. *See Marie O.*, 131 F.3d at 617; *Emma C.*, 985 F. Supp. at 946-47.

74. *See* Gary A. v. New Trier High Sch. Dist. No. 203, 796 F.2d 940 (7th Cir. 1986); *Joshua B.*, 770 F. Supp. at 433-34. A state educational agency is "the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools." § 101, 111 Stat. at 46.

75. The statute defines local educational agency as "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district or other political subdivision of a State." § 101, 111 Stat. at 44-45.

76. *See* W.B. v. Matula, 67 F.3d 484, 493-94 (3d Cir. 1995); *see also* Christopher P. by Norma P. v. Marcus, 915 F.2d 794, 799 (2d Cir. 1990). *See generally* P.C. v. McLaughlin, 913 F.2d 1033 (2d Cir. 1990); Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir. 1986); Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215 (N.D.N.Y. 1993). Officials of these agencies include individuals serving in such positions as superintendents, principals, and officers of state boards.

77. § 101, 111 Stat. at 92.

78. *See W.B.*, 67 F.3d at 494.

damages are not generally recoverable under the IDEA.[79] Even the circuits that generally reject the remedy of money damages, however, have acknowledged that damages might be available in exceptional circumstances. According to these courts, a monetary award may be justified when the school official failed to provide services to protect the health of the child and when the defendant "has acted in bad faith by failing to comply with the procedural provisions of [the IDEA] in an egregious fashion."[80]

Of even greater significance is the fact that most of the decisions disallowing damages were rendered before the Supreme Court decided *Franklin v. Gwinnett County Public Schools*.[81] As previously mentioned,[82] in *Franklin* the Supreme Court promulgated the general rule that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."[83] Accordingly, where the pre-*Franklin* courts began with the presumption that monetary relief was not available, courts in the post-*Franklin* era presume that all remedies are available.[84] Therefore, although the circuits are split as to the availability of money damages, there is reasonable support for the assertion that courts are presently more inclined to hold that money damages are available for violations of the IDEA.[85]

Even courts holding that money damages are available under the IDEA have limited the amount recoverable. Concern over exposing school districts and officials to exorbitant financial liabilities as well as fear of discouraging educators from trying innovative teaching methods and programs have prompted courts to consider compensatory

79. *See* Sellers v. School Bd. of Manassas, Va., 141 F.3d 524, 526-27 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 168 (1998); Charlie F. v. Board of Educ. of Skokie Sch. Dist. 68, 98 F.3d 989, 991 (7th Cir. 1996); Marvin H. v. Austin Indep. Sch. Dist., 714 F.2d 1348, 1356 (5th Cir. 1983); Powell v. Defore, 699 F.2d 1078, 1081 (11th Cir. 1983); Miener v. Missouri, 673 F.2d 969, 979 (8th Cir. 1982); Anderson v. Thompson, 658 F.2d 1205, 1206 (7th Cir. 1981); Mountain View-Los Altos Union High Sch. Dist. v. Sharron B.H., 709 F.2d 28, 30 (9th Cir. 1983).

80. *Anderson*, 658 F.2d at 1213-14; *see also Miener*, 673 F.2d at 980; Barwacz v. Michigan Dep't of Educ., 674 F. Supp. 1296, 1307 (W.D. Mich. 1987); Gerasimou by Gerasimou v. Ambach, 636 F. Supp. 1504, 1512 (E.D.N.Y. 1986).

81. 503 U.S. 60 (1992).

82. *See supra* note 34 and accompanying text.

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

84. In reaching the conclusion that money damages may be secured for violations of the IDEA, the Third Circuit started with the Supreme Court's *Franklin v. Gwinnett County Public School* presumption that, absent any congressional intent to the contrary, all appropriate relief is available. *See* W.B. v. Matula, 67 F.3d 484, 494 (3d Cir. 1995) (relying on *Franklin,* 503 U.S. at 66). After examining the text and legislative history and finding nothing indicating a congressional desire to limit the relief available under the IDEA, the Third Circuit found that monetary damages were recoverable. *See id.* at 494-95; *see also* Emma C. v. Eastin, 985 F. Supp. 940, 943-45 (N.D. Cal. 1997).

85. It is the courts that have sanctioned awards of damages that have also accepted qualified immunity as a defense. *See infra* Part III.C.

forms of relief other than a general award of damages. As the Third Circuit advised:

> [I]n fashioning a remedy for an IDEA violation, a district court may wish to order educational services, such as compensatory education beyond a child's age of eligibility, or reimbursement for providing at private expense what should have been offered by the school, rather than compensatory damages for generalized pain and suffering.[86]

Accordingly, both compensatory education[87] and retroactive reimbursement[88] are available under the IDEA. Additionally, the IDEA explicitly provides that a prevailing party is entitled to attorney's fees.[89]

In sum, the courts generally have construed the Acts to extend a cause of action for damages against individual public officials who intentionally discriminate against the disabled in violation of these Acts. The same courts, however, have undermined the damage remedy by allowing officials sued for discrimination to invoke a qualified immunity defense.

III. The Lower Federal Courts Have Mistakenly Permitted Public Officials to Assert a Qualified Immunity Defense in Actions Seeking Damages for Violation of the Disability Discrimination Statutes

None of the Acts textually prescribe an immunity defense for public officials who are sued for damages under the Acts. Nor does the United States Constitution confer a blanket grant of immunity

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86. *W.B.*, 67 F.3d at 495.

87. Several courts have found that compensatory education is an available and appropriate remedy for IDEA violations. *See* Board of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Illinois State Bd. of Educ., 79 F.3d 654, 656 (7th Cir. 1996); Lester H. v. Gilhool, 916 F.2d 865, 872 (3d Cir. 1990); Miener v. Missouri, 800 F.2d 749, 754 (8th Cir. 1986). An award of compensatory education obliges a school district to provide education past an individual's 21st birthday, even though the IDEA requires that appropriate education be provided only until age 21, in an attempt to cure any past deprivation. The standard generally followed in awarding compensatory education is based on the belief that

> a school district that knows or should know that a child has an inappropriate [Individual Education Plan] or is not receiving more than a de minimis educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation . . . .

M.C. v. Central Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996).

88. In *School Committee of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985), the Supreme Court held that district courts have the power to compel school authorities to reimburse parents for private special education if the court determines that the private facility was an appropriate placement. *See id.* at 369-70. In determining the amount of reimbursement to which a plaintiff is entitled, the Supreme Court has indicated that the district courts have "broad discretion" in calculating relief. *See id.* at 369.

89. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 101, 111 Stat. 37, 92-93; *see also* Gonzalez v. Puerto Rico Dep't of Educ., 1 F. Supp. 2d 111, 114-15 (D.P.R. 1998) (discussing the availability of and the standards for determining the appropriate amount of attorney's fees to be awarded).

upon government officials.[90] Nevertheless, the lower federal courts have uniformly allowed individual public officials who are sued for damages for intentionally discriminating on account of disability to evade liability by asserting the defense of qualified immunity.[91]

A. Qualified Immunity Under the Rehabilitation Act

The first case to endorse qualified immunity under the Rehabilitation Act was *Clouser v. City of Thornton*.[92] In *Clouser*, the plaintiff complained that he was discharged from his position as administrative assistant to the Thornton city manager because of a hearing impairment. Clouser sought compensatory and punitive damages from the city manager and the city finance director.[93]

Defendants moved for summary judgment on the ground that § 504 of the Rehabilitation Act was inapplicable because the plaintiff was fired from a job in a city department that had not received federal funds. Plaintiff responded that his job as an administrative assistant required that he use computer equipment that the city had purchased or leased with federal monies.[94] Without resolving whether there was a sufficient nexus between the department where plaintiff worked and the city's receipt of federal funds, the court granted defendants' motion for summary judgment. Because it was not clearly established whether such a funding link was sufficient to trigger the protections of the Rehabilitation Act, the court ruled, the defendants were as a matter of law entitled to judgment on the ground of qualified immunity.[95]

The *Clouser* court never explained its justification for allowing a qualified immunity defense under the Rehabilitation Act. Moreover, the court did not assess whether immunity could be squared with the language or legislative history of the Act. Rather the court assumed,

90. The only immunity embodied in the Constitution is the Speech and Debate Clause, U.S. CONST. art. I, § 6, cl. 1, which provides in pertinent part, "for any Speech or Debate in either House, [senators and representatives] shall not be questioned in any other Place."

91. Qualified or "good faith" immunity is an affirmative defense which the defendant official must plead. It is based on the notion that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)); *see, e.g.*, Torcasio v. Murray, 57 F.3d 1340, 1343 (4th Cir. 1995); Lue v. Moore, 43 F.3d 1203, 1205-06 (8th Cir. 1994); McGregor v. Louisiana State Univ. Bd. of Supervisors, 3 F.3d 850, 862 (5th Cir. 1993); P.C. v. McLaughlin, 913 F.2d 1033, 1039-40 (2d Cir. 1990); Lussier v. Dugger, 904 F.2d 661, 672-73 (11th Cir. 1990) (Johnson, J., dissenting). Qualified immunity is not available in suits against governmental entities, but is limited to claims against government employees in their individual capacities. The immunity is further restricted to actions for damages and is not available as a defense to equitable relief. *See* Wood v. Strickland, 420 U.S. 308, 314 n.6 (1975). At least one court has held that qualified immunity may be asserted by private individuals sued under the disability discrimination statutes. *See* Bartell v. Lohiser, 12 F. Supp. 2d 640, 644-45 (E.D. Mich. 1998).

92. 676 F. Supp. 228 (D. Colo. 1987).

93. *See id.* at 229.

94. *See id.* at 231.

95. *See id.* at 232.

without analysis, that the qualified immunity available to government officials sued under § 1983—an unrelated statute passed over a century before the Rehabilitation Act—applied equally to city employees sued under § 504.[96]

Subsequent federal court of appeals and district court cases perpetuated the reflexive extension of the § 1983 qualified immunity defense to actions under the Rehabilitation Act.[97] The lone case to even consider the propriety of according a qualified immunity defense under the Rehabilitation Act was *Lue v. Moore.*[98] *Lue* arose out of a blind Missouri inmate's claim that prison officials had violated § 504 of the Rehabilitation Act by denying him access to vocational programs. The court began its immunity analysis by observing that both parties assumed that the defense was available under the Act.[99] The court then reasoned that while the Rehabilitation Act does not textually designate immunity as a defense, four other courts of appeals had applied qualified immunity to actions for damages under the Rehabilitation Act.[100] Of course, as just analyzed, none of these courts of appeals had considered whether immunity was justified under the language or legislative history of the Rehabilitation Act, but merely extrapolated immunity from § 1983. The *Lue* court likewise looked solely to § 1983, interpreting the Supreme Court's decision in *Harlow v. Fitzgerald*[101] as suggesting "qualified immunity should normally be available in civil damages lawsuits unless Congress has stated otherwise."[102]

In sum, qualified immunity under the Rehabilitation Act is not founded upon the language or legislative history of the act. Rather, immunity derives entirely from the stated, or in most cases unstated, thesis that the immunity accorded officials sued under § 1 of the Civil Rights Act of 1871 presumptively applies across the board to government officials who violate any federal statute.

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96. *See id.*

97. *See* Stigall v. Lewis, No. 97-5301, 1999 U.S. App. LEXIS 4708, at *5-6 (6th Cir. Mar. 16, 1999); Ferguson v. City of Phoenix, 157 F.3d 668, 676 (9th Cir. 1998); Gorman v. Bartch, 152 F.3d 907, 914-16 (8th Cir. 1998); Allison v. Department of Corrections, 94 F.3d 494, 499 (8th Cir. 1996); Torcasio v. Murray, 57 F.3d 1340, 1355 (4th Cir. 1995); McGregor v. Louisiana State Univ. Bd. of Supervisors, 3 F.3d 850, 862-63 (5th Cir. 1993); P.C. v. McLaughlin, 913 F.2d 1033, 1041-42 (2d Cir. 1990); Lussier v. Dugger, 904 F.2d 661, 670 n.10 (11th Cir. 1990); Bartell v. Lohiser, 12 F. Supp. 2d 640, 649-50 (E.D. Mich. 1998); Randolph v. Rodgers, 980 F. Supp. 1051, 1061 (E.D. Mo. 1997); Bartlett v. New York State Bd. of Law Examiners, 970 F. Supp. 1094, 1145-46 (S.D.N.Y. 1997), *rev'd on other grounds*, 156 F.3d 321 (2d Cir. 1998); Timmons v. New York State Dep't of Correctional Servs., 887 F. Supp. 576, 582-83 (S.D.N.Y. 1995); Doe v. City of Chicago, 883 F. Supp. 1126, 1137-38 (N.D. Ill. 1994); Mackey v. Cleveland State Univ., 837 F. Supp. 1396, 1410-13 (N.D. Ohio 1993).

98. 43 F.3d 1203 (8th Cir. 1994).

99. *See id.* at 1205.

100. *See id.*

101. 457 U.S. 800 (1982).

102. *Lue*, 43 F.3d at 1205.

B. Immunity Under Title II of the ADA

As was true of actions under the Rehabilitation Act, the courts have mechanically incorporated § 1983 immunities into claims for damages against individual government officials under the ADA.[103] No court has explored whether the defense is compatible with the language or legislative history of the ADA. The only semblance of an explanation arose in the district court's opinion in *Gorman v. Bishop*.[104] Plaintiff Gorman, a paraplegic, sued the chief of police for damages for injuries suffered while Gorman was transported to a police station in a van that was not equipped with a wheelchair lift or wheelchair restraints. In considering Gorman's action under the ADA, the district court commenced its analysis by observing that because the ADA was based upon the Rehabilitation Act, cases under the Rehabilitation Act are instructive in construing the ADA.[105] Citing to *Lue v. Moore*,[106] the district court offered that "[f]or the same reasons that [defendant Chief of Police] Bishop would be entitled to assert a defense of qualified immunity with respect to claims under the Rehabilitation Act . . . Bishop is entitled to raise the defense with respect to the ADA claim."[107] The district court concluded that because the ADA's relevance to the manner in which disabled persons are to be transported following an arrest was not clear as of the date of the incident, the chief of police was entitled to summary judgment on the ground of qualified immunity.[108]

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103. *See* Stigall v. Lewis, No. 97-5301, 1999 U.S. App. LEXIS 4708, at *5-6 (6th Cir. Mar. 16, 1999); Ferguson v. City of Phoenix, 157 F.3d 668, 676 (9th Cir. 1998); Gorman v. Bartch, 152 F.3d 907, 914-16 (8th Cir. 1998); Allison v. Department of Corrections, 94 F.3d 494, 499 (8th Cir. 1996); Torcasio v. Murray, 57 F.3d 1340, 1355 (4th Cir. 1995); Demilo-Fytros v. City of Mt. Vernon, 993 F. Supp. 221, 224 (S.D.N.Y. 1998); Bartell v. Lohiser, 12 F. Supp. 2d 640, 649-50 (E.D. Mich. 1998); Key v. Grayson, No. 96-40166, 1998 U.S. Dist. LEXIS 3412, at *17-18 (E.D. Mich. Mar. 16, 1998); Hall v. Thomas, No. H-97-874, 1998 U.S. Dist. LEXIS 2956, at *13 (S.D. Tex. Jan. 15, 1998); Rouse v. Plantier, 987 F. Supp. 302, 316 (D.N.J. 1997); Randolph v. Rodgers, 980 F. Supp. 1051, 1061 (E.D. Mo. 1997); Bartlett v. New York State Bd. of Law Examiners, 970 F. Supp. 1094, 1145-46 (S.D.N.Y. 1997), *rev'd on other grounds*, 156 F.3d 321 (2d Cir. 1998); Little v. Lycoming County, 912 F. Supp. 809, 820 (M.D. Pa. 1996); Fowler v. Gomez, No. C94-2679 FMS, 1995 WL 779,128, at *2 (N.D. Cal. Nov. 22, 1995); Noland v. Wheatley, 835 F. Supp. 476, 487-88 (N.D. Ind. 1993). These courts simply assumed that the immunity defense was available and inquired only into whether the defendant satisfied the elements of the defense.

104. 919 F. Supp. 326 (W.D. Mo. 1996), *aff'd in part and rev'd in part sub nom.*, Gorman v. Bartch, 152 F.3d 907 (8th Cir. 1998).

105. *See Gorman*, 919 F. Supp. at 328; *see also* Halperin v. Abacus Tech. Corp., 128 F.3d 191, 197 (4th Cir. 1997); Patton v. TIC United Corp., 77 F.3d 1235, 1245 (10th Cir. 1996); Easley v. Snider, 36 F.3d 297, 300-01 (3d Cir. 1994). As the court stated in *Hanson v. Sangamon County Sheriff's Department*, "'The Rehabilitation Act is materially identical to and the model for the ADA, except that it is limited to programs that receive federal financial assistance.'" 991 F. Supp. 1059, 1062 n.2 (C.D. Ill. 1998) (quoting Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 483 (7th Cir. 1997)).

106. 43 F.3d 1203 (8th Cir. 1994).

107. *Gorman*, 919 F. Supp. at 328.

108. *See id.* at 331-32.

The Court of Appeals for the Eighth Circuit affirmed the district court's grant of qualified immunity.[109] The court of appeals did not inquire whether qualified immunity is available in actions under the ADA but assumed the applicability of the defense. Applying the standard developed for suits under § 1983, the court of appeals agreed that defendants were immune because their conduct did not violate clearly established rights under the ADA.[110]

To the extent that the district court's reasoning in *Gorman* accurately depicts the origin of the immunity defense in suits under the ADA, qualified immunity is not grounded in an interpretation of the text or legislative history of the ADA. Instead, qualified immunity under the ADA is descended from immunity under the Rehabilitation Act, which in turn is founded solely in the immunity granted to officials sued for constitutional violations under 42 U.S.C. § 1983.

C. The IDEA

Like the courts entertaining suits for damages under the Rehabilitation Act and the ADA, the courts that have sanctioned damage actions against public officials for violation of the IDEA have assumed that immunity under § 1983 is equally available to public officials sued under the IDEA. No court has probed whether the defense is supported by the language or legislative history of the IDEA.[111] Rather, the courts presumed that the defense was available and inquired only into whether the rights were clearly established and, if so, whether it was objectively reasonable for the defendants to believe that their actions did not violate those rights.[112]

In short, the courts adjudicating damage claims under the Rehabilitation Act, ADA, and IDEA have blindly cloned the § 1983 qualified immunity defense without considering whether the defense is consonant with Congress's intent. The courts bestowing qualified immunity upon individual governmental officials sued for damages under the disability discrimination statutes have neglected to address three fundamental questions concerning the availability of the defense. First, can the defense be reconciled with the absence of any reference to qualified immunity in the language of the Acts? Second, does the legislative history reveal that although failing to specify qualified immunity as a defense in the language of the Acts, Congress nonetheless intended that the courts recognize the defense? Third, did

109. *See* Gorman v. Bartch, 152 F.3d 907 (8th Cir. 1998).

110. *See id.* at 914-16.

111. *See* W.B. v. Matula, 67 F.3d 484, 499 (3d Cir. 1995); Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215, 221 (N.D.N.Y. 1993).

112. *See* P.C. v. McLaughlin, 913 F.2d 1033, 1039 (2d Cir. 1990); *see also W.B.*, 67 F.3d at 499; Christopher P. by Norma P. v. Marcus, 915 F.2d 794, 798 (2d Cir. 1990); Doe by Gonzales v. Maher, 793 F.2d 1470, 1495 (9th Cir. 1986); C.M. v. Board of Pub. Educ. of Henderson County, No. 1:98CV66, 1999 U.S. Dist. LEXIS 868, at *13-15 (W.D.N.C. Jan. 4, 1999).

Congress ordain that defenses it legislated over a century earlier for actions under § 1983 were to become part and parcel of the Rehabilitation Act, the ADA, and the IDEA? The answer to each of these questions is a resounding "no."

IV. Properly Construed, the Texts of the Disability Discrimination Statutes Preclude an Immunity Defense

It is a long-settled "canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself."[113] The Supreme Court has espoused the general proposition that the language of a statute must be regarded as conclusive unless Congress has unequivocally expressed a contradictory legislative intent.[114] Absent rare and exceptional circumstances, judicial inquiry ordinarily should end at the unambiguous text of the statute.[115]

Congress did not include any provision in the text of the Rehabilitation Act, the ADA, or the IDEA directly or indirectly prescribing a qualified immunity defense to exonerate government officials who intentionally discriminate in violation of the unequivocal guarantees of the statutes. Under the clearly established principle of statutory construction, absent a textual conferral of immunity, qualified immunity should not be entertained as a defense to excuse violations of the Acts.

The Supreme Court recently affirmed that the unambiguous language of a statute is dispositive in interpreting the ADA. In *Pennsylvania Department of Corrections v. Yeskey*,[116] the Court held that the protections of the ADA extend to inmates in state prisons. The Court rejected the state's assertion that the ADA should be interpreted to preserve the sovereign power of the state absent "an 'unmistakably clear' expression of intent to 'alter the usual constitutional balance between the States and the Federal Government.'"[117] It reasoned that the language of the ADA unmistakably extends to state prisons because the definition of "public entity" in Title II embodies state institutions and, of equal importance, does not include any exceptions. The Court similarly relied upon the plain text of the ADA to rebuff the state's contention that the ADA was ambiguous as to whether a state prisoner is a "qualified individual with a disability."[118]

113. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); *see also* United States v. Alvarez-Sanchez, 511 U.S. 350, 356 (1994); Mallard v. United States District Court for the S. Dist. of Iowa, 490 U.S. 296, 300 (1989).

114. *See Consumer Prod. Safety Comm'n*, 447 U.S. at 108.

115. *See* Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992); Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 873 (1991); United States *ex rel.* LaCorte v. SmithKline Beecham Clinical Lab., Inc., 149 F.3d 227, 232 (3d Cir. 1998).

116. 118 S. Ct. 1952 (1998).

117. *Id.* at 1954 (quoting Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991)).

118. *Id.* at 1955.

Finally, the Court declined the state's urging to look beyond the text of the statute to consider the fact that prisons and prisoners are not mentioned in the ADA's statement of findings and purposes. Even if Congress did not envision that the ADA would extend to state prisons, the Court opined, "in the context of an unambiguous statutory text, that is irrelevant. . . . [T]he fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"[119] Under this same reasoning, because the text of the disability discrimination statutes unambiguously makes no reference to immunity, qualified immunity may not be asserted as a defense.

The fact that Congress expressly granted individual immunity in other federal statutes further confirms that qualified immunity may not be raised as a defense where Congress failed to prescribe immunity in the Rehabilitation Act, ADA, and IDEA. As the court of appeals acknowledged in *In re Haas*, "[w]here Congress knows how to say something but chooses not to, its silence is controlling."[120]

Immunity is neither a novel nor an innovative concept. In drafting modern federal statutes, Congress has made apparent its intent to impart immunity. In some statutes Congress has shown its intent through explicit use of the word "immunity." For example, Congress expressly prescribed the "immunity of officers or employees of the government"[121] in 40 U.S.C. § 489 and "immunity for good faith reporting and associated actions"[122] in 42 U.S.C.A. § 13,031. Even in statutes that do not explicitly include the word "immunity," Congress, through alternate language, has unambiguously articulated its intent to immunize an individual government employee. Congress provided immunity to officials of the Tennessee Valley Authority by the following terms:

> An action against the Tennessee Valley Authority for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Tennessee Valley Authority while acting within the scope of his office or employment is exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim. Any other civil action or proceeding arising out of or relat-

119. *Id.* at 1956 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)).

120. 48 F.3d 1153, 1156 (11th Cir. 1995).

121. The statute provides:

> Where any property is transferred or disposed of in accordance with this Act and any regulations prescribed hereunder, no officer or employee of the Government shall (1) be liable with respect to such transfer or disposition except for his own fraud, or (2) be accountable for the collection of any purchase price for such property which is determined to be uncollectible by the Federal agency responsible therefor.

40 U.S.C. § 489(a) (1994).

122. The statute provides: "All persons who . . . make a [child abuse] report . . . shall be immune from civil and criminal liability arising out of such actions." 42 U.S.C. § 13,031(f) (1994).

> ing to the same subject matter against the employee or his estate is precluded . . . .[123]

Congress also granted immunity to members of professional review boards by stating, "If a professional review action . . . of a professional review body meets all the standards specified . . . [any person connected with such review] shall not be liable in damages under any law of the United States."[124] It is plain that at the time it passed the disability discrimination statutes, Congress was well aware of how to immunize government employees were it inclined to do so. The lack of an express grant of qualified immunity in the text of the Acts manifests Congress's intent to bar any immunity defense.

None of the courts that endorsed qualified immunity under the Acts examined the text of the Acts. Had the courts conferring immunity considered the language of the disability discrimination statutes under the governing rules of statutory interpretation, they would have been obliged to hold that no qualified immunity defense was available. Such was the reasoning employed in *Samuel v. Holmes*,[125] where the United States Court of Appeals for the Fifth Circuit rejected the claim of qualified immunity posited by school officials sued under the Federal False Claims Act (FCA).[126]

Samuel arose out of the dismissal of plaintiff from his position as an internal auditor for the Orleans Parish School District. Averring that he was fired in retaliation for reporting that the school district had overcharged the federal government in violation of the FCA, plaintiff sued the superintendent and five members of the school board for damages.[127] Plaintiff filed a claim under 42 U.S.C. § 1983 to redress the denial of procedural and substantive due process and also

123. 16 U.S.C. § 831c-2(a)(1) (1994).

124. 42 U.S.C. § 11,111(a)(1) (1994). While generally immunizing members of professional review boards, Congress specified that such immunity did not extend to damage actions "under any law of the United States or any state relating to the civil rights of any person or persons." *Id.* Similarly, the Federal Employees Liability Reform and Tort Compensation Act amended the Federal Tort Claims Act by substituting the United States as the sole defendant in cases where a federal employee, acting within the scope of his or her employment, is sued for negligence. *See* 28 U.S.C. § 2679 (1994); H.R. REP. NO. 100-700 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945. The Act thereby immunizes federal employees for negligent acts carried out within the scope of their employment. *See id.* As is true of the immunity granted to members of professional review boards, immunity granted to federal officials by the Federal Employees Liability Reform and Tort Compensation Act does not extend to a civil action against an employee of the government "which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." § 2679(b)(2)(B). U.S. Representative Frank noted, "we made it very clear in this bill that nothing in this bill takes away any right an individual might have had to sue an individual Federal employee under any other statute. . . . Other remedies under other acts, Civil Rights Act, are not affected at all." 134 CONG. REC. H4719 (daily ed. June 27, 1988) (statement of Rep. Frank). The fact that Congress has specifically withdrawn immunity for claims involving civil rights in two instances where it has expressly conferred immunity makes it particularly improbable that Congress meant to silently provide immunity to public officials who trammel the civil rights of the disabled.

125. 138 F.3d 173 (5th Cir. 1998).

126. *See id.* at 175.

127. *See id.*

asserted that his firing offended the antiretaliation provisions of the FCA.[128]

Defendants filed a motion for summary judgment on all claims on the ground of qualified immunity. On the § 1983 claim, the trial court granted the motion as to the school board members because they had relied upon the written recommendation of the superintendent, but denied the motion as to the superintendent. The court also denied the motion as to all defendants on the FCA claim, however, because the parties could not proffer any authority that qualified immunity was available as a defense to damage actions for violation of the FCA.[129]

Defendants took an interlocutory appeal from the denial of summary judgment, and the Fifth Circuit affirmed. The Fifth Circuit acknowledged that a qualified immunity defense could be raised to the count invoking rights under § 1983.[130] The court of appeals further held, however, that qualified immunity could not be asserted as a defense to the separate claim under the FCA. The court of appeals commenced its analysis by scrutinizing the language of the FCA. It concluded that because the FCA was silent on the existence of qualified immunity, the local officials could not propound the defense.[131] Thus the *Samuel* court applied the fundamental canon of statutory construction that has been ignored by every court that has accepted immunity under the disability discrimination statutes: where a statute is silent on the question of immunity, no immunity exists.

The *Samuels* court further reasoned that qualified immunity was contrary to Congress's aims in enacting the FCA—to discourage fraud against the government and to encourage those with knowledge to report the wrongdoing.[132] As will next be discussed, qualified immunity is likewise inconsistent with the legislative history of the Rehabilitation Act, the ADA, and the IDEA.

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128. 31 U.S.C. § 3730(h) (1994). The statute provides:

> (h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employer or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

Plaintiff also averred that his firing contravened the protections of the Louisiana whistle-blower statute, LA. REV. STAT. ANN. § 42:1169(A)-(C) (West 1997). *See Samuel*, 138 F.3d at 175.

129. *See Samuel*, 138 F.3d at 175.

130. The court of appeals agreed with the district court's denial of the superintendent's motion for summary judgment. Under clearly established law, the superintendent's conduct was not objectively reasonable and therefore he was not immune. *See id.* at 178.

131. *See id.*

132. *See id.*

V. THE LEGISLATIVE HISTORY OF THE DISABILITY DISCRIMINATION STATUTES CONFIRMS THAT QUALIFIED IMMUNITY IS NOT AVAILABLE AS A DEFENSE

While Congress's failure to prescribe qualified immunity in the disability discrimination statutes should be regarded as conclusive of its intent, the legislative history of the Acts corroborates that Congress did not intend to exonerate government officials who intentionally discriminate on the basis of disability.[133] To the contrary, Congress instructed that the Acts are to be liberally construed to afford relief to victims of discrimination.

A. The Rehabilitation Act

The legislative history of the Rehabilitation Act reveals that Congress intended to supply disabled individuals with broad legal remedies should their statutory rights be violated by individuals and entities receiving federal funds. Congress has progressively expanded the scope and reach of the Rehabilitation Act to afford greater remedies and to widen the class of defendants subjected to liability. In its original form, § 504 of the Rehabilitation Act did not include any remedy for those aggrieved within the meaning of the act.[134] In 1978, Congress amended the act in three major ways. First, it created a private right of action against the federal government.[135] Second, it provided

133. Typically, courts will consider the legislative history of a statute when the language of that statute is in any way ambiguous. *See* Cabalceta v. Standard Fruit Co., 883 F.2d 1553, 1559 (11th Cir. 1989) (citing Blum v. Stenson, 465 U.S. 886, 896 (1984)); *see also In re* Fairfield Communities, Inc., 990 F.2d 1075, 1077 (8th Cir. 1993). Justice Scalia's "New Textualism" approach, however, rejects the notion that legislative history should be used to help interpret a statute's meaning. *See, e.g.*, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 738 (1989) (Scalia, J., concurring) (agreeing with the holding except to extent that it relied on legislative history); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (arguing that statements of a handful of legislators in Congress should not determine the meaning of the statute's text); United States v. Stuart, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) (arguing that pre-ratification materials such as floor debates and committee reports are irrelevant when interpreting plain text); United States v. Taylor, 487 U.S. 326, 344 (1988) (Scalia, J., concurring) (arguing that consideration of legislative history is unnecessary when a statute's text is susceptible to independent construction by the Court). Under this approach, statutory interpretation focuses almost exclusively on the plain meaning of the statute's text, supplemented by consideration of the text of related statutes, and by consideration of the traditional canons of statutory construction. *See* William D. Poppin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1133-40 (1992). Although Justice Scalia's New Textualism approach gained support from the Court during the 1980s, this support has waned throughout the 1990s. Only Justice Thomas has remained consistently faithful to the approach. *See, e.g.*, United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in the judgment, joined by Thomas, J.) ("The Court attempts to minimize the amendment's harshness . . . , quoting some post-legislation legislative history (another oxymoron) to show that, despite the uncontested plain meaning of the statute, Congress never meant it to apply . . . .").

134. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394.

135. *See* Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 120(a), 92 Stat. 2955, 2982-83. In *Lane v. Pena*, the Supreme Court held that the amendment did not waive the federal government's sovereign immunity against awards of damages. *See* 518 U.S. 187, 192 (1996).

that the remedies available under Title VI of the Civil Rights Act of 1964 were available to any person who had been aggrieved under § 504.[136] Third, it permitted the prevailing party to recover attorneys' fees at the discretion of the court.[137]

In its 1986 amendment of the Rehabilitation Act, Congress evidenced its intent that the Act be liberally construed to afford relief in the event of discrimination against the disabled. The 1986 amendment was enacted as a direct response to the Supreme Court's ruling in *Atascadero State Hospital v. Scanlon,*[138] which held that Congress had not abrogated the states' Eleventh Amendment immunity for suits brought pursuant to § 504.[139] Congress in turn passed Public Law 99-506, amending the Rehabilitation Act to include a provision expressly stating that states shall not be immune from suit in federal court under the Eleventh Amendment for violations of the Act.[140] Speaking in support of the amendment, Senator Cranston echoed the importance of the damage remedy to the enforcement of the Rehabilitation Act:

> [A]s the result of Atascadero injunctive relief is now the only relief available in Federal court against a state agency for a violation of section 504 . . . . [L]itigation involving a claim of discrimination often takes years to resolve. Thus, where the disabled person is seeking employment or trying to pursue an education or participate in a project having only a 2- or 3-year life, an injunction may come too late to be of value in remedying the harm done through the unlawful discrimination. In a very real sense, the availability of only injunctive relief postpones the effective date of the antidiscrimination law, with respect to a State agency, to the date on which the court issues an injunction because there is no remedy for violations occurring before that date.[141]

Senator Cranston pointed out that Congress provided no exemptions from damages for violation of the Rehabilitation Act: "Congress created a right of action in Federal or State court to remedy violations of section 504—with no exception in the law either from the States or for any particular type of remedy, such as money damages."[142] By ex-

136. *See* § 120(a), 92 Stat. at 2982-83.

137. *See id.*

138. 473 U.S. 234 (1985). In *Atascadero*, a divided Court announced that Congress would not be deemed to have exercised its authority to waive the states' immunity under the 11th Amendment unless it unequivocally expressed its intent in the unmistakable language of the statute. *See id.* at 242-44. Because Congress had not expressly abrogated the states' immunity in the text of § 504, the Court held suit could not be brought against the states in federal court. *See id.*

139. *See id.* at 242-44.

140. *See* Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845, which states in part: "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . ."

141. CONG. REC. S15,104-05 (daily ed. Oct. 3, 1986) (statement of Sen. Cranston).

142. *Id.* at S15,104.

pressly abrogating the states' immunity, the 1986 legislation reinforced the intent of Congress that the Rehabilitation Act be broadly construed to hold accountable all persons and entities that discriminate against the disabled.

Congress again widened the scope of § 504 of the Rehabilitation Act in 1988. In *Grove City College v. Bell*, the Supreme Court held that the term "program or activity," as employed in § 504, prohibited discrimination only in the specific individual program or activity that received the federal funding rather than the entire institution to which the program or activity belonged.[143] Because the college received federal money only for student aid, the Court concluded that the financial aid office alone was subject to the antidiscrimination provisions of federal law. In response to the Supreme Court's cabining the scope of § 504, Congress passed the Civil Rights Restoration Act.[144] This Act amended § 504 by expanding the meaning of "program or activity" to make clear that discrimination would be prohibited on an institution-wide basis.[145] The Senate report emphasized that the Supreme Court's narrow construction of "program or activity" was inconsistent with Congress's general intent as to how the Rehabilitation Act was to be interpreted:

> In enacting the four civil rights statutes [Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975], Congress intended that each be broadly interpreted to provide effective remedies against discrimination. . . .
>
> When Congress enacted Title VI, it emphasized the breadth of its coverage. . . . Indeed, both proponents and opponents agreed that the prohibition of discrimination would be a broad one. . . .
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> . . . .
>
> . . . Just a year after passage of Section 504, Congress clearly expressed the view that prohibition against discrimination included in Section 504 was to be read as broadly as that included in Title VI.
>
> . . . .
>
> The inescapable conclusion is that Congress intended that title [sic] VI as well as its progeny—Title IX, Section 504 and the ADA—be given the broadest interpretation.[146]

143. 465 U.S. 555, 573-74 (1984).

144. Pub. L. No. 100-259, § 4, 102 Stat. 28, 29-30 (1988).

145. *See* § 4, 102 Stat. at 29-30. In the debates surrounding the amendment, Senator Kennedy said, "[S]o I hope that in the future, when the Supreme Court considers crucial issues such as this, the justices will try harder to decipher the intent of Congress instead of taking the judicial path of least resistance by telling the legislative branch to try again." 134 CONG. REC. S2731 (daily ed. Mar. 22, 1988) (statement of Sen. Kennedy).

146. S. REP. NO. 100-64, at 5-7, *reprinted in* 1988 U.S.C.C.A.N. 3, 7-9.

Consistent with the legislative history of the Rehabilitation Act, the courts have acknowledged that "[S]ection 504, as [a] remedial statute[ ], should be broadly and liberally construed."[147]

B. The ADA

The legislative history of the ADA likewise mandates a broad construction of the Act. Passed in 1990, the ADA was the "final proclamation that the disabled will never again be excluded, never again treated by law as second-class citizens."[148] Congress thought that through the passage of the Act, "43 million Americans with disabilities [would] gain freedom, dignity, opportunity—their civil rights."[149] Regarded as "the greatest expansion of civil rights protection since the 1964 Civil Rights Act,"[150] the ADA should be liberally interpreted to protect individuals covered under the Act.

Despite the fact that it already had enlarged the remedies afforded the disabled through three amendments to the Rehabilitation Act, Congress envisioned the ADA as carving an even wider swath, safeguarding those individuals who were not afforded relief under the Rehabilitation Act. As Senator Durenberger noted:

> Eighteen years ago, when Congress was debating the Rehabilitation Act here, the then senior Senator from Minnesota, Herbert Humphrey said, "The time . . . has come when we can no longer tolerate the invisibility of the handicapped in America. . . . These people have the right to live, to work to the best of their ability, to know the dignity to which every human being is entitled." . . . [I]t is time to complete the work we began . . . by opening all aspects of life—employment, public accommodations, public services, transportation, and telecommunications for persons with disabilities. The ADA is that step forward, giving people with disabilities the assurances that there is a future in this country for persons with disabilities.[151]

The ADA was designed to finish the task begun by the Rehabilitation Act by providing a "clear and comprehensive national mandate to end discrimination against individuals with disabilities."[152]

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147. S-1 v. Turlington, 635 F.2d 342, 347 (5th Cir. 1981).

148. 136 CONG. REC. S9684 (daily ed. July 13, 1990) (statement of Sen. McCain). Senator Harkin, the major sponsor of the ADA, proclaimed "The ADA is, indeed, the 20th century Emancipation Proclamation for all persons with disabilities. Today, the U.S. Senate will say to all Americans that the days of segregation and inequality are over . . . ." *Id.* at S9689.

149. *Id.* at S9685 (statement of Sen. Harkin).

150. *Id.* at S9688 (statement of Sen. Durenberger).

151. *Id.*

152. H.R. REP. No. 101-485, pt.2, at 22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304. The section of the House Report concerning enforcement of the ADA noted that "[s]everal witnesses emphasized that the rights guaranteed by the ADA are meaningless without effective enforcement provisions." *Id.* at 322.

The United States Supreme Court has approved "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes."[153] The lower federal courts have applied this canon to the ADA, instructing in accordance with its legislative history that as a "broad, remedial statute enacted to eliminate discrimination against disabled persons," the ADA "must be interpreted broadly to carry out its purpose."[154]

C. The IDEA

The legislative history of the IDEA also mandates a broad approach to protection of the disabled. As will be discussed more thoroughly later,[155] the IDEA is the culmination of twenty-five years of congressional enactments progressively expanding the substantive and procedural protections afforded disabled children and their families. The Senate report to the Education for All Handicapped Children Act, the precursor to the IDEA, emphasized that the Act was designed to create enforceable rights to ensure equal educational opportunity for disabled children:

> This Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue.
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> . . . .
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> . . . Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school. S.6 takes positive necessary steps to ensure that the rights of children and their parents are protected.[156]

In 1990, Congress expanded the relief available to the disabled when it expressly abrogated the states' Eleventh Amendment immu-

153. Tcherepin v. Knight, 389 U.S. 332, 336 (1967).

154. Niece v. Fitzner, 922 F. Supp. 1208, 1218-19 (E.D. Mich. 1996); *see also* Anderson v. Gus Mayer Boston Store, 924 F. Supp. 763, 771 (E.D. Tex. 1996) ("Unlike other legislation designed to settle narrow issues of law, the ADA has a comprehensive reach and should be interpreted with this goal in mind."); Lincoln CERCPAC v. Health & Hosps. Corp., 920 F. Supp. 488, 497 (S.D.N.Y. 1996) ("The ADA must be broadly construed to effectuate its remedial purposes."); Kinney v. Yerusalim, 812 F. Supp. 547, 551 (E.D. Pa. 1993), *aff'd*, 9 F.3d 1067 (3d Cir. 1993) ("The ADA is a remedial statute, designed to eliminate discrimination against the disabled in all facets of society. As a remedial statute it must be broadly construed to effectuate its purposes.").

155. *See infra* notes 178-96 and accompanying text.

156. S. REP. No. 94-168, at 9 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1433.

nity from suits in federal court under the IDEA.[157] The abrogation of the states' immunity is perhaps the most significant indicator of Congress's intent to afford generous remedies under the IDEA, as it was riposte to the Supreme Court's narrowing of the relief available under the IDEA in *Dellmuth v. Muth.*[158] In *Dellmuth*, the Court held that parents who paid for the appropriate placement of children who had been wrongly denied their guaranteed free appropriate public education could not recover the tuition payments from the states.[159] Congress "determined that the Supreme Court misinterpreted Congressional intent" and that "[s]uch a gap in coverage was never intended."[160] The House committee acknowledged that "it would be inequitable for [the IDEA] to mandate State compliance with its provisions and yet deny litigants the right to enforce their rights in Federal courts when State or State agency actions are at issue."[161] Under the 1990 amendment, "[i]n a suit against a State for a violation of this Act, remedies (including remedies both at law and in equity) are available for such violations to the same extent as remedies are available for any violation in a suit against public entities other than a State."[162]

Amending the IDEA evidences congressional intent to make the rights granted meaningful by ensuring remedies for violations of the Act.[163] Consistent with the expressed goal of guaranteeing equal edu-

157. *See* H.R. REP. NO. 101-544, at 12 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1723, 1724.

158. 491 U.S. 223 (1989).

159. *See id.* at 232.

160. Act of Oct. 1, 1990, Pub. L. No. 101-476, *reprinted in* 1990 U.S.C.C.A.N. (104 Stat. 1103) 1723, 1734.

161. *Id.*

162. *Id.*

163. The most recent IDEA amendments were passed in 1997. The major provisions of the 1997 amendments concern the ability of schools to discipline disabled students for behavior not related to their disability in the same way as they discipline children without disabilities; the inability of schools to dismiss or cut-off educational services to disabled children for bad conduct, no matter how extreme; the new federal fund allocation formulas based on a combination of school-age population and district poverty rates; the policy that a public agency such as a school is not required to pay for special education and related services at a private school if that agency made a free appropriate public education available to the child; and the new rule that does not require school districts to pay the fees of attorneys who represent the parents of disabled students in meetings that involve the student's individualized educational plan, unless the meetings are held by a court or administrative order. The goal of these amendments was to "place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 101, 111 Stat. 37 (1997). Specifically, the purposes of the 1997 amendments were to:

- Preserve the right of children with disabilities to a free appropriate public education;
- Promote improved educational results for children with disabilities through early intervention, preschool, and educational experiences that prepare them for later educational challenges and employment;
- Expand and promote opportunities for parents, special education, related services, regular education, and early intervention service providers, and other personnel to work in new partnerships at both the State and local levels;
- Create incentives to enhance the capacity of schools and other community-based entities to work effectively with children with disabilities and their families, through targeted

cational opportunity to disabled children, the courts have broadly and liberally construed the IDEA.[164]

D. Qualified Immunity Is Inconsistent with the Legislative History of the Rehabilitation Act, ADA, and IDEA

The legislative instruction that the Acts be broadly construed to afford relief to victims of disability discrimination obviously repudiates a qualified immunity defense that does not appear on the face of the statutes. Rather than promote relief, the qualified immunity defense deprives the victim of a damage remedy against the government official who intentionally engaged in the proscribed discrimination on the basis of disability. In fact, in two circumstances the immunity defense would have the effect of entirely barring recovery of the damages caused by intentional discrimination.

First, because damages may not be obtained from the federal government under the Rehabilitation Act or the ADA,[165] a disabled person would be left without compensation for harms suffered as a consequence of intentional discrimination caused by a federal official who successfully asserts the qualified immunity defense. Second, immunity may have the effect of precluding recovery of damages for discriminatory acts of state and local officials. Although state and local governmental entities are not sheltered by any immunity, the courts may require that plaintiff prove that the discrimination was inflicted pursuant to a governmental custom or policy before the entity will be held liable.[166] If the discriminatory acts of a public official do not represent governmental custom or policy, the entity may not be liable. If at the same time the state or local official is exonerated under the qualified immunity defense, the risk of loss from violations of the disability discrimination statutes will be borne by the least appropriate party, the victim of discrimination. Congress has repeatedly made plain its intent that the Acts should be construed, without exception, to afford relief when public officials discriminate against the disabled. Because qualified immunity impedes, and in some cases defeats, re-

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funding for personnel training, research, media, technology, and the dissemination of technical assistance and best practices.

H.R. REP. No. 105-95, at 83 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 80.

In this regard, Congress was most concerned with "the continued inappropriate placement of children from minority backgrounds and children with limited English proficiency in special education." *Id.* at 85. Clearly, Congress wanted all qualified individuals with disabilities to receive the benefits of the IDEA. Furthermore, Congress believed that these amendments were necessary for the country to "see clearer understanding of, and better implementation and fuller compliance with, the requirements of the IDEA." *Id.*

164. *See* S-1 v. Turlington, 635 F.2d 342, 357 (5th Cir. 1981).

165. 42 U.S.C. § 12,111(5)(B)(i) (1994); *see* Lane v. Pena, 518 U.S. 187, 196-200 (1996).

166. *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998) (holding that school district is not vicariously liable for sexual harassment of students under Title IX of Education Amendments of 1972). *Gebser* is analyzed more fully at Part VI.B, *infra*. *See also supra* cases cited in footnote 9.

covery of the damages caused by violation of the Acts, the defense must not be made available to those who discriminate.

Had the courts accepting a qualified immunity defense under the disability discrimination statutes consulted rather than ignored the language and legislative history of the Acts, they would have concluded that the defense is not available. Instead, the courts have assumed that the immunity of government officials sued under 42 U.S.C. § 1983 extends equally to officials sued for damages under the Rehabilitation Act, ADA, and IDEA. The immunity conferred by Congress when it enacted § 1983, however, is wholly inapplicable to actions for damages brought under the disability discrimination statutes.

VI. SECTION 1983 QUALIFIED IMMUNITY DOES NOT PERTAIN TO ACTIONS UNDER THE REHABILITATION ACT, THE ADA, OR THE IDEA

The lower federal courts' reliance upon § 1983 as a source of immunity is flawed because the Rehabilitation Act, ADA, and IDEA are independent of and unrelated to § 1983. In addition, the fact that immunity under § 1983 is anchored in the common law as of 1871 confirms that the defense has no relevance to disability discrimination statutes enacted over a century later.

A. The Rehabilitation Act and ADA Were Not Modeled After § 1983

The Rehabilitation Act and ADA are not linked historically to § 1983. Instead, the Rehabilitation Act and in turn its progeny, the ADA,[167] derive from Title VI of the Civil Rights Act of 1964.[168] The Senate report declares that "Section 504 [of the Rehabilitation Act] was patterned after, and is almost identical to, the anti-discrimination language of Section 601 of the Civil Rights Act of 1964."[169] In 1978, Congress reiterated the kinship between the Rehabilitation Act and Title VI when it adopted the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments, which authorized victims of disability discrimination to invoke the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964."[170]

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167. As discussed more fully in Part II.B, *supra*, the ADA expressly incorporates the remedies, procedures and rights under the Rehabilitation Act but extends the Act's antidiscrimination principle beyond recipients of federal financial assistance.

168. 42 U.S.C. § 2000d (1994).

169. S. REP. NO. 93-1297, at 39 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6390.

170. Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 120(a), 92 Stat. 2955, 2982-83. Like the Rehabilitation Act, Title VI does not prescribe immunity on the face of the statute. The statute commands, without exception, "No person in the United States shall, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The remedies provision of Title VI is similarly unqualified, specifying that "compliance with this section may

The express linkage to Title VI exposes the fallacy of looking to § 1983 as the font of immunity under the Rehabilitation Act and the ADA. Furthermore, the courts have recognized that the elements that a plaintiff must prove to impose liability for disability discrimination under the Rehabilitation Act and the ADA are different than the proof required in a § 1983 action alleging violation of the Equal Protection Clause of the United States Constitution.[171] In *Randolph v. Rodgers*,[172] a hearing-impaired inmate averred that the failure to provide him a sign language interpreter violated the inmate's rights under the Rehabilitation Act, the ADA, and § 1983. The court granted summary judgment to defendants on the inmate's § 1983 claim, which was premised upon a deprivation of the guarantees of the Equal Protection Clause of the Fourteenth Amendment. The court reasoned that

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be effected by the termination or refusal to grant or continue assistance or by any other means authorized by law." § 2000d-1.

The legislative history, rather than signaling who shall be immune from the strictures of Title VI, mirrors the capacious language of the statute and mandates that there is to be no tolerance of discrimination in federally assisted programs. The Civil Rights Act of 1964 was designed to "*guarantee* that there will be *no* discrimination among recipients of Federal financial assistance." H.R. REP. No. 88-914, at 18 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2394 (emphasis added). Title VI was enacted, without equivocation, to carry out "the policy of the United States that discrimination on the grounds of race, color, or national origin *shall not occur* . . . and authorizes and directs the appropriate federal departments and agencies to take action to carry out this policy." *Id.* at 2400 (emphasis added). In December of 1964, then Attorney General Nicholas Katzenbach issued "Guidelines for Enforcement of Title VI" to the heads of 21 departments and agencies having enforcement responsibilities under Title VI. In a letter accompanying those Guidelines, Attorney General Katzenbach stressed that the Act was to be applied without exception: "There should be no mistaking the clear intent and effect of the Guidelines—Title VI must and will be enforced. Assistance will be refused or terminated to noncomplying recipients and applicants who are not amenable to other sanctions." *Federal Race Guidelines*, XXI CONG. Q. ALMANAC 567, 567 (1965).

Supporters of the bill instructed the courts to join with the other branches of government in the common enterprise of eradicating discrimination:

> Congress must move rapidly—more rapidly than it has to date—to legislate intelligently and effectively in this critical area. The agencies of Government must strive more actively to enforce the law of the land. The courts—State and Federal—must exercise greater vigilance in guarding the interests of all the people.

Additional Views on H.R. 7152 of Hon. William M. McCullough, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, and Hon. James E. Bromwell, H.R. REP. No. 88-914, pt.2, at 32 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2518-19.

The Senate report to the Civil Rights Restoration Act of 1987 recapitulated the legislature's intent that Title VI was to be liberally construed: "When Congress enacted Title VI, it emphasized the breadth of its coverage. . . . Indeed, both proponents and opponents agreed that the prohibition of discrimination would be a broad one. . . . The inescapable conclusion is that Congress intended that title VI . . . be given the broadest interpretation." S. REP. No. 100-64, at 5-7 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3, 7-9.

171. *See* Davis v. Francis Howell Sch. Dist., 138 F.3d 754, 757 (8th Cir. 1998); Randolph v. Rodgers, 980 F. Supp. 1051, 1058, 1061 (E.D. Mo. 1997); Doe v. City of Chicago, 883 F. Supp. 1126, 1134-35, 1138 (N.D. Ill. 1994). The courts also have applied separate standards to § 1983 claims premised upon violation of other guarantees of the Constitution. *See* Duda v. Board of Educ. of Franklin Park Pub. Sch. Dist. No. 84, 133 F.3d 1054, 1062 (7th Cir. 1988) (constitutional right to privacy); Hutchinson v. Spink, 126 F.3d 895, 900 (7th Cir. 1997) (substantive due process); Duffy v. Riveland, 98 F.3d 447, 456-57 (9th Cir. 1996) (due process clause).

172. 980 F. Supp. 1051 (E.D. Mo. 1997), *rev'd in part and vacated in part on other grounds*, 170 F.3d 850 (8th Cir. 1999).

because a disability is not a "suspect class" within the meaning of the Equal Protection Clause, plaintiff could not prove that he was treated disparately based upon a suspect classification.[173] In addition, plaintiff could not establish that he was treated differently from similarly situated hearing-impaired inmates.[174]

While rejecting the plaintiff's § 1983 claim, the court applied a different standard of liability to the claims under the ADA and the Rehabilitation Act. The court held that the inmate had established a violation of the ADA by proving that: (1) he had a disability; (2) he was otherwise qualified for the benefit at issue; and (3) he was excluded from the benefit because of discrimination solely on the basis of his disability.[175] The inmate also had proven that the program from which he was excluded received federal financial assistance, the one additional element required to establish a violation of the Rehabilitation Act.[176] Accordingly, while it had granted defendants' motion for summary judgment on the § 1983 claim, the court granted summary judgment to plaintiff on the Rehabilitation Act and ADA claims.[177] Just as the Rehabilitation Act and ADA do not incorporate the standard of liability applicable to discrimination claims under § 1983, these acts do not adopt the immunity defense available in actions under that historically unrelated statute.

B. The IDEA Was Not Patterned After § 1983

Like the Rehabilitation Act and the ADA, the IDEA has a lineage completely distinct from § 1983. The IDEA traces its roots to Title VI of the Elementary and Secondary Education Act of 1965.[178] Title VI was supplanted by the EHA,[179] which consolidated into a single statute the various programs of education for the disabled that were administered by the Commissioner of Education. Among other things, the EHA authorized the Commissioner to make grants "for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects for the education of handicapped children at the preschool, elementary school, and secondary school levels."[180] The Education of the Handicapped Amendments of 1974 added significant provisions to the EHA requiring, among other

173. *See id.* at 1058.
174. *See id.*
175. *See id.* at 1061.
176. *See id.*
177. *See id.* at 1062. The court, however, held that because it was not clearly established that the Acts applied to prisons, the individual defendants were entitled to qualified immunity on the Rehabilitation Act and ADA claims. *See id.* at 1061.
178. Title VI was added to the Elementary and Secondary Education Act of 1965 by the Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, § 161, 80 Stat. 1191, 1204-10 (repealed 1971).
179. Pub. L. No. 91-230, §§ 601-662, 84 Stat. 121, 175-88 (1970). Note that § 662(3), 84 Stat. at 188 repealed Title VI of the Elementary and Secondary Education Act of 1965.
180. § 611, 84 Stat. at 178.

things, that states seeking federal monies ensure to the fullest extent appropriate that children with disabilities be educated with children who are not disabled. Disabled children were to be removed from the "regular educational environment . . . only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[181] The 1974 amendments further provided procedural guarantees to disabled children and their parents in connection with the identification, evaluation, and educational placement of the disabled child.[182]

The procedural and substantive protections of the EHA were further strengthened by the Education for All Handicapped Children Act of 1975 (1975 Act). The 1975 Act stiffened the eligibility standards for receipt of federal grant money, generally demanding that each state detail the policies and procedures by which it will assure that "a free appropriate public education will be available . . . for all handicapped children between the ages of three and twenty-one."[183] The 1975 Act also enhanced the procedural protections afforded families of disabled children, including the requirement that each local or intermediate educational unit seeking funding provide assurances that at the beginning of each school year it "will establish, or revise, whichever is appropriate, an individualized education program [IEP] for each handicapped child."[184] The Education of the Handicapped Act Amendments of 1990 changed the title of the Act to its present form, the Individuals with Disabilities Education Act (IDEA), expanded the range of disabilities covered under the Act, and reauthorized the discretionary grant programs which promote the common goal of "improvement of early intervention, special education, and related services provided to infants, toddlers, children, and youth with disabilities."[185]

From this cursory overview of the history of the IDEA, it is apparent that the legislation is the culmination of a quarter-century effort to provide for the equal and appropriate education of the disabled and in no way is derived from the Civil Rights Act of 1871. Hence, as is true of the Rehabilitation Act and the ADA, affording § 1983 immunity to officials sued under the IDEA cannot be justified by any historic linkage between the statutes.

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181. Pub. L. No. 93-380, § 614(d), 88 Stat. 580, 581-82 (1974).

182. *See id.* at 582.

183. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 5, 89 Stat. 773, 780.

184. § 5, 89 Stat. at 786. The IEP is to be generated from a meeting of a representative of the educational unit "qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children," the teacher, the parents or guardian of the child, and in appropriate cases, the child. *See id.* § 4, 89 Stat. at 776. The IEP must include a statement of annual goals as well as identify the specific educational services to be supplied to the child and the extent to which the child will be able to join in regular educational programs. *See id.*

185. H.R. REP. No. 101-544, pt. I, at 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1723, 1724.

In 1986, Congress expressly confirmed that the IDEA affords rights and remedies entirely independent of those provided by § 1983 when it added subsection (f) to 20 U.S.C. § 1415. This amendment was promulgated in response to the United States Supreme Court's opinion in *Smith v. Robinson*.[186] In *Smith*, the Court held that Congress intended that the EHA be the sole and exclusive means through which a disabled child may pursue a claim to a free appropriate public education.[187] Under *Smith*, an aggrieved family could not pursue a claim under § 1983 for violation of the Equal Protection Clause to the Fourteenth Amendment arising out of the failure to provide educational services to a disabled child. The 1986 amendment countermanded *Smith*, providing:

> Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (b)(2) and (c) shall be exhausted to the same extent as would be required had the action been brought under this part.[188]

By restoring the rights of families of disabled children to pursue constitutional claims through § 1983, the amendment made clear that the IDEA stands entirely apart from § 1983. As the House report stated, the amendment was passed to "reaffirm . . . the viability of . . . 42 U.S.C. § 1983 . . . *as [a] separate vehicle*[ ] for ensuring the rights of handicapped children."[189]

The autonomy of the IDEA is confirmed by the separate standards of liability governing equal protection claims under § 1983 and claimed violations of the IDEA. The different standards were summarized by the United States Court of Appeals for the Fourth Circuit in *Sellers v. School Board*:[190]

> Under IDEA, the simple failure to provide a child with a free appropriate public education constitutes a violation of the statute. 20 U.S.C. § 1412(1). By contrast, plaintiffs must meet a higher standard of liability to prevail on a constitutional claim. The Supreme Court's decision in *Washington v. Davis* requires that an equal protection claim be supported by evidence of purposeful discrimination. . . . And even if a plaintiff can prove a school

186. 468 U.S. 992 (1984).

187. *See id.* at 1018-21.

188. Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 3, 100 Stat. 796, 797. This section was amended again in 1997 to provide that the IDEA similarly does not limit rights and remedies provided by the Americans with Disabilities Act. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 101, 111 Stat. 37, 98.

189. H.R. REP. No. 99-296, at 4 (1985) (emphasis added).

190. 141 F.3d 524 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 168 (1998).

board intended to treat children differently because of their disabilities, another hurdle would remain. Because the Supreme Court has yet to classify disabled persons as a suspect class, and because the Court also has not identified education as a fundamental right, a plaintiff in this context would have to prove that a school board's decision was without any rational basis. Naturally school boards will be subject to liability for statutory IDEA violations much more frequently than for similarly pled constitutional claims.[191]

In one of its final cases of the past term, the United States Supreme Court prominently acknowledged that § 1983 and modern civil rights legislation are to be afforded independent interpretations. In *Gebser v. Lago Vista Independent School District*,[192] the Court was called upon to decide under what circumstances a school district could be held liable for damages under Title IX of the Education Amend-

191. *Sellers*, 141 F.3d at 530-31 (citations omitted). The *Sellers* court relied upon the different standards of culpability to conclude that litigants could not bring § 1983 actions to redress violation of the IDEA. While most commonly used as the mechanism to redress deprivations of federal constitutional rights caused by persons acting under color of state law, by its terms § 1983 also provides redress for violations of rights secured by the laws of the United States. Under this language, plaintiffs have alleged that the defendant's discriminatory conduct is actionable under § 1983 as a violation of federal law or, to be more exact, the Rehabilitation Act, the ADA, or the IDEA. Generally, these plaintiffs have pursued this separate course of action to avoid an exhaustion of administrative remedies requirement or to obtain relief not expressly provided for in the disability discrimination statutes.

The Supreme Court has held that plaintiffs may proceed under § 1983 to remedy violations of federal statutes as well as deprivations of rights secured by the federal Constitution. *See* Maine v. Thiboutot, 448 U.S. 1, 5 (1980). However, the ability to bring an action pursuant to § 1983 to vindicate rights conferred by other federal statutes is not unlimited. The Supreme Court has ruled that a plaintiff will not be permitted to proceed under § 1983 to redress statutory violations if "(1) 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983,' or (2) 'Congress has foreclosed such enforcement of the statute in the enactment itself.'" Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (alteration in original) (quoting Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 423 (1987)); *see also* Livadas v. Bradshaw, 512 U.S. 107, 132-33 (1994). Under this standard, the lower federal courts have had to determine whether the Rehabilitation Act, the ADA, and the IDEA foreclose the use of § 1983 as an independent means of seeking relief for violations of the statutes.

The courts have divided over whether parties may assert a cause of action under § 1983 for violations of the Rehabilitation Act and ADA. *Compare* Holbrook v. City of Alpharetta, 112 F.3d 1522, 1531 (11th Cir. 1997) (holding that Rehabilitation Act and the ADA provide extensive and comprehensive remedial framework that precludes enforcement under § 1983), *with* Hanson v. Sangamon County Sheriff's Dep't, 991 F. Supp. 1059, 1064 (C.D. Ill. 1998) (permitting a claim seeking to recover for violation of Rehabilitation Act through § 1983). There is a pronounced split in the circuits over whether § 1983 may be employed to redress violations of the IDEA. *Compare* Sellers v. School Bd. of Manassas, Va., 141 F.3d 524, 530 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 168 (1998), Heidemann v. Rother, 84 F.3d 1021, 1032-33 (8th Cir. 1996) (holding that plaintiff could not pursue claim for general damages under § 1983 based on alleged violations of IDEA), *and* Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 980 F.2d 382, 387 (6th Cir. 1992) (holding that violations of EHA do not give rise to cause of action under § 1983), *with* W.B. v. Matula, 67 F.3d 484, 494-95 (3d Cir. 1995) (holding that violations of the IDEA may be redressed through § 1983). In those jurisdictions that hold violations of the disability discrimination acts are not redressable under § 1983, it obviously would be anomalous to endorse the converse proposition that § 1983 defenses may be asserted in suits filed directly under the Rehabilitation Act, the ADA, and the IDEA.

192. 118 S. Ct. 1989 (1998).

ments of 1972,[193] which prohibits education programs receiving federal funds from discriminating on the basis of sex.[194] In a five to four opinion, the Court concluded that a school district was not vicariously liable for every act of sexual harassment of students by its teachers. Instead, the Court held:

> [I]n cases . . . that do not involve official policy . . . a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient [of federal funds] behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.[195]

The failure to respond must rise to the level of deliberate indifference to the risk of discrimination before the district will be held liable.[196]

At the conclusion of its opinion, the Court recognized that the standards of liability it found to govern actions under Title IX are entirely distinct from standards of culpability under § 1983, enacted a century earlier. The Court expressly limited its holding to Title IX, stating, "Our decision does not affect any right of recovery that an individual may have against a school district as a matter of state law or against a teacher in his individual capacity under state law or under 42 U.S.C. § 1983."[197] For the same reason that the standard of liability under Title IX has no bearing on litigation under § 1983, the Court's construction of qualified immunity under § 1983 does not extend to actions under the independent disability discrimination statutes.

C. The Common Law Origin of Qualified Immunity Under § 1983 Confirms § 1983 Immunity Is Inapplicable to Actions Under the Rehabilitation Act, the ADA, and the IDEA

The fact that immunity of public officials sued for damages under § 1983 originates in the common law as of 1871 confirms that § 1983 immunity does not extend to officials sued under the disability discrimination statutes enacted over a hundred years later. The text of § 1983 makes no reference to any immunity; to the contrary, it holds liable "every person" who, acting under color of state law, causes a constitutional violation. Nonetheless, the Supreme Court first recognized qualified immunity under § 1983 in *Pierson v. Ray*,[198] a damage action against Jackson, Mississippi, police officers who arrested Freedom Riders attempting to use a segregated waiting room at an interstate bus terminal. The Court reversed the lower courts' refusal to

193. 20 U.S.C. §§ 1681-1688 (1994).
194. Like the Rehabilitation Act, Title IX was modeled after Title VI of the Civil Rights Act of 1964. *See Gebser*, 118 S. Ct. at 1997.
195. *Id.* at 1999.
196. *See id.*
197. *Id.* at 2000.
198. 386 U.S. 547 (1967).

allow the officers to assert any immunity to the Freedom Riders' claim under § 1983. Because Congress did not expressly abrogate the well-established immunities that existed at common law when it enacted § 1983 in 1871, the Court reasoned, it was Congress's presumed intent to incorporate those immunities.[199] Consequently, the police officers sued in *Pierson* were entitled to avail themselves of the defenses of good faith and probable cause that were available at common law when Congress enacted § 1983.[200]

With varying fidelity,[201] the Supreme Court has continued to reference the common law as of 1871 to determine immunity under § 1983. Not only has the Court extended immunity to officials who were absolved under the common law, but the Court has also refused to confer qualified immunity on officials who did not benefit from immunity at common law as of 1871. For example, in *Tower v. Glover*,[202] the Court held that a public defender sued under § 1983 could not assert a qualified immunity defense.[203] The Court reasoned that because the office of public defender was first established in 1914, no immunity existed at common law in 1871. Furthermore, English barristers sued for intentional acts enjoyed no immunity in the nineteenth century. In addition, as of 1871, privately retained lawyers in the United States were not shielded by immunity for their intentional wrongs. Absent any common law foundation for immunity, the Court refused to countenance immunity under § 1983.[204]

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199. *See id.* at 553-56.

200. Qualified immunity in actions to redress constitutional violations inflicted by federal officials ultimately is founded in the common law as well. In determining what immunity exists in the cause of action implied from the Constitution, the Court reasoned that immunity of federal officials in *Bivens* actions should be identical to the immunity of counterpart state officials sued under § 1983. *See* Butz v. Economou, 438 U.S. 478, 504 (1978). Thus as with state officials sued under § 1983, the immunity of federal officials sued for constitutional violations emanates from the common law as it existed in 1871.

201. *See* Anderson v. Creighton, 483 U.S. 635, 645 (1987). In *Anderson*, the court stated:

> [W]e have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow* [*v. Fitzgerald*], where the Court completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action.

Id.; *see also* Richardson v. McKnight, 521 U.S. 399, 415-16 (1997) (Scalia, J., dissenting) ("The truth to tell, *Procunier v. Navarette* . . . did not trouble itself with history . . . but simply set forth a policy prescription.").

202. 467 U.S. 914 (1984).

203. *See id.* at 921. The Supreme Court had held in *Polk County v. Dodson* that appointed counsel in a state prosecution does not act under color of law for purposes of § 1983. 454 U.S. 312, 325 (1981). However, the Court in *Dennis v. Sparks*, held that private persons who are alleged to have engaged in a conspiracy with state officials to deprive a person of federal constitutional rights do act under color of state law and therefore are suable under § 1983. 449 U.S. 24, 29 (1980). The plaintiff in *Tower v. Glover* alleged that the public defenders who unsuccessfully represented him on a robbery charge had conspired with the trial and appellate court judges as well as the Attorney General of Oregon to secure his conviction. 467 U.S. 914, 916 (1984).

204. *See Tower*, 467 U.S. at 920-23; *see also Richardson*, 521 U.S. at 406-07 (holding that guards employed by a private prison management firm are not entitled to assert qualified immu-

The fact that immunity under § 1983 is grounded in the common law as of 1871 confirms that § 1983 immunity does not govern the trio of disability discrimination statutes. Just as is it clear that Congress did not pattern the disability acts after § 1983, it is patent that when it passed the Rehabilitation Act, ADA, and IDEA over a century later, Congress did not intend to silently incorporate state common law immunities defined as of 1871.

In the era in which the disability discrimination legislation was enacted, immunity under state law had ceased to be a matter of common law. Instead, states legislatively tailored the scope of immunity accorded their officials.[205] Congress certainly did not intend to incorporate state statutory defenses to liability when it enacted the Rehabilitation Act, ADA, and IDEA. Under the Supremacy Clause of the United States Constitution, state law cannot immunize conduct of officials that transgresses federal law.[206] There is no evidence that Congress meant to abrogate the ordinary effect of the Supremacy Clause when it chose to broadly guarantee federal protection against discrim-

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nity defense in prisoner § 1983 actions where neither English nor American common law furnished immunity to private jailers). The Court also has relied upon the common law as of 1871 to repudiate a government official's claim to absolute immunity. In *Antoine v. Byers & Anderson, Inc.*, the Court refused absolute immunity for a court reporter whose failure to produce a transcript delayed the hearing of an appeal from a criminal trial until four years following the conviction. 508 U.S. 429, 431, 437 (1993). The Court reasoned that when deciding which officials perform functions that might require absolute liability "we have undertaken 'a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'" *Id.* at 432 (quoting *Butz*, 438 U.S. at 508). Because official court reporters were first employed in the late 19th century, the Court found they were not among the persons protected when the common law doctrine of qualified immunity emerged. *See id.* at 433-34.

205. ALASKA STAT. § 26.20.140 (LEXIS 1998); ARIZ. REV. STAT. ANN. § 12-820.02 (West 1992 & Supp. 1998); ARK. CODE ANN. § 21-9-301 (Michie 1996); CAL. GOV'T CODE § 820.6 (West 1995); CONN. GEN. STAT. ANN. § 4-165 (West 1998); DEL. CODE ANN. tit. 10, § 4001 (West 1999); FLA. STAT. ANN. § 768.28 (West 1997 & Supp. 1999); GA. CODE ANN. § 50-21-24 (West 1999); HAW. REV. STAT. ANN. § 128-18 (Michie 1995); IDAHO CODE § 6-903 (1998); 745 ILL. COMP. STAT. 10/2-201, 202 (West 1994); IND. CODE ANN. § 34-13-3-3 (West Supp. 1998); IOWA CODE ANN. § 670.2 (West 1998); KAN. STAT. ANN. §§ 75-6103, -6104 (1997); LA. REV. STAT. ANN. § 9:2798.1 (West 1997); ME. REV. STAT. ANN. tit. 14, § 8103 (West 1964 & Supp. 1998); MD. CODE ANN., CTS. & JUD. PROC. § 5-522 (West 1999); MASS. ANN. Laws ch. 258, § 2 (Law. Co-op. 1992); MICH. COMP. LAWS ANN. § 691.1407 (West 1999); MINN. STAT. ANN. § 3.736 (West 1997 & Supp. 1999); MISS. CODE ANN. § 11-46-3 (1972 & Supp. 1998); MO. ANN. STAT. § 537.600 (West 1988 & Supp. 1998); NEB. REV. STAT. § 13-920 (1997); NEV. REV. STAT. ANN. §§ 41.032, .0334 (Michie 1996 & Supp. 1997); N.H. REV. STAT. ANN. §§ 541-B:11, -B:19 (1997); N.J. STAT. ANN. §§ 59:3-1, -2, -3 (West 1982 & Supp. 1998); N.M. STAT. ANN. § 41-4-4 (Michie 1996); N.Y. PUB. OFF. LAW § 17 (McKinney 1988 & Supp. 1999); N.D. CENT. CODE § 32-12.1-04 (1996); OHIO REV. CODE ANN. § 9.86 (Anderson 1990); OKLA. STAT. ANN. tit. 51, § 153 (West 1988); OR. REV. STAT. § 30.265 (1988 & Supp. 1998); 1998 PA. LEGIS. SERV. tit. 42, §§ 8545, 8548, 8549, 8550 (West); R.I. GEN. LAWS §§ 9-31-1, -8, -9, -12 (1997); S.C. CODE ANN. §§ 15-78-40, -60 (Law. Co-op. Supp. 1997); S.D. CODIFIED LAWS § 3-22-1 (Michie 1994); TENN. CODE. ANN. §§ 29-20-201, -205 (1980 & Supp. 1998); TEX. CIV. PRAC. & REM. CODE ANN. tit. 5, ch. 101, §§ 101.021, 104.002 (West 1999); UTAH CODE ANN. §§ 63-30-3, -4, -10 (1997); VT. STAT. ANN. tit. 12, §§ 5601, 5602 (1973 & Supp. 1998); VA. CODE ANN. § 8.01-195.3 (Michie 1992 & Supp. 1998); WASH. REV. CODE ANN. § 4.92.060, .070 (West 1988 & Supp. 1998); W. VA. CODE §§ 29-12A-5, -6, -11 (1992 & Supp. 1998); WIS. STAT. ANN. § 893.80 (West 1997 & Supp. 1998); WYO. STAT. ANN. § 1-39-104 (Michie 1997).

206. *See* U.S. CONST. art. VI, cl. 2; Martinez v. California, 444 U.S. 277, 284 n.8 (1980).

ination on the basis of disability. To the contrary, the disability discrimination statutes were passed in part to overcome the deficiencies in state law by affording federal protection to the rights of the disabled. As the House report to the ADA observed, "State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing. . . . The 50 state Governor's Committees . . . report that existing state laws do not adequately counter acts of discrimination against people with disabilities."[207] Against this background, it is incongruous to conclude that Congress intended to allow state law defenses to undermine the "compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability."[208]

VII. QUALIFIED IMMUNITY MAY NOT BE JUDICIALLY LEGISLATED FOR ACTIONS UNDER THE REHABILITATION ACT, ADA, OR IDEA

If Congress did not prescribe qualified immunity for public officials who intentionally discriminate, then it must be the courts that have legislated this defense to damage actions under the disability discrimination statutes. Indeed, the Court of Appeals for the Eleventh Circuit, in applying the defense to an action under the ADA, has frankly admitted that qualified immunity is "[j]udicially created."[209]

In interpreting statutes, the courts ordinarily are limited to ascertaining the will of the legislature and lack the power to manufacture defenses not intended by Congress. The Supreme Court acknowledged this limitation on judicial authority in *Tower v. Glover*, where it held that public defenders sued under § 1983 do not have any immunity because no immunity existed at common law at the time Congress enacted § 1983:

> [P]etitioners contend that public defenders have responsibilities similar to those of a judge or prosecutor and therefore should enjoy similar immunities. . . . Petitioners' concerns may be well founded, but the remedy petitioners urge is not for us to adopt. We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate.[210]

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207. H.R. REP. No. 101-485, pt.2, at 47 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 329.

208. *Id.* at 310.

209. Mason v. Stallings, 82 F.3d 1007, 1010 (11th Cir. 1996).

210. 467 U.S. 914, 922-23 (1984); *see also* Wyatt v. Cole, 504 U.S. 158, 171-72 (1992) (Kennedy, J., concurring). Justice Kennedy stated:

> It must be remembered that unlike the common-law judges whose doctrines we adopt, we are devising limitations to a remedial statute, enacted by the Congress, which "on its face does not provide for *any* immunities." We have imported common-law doctrines in the past because of our conclusion that the Congress which enacted § 1983 acted in light of existing

A bare majority of the Supreme Court, however, has assigned itself greater authority to shape the remedial scheme when construing implied causes of action. Even under the standards governing this heightened power to fashion remedies under implied causes of action, qualified immunity is not available as a defense to disability discrimination.

In its five to four opinion in *Gebser v. Lago Vista Independent School District*,[211] the Court proclaimed its power to engage in limited lawmaking in contouring causes of action implied from statutes. The *Gebser* Court addressed the circumstances under which a school district would be liable under Title IX of the Education Amendments of 1972[212] for the sexual harassment of a student by one of the district's teachers. The majority commenced its analysis by observing that because the private cause of action for damages under Title IX was not expressly set forth in the statute but was judicially inferred, the legislation does not detail the precise conditions under which money damages should be awarded.[213] The absence of an express legislative direction, the Court concluded, conferred upon the judiciary "a measure of latitude to shape a sensible remedial scheme that best comports with the statute."[214]

The *Gebser* Court did not arrogate uncircumscribed judicial authority to tailor remedies in an implied cause of action. When the language of a statute does not reveal the legislature's intent, Congress's intended purpose continues to steer the analysis. The court's task is "'to infer how the . . . Congress would have addressed the issue had the . . . action been included as an express provision in the' statute."[215] Thus even after *Gebser*, courts are not at liberty to impose their policy preferences upon the statutory scheme.

The courts' expanded role in shaping implied causes of action does not apply to the IDEA, for Congress expressly authorized a cause of action to redress violation of that act.[216] To determine whether it is appropriate to recognize qualified immunity as a defense to implied causes of action for damages under the Rehabilitation Act

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legal principles. That suggests, however, that we may not transform what existed at common law based on our notions of policy or efficiency.

Id. (quoting Malley v. Briggs, 475 U.S. 335, 342 (1986)). In *Malley*, the Court stated:

We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition. . . . Since the statute on its face does not provide for *any* immunities, we would be going far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871.

Malley, 475 U.S. at 342.

211. 118 S. Ct. 1989 (1998).

212. 20 U.S.C. §§ 1681-1688 (1994 & Supp. 1998).

213. *See Gebser*, 118 S. Ct. at 1994-96.

214. *Id.* at 1996.

215. *Id.* at 1997 (quoting Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 178 (1994)).

216. 20 U.S.C. § 1415(e) (1994 & 1998 Supp.).

and the ADA, courts must inquire how Congress would have legislated had it considered the issue of immunity. It is apparent that if Congress had debated the defense, it would not have endorsed qualified immunity when it enacted the Rehabilitation Act and the ADA.

A. *At the Time the Rehabilitation Act Was Promulgated, Qualified Immunity Was Available Only to Officials Who Acted in Good Faith*

In *Franklin v. Gwinnett County Public Schools*,[217] the Supreme Court delineated the sources of law to be consulted in ascertaining Congress's will under an implied statutory cause of action, in that case, under Title IX of the Education Amendments of 1972. Because the cause of action is implied, the usual sources of Congress's intent—the text and legislative history of the statute—will not be determinative. Therefore, to divine whether Congress intended to override the presumption that all appropriate remedies be available, the Court evaluated the state of the law under Supreme Court decisions at the time Congress enacted Title IX.[218]

To discern whether Congress would have intended to authorize qualified immunity as a defense to damage actions under the Rehabilitation Act and ADA, it is necessary to examine the controlling case law defining immunity in existence between 1973, the year in which the Rehabilitation Act was passed, and 1978, when the Act was amended to make available the remedies of Title VI.[219] During and just before this period, the Supreme Court had interpreted qualified immunity in three § 1983 cases: *Pierson v. Ray*,[220] *Scheuer v. Rhodes*,[221] and *Wood v. Strickland*.[222] In each of these cases, the Court held that to be immune from liability for damages, a government official must satisfy not only an objective standard, but must have subjectively acted in good faith as well.

The first Supreme Court case to define qualified immunity was *Pierson v. Ray*,[223] a § 1983 action against police officers who had arrested Freedom Riders for violating a provision of the Mississippi Code that made it a misdemeanor to "congregate [ ] with others in a public place under circumstances such that a breach of the peace may be occasioned thereby, and refuse[ ] to move on when ordered to do so by a police officer."[224] The *Pierson* Court held that although the

217. 503 U.S. 60 (1992).
218. *See id.* at 71.
219. Although the ADA was not enacted until 1990, it expressly incorporated the cause of action preexisting under the Rehabilitation Act. 42 U.S.C. § 12,133 (1995).
220. 386 U.S. 547 (1967).
221. 416 U.S. 232 (1974).
222. 420 U.S. 308 (1975).
223. 386 U.S. 547 (1967).
224. *Id.* at 549.

statute authorizing the arrest of the Freedom Riders was unconstitutional, the officers could avail themselves of the same immunity defense in the federal § 1983 action that would be available in a common law action for false arrest and false imprisonment.[225] To prevail under this defense, however, the officers would be required to establish not only objective probable cause, but also subjective good faith in making an arrest under a statute that they believed to be valid.[226] If, as they contended, the officers arrested the Freedom Riders to prevent violence, the officers would be immune. On the other hand, if there was no threat of violence and the officers' intent in arresting the Freedom Riders was to preserve segregation, the officers' actions would not be immunized.

The next case to interpret qualified immunity similarly construed the defense to demand proof of subjective good faith. In *Scheuer v. Rhodes*,[227] the Supreme Court refused to confer absolute immunity upon the governor of the state of Ohio and other executive branch officials in a § 1983 suit arising out of the shooting deaths of four students during an anti-Vietnam War protest at Kent State University.[228] Instead, the Court held, these officials could assert only a qualified immunity defense. As in *Pierson*, the *Scheuer* Court defined the immunity to demand not only objectively reasonable conduct, but subjective good faith as well:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, *coupled with good-faith belief*, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[229]

The Supreme Court reiterated that subjective good faith is a prerequisite to qualified immunity in *Wood v. Strickland*, a § 1983 action against school board members and school officials who had participated in expelling plaintiffs from high school.[230] The trial court had entered a directed verdict in favor of the defendants because plaintiffs had offered no evidence that the school officials were animated by malice. The court of appeals reversed, opining that the test for immunity is purely objective, not subjective.

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225. *See id.* at 557.
226. *See id.* at 556-57.
227. 416 U.S. 232 (1974).
228. *See id.* at 247-48.
229. *Id.* (emphasis added).
230. 420 U.S. 308 (1975).

The Supreme Court held that to be immune, an official must not only satisfy an objective criterion, but also must subjectively act in good faith.[231] The *Wood* Court found subjective good faith demanded by the common law, which protected school officials from liability only for "all good-faith, nonmalicious action taken to fulfill their official duties."[232] The Court further reasoned that as a matter of policy, it is appropriate to insist that an official subjectively act in good faith to be immune.[233]

Under the subjective prong of the defense, qualified immunity would not be available to officials who acted with a wrongful intent. The *Wood* Court pointed out that the common law did not afford absolute immunity to school officials because such immunity would deny redress to students who were subjected to intentional deprivations of their rights.[234] Accordingly, a school board member would not be immune under § 1983 "if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student."[235]

B. Proof of the Prima Facie Case of Disability Discrimination Negates the Subjective Tier of the Qualified Immunity Defense

At the time the Rehabilitation Act was enacted and amended, the Supreme Court had consistently held that in actions under §1983, qualified immunity would not shelter government officials who acted with wrongful intent.[236] Assuming Congress had consulted the § 1983

231. *See id.* at 318.

232. *Id.*

233. *See id.* at 321 (finding that school officials should not be liable for actions taken "in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances").

234. *See id.* at 320.

235. *Id.* at 322.

236. The Court's interpretations of immunity were informed by the common law, which was the avowed source of immunity under § 1983. As previously analyzed, at the time the disability discrimination statutes were enacted, statutes had supplanted the common law in conferring immunity under state law. Even if it were hypothesized that Congress consulted state statutory immunities when it passed and amended the Rehabilitation Act, Congress would have understood that an official is required to act subjectively in good faith to be immune. State statutes consistently deny immunity to officials for intentional wrongs and actions taken in bad faith. *See* ALASKA STAT. § 26.20.140(b) (LEXIS 1998) (mandating no liability "except in cases of wilful misconduct, gross negligence, or bad faith"); ARIZ. REV. STAT. ANN. § 12-820.02 (1992) (mandating no liability "[u]nless a public employee acting within the scope of his employment intended to cause injury or was grossly negligent"); ARK. CODE ANN. § 21-9-301 (Michie 1996). Arkansas courts have interpreted the statute to not cover intentional torts. *See* Battle v. Harris, 766 S.W.2d 431, 433 (Ark. 1989) ("[T]hat immunity [does not] include intentional torts committed by those officials."); *see also* CAL. GOV'T CODE § 820.8 (West 1995) ("Nothing in this section exonerates a public employee from liability for injury proximately caused by his own negligent or wrongful act or omission."); CONN. GEN. STAT. ANN. § 4-165 (West 1998) (mandating no liability if action is "not wanton, reckless or malicious"); DEL. CODE ANN. tit. 10, § 4001 (West 1999) (mandating no liability where acts were in connection with official duty, acts were done in good faith, and were done "without gross or wanton negligence"); FLA. STAT. ANN.

§ 768.28(9)(a) (West 1997) (mandating no liability "unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property"); GA. CODE ANN. § 50-21-24 (West 1999) ("[N]o liability for losses resulting from . . . [a]n act or omission by a state officer or employee exercising due care . . . ."); HAW. REV. STAT. ANN. § 128-18 (Michie 1995) (mandating no liability "except in cases of wilful misconduct"); IDAHO CODE § 6-904 (1998) (mandating that government actors are not liable "while acting within the course and scope of their employment and without malice or criminal intent"); 745 ILL. COMP. STAT. ANN. 10/2-202 (West 1994) ("A public employee is not liable . . . unless such act or omission constitutes wilful and wanton conduct."); IND. CODE ANN. § 34-13-3-3(8) (West Supp. 1998) ("not liable if a loss results from . . . an act or omission performed in good faith and without malice"); IOWA CODE ANN. § 670.2 (West 1998) (mandating no liability for unpaid service providers, "except for acts or omissions which involve intentional misconduct or knowing violation of the law"); KAN. STAT. ANN. § 75-6103(a) (1997) ("Subject to [exceptions], each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees"); LA. REV. STAT. ANN. § 9:2798.1(C)(2) (West 1997) ("The provisions . . . are not applicable . . . [t]o acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct."); MD. CODE ANN., CTS. & JUD. PROC. § 5-522 (West 1999) (mandating no waiver of immunity for state personnel unless they act "without malice or gross negligence"); MASS. ANN. LAWS ch. 258, § 2 (Law. Co-op. 1992) (mandating that officers "shall be liable for injury or loss of property or personal injury or death caused by negligent or wrongful act or omission"); MICH. COMP. LAWS ANN. § 691.1407 (West 1999) (stating no liability where employee believes he is acting within the scope of his authority, his agency was engaged in a governmental function, and where his conduct does not amount to gross negligence); 1996 MINN. LAWS § 3.736(9a) (1997) ("This subdivision (indemnification) does not apply in case of malfeasance in office or willful or wanton actions or neglect of duty . . . ."); MISS. CODE ANN. § 11-46-5(2) (1998) ("[C]onsidered to have waived immunity for any conduct . . . if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense other than traffic violations."); MO. ANN. STAT. § 537.600 (West 1988 & Supp. 1998) ("[Immunity does not apply if] either a negligent or wrongful act or omission . . . ."); NEB. REV. STAT. ANN. § 81-8,215.01 to -8,215.19 (West 1999); NEV. REV. STAT. ANN. § 41.0334 (Michie 1996) ("[Immunity] does not apply to any action for injury, wrongful death or other damage: (a) Intentionally caused or contributed to by an officer or employee of the state or any of its agencies or political subdivisions . . . ."); N.H. REV. STAT. ANN. § 541-B:19 (1997) ("[Immunity] shall not apply to: (d) Any claim arising out of an intentional tort [statute then gives examples.]"); N.J. STAT. ANN. § 59:3-3 (West 1982) ("A public employee is not liable if he acts in good faith . . . ."); N.M. STAT. ANN. § 41-4-4(E) (Michie 1996) ("A government entity shall have the right to recover from a public employee the amount expended . . . if it is shown that, while acting within the scope of his duty, the public employee acted fraudulently or with actual intentional malice . . . ."); N.Y. PUB. OFF. LAW § 17(3)(a) (McKinney 1988) ("[T]he duty to indemnify and save harmless or pay prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing . . . ."); N.D. CENT. CODE § 32-12.1-04(3) (1996) ("unless the acts or omissions constitute reckless or grossly negligent conduct, or willful or wanton misconduct"); OHIO REV. CODE ANN. § 9.86 (Anderson 1990) (mandating no officer or employee liability "unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner"); OKLA. STAT. ANN. tit. 51, §§ 152, 153 (West 1999) (mandating no liability for employees "acting within the scope of employment," defined as "performance by an employee acting in good faith within the duties of his office"); OR. REV. STAT. § 30.265(f) (1988) (mandating no liability "unless such act was done or omitted in bad faith or with malice"); PA. STAT. ANN. tit. 42, § 8550 (West 1988) (Immunity does not apply if "it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct."); R.I. GEN. LAWS § 9-31-9 (1997) (State may not assume liability of an employee if the attorney general determines that "the act or failure to act was because of actual fraud, willful misconduct, or actual malice."); S.C. CODE ANN. § 15-78-70 (Law. Co-Op. 1997) (No immunity "if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude."); TENN. CODE ANN. § 29-20-205 (1980) ("[Immunity] removed for injury proximately caused by a negligent act or omission of any employee."); TEX. CIV. PRAC. & REM. CODE ANN. § 104.002(a)(1) (West 1999) (State must indemnify employee in scope of duties "except a willful or wrongful act or an act of gross negligence."); UTAH CODE ANN. § 63-30-4(3)(b)(i) (1997) (no

qualified immunity standard when it enacted and amended the Rehabilitation Act, it would have concluded that no immunity should be available to an official sued for damages for disability discrimination. It is axiomatic that proof of the prima facie case always would disprove subjective good faith and thereby defeat any claim to qualified immunity.

To recover damages for disability discrimination, it does not suffice to prove that the effect of a government officer's conduct is discriminatory; the plaintiff must further prove that the official acted with an intent to discriminate on the basis of disability.[237] If the plaintiff establishes that the official intended to discriminate, the official could not at the same time have acted in good faith. Thus the immunity defense would in every case be meaningless and superfluous.

In *Flores v. Pierce*, a § 1983 action alleging that city officials delayed issuance of a liquor license because of plaintiff's race and national origin, the court of appeals held that it was unnecessary to instruct the jury on the qualified immunity defense:

> [O]nce a defendant is shown to have acted with intent to discriminate based on racial or ethnic hostility, such intent constitutes the malicious intention to cause a deprivation of constitutional rights that is inconsistent with the subjective state of mind required for the defense of good faith immunity.
>
> . . . .
>
> If the jury found that the defendants acted with the proscribed discriminatory intent, the defendants would not have been entitled to immunity; if, however, discriminatory intent were not proved, then there would be no violation of the equal protection clause, no cause of action under section 1983, and no need for immunity to protect an official from liability for damages. Under the first possibility immunity is not present and under the second it would not be needed.[238]

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immunity "if the employee acted or failed to act through fraud or malice"); VT. STAT. ANN. tit. 12, § 5602 (1973) (mandating state liability for employee's acts that are wrongful or negligent, which happens unless the claim arises "out of alleged assault, battery, false imprisonment, false arrest . . . misrepresentation, deceit, fraud, interference with contractual rights or invasion of the right to privacy"); VA. CODE ANN. § 8.01-195.3 (Michie 1992) (mandating that employee "shall be liable for claims for money only . . . on account of damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission"); WASH. REV. CODE ANN. § 4.92.070 (West 1988) (State will provide defense only "if the attorney general shall find that said officer, employee, or volunteer's act or omissions were, or purported to be in good faith."); W. VA. CODE § 29-12A-11(a)(2) (1992) (State will indemnify employee "if at the time of the act or omission the employee was acting in good faith."); WIS. STAT. ANN. § 893.80(7) (West 1996) ("No suit may be brought against any [government employee or official] who, in good faith, acts or fails to act . . . ."). *But see* WYO. STAT. ANN. § 1-39-104(b) (Michie 1997) ("When liability is alleged against any public employee, if the governmental entity determines he was acting within the scope of his duty, *whether or not alleged to have been committed maliciously or fraudulently*, the government entity shall provide a defense at its expense." (emphasis added)).

237. *See supra* Part II.

238. 617 F.2d 1386, 1392 (9th Cir. 1980); *see also* Goodwin v. Circuit Court of St. Louis County, Mo., 729 F.2d 541, 546 (8th Cir. 1984) ("If the jury finds that intentional discrimination

Just as proof of an intent to discriminate would disprove good faith in *Flores*, the subjective tier of the qualified immunity defense would be negated in every instance in which the plaintiff proved the intentional discrimination necessary to satisfy the prima facie case in damage actions under the Rehabilitation Act. As in *Flores*, immunity would be unnecessary if the plaintiff were to fail to meet its burden of proving discriminatory intent. Consequently, had Congress considered qualified immunity when it enacted and amended the Rehabilitation Act, Congress would have concluded that the defense plays no role in a statute that requires plaintiff to prove intent to discriminate to recover damages.

C. *The Supreme Court's Subsequent Abrogation of the Subjective Tier of the Qualified Immunity Defense for § 1983 Actions Is Irrelevant to Congress's Intention Under the Rehabilitation Act*

In 1982, the Supreme Court abrogated the subjective prong of the qualified immunity test for § 1983 actions, thus admitting of the possibility of immunity even where the government official engaged in intentional wrongdoing. The Court's modification of the immunity standard, however, is irrelevant to Congress's intent nine years earlier when it passed the Rehabilitation Act.

In *Harlow v. Fitzgerald*,[239] the Supreme Court eliminated the requirement that an official must act in good faith to be immune. After *Harlow*, immunity is governed by a purely objective standard. Hence even if an official acts with the intent to injure the plaintiff, the official is immune if the constitutional right violated was not clearly established. The *Harlow* Court did not premise its refashioning of the qualified immunity standard upon a concomitant evolution in the source of the immunity, the common law.[240] To the contrary, the Court "completely reformulated qualified immunity along principles not at all embodied in the common law."[241]

The lone reason the Court abrogated the subjective tier was the perceived social costs of litigating the issue of the intent of government actors—the expenses of litigation, the diversion of official energy from pressing issues, and the deterrence of able citizens from acceptance of public office.[242] The Court believed these costs were exacerbated by inquiry into the subjective intent of the official be-

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has occurred . . . 'good faith' on the part of the defendant is logically excluded."); Williams v. Board of Regents of Univ. Sys., 629 F.2d 993, 1004 (5th Cir. 1980) (holding that trial court properly refused to charge jury on qualified immunity in § 1983 action because malicious intent to injure is inconsistent with subjective good faith).

239. 457 U.S. 800 (1982).

240. *See id.* at 815-20.

241. Anderson v. Creighton, 483 U.S. 635, 645 (1987).

242. *Harlow*, 457 U.S. at 816.

cause of the wider discovery required where intent is at issue, as well as the inability to dispose of intent issues on summary judgment.[243] To reduce the burdens imposed by judicial inquiry into the intent of government actors, the Court abolished the subjective aspect of the qualified immunity and further instructed that no discovery should be permitted until the trial court resolves whether defendant satisfied the objective prong of the immunity.

The Supreme Court's unilateral redefinition of qualified immunity for § 1983 actions does not resurrect immunity as a viable defense to suits for damages under the Rehabilitation Act and its progeny, the ADA. First, it is doubtful that the intent of Congress is ever properly determined by unforeseeable developments in case law years after a statute is passed.[244] It is particularly improbable that the Congress that passed the Rehabilitation Act intended to delegate to the Supreme Court the plenary power to subsequently immunize intentional discrimination based upon the Court's unilateral analysis of the costs of litigating the issue of intent.[245]

Second, the policy goal that animated the *Harlow* Court's abrogation of the subjective aspect of the qualified immunity—saving the costs of litigation associated with the issue of intent—cannot be

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243. *See id.* It is debatable whether the latter concern remains true. As Justice Kennedy wrote in his concurring opinion in *Wyatt v. Cole*, 504 U.S. 158, 171 (1992):

> *Harlow* was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent, even when the plaintiff bore the burden of proof on the question; and in *Harlow* we relied on that fact in adopting an objective standard for summary judgment. 457 U.S. at 815-819. However, subsequent clarifications to summary-judgment law have alleviated that problem, by allowing summary judgment to be entered against a nonmoving party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Under the principles set forth in *Celotex* and related cases, the strength of factual allegations such as subjective bad faith can be tested at the summary-judgment stage.

See also Grant v. City of Pittsburgh, 98 F.3d 116, 126 (3d Cir. 1996) ("*Celotex* adequately protects public officials from groundless allegations of 'bad' intent.").

244. *See* Smith v. Wade, 461 U.S. 30, 65-66 (1983) (Rehnquist, J., dissenting). Justice Rehnquist argues:

> The Court's opinion purports to pursue an inquiry into legislative intent, yet relies heavily upon state-court decisions decided well after the 42d Congress adjourned . . . . I find these cases unilluminating, at least in part because I am unprepared to attribute to the 42d Congress the truly extraordinary foresight that the Court seems to think it had. The reason our earlier decisions interpreting § 1983 have relied upon common-law decisions is simple: Members of the 42d Congress were lawyers, familiar with the law of their time. In resolving ambiguities in the enactments of that Congress, as with other Congresses, it is useful to consider the principles and legal rules that shaped the thinking of its Members. The decisions of state courts decided well after 1871, while of some academic interest, are largely irrelevant to what Members of the 42d Congress intended by way of a standard for punitive damages.

Id.

245. The Supreme Court has not proven singularly adept at divining Congress's intent with respect to immunity for acts of discrimination against the disabled. Congress has on multiple occasions reinstated the waiver of the states' 11th Amendment immunity that the Court erroneously concluded was not intended by Congress in enacting the disability discrimination statues. *See supra* Part V.

achieved in actions for damages under the Rehabilitation Act and the ADA, as the intent of the official remains an element of the prima facie case. In *Crawford-El v. Britton*,[246] the Supreme Court affirmed that *Harlow* did not eliminate litigation of intent where the state-of-mind issue is an element of plaintiff's prima facie case. *Britton* arose out of an inmate's claim that prison officials misdirected boxes containing his personal belongings in retaliation for the exercise of the prisoner's First Amendment rights. Although *Harlow* had abolished the intent issue under qualified immunity, the motivation of the officials remained as an element of plaintiff's First Amendment claim. The court of appeals, however, interpreted *Harlow* as mandating an across-the-board rule that government officials are entitled to disposition of state-of-mind issues before trial. Therefore, it elevated the plaintiff's burden of establishing intent from the ordinary civil standard of a preponderance of the evidence, to the heightened standard of clear and convincing evidence.[247]

Ruling that the court of appeals had misapprehended the scope of *Harlow*, the Supreme Court reversed. The Court observed that its holding in *Harlow* "related only to the scope of an affirmative defense [providing] no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation."[248] The court of appeals, however, had crafted its clear and convincing evidence requirement to expedite resolution of plaintiff's prima facie case and not the qualified immunity defense. Because the heightening of the burden was not authorized by *Harlow*, the Court held, the lower court lacked authority to legislate special rules for the general litigation of intent claims.[249]

Britton confirms that the modification of the qualified immunity in *Harlow* does not affect the litigation of the issue of intent as an element of the plaintiff's prima facie case. Because a plaintiff must prove intent to discriminate to recover damages against an individual official under the disability discrimination statutes, the costs of litigating the state-of-mind issue cannot be avoided.[250] Therefore it is evi-

246. 118 S. Ct. 1584 (1998).

247. *See id.* at 1589.

248. *Id.* at 1592.

249. *See id.* at 1585-86.

250. *See* Grant v. City of Pittsburgh, 98 F.3d 116, 125 (3d Cir. 1996) ("[I]n evaluating a defense of qualified immunity, an inquiry into the defendant's state of mind is proper where such state of mind is an essential element of the underlying civil rights claim"); Sheppard v. Beerman, 94 F.3d 823, 828-29 (2d Cir. 1996) (holding that the district court erred in finding intent irrelevant and denying discovery where subjective state of mind of defendant is an element of proof of the constitutional violation); Ratliff v. DeKalb County, Ga., 62 F.3d 338, 341 (11th Cir. 1995) ("[I]n qualified immunity cases, intent is a relevant inquiry *if discriminatory intent is a specific element* of the constitutional tort . . . ."); Hill v. Shelander, 992 F.2d 714, 717 (7th Cir. 1993) ("[D]espite *Harlow's* focus on a purely objective inquiry, the plaintiff must be afforded an adequate opportunity to establish intent when it is an element of the alleged constitutional violation."); Poe v. Haydon, 853 F.2d 418, 430 (6th Cir. 1988) (*Harlow* "did not rule out all consideration of the official's discriminatory intent or motive in cases where, as here, the exist-

dent that Congress would not have intended to revive the qualified immunity defense after *Harlow* in a futile effort to spare litigation costs.

VIII. CONCLUSION

The courts that have permitted a qualified immunity defense under the Rehabilitation Act, the ADA, and the IDEA have neglected to consider the language and legislative history of the Acts and have mistakenly extended the immunity available in actions under § 1983. The courts' endorsement of immunity frees those government officials who persist in intentional discrimination from accountability for their misconduct and undermines the unambiguous goal of Congress to eliminate discrimination against the disabled. In holding that money damages could be recovered for intentional discrimination in an implied cause of action under Title IX of the Education Amendments of 1972, the Supreme Court observed that "Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to proscribe."[251] By the same reasoning, Congress surely would not have intended to immunize government officials who intentionally engage in the very discrimination that the Rehabilitation Act, ADA, and IDEA were designed to eradicate.

ence of a violation is dependent on proof of such intent."); Martin v. D.C. Metropolitan Police Dep't, 812 F.2d 1425, 1433 (D.C. Cir. 1987) (en banc) ("[W]hen the governing precedent identifies the defendant's intent . . . as an essential element of plaintiff's constitutional claim, . . . the plaintiff must be afforded an opportunity to overcome an asserted immunity with an offer of proof of the defendant's alleged unconstitutional purpose.").

251. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992).