10-1983

Smith v. Robinson

Lewis F. Powell Jr.

jen 09/20/83

No. 82-2120 Smith v. Robinson

You asked to see the papers in this case a few days before Conference. The petn is attached; the response is not yet in.

With regard to your notes on the pool memo, the ground for decision in favor of plaintiffs on the merits was state law, as construed by the state supreme court to avoid a conflict with EAHCA. (A5) EAHCA requires state law to provide certain rights (as a condition of funding), and provides a right of action in federal or state court to enforce those rights once administrative proceedings are exhausted. 20 USCA §1415(e). In barring attorney's fees, CA1 looked to the comprehensiveness of EAHCA remedies apparently because that statute provided the right of action, and because it was "the foundation of plaintiffs' victory," since the state court looked to it in construing state law. (A9)

The more I have thought about this case, the less sure I am that CA1 was wrong. Assuming that it was right to look to the EAHCA in the procedural posture here, then the question under Sea Clammers was whether EAHCA was intended entirely to replace substantially identical §1983 remedies. It may not make any difference whether the §1983 remedies are based on federal statutes or the Constitution. Also, the legislative history of the previously enacted §1988 is not all that relevant to this inquiry, since it is based on the idea that Congress repealed (by implication) part of §1983. I will be interested to see what the response has to say.

Joe

Response not in yet 9/20 Grant

Primary Q is whether under Education for Handicapped Act, an implied cause of action exists to recover atty's fees. Sea Clammers suggests "no", and not CA1 was right.

CFR

jen 08/11/83

Joe - I'm not clear about this case, as my notes demonstrates. I'd like to see the papers a few days before our Conference

letter to Mr. Stevens 8/25/83

Petr., handicapped child, asserted a number of claims vs. Respts (School Bd. officials: (1) Education for all Handicapped Children Act [EAHCA], (2) Rehabilitation Act, & (3) Const. claims - D/P & E/P - under § 1983.

Petr. prevailed on grounds not clear to me (see pp 2, 3), & won atty's fees for services in the state proceeding on the quest. of State law submitted to R. I. S/Ct. DC also awarded fees on the fed. statutory & const claims (I think).

CA1 reversed. It held that EAHCA was a comprehensive statute & unlike other statutes did not authorize fees, citing my op. in Seslawmers under § 1988 even though Const. issues decided in this case could have been decided under § 1983

PRELIMINARY MEMORANDUM

September 26, 1983 Conference
Summer List 15, Sheet 2

No. 82-2120 CFX — Cert to CA1 (Aldrich, Campbell, Breyer)

Smith, et al. (handicapped child)

v.

Robinson, et al. (RI school officials) — Federal/Civil — Timely

1. SUMMARY: Where plaintiffs prevail on claims under a statute that does not include provision for award of attorney's

CFR with an eye to granting. Summary reversal might also be a possibility. Joe (But see Joe's memo re 82-120. CA1 may be right

fees, can they recover fees under 42 USC §1988 or under the Rehabilitation Act's fee provision if the court does not reach the plaintiffs' essentially identical claims under those laws?

2. FACTS AND DECISION BELOW: Tommy Smith is a handicapped child. His education in a special school was paid for by the local school board. In November 1976, the board informed the Smiths that it would no longer pay the tuition because it believed the state mental health department was responsible for it. The Smiths, petrs here, sued in federal court under §1983 alleging a violation of due process (no hearing) and equal protection (discrimination on basis of handicap). The court (DRI Pettine, C.J.) granted a preliminary injunction while petrs exhausted their administrative remedies. Petrs subsequently amended their complaint to include claims under the Education for All Handicapped Children Act (EAHCA), 20 USC §§1401 et seq., and the Rehabilitation Act of 1973, 29 USC §794. These claims alleged violations in denying Tommy a free appropriate education, discrimination on the basis of handicap, and refusal to grant an impartial hearing. Ultimately, the TC certified to the RI Sup. Ct. the question of which agency was responsible under RI law for Tommy's education. The SC said the local board was, stating that a contrary result risked placing the state's law in conflict with the federal EAHCA. The TC granted a permanent injunction on this basis. The CA1 affirmed. The federal statutory and constitutional issues were not reached. (But what was fed basis?)

Petrs then sought attorney's fees. The local school board settled for the amount of fees incurred in obtaining the prelimi-

nary injunction, which had been granted on constitutional grounds. Against the state, the TC awarded $32,109 in fees for proceedings before the state agencies and court, and in the federal courts. Although the EAHCA does not provide for fees, the Rehabilitation Act and §1988 do, and petrs' claims under those statutes were colorable and nonfrivolous.

CA1 reversed, denying any entitlement to further fees.[1] It said that EAHCA is a comprehensive statute establishing substantive educational rights for handicapped children and detailed remedial procedures, including private rights of action. The singular omission of any provision for attorney's fees cannot be rectified by recourse to the more general §1988 or the Rehabilitation Act. With regard to §1988, CA1 cited Hymes v. Harnett Cty. Bd. of Ed., 664 F.2d 410 (CA4 1981); Anderson v. Thompson, 658 F.2d 1205 (CA7 1981). But see Monahan v. Nebraska, 687 F.2d 1164 (CA8 1982); Hastings v. Maine-Endwell Sch. Dist., 676 F.2d 893 (CA2 1982); Robert M. v. Benton, 671 F.2d 1104 (CA8 1982); Jose P. v. Ambach, 669 F.2d 865 (CA2 1982). CA1 found support for its §1988 holding in Middlesex Cty. Sewerage Auth. v. Sea Clammers Assn., 453 US 1, 20 (1981), in which this Court held that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to preclude the remedy of suits under §1983." CA1 limited its holding to cases

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[1] CA1 did not reach the other questions presented by the state, including whether petrs were entitled to fees for work before the state agencies and state court.

in which the constitutional claims asserted under §1983 arise from the same factual underpinnings as the statutory claims under EAHCA. Here, that is the case. In fact, part of the purpose of the EAHCA was to enable states to fulfill their constitutional obligations to handicapped children. The denial of fees under the Rehabilitation Act is based on substantially the same reasons as those justifying the rejection of fees under §1988. This conclusion is epecially appropriate where the existence of a private right of action under the Rehabilitation Act is in doubt.

3. *CONTENTIONS*: Petrs assert that CA1's decision conflicts with the legislative history of §1988 and of the Rehabilitation Act. The House Report on §1988 expressly allows fees where a substantial constitutional question is not addressed by the court:

> In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. ... In such cases, if the claim for which fees may be awarded meets the "substantiality" test, see Hagans v. Lavine, [415 US 528 (1974),] ... attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." United Mine Workers v. Gibbs, [383 US 715, 725 (1966)].

The legislative history of the Rehabilitation Act, which is worded identically to §1988, expressly incorporated the legislative history of the latter section.

Petrs also assert that CA1's decision conflicts with Maher v. Gagne, 448 US 122, 128 n.10 (1980), which held that petr could recover attorney's fees even though her success was based solely

on the Social Security Act, since her constitutional claims were sufficiently substantial to support federal jurisdiction, citing the quoted legislative history. Sea Clammers is distinguishable because that concerned the assertion of a federal statutory right through §1983, while here and in the Maher footnote the question is whether the assertion of a federal constitutional right through §1983 is precluded by the comprehensiveness of the EAHCA.

Finally, petrs assert that CA1's decision conflicts with decisions of CA8 and CA2 that hold that when a plaintiff prevails under EAHCA so that factually identical §1983 claims based on the Constitution are not reached, attorney's fees may still be awarded under §1988. Monahan; Benton; Ambach. Petrs say that Hymes, the CA4 case cited by CA1, rested on a finding that the EAHCA does not fall within the "and laws" language of §1983, so it does not give rise to a §1983 claim. In the present case, petrs never asserted that their EAHCA action was a §1983 claim, but rest their claim for attorney's fees on the existence of substantial constitutional claims alleged through §1983. Hymes also conflicts with Hensley v. Eckerhart, 51 USLW 4552, 4555 (US 5/15/83) (time spent by attorney on unsuccessful contentions related to the ones adopted by the court should not be subtracted in computing fee), in that CA4 awarded fees for time expended on a due process claim, while denying fees for time spent on the EAHCA claim.

Petrs request either summary reversal or plenary review and reversal.

4. DISCUSSION: On the question of whether EAHCA is so comprehensive as to preclude awarding fees for identical constitutional claims brought through §1983, the circuit split is not as broad as either CA1 or petrs say. The CA2 cases do not raise the question because there plaintiffs explicitly prevailed under either the Rehabilitation Act or a §1983 due process claim, both of which allow attorney's fee awards. As petrs assert, the CA4 case appears to deal with whether an EAHCA claim can be brought through §1983, not with whether a constitutional claim can be brought through §1983. Nevertheless, there is a "clear conflict" between CA1's decision here and the two CA8 cases cited, Benton and Monahan. Those cases held that constitutional claims substantially identical to the EAHCA claims on which plaintiffs prevailed could provide the basis for attorney's fees.

This case also is a reasonably important sequel to Sea Clammers. That case held that a comprehensive statute could preclude bringing a statutory claim under §1983. This case raises the question whether such a statute precludes bringing a substantially identical constitutional claim under §1983. It appears that the EAHCA will probably fulfill the predicate requirement of comprehensiveness. No circuit has held otherwise, apparently; CA8 left the question undecided and CA4 and CA7 agree with CA1 that an EAHCA claim cannot be brought through §1983.

In light of the legislative history of §1988 cited by petrs, and acknowledged by both the majority and concurrence in Maher, 448 US at 132 n.15, 134, it may be that this case is obvious enough for summary reversal. Nevertheless, there is language in

Sea Clammers that suggests CA1's result. Also, I suspect that the importance of the question justifies plenary review.

There is in addition the question whether the EAHCA precludes awarding attorney's fees where the plaintiff has raised unaddressed claims under the Rehabilitation Act. Because the §1988 legislative history was incorporated into the Rehabilitation Act, this issue appears little different from the §1988 question, though less significant. CA1 is apparently the first court to confront the interaction of the EAHCA and the Rehabilitation Act.

5. RECOMMENDATION: I recommend CFR with an eye to granting.

There is no response.

August 12, 1983 Neuhaus Opin in petn

Tobe 10/24/83

jen 10/07/83

Probably a Grant to resolve recent conflict with CA 5 on implying 1983 cause of action where statute provides comprehensive relief. If I understand more cases,

Though CA1 is probably right.

No. 82-2120 Smith v. Robinson

The response has been received in this case. It adds nothing new. It consists of an extended quotation from a D.Del. opinion in which the DC exercised discretion under § 1988 to deny fees, and several extended quotations from CA1's opinion in this case.

I think CA1 was right in following Scadamuro

In addition, petr has filed a supplemental brief to inform the Court of a CA5 decision that conflicts with CA1's decision in the case at bar. The court in Espino v. Besteiro, 708 F.2d 1002, 1006-1010 (CA5 1983), explicitly rejected the holding in this case. Although CA5 appears to have mistakenly thought CA1's case involved a §1983 suit brought to remedy a violation of the EAHCA itself, rather than to remedy an independent constitutional violation, the two decisions are squarely in conflict. CA5 relied on the rule that Bivens actions will be deemed to be preempted by Congress only where "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective," Carlson v. Green, 446 U.S. 14, 18-19 (1980) (emphasis in original). CA5 thought this rule had even greater force where the private right of action is not implied, but is expressly provided by § 1983. Finding no express evidence in the EAHCA of an intent

A case last Term relaxed this unfortunate language to some extent

to displace § 1983 actions, CA5 granted attorney's fees under § 1988. CA5 did not address your opinion in Sea Clammers.

I find this a difficult case. The question is how explicit Congress must be in enacting specific statutory remedies in order to preclude a § 1983 action to enforce a similar or identical right. Sea Clammers held that when the § 1983 action is based on the specific statute itself, a preemptive intent will be inferred merely from the comprehensiveness of the remedies provided in that statute. CA1 held that such comprehensiveness plus a legislative awareness of the constitutional rights involved, see 703 F.2d, at 8 (EAHCA intended to enable states to fulfill their constitutional obligations to handicapped), sufficed to show an intent to supplant § 1983 actions to enforce identical constitutional rights. CA5 thought such an intent could be inferred only from an explicit statutory provision. (CA8 agrees with the CA5's result, but its pre-Smith cases do not address whether EAHCA was intended to repeal § 1983 by implication.) The question is an important and open one as to which the CAs are in conflict.

It may be argued that the fact that the relief on the merits was granted formally on the basis of state law will be a problem, either because of the Eleventh Amendment or because § 1988 does not allow fees where relief was actually granted on state-law grounds. (1) With respect to the Eleventh Amendment, I cannot tell from the papers whether relief was granted only against local officials (ordering them to pay for Tommy's education) or also against state officials (the local decision was upheld by the state education dep't, and it is only from them that fees are

now sought). If the former, then the Eleventh Amendment does not apply. In any event, the "judgment" on the merits is now final, having been affirmed by CA1 without cert. being sought, so that Pennhurst cannot affect it. The award of attorney's fees pursuant to a federal statute should not raise an Eleventh Amendment problem by itself. Hutto v. Finney, 437 U.S. 678, 693-698 (1978). (2) There should be no problem under § 1988 in granting fees where the relief was based on state law. The legislative history of § 1988 does not suggest any such limitation on awarding fees where relief was actually granted under a nonfee statute. In fact, the House report invokes the Gibbs tests of pendent jurisdiction over state-law claims to decide whether the nonfee claim and the § 1983 claim are closely related. The theory of allowing fees in such cases is based on the doctrine of avoiding constitutional questions, which applies with equal force (in the absence of an Eleventh Amendment problem) when the alternative law is state law as it does when the law is federal. Since I doubt that either of these will be a problem, I recommend a GRANT.

Joe

March 26, 1984

SMITH GINA-POW

82-2120 Smith v. Robinson

This is a summary memorandum merely to reflect my recollection as to what this case is "about".

The petitioners are a handicapped child and his parents. He had been enrolled in an institution in Rhode Island that the parties agree provide him with an appropriate education (The "Bradley" Hospital/School). The local school board ("Columbia School Committee") stopped paying the child's tuition because it believed the Rhode Island Department of Mental Health was required to do it. This suit was instituted in USDC charging a violation of the Constitution, the Rehabilitation Act of 1973, and particularly the Education for All Handicapped Children Act (the "Handicappped Act").

After issuing a preliminary injunction to permit exhaustion of administrative remedies within the state, the DC certified to the Rhode Island Supreme Court the question of which state agency was responsible for paying for the child's education as required by the Handicapped Act. The State Supreme Court ruled that the School

Committee was responsible under state law - not the state agency.

The District Court then found that the plaintiffs below (petitioners here) had, according to CA1's opinion: "Won all that they sought under state law" and accordingly it granted a permanent injunction. The DC's action was affirmed by CA1, and all that remains in this case is petitioners claim for attorneys fees. The DC awarded fees under §1988 for the attorneys work on the "state claim". CA1 reversed, holding that §1988 was not applicable.

In an unanimous opinion written by Chief Judge Campbell, CA1 said:

> "ultimately it was to the EAHCA that the Rhode Island Supreme Court looked in determining that state law required the school committee to fund Thomas's placement at Bradley. R. I. 415 A.2d, at 172. Not only was EAHCA the foundation of plaintiffs' victory, its provisions encompassed all the relief for which plaintiffs now seek attorneys' fees, i.e., all relief beyond the preliminary injunction. See footnote 3, infra.
>
> Yet while EAHCA provides expressly for the bringing of private enforcement actions such as this one, 20 U.S.C. ¶1415(e), it contains no provision for attorneys' fees."

* * *

> "But even if plaintiffs' section 1983 claims qualify as 'substantial,' we do not think that fact alone created authority for fees in a case bottomed so completely on an encompassing federal statute that does not authorize fees. Alyeska makes clear that it is for Congress, not the courts, to pick and choose among types of actions warranting fees. 421 U.S. at 269, 95 S. Ct. at 1627. Thus the question before us remains one of finding affirmative congressional sanction for fees in this situation. We can find none."

The Court of Appeals also relied substantially on my opinion in Sea Clammers in which we stayed that "when the remedial devices provided in a particular act are sufficiently comprehensive, they will suffice to preclude the remedy of suits under §1983". although Sea Clammers was addressing the right to sue under §1983, and this case involves the right to imply attorneys' fees under §1988 from the substantive rights provided by the Handicapped Act, CAl thought the same principles were involved.

LFP, JR.

Renewed 3/27

Close Q. Cammie's memo, thoughtful as usually, tentatively treats the 1983 claim of denial by ~~the~~ Petrs ~~[illegible]~~ (handicapped child & parents) of Const. rights as not substantial under Gibbs

The case (after the Packin. Inj.) was decided solely in state court under EAHCA ~~[illegible]~~ Education of all Handicapped Children Act] and state law. Section 1983 played no part in the result. - 8,9.

BENCH MEMORANDUM

No. 82-2120

(Argument Date March 28, 1984)

Cammie R. Robinson Smith v. Robinson March 27, 1984

Question Presented

Whether §1988 authorizes an award of attorneys fees to a plaintiff who alleges constitutional claims under §1983, but who ultimately prevails exclusively under state law.

FACTS & DECISION BELOW

The chronology of the litigation is somewhat important, but since it is set out fairly clearly in CA1's opinion, I will not repeat it here.

DISCUSSION

Plaintiffs claimed that denial of a free appropriate public education to their handicapped child violated rights guaranteed by the Constitution (Equal Protection; Due Process) and by federal statute (the Education for All Handicapped Children Act [EAHCA] and §504 of the Rehabilitation Act). Section 1983 provided a private right of action for the alleged constitutional violation; the EAHCA provided a private right of action for the alleged statutory violation. Although §1988 provides for an award of attorneys fees for the §1983 claim, no attorneys fees are authorized by the EAHCA. CA1 (Cambell, J.) held that "where, as here, the constitutional allegations arise from the same factual underpinnings as the statutory claims, §1988 does not apply." I think that the reasoning CA1 used to reach its result is flawed in several respects.

1. Although plaintiffs alleged no state claims, they prevailed on state law. The DC never reached the merits of either the §1983 claim or the federal statutory claims.[1] Thus,

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Footnote(s) 1 will appear on following pages.

it seems that the propriety of a fee award in this case depends on whether fees may be awarded under §1988 when the party prevails on a pendent state claim for which no fees are provided. The legislative history of §1988 indicates that fees are appropriate in such a case as long as the §1983 claim "meets the 'substantiality' test" of Hagans v. Lavine, 415 U.S. 528 (1974), and United Mine Workers v. Gibbs, 383 U.S. 715 (1966). H.R. Rep. No. 94-1558, p.4, n.7. See Maher v. Gagne, 448 U.S. 122, 132-133 & n.15 (1980). Thus, the crucial question is whether the §1983 claims were "substantial." CA1 did not employ this analysis, nor fully resolve that issue.

2. CA1's reliance on Middlesex County Sewage Authority v. Sea Clammers Association, 453 U.S. 1 (1981) (JUSTICE POWELL), is misplaced. Maine v. Thiboutot, 448 U.S. 1 (1980), held that violation of federal statutory rights under color of state law will support a §1983 claim.[2] Sea Clammers established a limitation to that decision. It held that Congress is presumed to have precluded any right of action under §1983 to vindicate

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[1]There is arguably a Pennhurst problem here. The DC entered a permanent injunction on the basis of state law. However, it appears from the papers that the injunction was entered against the local school committee rather than state officials and that the school committee was not carrying out any state policy. See J.A., at 175. That may eliminate any Pennhurst problem. Moreover, there was a final judgment in this case before Pennhurst was handed down. Finally, there is not much briefing on this issue and it does not seem necessary to resolution of the fee question in the same way that the underlying issue was necessary to the fee question in Pulliam. Thus, I suggest that the Court not dwell on whatever Pennhurst problem exists.

[2]You dissented in Maine.

statutory rights created by a federal statute that provides its own comprehensive enforcement scheme. If Congress by enacting the EAHCA intended to preclude identical claims brought under §1983, §1988 would not provide for attorneys fees in this case. CA1, however, did not rely on Sea Clammers to hold that the EAHCA precluded plaintiffs' §1983 claims.[3] Instead, it relied on the rationale of Sea Clammers to hold that "the omission [of attorneys fees under the EAHCA] has the same preclusive effect with regard to section 1988 that the lack of a private remedy in [Sea Clammers] had with regard to section 1983." Cert. Pet. at A.14-15 (emphasis in original).

This reasoning is flawed for two reasons: (i) The EAHCA was enacted in 1975 -- one year before §1988 and before this Court handed down its opinion in Aleyska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). At the time of the enactment, courts were awarding attorneys fees liberally to private attorneys general. Congress well may have believed that attorneys fees would be available under the EAHCA without any express requirement. (I recognize that this is a weak argument in light of the Aleyska decision).

(ii) More important, Congress in enacting §1988 made clear that where a plaintiff alleges both a §1983 claim and a pendent statutory

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[3] To the contrary, it expressly noted that Sea Clammers "may not logically preclude a section 1983 action for violation of the EAHCA." Cert. Pet., at A.14.

claim for which fees cannot be awarded, fees may be awarded under §1988 as long as the §1983 claim meets the "substantiality" test of Hagans and Gibbs. See H.R. Rep., supra; Maher, 448 U.S., at 132-133 & n.15. CA1 ignored this legislative history, and this Court's decision in Maher, and failed to undertake the proper "substantiality" analysis.

CA1 ignored leg. hist. & Maher

3. Even under a proper application of Sea Clammers, it is not clear that plaintiffs' §1983 claims are precluded by the EAHCA. The §1983 claims at issue here are based on alleged constitutional violations. The §1983 claims at issue in Sea Clammers were based on alleged violations of a federal statute that had its own comprehensive enforcement scheme. The principle of Sea Clammers is that Congress may create a federal statutory right without at the same time creating a right of action under §1983. If Congress has provided a comprehensive scheme for the enforcement of these new statutory rights, the Court will presume that Congress did not intend also to provide a right of action under §1983. Where, as here, the §1983 claims are based on alleged constitutional violations, the Sea Clammers principle may not be applicable.

In passing §1983, Congress provided a private right of action for constitutional violations committed under color of state law. A subsequent statutory scheme may protect the same rights and provide a comprehensive scheme for enforcing any statutory violations without precluding §1983 claims. Cf. Johnson v. Railway Express, 421 U.S. 454 (1975) (Title VII does not preclude §1983 claims for race discrimination). To eliminate

the §1983 claim, this Court must presume that Congress intended the new statute partially to repeal §1983. Such repeals by implication are disfavored, as this Court expressly held in Carlson v. Green, 446 U.S. 14, 18-19 (1980).[4] When §1983 claims are based on alleged constitutional violations, it is Carlson rather than Sea Clammers that seems to control. Under Carlson, there is no reason to believe that Congress intended the EAHCA to preclude plaintiffs' §1983 claims. (I have not checked to see if there is a more recent statement than Carlson. There may be one from last term. I will check.).

If the EAHCA does not preclude plaintiffs' §1983 claims, it is necessary under Maher to determine whether the constitutional claims meet the "substantiality" test of Gibbs. Although CA1 did not attempt such an analysis for purposes of determining the propriety of a fee award, it did make the following offhand remark: "[P]laintiffs' section 1983 claims were arguably 'substantial' in that, though weak, they would at least have supported federal jurisdiction." Cert. App., at A.10. Arguably this establishes the propriety of the fee award under Maher. Because this comment was more offhanded dicta than well-reasoned analysis, I recommend that the Court conduct its own

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[4] Carlson provided that the §1983 claim is eliminated only "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective as Bivens." 446 U.S., at 181-19. You objected to this statement in your separate concurrence. 446 U.S., at 26-27.

"substantiality" analysis.

There are several factors supporting a finding of "substantiality."

1. The constitutional claims were substantial enough to secure a preliminary injunction.[5]

2. At least one DC before passage of the EAHCA had held that the Equal Protection Clause required school districts to provide special education to handicapped children. Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972).

3. The legislative history of the EAHCA makes clear that Congress enacted the legislation to help states fulfill what Congress believed were constitutional obligations to provide free appropriate education to handicapped children. The legislative history expressly referred to the Mills case and to this Court's decision in Brown v. Board of Education, 348 U.S. 886 (1954), as establishing such a constitutional obligation.[6] Of course, Congress is not the arbiter of constitutional rights, but the constitutional claims asserted here have found at least some support.

There are several factors that cut against a finding of

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[5]By agreement among the parties, attorneys fees were awarded to plaintiffs in connection with that preliminary injunction.

[6]The legislative history quoted the following passage from Brown as support: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity ... is a right which must be made available to all on equal terms." S. Rep. No. 94-168, 6-7 (1975).

"substantiality" here.

1. Gibbs provides the test for "substantiality." At one point in Gibbs, the Court indicated that the test is not met if "the federal issues were so remote or played such a minor role ... that in effect only the state claim was tried." 383 U.S., at 728. Here, the §1983 claims arguably were remote and played a minor (to say the least) role in the case after the preliminary injunction stage. As far as I can tell from the Appendix, the constitutional claims were never discussed after the preliminary injunction. All the debate and discussion centered on the state law questions as they were resolved in light of the EAHCA. While both state law and the EAHCA played a substantial role in the relief awarded here, the §1983 claims played absolutely none. If they were litigated at all, they certainly were not resolved.

2. One might argue that an Equal Protection claim is not substantial here because handicapped children and non-handicapped children are not similarly situated.[7]

I find this an extremely close case. I tentatively recommend that the Court affirm the result reached by CA1. As long as the preliminary injunction stage is considered separately from the rest of the litigation, and fees are awarded for that stage, it seems that the §1983 claims virtually dropped out of the litigation thereafter. Although those claims certainly were

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[7]This is a harsh an unattractive argument, but I suppose accurate at some point. I agree

substantial enough to support federal jurisdiction, that will be true in almost any case. The Court may want to announce a rule that §1983 claims will not be considered "substantial" for purposes of a fee award if they were never legitimately litigated on the merits. This may conflict, however, with the legislative history, which indicates that Congress intended to apply the "substantiality" test of Gibbs.[8]

[8] I think the question whether attorneys fees may be awarded on the basis of the §504 claim is much easier. As far as I can tell, that claim played even less of a role in the litigation than the §1983 claims. Because there is no legislative history on the Rehabilitation Act suggesting that Congress intended courts to award attorneys fees merely because §504 claims were "substantial," I think it is clear that no fees are available under that Act.

crr 03/27/84

SUPPLEMENTAL BENCH MEMO

Helpful & on-target.

RE: Smith v. Robinson, No. 82-2120

TO: Justice Powell

FROM: Cammie

Having done this bench memo so hurriedly, I thought it best to check a few things. I have found some items worth adding and some worth correcting.

After reviewing the issues once again, I am more convinced that CAl's result was correct. The "chronology" of the litigation suggests to me that the Equal Protection claim asserted under §1983 and the Rehabilitation claim were added merely for the purpose of securing attorneys fees. Thus, I think the chronology is worth setting out.

claims added

In Nov. 1976, plaintiffs filed a complaint under §1983 in DC claiming that the local school committee had violated Due Process by terminating Tommy's special education before the completion of state administrative proceedings. It was this due process claim that secured the preliminary injunction. Plaintiffs have received attorneys fees for all work done in connection with that issue.

The administrative review was completed in April 1978 and the Rhode Island Commissioner of Education issued a written opinion holding that the Mental Health, Retardation Hospitals [MHRH] rather than the local school committee had the responsi-

bility for providing Tommy's special education. This meant that the education would not be provided completely free of charge.

In May 1978, plaintiffs filed a first amended complaint alleging that the administrative review process that had been used violated Due Process and various provisions of the EAHCA. They also claimed that the denial of a free special education violated the EAHCA.

In January 1979, the DC certified two questions to the Rhode Island Supreme Court. Both questions sought to determine whether, under state law, the local school committee or the MHRH had responsibility for providing Tommy's special education. If state law required the local school committee to provide that education, there would be no need to address the federal statutory or constitutional questions.[1]

In June 1980, the state court held that under state law the local school committee was responsible for providing the special education at issue here. Promptly thereafter, in Sept. 1980, plaintiffs filed a second amended complaint adding the Equal Protection claim under §1983 and the Rehabilitation claim under §504. Because resolution of the state law questions already had provided plaintiffs with all the relief they sought, this second amended complaint seems to have been an obvious ploy

[1]All parties agreed that if the local school committee were responsible for providing the education, it would be provided to Tommy completely free of charge. If, on the other hand, the MHRH was responsible for providing the education, it would not be completely free of charge under state law, thereby making resolution of the federal issues necessary.

to obtain attorneys fees under §1988 and the Rehabilitation Act.

In Jan. 1981, the DC held explicitly what was made so obvious by the state court's decision -- plaintiffs had secured all requested relief under state law and therefore resolution of the federal issues was unnecessary.

The DC nevertheless awarded attorneys fees to plaintiffs under §1988 and the Rehabilitation Act because "substantial" claims under §1983 and §504 had been alleged. Although, I do not agree with CA1's reasoning, I now think it is clear that no such fee award should be made in this case. I think that the Court can easily conclude that the Equal Protection claim and the §504 claim were not "substantial" in this case because they appeared only after it was clear that relief would be granted on the basis of state law. The due process claim that was alleged from the outset is more troubling. I would argue that it was not "substantial" in this case because it was never actually litigated and played absolutely no role in the relief granted here.

As for corrections, I referred to Carlson v. Green in the bench memo as if it were a §1983 case. It is not. It is a Bivens case. Carlson, therefore, is relevant only by analogy. The point is that a subsequent statute may preclude §1983 claims based on alleged constitutional violations only if Congress intended that statute partially to repeal §1983 by implication. No such repeal by implication was necessary to the decision in Sea Clammers.

Finally, the Court last term decided a case that seems to have modified the language you objected to in Carlson. In

Bush v. Lucas, 103 S.Ct. 2404, 2411 (1983), the Court held that "[w]hen Congress provides an alternative remedy, it may, of course, indicate its intent [to preclude a Bivens action], by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself." Because CA1 did not address the issue, and I have not reviewed the statutory scheme set forth by the EAHCA, I am not certain whether that statute is so comprehensive that it indicates an intent on the part of Congress to preclude constitutional claims under §1983. A remand to CA1 to address this issue might be appropriate. However, if a fee award would be inappropriate in any event, as I think it would be, a remand would be wasteful.

Recommendation - I recommend that the Court hold that no fee award may be made under §1988 because the §1983 claims were not "substantial," and that no fee award be made under the Rehabilitation Act because plaintiffs did not prevail on their §504 claim.

82-2120 SMITH v. ROBINSON

Argued 3/28/84

Lawson (Pet+)
(Answers to my questions not clear) (See his Reply)

Avila (Resp - NJ Commissioner of Ed)
Complaint as first filed alleged only a D/P claim - no E/P claim.

State S/Ct held the Commissioner of Ed had erred, and as a matter of state law it was duty of local school committee.

School Committee had pd. fees assessed by Ct. CA1 said this was appropriate as the Complaint had alleged a Const. violation (D/P).
But present claim for fees is only for the subsequent controversy that was resolved under State law by State S/Ct.

(Purpose of 1988 was to encourage assertion of fed. rights. The purpose is not served in any sense by Resp's claim here)

Court ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19...

Submitted ....., 19... Announced ....., 19...

October 28, 1983

No. 82-2120

SMITH

vs.

ROBINSON

I PS thinks CA1 is right — as do I. But the conflict is sharp.

G

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.		✓											
White, J.					Join 3								
Marshall, J.		✓											
Blackmun, J.					ll								
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											
O'Connor, J.			✓										

crr 03/29/84

March 29, 1984

RE: No. 82-2120, Smith v. Robinson

TO: Justice Powell

FROM: Cammie

You requested a brief memo on the §1983 due process claim.

After plaintiffs had lost in state administrative proceedings, they filed their "First Amended Complaint" (May 10, 1978) (J.A., at 49). This complaint alleged two claims -- a due process claim under §1983 and a claim for free appropriate education under the EAHCA.

The 1983 due process claim was purely procedural. Plaintiffs claimed that the state proceedings had violated due process by denying them an impartial hearing officer. As relief, plaintiffs sought a declaratory judgment that the administrative proceedings were unconstitutional,[1] and a "prohibitory injunction against the Commissioner and the Associate Commissioner conducting any more [such] hearings" without conforming them to the pro-

[1]Plaintiffs also sought a declaration that the state procedure violated the procedural requirements of the EAHCA. The EAHCA claim, of course, would not support a claim for attorneys fees.

cedural requirements of the EAHCA. J.A., at 60.[2] The EAHCA claim was purely substantive. Plaintiffs claimed that the state agency's decision violated their federal statutory right to have the local school committee provide a free appropriate education to Tommy. As relief, they sought an injunction compelling the local school committee to provide that education. Thus, the due process claim and the EAHCA claim were two distinctly different claims, based on different legal theories, and seeking separate types of relief. Although plaintiffs prevailed on the EAHCA claim[3] and obtained all the relief they had requested in that regard, the DC never ruled on their due process claim, and plaintiffs obtained none of the relief requested under that count. There seems to be little reason, therefore, why plaintiffs should recover attorneys fees under §1988 for their success under the EAHCA merely because they included this separate §1983 claim in

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[2]This request for relief seems odd. Plaintiffs had completed the administrative process, and there is no indication that they would be subjected to it in the future. They have not argued that the DC should declare the administrative process unconstitutional and then order the state agency to reconsider their substantive claim under different procedures. What they want is a decision by a federal court that they are entitled to the educational opportunities the state has denied them. I simply do not understand why plaintiffs sought the relief requested. Moreover, in view of the requested relief, the EAHCA may have mooted the due process claim. The EAHCA, effective only after these proceedings were complete, imposes detailed procedural requirements on states accepting funding under the Act and has made the procedures used in those proceedings obsolete.

[3]For purposes of a fee award, I think it is fair to say that plaintiffs prevailed on their EAHCA claim even though it was state rather than federal law that provided the basis for their relief.

their complaint.

I think reliance on Maher to support this result is misplaced. Relying on a passage in the legislative history, Maher held that fees may be awarded under §1988 where a plaintiff "prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim" that is never adjudicated. The relevant passage in the legislative history provided:

> "In some instances, ... the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. ... In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see Hagans v. Lavine; United Mine Workers v. Gibbs, ... attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.'" H.R. Rep. No. 94-1558, p.4, n.7 (emphasis added).

The italicized phrase in this passage seems to indicate that plaintiffs who prevail on non-fee claims may recover attorney's fees under §1988 only if their pendant §1983 claims might have provided alternate grounds for obtaining the same relief obtained under the non-fee claims. It would make little sense to apply the Gibbs "substantiality" test to a §1983 claim that is entirely separate from the claim under which plaintiff prevailed.

Language in Hensley is instructive on this point. There the Court stated:

> "In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants ..., counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.' ... The congressional intent to limit

> awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." Hensley, 103 S.Ct., at 1940 (emphasis added).

The EAHCA claim and the due process claim alleged here should be treated as if they were raised in separate lawsuits. Where a non-fee claim and a §1983 claim are completely separate, success on the non-fee claim should not support an award of attorneys fees under §1988 no matter how substantial the §1983 claim. Maher applies only where the non-fee claim and the §1983 claim are mere substitues for one another and seek the same relief. Such is not the case here.[4]

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[4]The equal protection claim, on the other hand, is precisely this type of claim. There are two ways of dealing with that claim. The first is to say that it is not "substantial." The second, and I think preferable way, is to say that a §1983 claim that is alleged only after success on alternate grounds is clear will not support an award of attorneys fees no matter how substantial. This will avoid making a quasi constitutional ruling, and it also will ~~stop~~ help stop an abusive practice of adding claims merely to secure a fee award.

Handicapped Children Act

82-2120 Smith v Robinson

(CA1 denied 1988 fees)

Chronology shows 1983 claim was not "substantial"

1976 – § 1983 Complaint filed claiming denial of F/A by terminating Tommy's special-education before completion of Adm. review process. Resulted in a prelim. injunction.

Atty's fees were paid for this all of work.

April 1978 – Adm. review completed. Commissioner of Ed ruled the State Mental Hospital was responsible for education – not Local School Committee

May 1978 - First Amended Complaint filed in D C alleging the Adm. Review had violated D/P, & that the denial of entirely free ed. violated Fed Act EAHCA (handicapped children)

Jan 79 - DC Certified question to State S/Ct.

June 80 - State S/Ct ruled in Pet's favor, holding Local School Committees must provide free education.

Sept 80 - Pets filed 2nd Amended Complaint alleging violation of §1983.

Jan 81 - DC ruled that Pets had received all relief requested under State law & need not reach fed issues.

Affirm (tentative) 5
Rev - 4

No. 82-2120, Smith v. Robinson Conf. 3/30/84

The Chief Justice Affirm (tentative)

Plaintiff won case on state law claims.

Under Hensley, P did not prevail on 1983 claims

Maher not applicable

CA 1 was right

X X X

Could agree with L F P

Justice Brennan Rev. + Remand

Murky case.

It is hard to justify allowing fees under 1988. But under Maher & leg. histories, fees should be allowed.

Also would imply fees under EAHCA. Not like J-cat claims

But would Remand to ?? have Ct. decide whether claims were related.

Justice White Rev & Remand

CA 1 is wrong.

There may be a fee award under EAHCA & even under other claims. CA 1 didn't address right issue.

Justice Marshall Aff in (tentative) (I don't think TM will stay with this)
Not right to ~~~~ allow fees
in this case.
(No reasons given)

Justice Blackmun Aff in (tentative)
Difficult case.
Relies on Hensley - claims
~~~~ unrelated.

Justice Powell Aff'm
See my notes
~~~~

Justice Rehnquist Aff'm

CA1's analysis was wrong.
But agree with LFP as to application of Hensley.
The State D/P ~~claim~~ claim was frivolous.

Justice Stevens Rev.

Case is a "muddle"
Case began with a clear 1983 claim, & Π did prevail all the way through.
CA1 was wrong.
Π did rely on Thiboleau-

Justice O'Connor Aff'm (tentatively)

Difficult case & still in doubt.
Probably could agree with LFP on Hensley.
1983 claim was vs. School Committee & no relief ever given on the ~~first~~ first 1983 claim. Fee allowed on that.
Second 1983 claim was an LFP raid

Commie

Page or pages following p 27 are missing.

Sally Join

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
ice Powell
ice Rehnquist
ice Stevens
ice O'Connor

L.F.P

m: Justice Blackmun

culated: JUN 1 1984

Recirculated: _____

Renewed 6/2

Join

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-2120

THOMAS F. SMITH, JR., ET AL., PETITIONERS *v.* WILLIAM P. ROBINSON, JR., RHODE ISLAND ASSOCIATE COMMISSIONER OF EDUCATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June —, 1984]

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents questions regarding the award of attorney's fees in a proceeding to secure a "free appropriate public education" for a handicapped child. At various stages in the proceeding, petitioners asserted claims for relief based on state law, on the Education of the Handicapped Act (EHA), 84 Stat. 175, as amended, 20 U. S. C. §§ 1400 *et seq.*, on § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. § 794, and on the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The United States Court of Appeals for the First Circuit concluded that because the proceeding, in essence, was one to enforce the provisions of the EHA, a statute that does not provide for the payment of attorney's fees, petitioners were not entitled to such fees. *Smith* v. *Cumberland School Committee*, 703 F. 2d 4 (1983). Petitioners insist that this Court's decision in *Maher* v. *Gagne*, 448 U. S. 122 (1980), compels a different conclusion.

I

The procedural history of the case is complicated, but it is significant to the resolution of the issues. Petitioner Thomas F. Smith, III (Tommy), suffers from cerebral palsy and a va-

riety of physical and emotional handicaps. When this proceeding began in November 1976, Tommy was 8 years old. In the preceding December, the Cumberland School Committee had agreed to place Tommy in a day program at Emma Pendleton Bradley Hospital in East Providence, R. I., and Tommy began attending that program. In November 1976, however, the Superintendent of Schools informed Tommy's parents, who are the other petitioners here, that the School Committee no longer would fund Tommy's placement because, as it construed Rhode Island law, the responsibility for educating an emotionally disturbed child lay with the State's Division of Mental Health, Retardation and Hospitals [MHRH]. App. 25–26.

Petitioners took an appeal from the decision of the Superintendent to the School Committee. In addition, petitioners filed a complaint under 42 U. S. C. § 1983 in the United States District Court for the District of Rhode Island against the members of the School Committee, asserting that due process required that the Committee comply with "Article IX—Procedural Safeguards" of the Regulations adopted by the State Board of Regents regarding Education of Handicapped Children [Regulations][1] and that Tommy's placement

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[1] In November 1976, Rhode Island, through its Board of Regents for Education, was in the process of promulgating new regulations concerning the education of handicapped children. The old regulations, approved in 1963, had been issued by the State Department of Education and were entitled "Regulations—Education of Handicapped Children." Most of the new Regulations became effective October 1, 1977. Article IX of Section One, however, was made effective June 14, 1976. See Section One, Art. XII.

The Regulations were promulgated pursuant to R. I. Gen. Laws § 16–24–2 (1981). The immediately preceding section, § 16–24–1, sets out the duty of the local school committee to provide, for a child, "who is either mentally retarded or physically or emotionally handicapped to such an extent that normal educational growth and development is prevented," such type of special education "that will best satisfy the needs of the handicapped child, as recommended and approved by the board of regents for education in accordance with its regulations." Section 16–24–1 has its ori-

in his program be continued pending appeal of the Superintendent's decision.

In orders issued in December 1976 and January 1977, the District Court entered a temporary restraining order and then a preliminary injunction. The court agreed with petitioners that the Regulations required the School Committee to continue Tommy in his placement at Bradley Hospital pending appeal of the Superintendent's decision. The School Committee's failure to follow the Regulations, the court concluded, would constitute a deprivation of due process.

On May 10, 1978, petitioners filed a First Amended Complaint. App. 49. By that time, petitioners had completed the state administrative process. They had appealed the Superintendent's decision to the School Committee and then to the State Commissioner of Education, who delegated responsibility for conducting a hearing to an Associate Commissioner of Education. Petitioners had moved that the Associate Commissioner recuse himself from conducting the review of the School Committee's decision, since he was an employee of the State Educational Agency and therefore not an impartial hearing officer. The Associate Commissioner denied the motion to recuse.

All the state officers agreed that, under R. I. Gen. Laws, Tit. 40, ch. 7 (1977), the responsibility for educating Tommy lay with MHRH.[2] The Associate Commissioner acknowledged petitioners' argument that since § 40.1–7–8 would require them to pay a portion of the cost of services provided to Tommy,[3] the statute conflicted with the EHA, but concluded

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gin in 1952 R. I. Pub. Laws, ch. 2905, § 1, and was in effect in November 1976.

[2] Under § 40.1–7–3, enacted by 1971 R. I. Pub. Laws, ch. 89, art. 1, § 1, MHRH is charged "with the responsibility to promote the development of specialized services for the care and treatment of emotionally disturbed children and to cooperate to this end with all reputable agencies of a public or private character serving such children . . . ."

[3] Section 40.1–7–8 provides: "The parents of children in the program, depending upon their resources, shall be obligated to participate in the

that the problem was not within his jurisdiction to resolve.

In their First Amended Complaint, petitioners added as defendants the Commissioner of Education, the Associate Commissioner of Education, the Board of Regents for Education, and the Director of MHRH. They also specifically relied for the first time on the EHA, noting that at all times mentioned in the complaint, the State of Rhode Island had submitted a plan for state-administered programs of special education and related services and had received federal funds pursuant to the EHA.[4]

In the First Count of their Amended Complaint, petitioners challenged the fact that both the hearing before the School Committee and the hearing before the Associate Commissioner were conducted before examiners who were employees of the local or state education agency. They sought a declaratory judgment that the procedural safeguards contained in Article IX of the Regulations did not comply with the Due Process Clause of the Fourteenth Amendment or with the requirements of the EHA, 20 U. S. C. § 1415, and its accompanying regulations. They also sought an injunction prohibiting the Commissioner and Associate Commis-

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costs of the care and treatment of their children in accordance with regulations to be promulgated by the director."

[4] The 1975 Amendment to the EHA, on which petitioners rely, became effective October 1, 1977. Prior to that date, the federal requirements governing States which, like Rhode Island, submitted state plans and received federal money for the education of handicapped children were found in the Education of the Handicapped Act, 84 Stat. 175, as amended in 1974, 88 Stat. 579. The obligations imposed on a State by that Act were to expend federal money on programs designed to benefit handicapped children. From August 1974 to September 30, 1977, the Act also required that parents be given minimal due process protections when the State proposed to change the educational placement of the child. 88 Stat. 582. The state hearing process in this case began on January 20, 1977, with a hearing before the School Committee. By the time petitioners' appeal progressed to the Associate Commissioner of Education on November 2, 1977, the 1975 Act was in effect. Unless otherwise indicated, future references to the "EHA" refer to the 1975 amendments to that Act.

sioner from conducting any more hearings in review of decisions of the Rhode Island local education agencies (LEAs) unless and until the Board of Regents adopted regulations that conformed to the requirements of § 1415 and its regulations. Finally, they sought reasonable attorney's fees and costs.

In the Second Count of their Amended Complaint, petitioners challenged the substance of the Associate Commissioner's decision. In their view, the decision violated Tommy's rights "under federal and state law to have his LEA provide a free, appropriate educational placement without regard to whether or not said placement can be made within the local school system." App. 61. They sought both a declaratory judgment that the School Committee, not MHRH, was responsible for providing Tommy a free appropriate education, and an injunction requiring the School Committee to provide Tommy such an education. They also asked for reasonable attorney's fees and costs.

On December 22, 1978, the District Court issued an opinion acknowledging confusion over whether, as a matter of state law, the School Committee or MHRH was responsible for funding and providing the necessary services for Tommy. App. 108. The court also noted that if the Associate Commissioner were correct that Tommy's education was governed by § 40.1–7, the state scheme would appear to be in conflict with the requirements of the EHA, since § 40.1–7 may require parental contribution and may not require MHRH to provide education at all if it would cause the Department to incur a deficit. At the request of the state defendants, the District Court certified to the Supreme Court of Rhode Island the state law questions whether the school committee was required to provide special education for a resident handicapped student if the local educational programs were inadequate, and whether the cost of such programs was the responsibility of the local school committee or of the MHRH.

On May 29, 1979, the District Court granted partial summary judgment for the defendants on petitioners' claim that they were denied due process by the requirement of the Regulations that they submit their dispute to the School Committee and by the Associate State Commissioner's refusal to recuse himself. The court noted that the School Committee's members were not "employees" of the local education agency, but elected officials, and determined that the provision of the EHA directing that no hearing shall be conducted by an employee of an agency or unit involved in the education or care of the child does not apply to hearings conducted by the state education agency.

On June 3, 1980, the Rhode Island Supreme Court issued an opinion answering the certified questions. *Smith* v. *Cumberland School Committee*, —— R. I. ——, 415 A. 2d 168. Noting the responsibility of the Board of Regents for Education to comply with the requirements of the EHA, the court determined that the primary obligation of financing a handicapped child's special education lay with the local School Committee. Whatever obligation § 40.1–7 imposes on MHRH to provide educational services is limited and complements, rather than supplants, the obligations of School Committees under § 16.24–1.

Petitioners thereafter filed their Second Amended and Supplemental Complaint. App. 152. In it they added to Count II claims for relief under the Equal Protection Clause of the Fourteenth Amendment and under § 504 of the Rehabilitation Act of 1973, as amended, 29 U. S. C. § 794. They also requested attorney's fees under 42 U. S. C. § 1988 and what was then 31 U. S. C. § 1244(e) (1976 ed.).[5]

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[5] By the time of the filing of petitioners' Second Amended Complaint on September 16, 1980, attorney's fees were available directly under the Rehabilitation Act. See Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, § 120, 92 Stat. 2982, 29 U. S. C. § 794a. Instead of relying on that statute, however, petitioners relied on 31 U. S. C. § 1244(e) (1976 ed.) (now replaced by 31 U. S. C.

On January 12, 1981, the District Court issued an order declaring petitioners' rights, entering a permanent injunction against the School Committee defendants, and approving an award of attorney's fees against those defendants. App. 172. The court ordered the School Committee to pay the full cost of Tommy's attendance at Harmony Hill School, Tommy's then-current placement. By agreement between petitioners and the School Committee and without prejudice to petitioners' claims against the other defendants, the court awarded attorney's fees in the amount of $8,000, pursuant to 42 U. S. C. § 1988 and the then 31 U. S. C. § 1244 (e).

On June 4, 1981, the District Court issued two orders, this time addressed to petitioners' claims against the state defendants. In the first order, App. 177, the court denied the state defendants' motion to dismiss. In the second order, *id.*, at 189, the court declared that Tommy is entitled to a free appropriate special education paid for by the Cumberland School Committee. The court noted that since Tommy was entitled to the relief he sought as a matter of state law, it was unnecessary and improper for the court to go further and reach petitioners' federal statutory and constitutional claims. Petitioners were given 14 days to move for an award of fees.

The Court of Appeals for the First Circuit affirmed in an unpublished *per curiam* opinion filed on January 11, 1982. It concluded that the Commissioner was not immune from injunctive relief and that petitioners' challenge to the District Court's award of summary judgment to respondents on their due process challenge was moot.

Petitioners requested fees and costs against the state defendants. *Id.*, at 195. On April 30, 1982, the District Court

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§ 6721(c)(2)), a statute that authorized a civil action to enforce § 504 of the Rehabilitation Act against any State or local government receiving federal funds under the State and Local Fiscal Assistance Act of 1972, 86 Stat. 919, as amended by the State and Local Fiscal Assistance Amendments of 1976, 90 Stat. 2341. Section § 1244(e) authorized an award of attorney's fees to a "prevailing party."

ruled orally that petitioners were entitled to fees and costs in the amount of $32,109 for the hours spent in the state administrative process both before and after the state defendants were named as parties to the federal litigation. App. to Pet. for Cert. A31–A58. Relying on *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54 (1980), and its own opinion in *Turillo* v. *Tyson*, 535 F. Supp. 577 (R. I. 1982), the court reasoned that because petitioners were required to exhaust their EHA remedies before bringing their § 1983 and § 504 claims, they were entitled to fees for those procedures. The court agreed with respondents that petitioners were not entitled to compensation for hours spent challenging the use of employees as hearing officers. No fees were awarded for hours spent obtaining the preliminary injunctive relief, as petitioners already had been compensated for that work by the school committee defendants. Finally, the court rejected the defendants' argument that fees should not be allowed because this was an action under the EHA, which does not provide for fees. In the court's view, respondents had given insufficient weight to the fact that petitioners had alleged equal protection and § 1983 claims as well as the EHA claim. The court added that it found ~~that~~ the equal protection claim petitioners included in their second amended complaint to be colorable and nonfrivolous. Petitioners thus were entitled to fees for prevailing in an action to enforce their § 1983 claim.

The Court of Appeals reversed. *Smith* v. *Cumberland School Committee*, 703 F. 2d 4 (CA1 1983). The court first noted that, under what is labelled the "American Rule," attorney's fees are available as a general matter only when statutory authority so provides. *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U. S. 240 (1975). Here the action and relief granted in this case fell within the reach of the EHA, a federal statute that establishes a comprehensive federal-state scheme for the provision of special education to handicapped children, but that does not provide for attor-

ney's fees.[6] For fees, the District Court had to look to § 1988 and § 505 of the Rehabilitation Act.

As to the § 1988 claim, the court acknowledged the general rule that when the claim upon which a plaintiff actually prevails is accompanied by a "substantial," though undecided, § 1983 claim arising from the same nucleus of facts, a fee award is appropriate. *Maher* v. *Gagne*, 448 U. S. 122, 130–131 (1980). Here, petitioners' § 1983 claims arguably were at least substantial enough to support federal jurisdiction. *Ibid.* Even if the § 1983 claims were substantial, however, the Court of Appeals concluded that, given the comprehensiveness of the EHA, Congress could not have intended its omission of attorney's fees relief to be rectified by recourse to § 1988.

The Court of Appeals drew support for its conclusion from this Court's decision in *Middlesex County Sewage Auth.* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981). There the Court held that where Congress had provided comprehensive enforcement mechanisms for protection of a federal right and those mechanisms did not include a private right of action, a litigant could not obtain a private right of action by asserting his claim under § 1983. The Court of Appeals recognized that *Sea Clammers* might not logically preclude a § 1983 action for violation of the EHA, since the EHA ex-

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[6] The District Court purported to award relief on the basis of state law. In light of the decision in *Pennhurst State School and Hospital* v. *Halderman*, —— U. S. —— (1984), that was improper. The propriety of the injunctive relief, however, is not at issue here. We think the Court of Appeals was correct in treating the relief as essentially awarded under the EHA, since petitioners had challenged the State Commissioner's construction of state law on the basis of their rights under the EHA, and since the question of state law on which petitioners prevailed was certified by the District Court in an effort to avoid a Supremacy Clause conflict with the EHA. It is clear that the EHA creates a right, enforceable in federal court, to the free appropriate public education required by the statute. *Board of Education* v. *Rowley*, 458 U. S. 176 (1982); 20 U. S. C. § 1415(e)(2).

pressly recognizes a private right of action, but it does support the more general proposition that when a statute creates a comprehensive remedial scheme, intentional "omissions" from that scheme should not be supplanted by the remedial apparatus of § 1983. In the view of the Court of Appeals, the fact that the § 1983 claims alleged here were based on independent constitutional violations rather than violations of the EHA was immaterial. The constitutional claims alleged—a denial of due process and a denial of a free appropriate public education because of handicap—are factually identical to the EHA claims. If a litigant could obtain fees simply by an incantation of § 1983, fees would become available in almost every case.[7]

The court disposed of the Rehabilitation Act basis for fees in a similar fashion. Even if Congress did not specifically intend to pre-empt § 504 claims with the EHA, the EHA's comprehensive remedial scheme entails a rejection of fee-shifting that properly limits the fees provision of the more general Rehabilitation Act.

Because of confusion in the circuits over the proper interplay among the various statutory and constitutional bases for relief in cases of this nature, and over the effect of that interplay on the provision of attorney's fees,[8] we granted certiorari, —— U. S. —— (1983).

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[7] The Court of Appeals added that it did not intend to indicate that the EHA in any way limits the scope of a handicapped child's constitutional rights. Claims not covered by the EHA should still be cognizable under § 1983, with fees available for such actions. The court noted, for instance, that to the extent petitioners' securing of a preliminary injunction fell outside any relief available under the EHA, attorney's fees might be appropriate for that relief. Because the award of fees against the School Committee for work done in obtaining the preliminary injunction was not challenged on appeal, the court had no occasion to decide the issue.

[8] See, *e. g.*, *Quackenbush* v. *Johnson City School District*, 716 F. 2d 141 (CA2 1983) (§ 1983 remedy, including damages, available for claim that plaintiff was denied access to EHA procedures); *Department of Education* v. *Katherine D.*, 727 F. 2d 809 (CA 9 1983) (EHA precludes reliance on

II

Petitioners insist that the Court of Appeals simply ignored the guidance of this Court in *Maher* v. *Gagne*, *supra*, that a prevailing party who asserts substantial but unaddressed constitutional claims is entitled to attorney's fees under 42 U. S. C. § 1988. They urge that the reliance of the Court of Appeals on *Sea Clammers* was misplaced. *Sea Clammers* had to do only with an effort to enlarge a statutory remedy by asserting a claim based on that statute under the "and laws" provision of § 1983.[9] In this case, petitioners made no effort to enlarge the remedies available under the EHA by asserting their claim through the "and laws" provision of § 1983. They presented separate constitutional claims, properly cognizable under § 1983. Since the claim on which they prevailed and their constitutional claims arose out of a "common nucleus of operative fact," *Maher* v. *Gagne*, 448 U. S., at 132, n. 15, quoting H. R. Rep. No. 94–1558, p. 4, n. 7 (1976), and since the constitutional claims were found by the District Court and assumed by the Court of Appeals to be substantial, petitioners urge that they are entitled to fees under § 1988. In addition, petitioners presented a substan-

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§ 1983 or § 504); *Robert M.* v. *Benton*, 671 F. 2d 1104 (CA8 1982) (fees available under § 1988 because plaintiff made colorable due process as well as EHA challenges to use of state agency employee as hearing officer); *Hymes* v. *Harnett County Board of Education*, 664 F. 2d 410 (CA4 1981) (claims made under the EHA, § 504 and § 1983; fees available for due process relief not available under the EHA); *Anderson* v. *Thompson*, 658 F. 2d 1205 (CA7 1981) (EHA claim not assertable under § 1983; attorney's fees therefore not available).

[9] 42 U. S. C. § 1983 provides a remedy for a deprivation, under color of state law, "of any rights, privileges, or immunities secured by the Constitution *and laws*" (emphasis added). In *Maine* v. *Thiboutot*, 448 U. S. 1 (1980), the Court held that § 1983 authorizes suits to redress violations by state officials of rights created by federal statutes as well as by the Federal Constitution and that fees are available under § 1988 for such statutory violations.

Sea Clammers excluded from the reach of *Thiboutot* cases in which Congress specifically foreclosed a remedy under § 1983. 453 U. S., at 19.

tial claim under § 504 of the Rehabilitation Act. Since § 505 of that Act authorizes attorney's fees in the same manner as does § 1988 and in fact incorporates the legislative history of § 1988, see 124 Cong. Rec. 30346 (1978) (remarks of Sen. Cranston), the reasoning of *Maher* applies to claims based on § 504. Petitioners therefore, it is claimed, are entitled to fees for substantial, though unaddressed, § 504 claims.

Respondents counter that petitioners simply are attempting to circumvent the lack of a provision for attorney's fees in the EHA by resorting to the pleading trick of adding surplus constitutional claims and similar claims under § 504 of the Rehabilitation Act. Whatever Congress' intent was in authorizing fees for substantial, unaddressed claims based on § 1988 or § 505, it could not have been to allow plaintiffs to receive an award of attorney's fees in a situation where Congress has made clear its intent that fees not be available.

Resolution of this dispute requires us to explore congressional intent, both in authorizing fees for substantial unaddressed constitutional claims and in setting out the elaborate substantive and procedural requirements of the EHA, with no indication that attorney's fees are available in an action to enforce those requirements. We turn first to petitioners' claim that they were entitled to fees under 42 U. S. C. § 1988 because they asserted substantial constitutional claims.

III

As the legislative history illustrates and as this Court has recognized, § 1988 is a broad grant of authority to courts to award attorney's fees to plaintiffs seeking to vindicate federal constitutional and statutory rights. *Maine* v. *Thiboutot*, 448 U. S. 1, 9 (1980); *Maher* v. *Gagne*, *supra*; *Hutto* v. *Finney*, 437 U. S. 678, 694 (1978); S. Rep. No. 94–1011, p. 4 (1976) (a prevailing plaintiff "'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust,'" quoting *Newman* v. *Piggie Park Enterprises*, Inc., 390 U. S. 400, 402 (1968)). Congress did not intend to have

that authority extinguished by the fact that the case was settled or resolved on a nonconstitutional ground. *Maher* v. *Gagne*, 448 U. S., at 132. As the Court also has recognized, however, the authority to award fees in a case where the plaintiff prevails on substantial constitutional claims is not without qualification. Due regard must be paid, not only to the fact that a plaintiff "prevailed," but also to the relationship between the claims on which effort was expended and the ultimate relief obtained. *Hensley* v. *Eckerhart*, —— U. S. —— (1983); *Blum* v. *Stenson*, —— U. S. —— (1984). Thus, for example, fees are not properly awarded for work done on a claim on which a plaintiff did not prevail and which involved distinctly different facts and legal theories from the claims on the basis of which relief was awarded. *Hensley* v. *Eckerhart*, —— U. S., at ——. Although, in most cases, there is no clear line between hours of work that contributed to a plaintiff's success and those that did not, district courts remain charged with the responsibility, imposed by Congress, of evaluating the award requested in light of the relationship between particular claims for which work is done and the plaintiff's success. *Id.*, at —— – ——.

A similar analysis is appropriate in a case like this, where the prevailing plaintiffs rely on substantial, unaddressed constitutional claims as the basis for an award of attorney's fees. The fact that constitutional claims are made does not render automatic an award of fees for the entire proceeding. Congress' purpose in authorizing a fee award for an unaddressed constitutional claim was to avoid penalizing a litigant for the fact that courts are properly reluctant to resolve constitutional questions if a nonconstitutional claim is dispositive. H. R. Rep. No. 94–1558, p. 4, n. 7. That purpose does not alter the requirement that a claim for which fees are awarded be reasonably related to the plaintiff's ultimate success. It simply authorizes a district court to assume that the plaintiff

has prevailed on his fee-generating claim and to award fees appropriate to that success.[10]

In light of the requirement that a claim for which fees are awarded be reasonably related to the plaintiff's ultimate success, it is clear that plaintiffs may not rely simply on the fact that substantial fee-generating claims were made during the course of the litigation. Closer examination of the nature of the claims and the relationship between those claims and petitioners' ultimate success is required.

Besides making a claim under the EHA, petitioners asserted at two different points in the proceedings that procedures employed by state officials denied them due process. They also claimed that Tommy was being discriminated against on the basis of his handicapping condition, in violation of the Equal Protection Clause of the Fourteenth Amendment.

A

The first due process claim may be disposed of briefly. Petitioners challenged the refusal of the School Board to grant them a full hearing before terminating Tommy's funding. Petitioners were awarded fees against the School Board for their efforts in obtaining an injunction to prevent that due process deprivation. The award was not challenged on appeal and we therefore assume that it was proper.

The fact that petitioners prevailed on their initial due process claim, however, by itself does not entitle them to fees for the subsequent administrative and judicial proceedings. The due process claim that entitled petitioners to an order

[10] The legislative history also makes clear that the fact that a plaintiff has prevailed on one of two or more alternative bases for relief does not prevent an award of fees for the unaddressed claims, as long as those claims are reasonably related to the plaintiff's ultimate success. See S. Rep. No. 94–1011, p. 6 (1976), citing *Davis* v. *County of Los Angeles*, 8 EPD ¶9444 (CD Cal. 1974). See also *Hensley* v. *Eckerhart*, —— U. S., at ——. The same rule should apply when an unaddressed constitutional claim provides an alternative, but reasonably related, basis for the plaintiff's ultimate relief.

maintaining Tommy's placement throughout the course of the subsequent proceedings is entirely separate from the claims petitioners made in those proceedings. Nor were those proceedings necessitated by the School Board's failings. Even if the School Board had complied with state regulations and had guaranteed Tommy's continued placement pending administrative review of its decision, petitioners still would have had to avail themselves of the administrative process in order to obtain the permanent relief they wanted—an interpretation of state law that placed on the School Board the obligation to pay for Tommy's education. Petitioners' initial due process claim is not sufficiently related to their ultimate success to support an award of fees for the entire proceeding. We turn, therefore, to petitioners' other § 1983 claims.

As petitioners emphasize, their § 1983 claims were not based on alleged violations of the EHA,[11] but on independent claims of constitutional deprivations. As the Court of Appeals recognized, however, petitioners' constitutional claims, a denial of due process and a denial of a free appropriate public education as guaranteed by the Equal Protection Clause, are virtually identical to their EHA claims.[12] The question to be asked, therefore, is whether Congress intended that

[11] Courts generally agree that the EHA may not be claimed as the basis for a § 1983 action. See, *e. g.*, *Quackenbush* v. *Johnson City School District*, *supra*; *Department of Education* v. *Katherine D.*, *supra*; *Anderson* v. *Thompson*, *supra*.

[12] The timing of the filing of petitioners' second amended complaint, after the Supreme Court of Rhode Island had ruled that petitioners were entitled to the relief they sought, reveals that the equal protection claim added nothing to petitioners' claims under the EHA and provides an alternative basis for denying attorney's fees on the basis of that claim. There is, of course, nothing wrong with seeking relief on the basis of certain statutes because those statutes provide for attorney's fees, or with amending a complaint to include claims that provide for attorney's fees. But where it is clear that the claims that provide for attorney's fees had nothing to do with a plaintiff's success, *Hensley* v. *Eckerhart*, *supra*, requires that fees not be awarded on the basis of those claims.

the EHA be the exclusive avenue through which a plaintiff may assert those claims.

B

We have little difficulty concluding that Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education. The EHA is a comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children. Both the provisions of the statute and its legislative history indicate that Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute.

In the statement of findings with which the EHA begins, Congress noted that there were more than 8,000,000 handicapped children in the country, the special education needs of most of whom were not being fully met. 20 U. S. C. §§ 1400(b)(1), (2), and (3). Congress also recognized that in a series of "landmark court cases," the right to an equal education opportunity for handicapped children had been established. S. Rep. No. 94–168, p. 6 (1975). See also *id.*, at 13 ("It is the intent of the Committee to establish and protect the right to education for all handicapped children and to provide assistance to the States in carrying out their responsibilities under State law and the Constitution of the United States to provide equal protection of the laws"). The EHA was an attempt to relieve the fiscal burden placed on States and localities by their responsibility to provide education for all handicapped children. 20 U. S. C. §§ 1400(b)(8) and (9). At the same time, however, Congress made clear that the EHA is not simply a funding statute. The responsibility for providing the required education remains on the States. S. Rep. No. 94–168, at 22. And the Act establishes an enforce-

able substantive right to a free appropriate public education. See *Board of Education* v. *Rowley*, 458 U. S. 176 (1982). See also 121 Cong. Rec. 37417 (1975) (statement of Sen. Schweiker: "It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school. [The bill] takes positive necessary steps to insure that the rights of children and their families are protected").[13] Finally, the Act establishes an elaborate procedural mechanism to protect the rights of handicapped children. The procedures not only ensure that hearings conducted by the State are fair and adequate. They also effect Congress' intent that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review. §§ 1412(4), 1414(a)(5), 1415. See also S. Rep. No. 94–168, at 11–12 (emphasizing the role of parental involvement in assuring that appropriate services are provided to a handicapped child); *id.*, at p. 22; *Board of Education* v. *Rowley*, 458 U. S., at 208–209.

In light of the comprehensive nature of the procedures and guarantees set out in the EHA and Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child, we find it difficult to believe that Congress also meant to leave undisturbed the

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[13] Prior to 1975, federal provisions for the education of handicapped children were contained in the Education of the Handicapped Act, passed in 1970, 84 Stat. 175, and amended in 1974, 88 Stat. 579 (current version at 20 U. S. C. § 1400 *et seq.*). The Act then provided for grants to States to facilitate the development of programs for the education of handicapped children. § 611(a). The only requirements imposed on the States were that they use federal funds on programs designed to meet the special education needs of handicapped children, § 613(a), and that parents or guardians be guaranteed minimum procedural safeguards, including prior notice and an opportunity to be heard when a State proposed to change the educational placement of the child. § 614 (d). See n. 4, *supra*.

ability of a handicapped child to go directly to court with an equal protection claim to a free appropriate public education.[14] Not only would such a result render superfluous most of the detailed procedural protections outlined in the statute, but, more important, it would run counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education. No federal district court presented with a constitutional claim to a public education can duplicate that process.

We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim. Since 1871, when it was passed by Congress, § 1983 has stood as an independent safeguard against deprivations of federal constitutional and statutory rights. See *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982); *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972); *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961). Nevertheless, § 1983 is a statutory remedy and Congress retains the authority to re-

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[14] The District Court in this case relied on similar reasoning—that Congress could not have meant for a plaintiff to be able to circumvent the EHA administrative process—and concluded that a handicapped child asserting an equal protection claim to public education was required to exhaust his administrative remedies before making his § 1983 claim. See *Turillo* v. *Tyson*, 535 F. Supp. 577, 583 (R. I. 1982), cited in the District Court's oral decision of April 30, 1982, App. to Pet. for Cert. A40. Because exhaustion was required, the court, relying on *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54 (1980), concluded that attorney's fees were appropriate under § 1988 for work performed in the state administrative process.

The difference between *Carey* and this case is that in *Carey*, the statute that authorized fees, Title VII, also required a plaintiff to pursue available state administrative remedies. In contrast, nothing in § 1983 requires that a plaintiff exhaust his administrative remedies before bringing a § 1983 suit. See *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982). If § 1983 stood as an independent avenue of relief for petitioners, then they could go straight to court to assert it.

peal it or replace it with an alternative remedy.[15] The crucial consideration is what Congress intended. See *Brown* v. *GSA*, 425 U. S. 820, 825–829 (1976); *Johnson* v. *Railway Express Agency*, 421 U. S. 454, 459 (1975); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 151, n. 5 (1970).

In this case, we think Congress' intent is clear. Allowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme. The legislative history gives no indication that Congress intended such a result.[16] Rather, it indicates that

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[15] There is no issue here of Congress' ability to preclude the federal courts from granting a remedy for a constitutional deprivation. Even if Congress repealed all statutory remedies for constitutional violations, the power of federal courts to grant the relief necessary to protect against constitutional deprivations or to remedy the wrong done is presumed to be available. See *Bell* v. *Hood*, 327 U. S. 678, 684 (1946); *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 396 (1971); *id.*, at 400–406 (Harlan, J., concurring in judgment).

[16] Petitioners insist that regardless of the wisdom of requiring resort to available EHA remedies before a handicapped child may seek judicial review, Congress specifically indicated that it did not intend to limit the judicial remedies otherwise available to a handicapped child. If that were true, we would agree with petitioners that Congress' intent is controlling and that a § 1983 remedy remained available to them. See *Johnson* v. *Railway Express Agency*, 421 U. S. 454, 459 (1975). The sentence in the legislative history on which petitioners rely, however, is not the clear expression of congressional intent petitioners would like it to be.

The sentence on which petitioners rely is included in the Committee Report of the Senate's version of the EHA. S. Rep. No. 94–168, pp. 27–28 (1975). The Senate bill included a requirement, not in the Conference bill, see Senate Conference Report No. 94–455, pp. 39–40 (1975), that the States set up an entity for ensuring compliance with the EHA. The compliance entity would be authorized, *inter alia*, to receive complaints regarding alleged violations of the Act. The Committee added that it did "not intend the existence of such an entity to limit the right of individuals to seek redress of grievances through other avenues, such as bringing civil action in Federal or State courts to protect and enforce the rights of handicapped children under applicable law." S. Rep. No. 94–168, p. 26 (1975). In the context in which the statement was made, it appears to establish nothing more than that handicapped children retain a right to judicial re-

Congress perceived the EHA as the most effective vehicle for protecting the constitutional right of a handicapped child to a public education. We conclude, therefore, that where the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim.

EHA is exclusive

C

Petitioners also made a due process challenge to the partiality of the state hearing officer. The question whether this claim will support an award of attorney's fees has two aspects—whether the procedural safeguards set out in the EHA manifest Congress' intent to preclude resort to § 1983 on a due process challenge and, if not, whether petitioners are entitled to attorney's fees for their due process claim. We find it unnecessary to resolve the first question, because we are satisfied that even if an independent due process challenge may be maintained, petitioners are not entitled to attorney's fees for their particular claim.[17]

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view of their individual cases. It does not establish that they can choose whether to avail themselves of the EHA process or go straight to court with an equal protection claim.

[17] We note that the issue is not the same as that presented by a substantive equal protection claim to a free appropriate public education. The EHA does set out specific procedural safeguards that must be guaranteed by a State seeking funds under the Act. See 20 U. S. C. § 1415. And although some courts have concluded that the EHA does not authorize injunctive relief to remedy procedural deficiencies, see, *e. g.*, *Hymes* v. *Harnett County Board of Education*, 664 F. 2d 410 (CA4 1981), other courts have construed the district courts' authority under § 1415(e)(2) to grant "appropriate relief" as including the authority to grant injunctive relief, either after an unsuccessful and allegedly unfair administrative proceeding, or prior to exhaustion of the state remedies if pursuing those remedies would be futile or inadequate. See, *e. g.*, *Robert M.* v. *Benton*, 622 F. 2d 370 (CA8 1980); *Monahan* v. *Nebraska*, 491 F. Supp. 1074 (Neb. 1980), aff'd in part and vacated in part, 645 F. 2d 592 (CA8 1981); *Howard S.* v. *Friendwood Independent School District*, 454 F. Supp. 634 (SD Tex.

Petitioners' plea for injunctive relief was not made until after the administrative proceedings had ended. They did not seek an order requiring the Commissioner of Education to grant them a new hearing, but only a declaratory judgment that the state regulations did not comply with the requirements of due process and the EHA, and an injunction prohibiting the Commissioner from conducting further hearings under those regulations. App. 59–60. That due process claim and the substantive claim on which petitioners ultimately prevailed involved entirely separate legal theories and, more important, would have warranted entirely different relief. According to their complaint, petitioners did not even seek relief for themselves on the due process claim, but sought only to protect the rights of others coming after them in the administrative process. The efforts petitioners subsequently expended in the judicial process addressed only the substantive question as to which agency, as a matter of state and federal law, was required to pay for Tommy's education.

1978); *Armstrong* v. *Kline*, 476 F. Supp. 583, 601–602 (ED Pa. 1979), remanded on other grounds *sub nom. Battle* v. *Pennsylvania*, 629 F. 2d 269 (CA3 1980), cert. denied, 452 U. S. 968 (1981); *North* v. *District of Columbia Board of Education*, 471 F. Supp. 136 (D. C. 1979). See also 121 Cong. Rec. 37416 (1975) (remarks of Sen. Williams) ("exhaustion of the administrative procedures established under this part should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter").

On the other hand, unlike an independent equal protection claim, maintenance of an independent due process challenge to state procedures would not be inconsistent with the EHA's comprehensive scheme. Under either the EHA or § 1983, a plaintiff would be entitled to bypass the administrative process by obtaining injunctive relief only on a showing that irreparable harm otherwise would result. See *Monahan* v. *Nebraska*, 645 F. 2d 592, 598–599 (CA8 1981). And, while Congress apparently has determined that local and state agencies should not be burdened with attorney's fees to litigants who succeed, through resort to the procedures outlined in the EHA, in requiring those agencies to provide free schooling, there is no indication that agencies should be exempt from a fee award where plaintiffs have had to resort to judicial relief to force the agencies to provide them the process they were constitutionally due.

Whether or not the state procedures accorded petitioners the process they were due had no bearing on that substantive question.

We conclude that where, as here, petitioners have presented distinctly different claims for different relief, based on different facts and legal theories, and have prevailed only on a non-fee claim, they are not entitled to a fee award simply because the other claim was a constitutional claim that could be asserted through § 1983. See *Hensley* v. *Eckerhart*, —— U. S., at ——. We note that a contrary conclusion would mean that every EHA plaintiff who seeks judicial review after an adverse agency determination could ensure a fee award for successful judicial efforts simply by including in his substantive challenge a claim that the administrative process was unfair. If the court ignored the due process claim but granted substantive relief, the due process claim could be considered a substantial unaddressed constitutional claim and the plaintiff would be entitled to fees.[18] It is unlikely that Congress intended such a result.

IV

We turn, finally, to petitioners' claim that they were entitled to fees under § 505 of the Rehabilitation Act, because they asserted a substantial claim for relief under § 504 of that Act.

Much of our analysis of petitioners' equal protection claim is applicable here. The EHA is a comprehensive scheme designed by Congress as the most effective way to protect the

[18] Even if the court denied the due process claim, as here, it is arguable that the plaintiff would be entitled to have an appellate court determine whether the district court was correct in its ruling on the due process claim. In this case, the District Court ruled against petitioners on their due process claim and the Court of Appeals determined, on appeal from the District Court's award of substantive relief, that the issue was moot. Nevertheless, in considering the propriety of the District Court's award of fees, the Court of Appeals recognized that the due process claim was at least substantial enough to support federal jurisdiction. 703 F. 2d, at 7.

right of a handicapped child to a free appropriate public education. We concluded above that in enacting the EHA, Congress was aware of, and intended to accommodate, the claims of handicapped children that the Equal Protection Clause required that they be ensured access to public education. We also concluded that Congress did not intend to have the EHA scheme circumvented by resort to the more general provisions of § 1983. We reach the same conclusion regarding petitioners' § 504 claim. The relationship between the EHA and § 504, however, requires a slightly different analysis from that required by petitioners' equal protection claim.

Section 504 and the EHA are different substantive statutes. While the EHA guarantees a right to a free appropriate public education, § 504 simply prevents discrimination on the basis of handicap. But while the EHA is limited to handicapped children seeking access to public education, § 504 protects handicapped persons of all ages from discrimination in a variety of programs and activities receiving federal financial assistance.

Because both statutes are built around fundamental notions of equal access to state programs and facilities, their substantive requirements, as applied to the right of a handicapped child to a public education, have been interpreted to be strikingly similar. In regulations promulgated pursuant to § 504, the Secretary of Education[19] has interpreted § 504 as requiring a recipient of federal funds that operates a public elementary or secondary education program to provide a free appropriate public education to each qualified handicapped person in the recipient's jurisdiction. 34 CFR § 104.33(a)

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[19] The regulations were promulgated by the Secretary of Health, Education, and Welfare (HEW). 42 Fed. Reg. 22676 (1977). The functions of the Secretary of HEW under the Rehabilitation Act and under the EHA were transferred in 1979 to the Secretary of Education under the Department of Education Organization Act, § 301(a), 93 Stat. 677, 20 U. S. C. § 3441(a).

(1983).[20] The requirement extends to the provision of a public or private residential placement if necessary to provide a free appropriate public education. § 104.33(c)(3). The regulations also require that the recipient implement procedural safeguards, including notice, an opportunity for the parents or guardian to examine relevant records, an impartial hearing with opportunity for participation by the parents or guardian and representation by counsel, and a review procedure. § 104.36. The Secretary declined to require the exact EHA procedures, because those procedures might be inappropriate for some recipients not subject to the EHA, see 34 CFR, subtitle B, ch. 1, App. A, p. 371, but indicated that compliance with EHA procedures would satisfy § 104.36.

On the other hand, although both statutes begin with an equal protecton premise that handicapped children must be given access to public education, it does not follow that the affirmative requirements imposed by the two statutes are the same. The significant difference between the two, as applied to special education claims, is that the substantive and procedural rights assumed to be guaranteed by both statutes are specifically required only by the EHA.

Section 504, 29 U. S. C. § 794, provides, in pertinent part, that:

> "No otherwise qualified handicapped individual in the United States, . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any

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[20] Regulations under § 504 and the EHA were being formulated at the same time. The § 504 regulations were effective June 3, 1977. 42 Fed. Reg., at 22676. The EHA regulations were effective October 1, 1977. *Id.*, at 42474. The Secretary of HEW and the Commissioner of Education emphasized the coordination of effort behind the two sets of regulations and the Department's intent that the § 504 regulations be consistent with the requirements of the EHA. See 41 Fed. Reg. 56967 (1976); 42 Fed. Reg., at 22677.

program or activity receiving Federal financial assistance . . . ."

In *Southeastern Community College* v. *Davis*, 442 U. S. 397 (1979), the Court emphasized that § 504 does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination against those persons. 442 U. S., at 411–412. In light of *Davis*, courts construing § 504 as applied to the educational needs of handicapped children have expressed confusion about the extent to which § 504 requires special services necessary to make public education accessible to handicapped children.[21]

In the EHA, on the other hand, Congress specified the affirmative obligations imposed on States to ensure that equal access to a public education is not an empty guarantee, but offers some benefit to a handicapped child. Thus, the statute specifically requires "such . . . supportive services . . . as may be required to assist a handicapped child to benefit from special education," see *Board of Education* v. *Rowley*, 458 U. S., at 200, including, if the public facilities are inadequate for the needs of the child, "instruction in hospitals and institutions." 20 U. S. C. §§ 1401(16) and (17).

We need not decide the extent of the guarantee of a free appropriate public education Congress intended to impose under § 504. We note the uncertainty regarding the reach of § 504 to emphasize that it is only in the EHA that Congress specified the rights and remedies available to a handicapped child seeking access to public education. Even assuming that the reach of § 504 is coextensive with that of the EHA,

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[21] Courts generally have upheld the § 504 regulations on the grounds that they do not require extensive modification of existing programs and that States and localities generally provide nonhandicapped children with educational services appropriate to their needs. See *Phipps* v. *New Hanover County Board of Education*, 551 F. Supp. 732 (ED N. C. 1982). But see *Colin K.* v. *Schmidt*, 715 F. 2d 1, 9 (CA1 1983) (in light of *Davis*, requirement that a school system provide a private residential placement could not be imposed under § 504).

there is no doubt that the remedies, rights, and procedures Congress set out in the EHA are the ones it intended to apply to a handicapped child's claim to a free appropriate public education. We are satisfied that Congress did not intend a handicapped child to be able to circumvent the requirements or supplement the remedies of the EHA by resort to the general antidiscrimination provision of § 504.

There is no suggestion that § 504 adds anything to petitioners' substantive right to a free appropriate public education.[22] The only elements added by § 504 are the possibility of circumventing EHA administrative procedures and going straight to court with a § 504 claim,[23] the possibility of a damages award in cases where no such award is available under the EHA,[24] and attorney's fees. As discussed above, Congress' intent to place on local and state educational agencies the responsibility for determining the most appropriate edu-

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[22] Of course, if a State provided services beyond those required by the EHA, but discriminatorily denied those services to a handicapped child, § 504 would remain available to the child as an avenue of relief. In view of the substantial overlap between the two statutes and Congress' intent that efforts to accommodate educational needs be made first on the local level, the presumption in a case involving a claim arguably with the EHA should be that the plaintiff is required to exhaust EHA remedies, unless doing so would be futile.

[23] Lower courts appear to agree, however, that unless doing so would be futile, EHA administrative remedies must be exhausted before a § 504 claim for the same relief available under the EHA may be brought. See, *e. g.*, *Riley* v. *Ambach*, 668 F. 2d 635 (CA2 1981); *Phipps* v. *New Hanover County Board of Education*, *supra*; *Harris* v. *Campbell*, 472 F. Supp. 51 (ED Va. 1979); *H. R.* v. *Hornbeck*, 524 F. Supp. 215 (Md. 1981).

[24] There is some confusion among the circuits as to the availability of a damages remedy under § 504 and under the EHA. Without expressing an opinion on the matter, we note that courts generally agree that damages are available under § 504, but are available under the EHA only in exceptional circumstances. See, *e. g.*, *Miener* v. *Missouri*, 673 F. 2d 969, 978 (CA8 1982), cert. denied, —— U. S. —— (1983); *Anderson* v. *Thompson*, 658 F. 2d 1205 (CA7 1981); *Monahan* v. *Nebraska*, 491 F. Supp., at 1094; *Hurry* v. *Jones*, 560 F. Supp. 500 (R. I. 1983); *Gregg B.* v. *Board of Education*, 535 F. Supp. 1333, 1339–1340 (ED N. Y. 1982).

cational plan for a handicapped child is clear. To the extent § 504 otherwise would allow a plaintiff to circumvent that state procedure, we are satisfied that the remedy conflicts with Congress' intent in the EHA.

Congress did not explain the absence of a provision for a damages remedy and attorney's fees in the EHA. Several references in the statute itself and in its legislative history, however, indicate that the omissions were in response to Congress' awareness of the financial burden already imposed on States by the responsibility of providing education for handicapped children. As noted above, one of the stated purposes of the statute was to relieve this financial burden. See 20 U. S. C. §§ 1400(b)(8) and (9). Discussions of the EHA by its proponents reflect Congress' intent to "make every resource, or as much as possible, available to the direct activities and the direct programs that are going to benefit the handicapped." 121 Cong. Rec. 19501 (1975) (remarks of Sen. Dole). See also *id.*, at 37025 (procedural safeguards designed to further the congressional goal of ensuring full educational opportunity without overburdening the local school districts and state educational agencies) (remarks of Rep. Perkins); S. Rep. No. 94–168, p. 81 (minority views cognizant of financial burdens on localities). The Act appears to represent Congress' judgment that the best way to ensure a free appropriate public education for handicapped children is to clarify and make enforceable the rights of those children while at the same time endeavoring to relieve the financial burden imposed on the agencies responsible to guarantee those rights. Where § 504 adds nothing to the substantive rights of a handicapped child, we cannot believe that Congress intended to have the careful balance struck in the EHA upset by reliance on § 504 for otherwise unavailable damages or for an award of attorney's fees.

We emphasize the narrowness of our holding. We do not address a situation where the EHA is not available or where § 504 guarantees substantive rights greater than those avail-

82-2120 Smith v Robertson

After TT lost in State Adm. proceedings:

Filed 1st Amended Complaint - sought two separate types of relief:

1. 1983 D/P claim - alleged State Adm. proceedings violated D/P by absence of an impartial hearing officer.

Relief sought was injunction against conducting hearings w/out D/P.

2. EAHCA (Ed for Handicapped Kids) claim was purely substantive.

Relief sought was free ed from School Committee

Thus, claims were wholly different. - def. theories & def relief.

Result: The 1983 D/P claim was never ~~decided~~ addressed or decided.

Only relief was on EAHCA claim & it provides no fees would not imply.

Hensley controls: Two separate claims - separate issues, & TT prevailed on only one

crr 06/02/84

RE: No. 82-2120, Smith v. Robinson

TO: Justice Powell

FROM: Cammie

Excellent memo. I have read opinion with some care, & agree. 6/12

You were right -- this opinion is too long. It is, however, consistent with your vote at Conference, and I recommend that you join. The procedural history is complicated. See pp. 1-10. Relevant here is the fact that after completing administrative remedies, petrs filed a first amended complaint in federal DC consisting of two counts -- Count One was a procedural due process claim under §1983 (see p. 4); Count Two was a substantive claim under state law and the EHA (see p.5). If they prevailed, Petrs could recover attorneys fees on count one but not on count two. The DC certified the substantive state law claim to the state supreme court, which resolved it in favor of petrs. This result gave petrs all they asked for on their substantive claim. Thereafter, petrs filed a second amended complaint in DC adding to Count Two claims under the Equal Protection Clause of the 14th Amendment and under §504 of the Rehabilitation Act. Claims under both these provisions would entitle prevailing plaintiffs to attorneys fees. The questions presented here are whether petrs may recover fees under their Equal Protection claim, their §504 claim, or their procedural due process claims. CA1 said no and this Court agrees. Yes

On the merits, the opinion may be summarized as follows:

1. Under Maher v. Gagne, 448 U.S. 122 (1980), when the claim upon which a plaintiff actually prevails is accompanied by a "substantial," though undecided, §1983 claim arising from the same nucleus of facts, a fee award is appropriate. At pages 13-14, Justice Blackmun establishes the additional requirement that the unaddressed §1983 claim be "reasonably related" to the claim on which the plaintiff prevailed. This requirement is taken from Hensley and Blum and seems to be a good one.

2. Justice Blackmun then applies the "reasonably related" test to the §1983 claims asserted here.

(a) He holds first that petrs' claim that the School Board violated procedural due process by not granting a hearing before terminating Tommy's education is not reasonably related to the claims on which petrs prevailed. See page 15. I agree with this.

(b) Later in the opinion, he holds that petrs' claim that the subsequent administrative proceedings violated procedural due process by failing to provide unbiased hearing officers was is not reasonably related to the claims on which petrs prevailed. See pages 21-22. I agree with this. Justice Blackmun says that he need not also determine whether Congress intended the EHA to be the exclusive remedy for this due process claim. Page 20. However, he seems to decide the issue in note 17 and to find that the EHA is not the exclusive remedy. I would eliminate that note as unnecessary.

(c) Justice Blackmun finds that the other §1983 claims -- the equal protection claim and the due process claim that the

agency did not provide unbiased hearing officers -- are "reasonably related" to the EHA claims on which petrs prevailed. See page 15. I agree with this.

3. Justice Blackmun then sets out to determine whether Congress intended the EHA to be the exclusive avenue for vindicating the substantive right at issue here, making unavailable any claim for relief or fees under the equal protection claim.

Justice Blackmun concludes that the EHA is the exclusive remedy and that petrs therefore are not entitled to fees for the equal protection claim. See pages 16-20. He also indicates in a footnote that fees are inappropriate on the alternate ground that the equal protection claim was added after success on the substantive claim was clear, and therefore seems a ploy for fees. See note 12 at page 15. I agree with both these conclusions, but would eliminate note 15 as unnecessary.

4. Justice Blackmun's long discussion of the §504 claim boils down to the fact that this claim is precluded for the same reason the equal protection claim is precluded -- the EHA provides the exclusive remedy. See pages 22-28. I agree with this conclusion.

June 4, 1984

82-2120 Smith v. Robinson

Dear Harry:

Please join me.

Sincerely,

Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 4, 1984

Re: 82-2120 - Smith v. Robinson

Dear Harry,

I had thought there was a fairly good argument that Maher controlled this case, and my conference vote was cast on that basis. However, the views I have expressed in the past make me sympathetic to your draft; and if it commands a majority, which I assume it will, I shall table a planned dissent and sign on with you.

Sincerely,

Byron

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 4, 1984

No. 82-2120

Smith v. Robinson, et al.

Dear Harry,

I'll await the dissent in the above.

Sincerely,

Bill

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 4, 1984

Re: No. 82-2120 Smith v. Robinson

Dear Harry,

Please join me.

Sincerely,

Sandra

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 5, 1984

Re: No. 82-2120 Smith v. Robinson

Dear Harry:

Please join me.

Sincerely,

WHR

Justice Blackmun

cc: The Conference

I've Joined

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 15, 1984

Re: 82-2120 - Smith v. Robinson

Dear Harry,

Having looked this case over again, I join your draft.

Sincerely yours,

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1984

Re: 82-2120 - Smith v. Robinson, Et al.

Dear Harry:

I join.

Regards,

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 28, 1984

Re: No. 82-2120-Smith v. Robinson

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 28, 1984

Re: 82-2120 - Smith v. Robinson

Dear Bill:

Please join me in your dissenting opinion.

Respectfully,

Justice Brennan

Copies to the Conference

82-2120 Smith v. Robinson (Cammie)

HAB for the Court 3/31/84
1st draft 6/1/84
2nd draft 6/29/84
Joined by LFP 6/4/84
BRW 6/4/84
SOC 6/4/84
HAB 6/5/84
BRW 6/15/84
CJ 6/19/84

WJB dissent
Typed draft 6/28/84
1st draft 7/1/84
Joined by TM 6/28/84
Joined by JPS 6/28/84

WJB await dissent 6/4/84