The Eleventh Amendment Controversy Continues: The Availability and Scope of Relief Against State Entities Under the Education of the Handicapped Act

I. Introduction

Historically, handicapped children have suffered not only from physical and mental limitations, but from a denial by society of educational opportunities which could help them achieve their maximum potential. It was not until 1975 that handicapped children received significant congressional recognition of their problems in the Education of the Handicapped Act (EHA or Act),[1] which was enacted "to assure that all handicapped children have available to them . . . a free appropriate public education."[2] The Act begins with findings that in 1970 there were more than eight million handicapped children in the United States, more than half of whom had special educational needs not being fully met.[3] The Act provides federal funds to state and local agencies to support their efforts in educating the handicapped; however, the Act conditions this assistance on the state's development of a policy and plan "that assures all handicapped children the right to a free appropriate public education."[4]

One of the basic purposes of the Act is to assure the protection of the rights of handicapped children and their parents or guardians.[5] Detailed procedural requirements are imposed upon the states to safeguard those rights.[6] These procedures include the right of the parents or guardians, and the child when appropriate, to have notice of and participate in the development and review of an individualized educational program (IEP) for the child. This IEP specifies instructional goals and objectives, and criteria for progress evaluation.[7] If the parents or the child decide this educational program is not adequate or appropriate, or if they feel their procedural rights have been infringed, they have a right to a hearing before the state educational agency.[8] Further, if any party is "aggrieved" by the findings and decision of this agency hearing, the Act grants a right to bring a civil action in federal or state court.[9]

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1. 20 U.S.C. §§ 1400-85 (1982 & Supp. 1985).
2. *Id.* § 1400(c).
3. *Id.* § 1400(b)(1)-(3).
4. *Id.* § 1412(1). *See* S. Rep. No. 168, 94th Cong., 1st Sess. 13, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1437.
5. 20 U.S.C. § 1400(c) (1982).
6. *Id.* § 1415.
7. *Id.* § 1401(19); *See* Board of Educ. v. Rowley, 458 U.S. 176, 181 (1982).
8. 20 U.S.C. § 1415(c) (1982).
9. *Id.* § 1415(e)(2).

When a party has been aggrieved, the EHA directs a court to "grant such relief as the court determines is appropriate;"[10] however, the Act itself gives no explanation as to the meaning of "appropriate" relief.[11] This lack of congressional guidance has led to disagreement among the United States Circuit Courts of Appeals over the scope of relief available under the Act.[12] Included in this debate is the question of whether states are immune from suits in federal court for monetary relief under the Act in light of the Constitutional protections of the eleventh amendment.

In 1985, a case[13] reached the Supreme Court which involved a similar question of whether the eleventh amendment bars suits in federal court for monetary relief under Section 504 of the Rehabilitation Act of 1973.[14] The Court in *Atascadero State Hospital v. Scanlon* created an effective barrier to such suits under Section 504 by holding that "Congress must express its intention to abrogate" a state's eleventh amendment immunity "in unmistakable language in the statute itself."[15] This decision established a stringent standard for determining congressional intent before the eleventh amendment bar will be overridden.[16]

The strict standard of *Atascadero*, however, has failed to resolve the split among the federal circuits as to the applicability of the eleventh amendment to suits against states under the EHA.[17] A resolution of this

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10. *Id.*

11. "Absent other reference, the only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with 'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.'" Burlington School Comm. v. Department of Educ., 471 U.S. 359, 369 (1985).

12. *See, e.g., id.* (resolved conflict among the circuits to hold that appropriate relief includes retroactive reimbursement to parents for their expenditures on private special education for the child if a court ultimately determines that such placement rather than a proposed program, is proper under the Act); Meiner v. Missouri, 800 F.2d 749 (8th Cir. 1986) (compensatory education appropriate under the Act as similar to reimbursement); Alexopulos v. Riles, 784 F.2d 1408 (9th Cir. 1986) (compensatory education not appropriate relief as identical to a request for damages).

13. Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

14. 29 U.S.C. § 794 (1982 & Supp. 1985). This section provides:

> No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of this handicap, be excluded from the participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

15. *Atascadero*, 473 U.S. at 243.

16. *See* Doe *ex rel.* Gonzales v. Maher, 793 F.2d 1470, 1493-94 (9th Cir. 1986), *aff'd on other grounds sub nom.* Honig v. Doe, 108 S. Ct. 592 (1988); David D. v. Dartmouth School Comm., 775 F.2d 411, 417 (1st Cir. 1985), *cert. denied sub nom.* Massachusetts Dep't of Educ. v. David D., 475 U.S. 1140 (1986).

17. *See, e.g.*, Muth v. Central Bucks School Dist., 839 F.2d 113 (3d Cir. 1988)

intercircuit split is crucial because state agencies play significant roles in implementing the policies and programs of the Act.[18] Further, the states also make the determination in administrative proceedings of what constitutes appropriate educational programs.[19] Therefore, it is often a state agency's policy or determination which serves as the basis of a cause of action in federal court. To impose upon states affirmative duties to insure the rights provided for in the Act, while at the same time providing the states with immunity from breaches of those duties seems a contradictory result at best.[20]

This Note will first discuss the eleventh amendment, both from a historical perspective and through an analysis of the *Atascadero* decision. It will then review the types of relief available under the EHA and recent court decisions and statutory enactments which have clarified those types of relief, and it will analyze the availability of each type of relief against a state or state entity. It will also examine the conflicting approaches the courts of appeals have applied to the abrogation of state immunity in the EHA under the more rigorous rules of *Atascadero*. It is the central thesis of this Note that the eleventh amendment does not bar private suits for monetary relief under the *Atascadero* test, based upon the EHA's language and purpose.

II. Eleventh Amendment Doctrine

A. General Scope of Eleventh Amendment Immunity

The eleventh amendment provides:

(held the EHA authorizes suits against states in federal court for both injunctive and monetary relief); *David D.*, 775 F.2d 411 (same); *Maher*, 793 F.2d 1470 (held Congress did not abrogate eleventh amendment immunity in the EHA); Gary A. v. New Trier High School Dist. No. 203, 796 F.2d 940 (7th Cir. 1986) (same).

18. 20 U.S.C. § 1412(6) (1982 & Supp. 1985) provides:

> The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided handicapped children in the State.

19. *Id.* § 1415(c) (1982).

20. Congress stated in the preamble to the EHA:

> [I]t is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

20 U.S.C. § 1400(b)(9) (1982).

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[21]

The significance of this amendment "'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Article III' of the Constitution."[22] The amendment restricts only the jurisdiction of federal courts.[23] However, the amendment has no effect on suits brought in federal court against a state by another state[24] or by the United States.[25] It does not bar suits against local government entities, such as local school boards or educational agencies.[26] Further, it does not bar suits against state officials sued in their individual capacities for illegal activities.[27]

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21. U.S. CONST. amend. XI. The eleventh amendment was proposed and adopted in response to the four to one Supreme Court decision in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), which held that a federal court had jurisdiction to hear a suit brought by a South Carolina citizen to collect a Revolutionary War debt from Georgia. *See* Jacobs, *The Eleventh Amendment and Sovereign Immunity* 64-65 (1972). Within two days, Congress proposed constitutional amendments, one virtually identical to the present eleventh amendment. By early 1794, both Houses of Congress had passed the resolution for the eleventh amendment, the Senate by a vote of twenty-three to two, the House by a vote of eighty-one to nine. *See* Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1436-37 (1975).

22. *Atascadero*, 473 U.S. at 243 (*quoting* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98 (1984)). *See* Nowak, *supra* note 21. Nowak's argument, which is consistent with the Supreme Court's interpretation of the amendment's significance, is that the amendment is directed not at Congress, but at the federal judiciary. It limits judicial assumption of jurisdiction in suits against states, but does not affect Congress' authority to allow suits by citizens against state defendants when acting pursuant to a constitutional exercise of its powers. Nowak, *supra* note 21, at 1441-45. *See* Note, *The Eleventh Amendment and State Damage Liability Under the Rehabilitation Act of 1973*, 71 VA. L. REV. 655, 658 (1985).

23. Nowak, *supra* note 21, at 1414.

24. *See, e.g.*, North Dakota v. Minnesota, 263 U.S. 365, 372-73 (1923).

25. *See, e.g.*, United States v. Mississippi, 380 U.S. 128, 140-41 (1965), *remanded*, 256 F. Supp. 344 (S.D. Miss. 1966).

26. *See, e.g.*, Lincoln County v. Luning, 133 U.S. 529 (1890); Gary A. v. New Trier High School Dist. No. 203, 796 F.2d 940, 944-47 (7th Cir. 1986).

27. *Ex parte* Young, 209 U.S. 123 (1908). This exception does not apply to suits for damages where state government is the real party in interest. Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945): "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.* at 464. *See* Edelman v. Jordan, 415 U.S. 651, 667-69 (1974), *reh'g denied*, 416 U.S. 1000, *rem'd sub nom.* Joran v. Trainer, 405 F. Supp. 802 (N.D. Ill. 1975) (the Court held that even "equitable restitution" is barred if not essential to the injunctive relief).

However, the amendment does serve as a very real constraint on the federal courts, especially as interpreted by a line of restrictive Supreme Court decisions, and has become a strict barrier to suits for money damages not expressly authorized by Congress.[28] In addition, the Supreme Court has construed the principles of Article III[29] together with the purposes of the eleventh amendment to bar suits in federal court brought against a state by citizens of that state, even though the express language of the eleventh amendment does not bar such suits.[30]

B. The Atascadero *Decision*

Although the scope of the eleventh amendment literally extends to any suit in law or equity in federal court, there are two well-established exceptions to the amendment's reach.[31] First, if a state waives its immunity and consents to suit in federal court, the amendment does not bar the action.[32] Secondly, the eleventh amendment is limited by Congress' power under section 5 of the fourteenth amendment to enforce by appropriate legislation the substantive provisions of the fourteenth amendment.[33] The Supreme Court in *Atascadero* addressed the question of whether a suit under the Rehabilitation Act fell within the eleventh amendment bar to suit in federal court by litigants seeking retroactive monetary relief against states and state agencies.[34]

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28. *See* Nowak, *supra* note 21, at 1414.

29. Article III in relevant part, reads:

> The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction, - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

30. Hans v. Louisiana, 134 U.S. 1 (1890). *See infra* note 53.

31. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985).

32. *Id.* (citing Clark v. Barnard, 108 U.S. 436, 447 (1883)).

33. *Id.* (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)). U.S. CONST. amend. XIV, provides, in part:

> Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
> . . .
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

34. *Atascadero*, 473 U.S. at 237. More recent Supreme Court decisions have addressed the eleventh amendment question in varying contexts and the majority opinions in these

The plaintiff in *Atascadero* brought suit under Section 504 of the Rehabilitation Act of 1973 to recover compensatory, injunctive, and declaratory relief against Atascadero State Hospital and the California Department of Mental Health for their refusal to hire him as a graduate student assistant.[35] The Ninth Circuit reversed the district court and held that the eleventh amendment did not bar plaintiff's suit against the state, because the state had participated in Rehabilitation Act programs and therefore had "implicitly consented to be sued as a recipient [of federal assistance] under [section 504]."[36] The Supreme Court in a five to four decision, reversed the Ninth Circuit.[37]

The Supreme Court first addressed the issue of whether California had waived its eleventh amendment immunity to suit in federal court.[38] The Court here reaffirmed its position that a State's general waiver of sovereign immunity in its constitution subjects it to suit in state court, but is not enough to waive the immunity guaranteed by the eleventh amendment.[39] The Court summed up its holding as follows, "[I]n order for a state statutory or constitutional provision to constitute a waiver of eleventh amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*."[40] The Court concluded that the California constitutional provision in question did not specifically indicate such an intention.[41]

Having thus disposed of the issue of whether California had waived its eleventh amendment immunity, the Court in *Atascadero* considered

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cases have followed the stringent standard of "express waiver-abrogation" established in *Atascadero*. *See, e.g.*, Welch v. State Dep't of Highways & Public Transp., 107 S. Ct. 2941 (1987); Papasan v. Allain, 106 S. Ct. 2932 (1986); Green v. Mansour, 474 U.S. 64 (1985). The *Atascadero* decision has been chosen as the focus of this Note both because it established the more stringent standard of "express waiver-abrogation" and because of the similarities between the Rehabilitation Act and the EHA.

35. *Atascadero*, 473 U.S. at 236. Plaintiff suffered from diabetes mellitus and had no sight in one eye, therefore qualifying him as a handicapped individual under the Rehabilitation Act.

36. Scanlon v. Atascadero State Hosp., 735 F.2d 359, 362 (9th Cir. 1984). The court determined on the basis of Edelman v. Jordan, 415 U.S. 651, 671 (1974), that the "threshold fact of congressional authorization to sue a class of defendants which literally includes the States" was present in *Scanlon*. *Atascadero*, 473 U.S. at 237 (quoting *Scanlon*, 735 F.2d at 361).

37. *Atascadero*, 473 U.S. at 237.

38. *Id.* at 241.

39. *Id.* *See* Florida Dep't of Health & Rehab. Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 150 (1981) (*per curiam*). The California constitutional provision at issue in *Atascadero* stated: "Suits may be brought against the State in such manner and in such courts as shall be directed by law." CAL. CONST. art. III, § 5.

40. *Atascadero*, 473 U.S. at 241 (emphasis in original).

41. *Id.*

whether Congress abrogated the state's immunity through its enactment of the Rehabilitation Act.[42] The Court, in resolving this issue, looked only to the general statutory language and declined to rely on the Act's statutory inferences or its legislative history to find a congressional intent to abrogate.[43] Instead, the Court concluded that Congress must express its intention to abrogate a state's eleventh amendment immunity from suit "in unmistakable language in the statute itself."[44]

The majority based its reasoning on the need to maintain the "constitutionally mandated balance of power" between state and federal governments.[45] The Court reasoned as follows:

> By guaranteeing the sovereign immunity of the States against suit in federal court, the eleventh amendment serves to maintain this balance. "Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system."[46]

While the majority recognized that Congress may provide for private suits against states or state officials in federal court for the purpose of enforcing the provisions of the fourteenth amendment, the Court stated that it would recognize such suits only upon the clearest indication that Congress intended to expand the federal courts' jurisdiction by abrogating eleventh amendment immunity.[47] The Court found such clear indication was absent in the language of the Rehabilitation Act, even though the state was a "recipient of federal assistance" under section 505 of the statute.[48] The Court distinguished the "several states" from other recipients of federal aid because of their constitutional role in maintaining the constitutional balance of power. The Court stated that Congress must specifically subject states to federal jurisdiction in order to abrogate the eleventh amendment.[49]

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42. *Id.* at 242.

43. *Id.* The "general statutory language" referred to by the Court is found at Section 505(a) of the Rehabilitation Act, which describes available remedies as follows:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d to 2000d-6] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

29 U.S.C. § 794a(a)(2) (1982 & Supp. 1985).

44. *Atascadero*, 473 U.S. at 243.

45. *Id.* at 242.

46. *Id.* (quoting Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984)).

47. *Id.* at 243.

48. *Id.* at 245-46. *See supra* note 43 for Section 505's statutory language.

49. *Atascadero*, 473 U.S. at 246 (citing *Pennhurst*, 465 U.S. at 99; Quern v. Jordan, 440 U.S. 332, 342 (1979)).

Finally, the *Atascadero* Court considered whether California had consented to suit in federal court by its acceptance of federal funds under the Rehabilitation Act, an act which authorizes suits against a general class of defendants which literally includes state or state agencies.[50] The Court concluded that although the Ninth Circuit had properly recognized that mere receipt of federal funds cannot establish a state's consent to suit in federal court, the Ninth Circuit had erred in deciding that a state consents to suit in federal court by participating in programs under the Rehabilitation Act.[51] Just as the Court decided that the Rehabilitation Act did not demonstrate an unmistakable congressional intent to abrogate a state's eleventh amendment immunity in federal court, the Court likewise found that the Rehabilitation Act "fell far short" of indicating a congressional intent to condition participation in the Act's programs on a state's waiver of its constitutional immunity.[52] Thus, the states won a major victory by expanding the scope of their immunity from suit in federal court through the "express waiver-abrogation" requirements established in *Atascadero*.

Four justices disagreed. Justices Brennan, Marshall, Blackmun and Stevens believed the majority had once again followed the "misguided history" of the eleventh amendment to exempt "the States from compliance with laws that bind every other legal actor in our Nation."[53]

Justice Brennan, writing for the dissent, did not attack state waiver of immunity; however, Justice Brennan did object to the majority's "stringent" test in this regard.[54]

> The "stringent" . . . test that the Court applies to purported state waivers of sovereign immunity is a mirror image of the

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50. *Id.* at 246.

51. *Id.* at 246-47. The Ninth Circuit was relying on the language of Edelman v. Jordan, 415 U.S. 651, 672 (1974), that authorization of such a class would be sufficient to abrogate. The Court in *Edelman* found such a congressional authorization to sue a class of defendants which literally included the states, however, was wholly absent in the statute enacting the Aid to the Aged, Blind and Disabled Program.

52. *Atascadero*, at 247. The Court further noted:

> Thus were we to view this statute as an enactment pursuant to the Spending Clause, Art. I, § 8 . . . we would hold that there was no indication that the State of California consented to federal jurisdiction.

Id. See infra text accompanying note 76.

53. *Id.* at 248. The Brennan dissent contains an exhaustive historical analysis of the eleventh amendment which is beyond the scope of this Note to discuss in detail. *See id.* at 247-302. However, the basic premise of his dissent is on the ground that Hans v. Louisiana, 134 U.S. 1 (1890), was erroneously decided, as the eleventh amendment was not enacted to bar suits by citizens against their own state based upon federal question jurisdiction. *See id.* at 260.

54. *Atascadero*, 473 U.S. at 253 n.5.

> test it applies to congressional abrogation of state sovereign immunity. Just as the Court today decides that Congress, if it desires effectively to abrogate a State's sovereign immunity, must do so expressly in the statutory language, so the Court similarly decides that a State's waiver, to be effective, must be "specifically applicable to federal court jurisdiction."[55]

Therefore, the majority, in the eyes of the dissent, imposed the same special rules of statutory draftsmanship on state legislatures as it did on Congress before immunity to suit in federal court could effectively be waived, instead of properly construing a state constitution in accordance with its own legislative history and state law.[56]

The dissent then examined the statutory language and purpose of the Rehabilitation Act and found it "quite incredible" that Congress would intend that states be exempt from liability for discrimination under the Rehabilitation Act, while at the same time receiving a large percentage of the Act's federal funds.[57] The dissent pointed to other instances in which the statutory language "recipient of federal assistance" had led federal agencies to promulgate regulations which specifically defined states and state agencies as recipients of federal assistance, and emphasized that the Rehabilitation Act's wording had been patterned after such statutes.[58] The dissent found that the Rehabilitation Act expressly stated in section 505 that its remedies against "any act or failure to act by any recipient of Federal assistance," included the remedies found in Title VI of the Civil Rights Act of 1964, one of the statutes which specifically defines state and state agencies as recipients.[59] The dissent concluded from these

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55. *Id.*

56. *Id.* If this reading of the majority opinion is correct, then arguably the Court has dispensed with the rule that a state waiver of immunity may result because of "overwhelming implications from the text," which was the test used in Florida Dep't of Health & Rehab. Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 150 (1981) (per curiam) and Edelman v. Jordan, 415 U.S. 651, 673 (1974).

57. *Atascadero*, 473 U.S. at 248-49.

58. *Id.* at 249-50. Soon after Title VI of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000d (1982 & Supp. 1985), was enacted, which bans discrimination of the basis of race, color, or national origin by "any program or activity receiving Federal financial assistance," seven agencies promulgated regulations defining states as recipients of federal financial assistance. Another statute which uses Title VI's definition of "recipient" is Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex by "any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (1982).

59. *Atascadero*, 473 U.S. at 252. *See supra* language of Section 505. Representative Jeffords stated upon the enactment of Section 505 that "it did not seem right to me that the Federal Government should require States and Localities to eliminate discrimination against the handicapped wherever it exists and remain exempt themselves." 124 Cong. Rec. 38, 551 (1978). *See Atascadero*, 473 U.S. at 251 n.4.

factors that Congress clearly intended to subject states under the Rehabilitation Act to both a duty not to discriminate against the handicapped and an amenability to all the remedies available against other entities as a "recipient of Federal assistance."[60]

The dissent further attacked the majority opinion on the ground that the Court's "series of special rules of statutory draftsmanship" used to abrogate eleventh amendment immunity, were not justified as efforts to determine congressional intent.[61] The dissent argued that these rules, instead of determining the intent of Congress, were instead being used by the Court to ignore the will of Congress and to deny damage awards which might be a plaintiff's only practical remedy, on a flawed constitutional policy of disfavoring suits against states by their own citizens.[62]

C. State Waiver of Immunity

The *Atascadero* opinion discussed two ways in which a state could waive its eleventh amendment immunity: through enactment of a state statute or constitutional provision which specifies an intention to subject the state to suit in federal court[63] and through a state's participation in programs which condition participation on a state's waiver of constitutional immunity.[64] In addressing the first way to waive immunity, the *Atascadero* majority did not go so far as to hold that the constitutional or statutory provision must expressly state that "the state waives its immunity to suit in federal court." However, it could reasonably be inferred that these words or their equivalent are now necessary to waive immunity, as California did have a constitutional provision waiving its sovereign immunity.[65]

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60. *Atascadero*, 473 U.S. at 252.

61. *Id.* at 252-55. Employees v. Department of Public Health & Welfare, 411 U.S. 279 (1973), held that Congress must make its intention "clear" to lift a state's immunity. Edelman v. Jordan, 415 U.S. 651, 673 (1974) (citing Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)), held "we will find waiver only where stated by the most express language or 'by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) required "an unequivocal expression of congressional intent." Brennan felt *Atascadero* "tightens the noose" by requiring that Congress must express that unequivocal intention *in the statute itself* and thus changed the rules of lawmaking Congress was acting under when it enacted Section 504. 473 U.S. at 254 & n.7.

62. *Atascadero*, 473 U.S. at 254-55. Congress, in response to the *Atascadero* decision, amended the Rehabilitation Act to clearly provide for private suits for money damages against a State. *See infra* notes 193-96 and accompanying text.

63. *See supra* notes 38-40 and accompanying text.

64. *See supra* notes 50-52 and accompanying text.

65. *See* McClintock, *The* Atascadero *Rule: New Hurdle for Plaintiffs Suing States in Federal Court*, 21 GONZAGA L. REV. 47, 70 (1985/86).

One nationwide review that has been done of state constitutional and statutory provisions indicated that state would meet this "stringent" test if that is the interpretation to be placed on *Atascadero*.[66] Some states, including Florida, Maine, Mississippi, Nevada, Oklahoma and Pennsylvania, have expressly preserved their immunity from suit in federal court.[67] Other states, such as Idaho, Utah and Georgia, indicate that the state is not to be made a defendant in federal court.[68] A number of states, including California, do have provisions waiving sovereign immunity, while others, such as New York, Michigan and Indiana, have no sovereign immunity provisions.[69] No state waiver provisions, however, mention the eleventh amendment or federal courts expressly.[70]

The waiver of a state's immunity through its participation in federal programs and receipt of these programs' benefits had earlier been recognized by the Supreme Court in *Parden v. Terminal Railway*.[71] In *Parden*, a majority of the Court held that although nothing in the Federal Employer's Liability Act's (FELA)[72] language or statutory history indicated an intent to abrogate state immunity, the state was liable for damages in a personal injury suit brought under the Act, because Congress intended to subject states which operated railways to liability under FELA.[73] Justice Brennan in the majority opinion emphasized that, "[b]y empowering Congress to regulate commerce . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation."[74] The *Parden* decision thus recognized that actual waiver by the states is not necessary to lift the bar on a state's immunity as Congress is empowered to lift the bar for them in circumstances where Congress is exercising power expressly granted to it in Article I.[75]

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66. *Id.* at 71-73.

67. *Id.* at 71. *See* FLA. STAT. ANN. § 768.28(16) (West Supp. 1989); ME. REV. STAT. ANN. tit. 14, § 8118 (1980); MISS. CODE ANN. § 11-46-5(4) (Supp. 1988); NEV. REV. STAT. § 41.031(3) (1979); OKLA. STAT. ANN. tit. 51, § 152.1(B) (West 1988); PA. STAT. ANN. tit. 42, § 8521(b) (Purdon 1982).

68. McClintock, *supra* note 65, at 71. *See* IDAHO CODE § 6-903(f) (Supp. 1987); UTAH CODE ANN. § 63-30-4 (1986); GA. CONST. art. I, § 2, § 9(a).

69. McClintock, *supra* note 65, at 72. *See* Trotman v. Palisades Interstate Park Comm., 557 F.2d 35 (2d Cir. 1977); Dawkins v. Craig, 483 F.2d 1191 (4th Cir. 1973); Stanley v. Indiana Civil Rights Comm'n, 557 F. Supp. 330 (N.D. Ind. 1983), *aff'd*, 740 F.2d 972 (7th Cir. 1984).

70. McClintock, *supra* note 65, at 72. *See supra* notes 38-40 and accompanying text.

71. 377 U.S. 184 (1964).

72. 45 U.S.C. § 51 (1982).

73. Parden v. Terminal Ry. of Alabama State Docks Dep't, 377 U.S. 184, 190 (1964). *See* Nowak, *supra* note 21, at 1416 n.15.

74. *Parden*, 377 U.S. at 192.

75. Nowak believed the *Parden* decision was subject to at least three different

The *Atascadero* decision, however, held that the state's receipt of funds under the Rehabilitation Act did not abrogate the state's immunity to suit in federal court as an enactment pursuant to the Spending Clause in Article I.[76] The Court stated for a waiver to be found, there must be a clear congressional intent to condition participation in the federal programs on a state's consent to waive its constitutional immunity.[77] The *Atascadero* court thus implied that this congressional intent could only be found in the regulatory statute's language, not in the general purpose of a statute to make the states recipients of its benefits.

This implied holding in *Atascadero* was made express by the Supreme Court's subsequent decision in *Welch v. Texas Department of Highways and Public Transportation*.[78] Although the issue of a state's waiver of immunity was not directly before the Court in *Welch*,[79] the Court took the opportunity to overrule *Parden* to the extent that it is inconsistent with the requirement that abrogation by Congress be stated in unmistakably clear language in the statute itself.[80] The Court noted that the majority in *Parden* had mistakenly reasoned that general language in FELA made the statute applicable to states, as they received benefits under the Act.[81] The Court in *Welch* instead agreed with the dissenting opinion in *Parden* which stated:

> It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect

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interpretations. First, Congress can create federal damage actions against states under its powers as long as the regulated activity is within the scope of those powers also. Second, Congress can establish federal damage actions against states and the Court should interpret the statutes as creating such causes of action whenever the states come within the class of persons subject to such suits. Third, Congress can regulate the activity and force states to elect between consenting to federal jurisdiction in damage suits or discontinuing the regulated activity. Nowak, *supra* note 21, at 1417.

76. *See supra* note 52 and accompanying text.

77. *Atascadero*, 473 U.S. at 247.

78. 107 S. Ct. 2941 (1987). Decisions prior to *Atascadero* had already begun to question the Court's decision in *Parden*. *See, e.g.*, Employees v. Department of Public Health & Welfare, 411 U.S. 279 (1973) (Supreme Court, although it recognized Congress' power to lift a State's immunity, refused to find such abrogation under the Fair Labor Standards Act as there was no clear statement of such a congressional intent, and the Fair Labor Standards Act involved a traditional governmental function as opposed to the proprietary function found in *Parden*); Edelman v. Jordan, 415 U.S. 651 (1974) (in a case brought under the Aid to the Aged, Blind and Disabled program, the Court questioned in dicta the *Parden* theory that a state may impliedly consent to suit merely by participating in a federally regulated or funded activity).

79. *See* Welch v. Texas Dep't of Highways & Public Transp., 107 S. Ct. 2941, 2946-47 (1987).

80. *Id.* at 2947-48.

81. *Id. See Parden*, 377 U.S. at 190.

> an automatic and compulsory waiver of rights arising under another. Only when Congress has clearly considered the problem and expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense.[82]

Therefore, negating eleventh amendment immunity can be accomplished by the states in either their constitutions or legislation, or by Congress in federal statutes. Whatever the method, however, *Atascadero*'s test requires, on the face of the statute or constitution itself, express abrogating language or unmistakably clear intent for states to be sued in federal court; a waiver will no longer be implied from a statute's general purposes.

D. Congressional Abrogation Under Its Fourteenth Amendment Powers

An analysis of congressional abrogation of immunity under the fourteenth amendment should begin with *Fitzpatrick v. Bitzer*,[83] which addressed the issue of whether "Congress has the power to authorize federal courts to enter (a monetary damage) award against the State as a means of enforcing the substantive guarantees of the Fourteenth Amendment."[84] *Fitzpatrick* involved a class action on behalf of Connecticut's male state employees, which alleged that the State's retirement plan discriminated against them because of their sex, and therefore was in violation of Title VII of the Civil Rights Act of 1964.[85]

The district court found the retirement plan was discriminatory and entered prospective injunctive relief against the state in favor of the plaintiffs; however, the district court refused to allow recovery of money damages against the state on the ground they were barred by the eleventh amendment.[86] The appellate court affirmed the district court, holding that *Edelman v. Jordan*[87] mandated that "'a private federal action for retroactive damages' is not a 'constitutionally permissible method of enforcing fourteenth amendment rights.'"[88]

The Supreme Court began its analysis in *Fitzpatrick* with the recognition that Title VII expressly authorized suits against the state as an

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82. *Welch*, at 2948 (quoting *Parden*, 377 U.S. at 198-99 (White, J., dissenting)).

83. 427 U.S. 445 (1976).

84. *Id.* at 448. *See* U.S. CONST. amend. XIV, *supra* note 33.

85. *Fitzpatrick*, 427 U.S. at 448. Title VII, as amended, is codified at 42 U.S.C. §§ 2000e to 2000e-17 (1982).

86. *Fitzpatrick*, 427 U.S. at 449-50.

87. 415 U.S. 651 (1974).

88. *Fitzpatrick*, 427 U.S. at 450-51 (quoting Fitzpatrick v. Bitzer, 519 F.2d 559, 569 (2d Cir. 1975)).

employer, pursuant to congressional authority under Section 5 of the fourteenth amendment, to enforce, by appropriate legislation, the prohibitions, guaranteed rights and immunities of the fourteenth amendment.[89] The Court then addressed the relationship between the Section 5 enforcement provision and the substantive provisions of the fourteenth amendment. It quoted at length from the earlier Supreme Court decision in *Ex parte Virginia*,[90] a case in which a state judge had been indicted under a federal statute prohibiting the exclusion, on the basis of race, of a citizen from service as a juror in state court. The Court in *Ex parte Virginia* held that:

> The prohibitions of the fourteenth amendment are directed to the States, and they are to a degree restrictions of State Power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. . . .
>
> [I]n exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not thus been granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them. . . .
>
> Were it not for the fifth section of [the Fourteenth] Amendment, there might be room for argument that the first section is only declaratory of the moral duty of the State . . . . But the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the fourteenth amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete.[91]

Ex Parte Virginia interpreted the fourteenth amendment as a prohibition, meaning that no state agency or state official shall deny to any person within that state the equal protection of the laws.[92]

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89. *Id.* at 452-53.
90. 100 U.S. 339 (1879).
91. *Id.* at 346-48.
92. *Id.* at 347.

Because the fourteenth amendment inherently limits state sovereignty, the *Fitzpatrick* Court concluded that Congress had the authority, for the purpose of enforcing the substantive provisions of the fourteenth amendment, to "provide for private suits [for money damages] against States and State officials which are constitutionally impermissible in other contexts [under the eleventh amendment]."[93] The *Fitzpatrick* Court recognized two crucial interpretations of the fourteenth amendment: first, that the substantive provisions of the fourteenth amendment are directed at the states and through those provisions the states have duties with respect to the treatment of private individuals; and secondly, because these constitutional duties are to be enforced in federal court, there should be a third way in which a state's eleventh amendment immunity can be abrogated.[94] In the fourteenth amendment context, the Court in *Fitzpatrick* held that state consent to suit in federal court is unnecessary as the states have already waived their immunity in part through ratification of the fourteenth amendment.[95]

Prior to *Atascadero*, the sufficiency of the statutory language to effectively abrogate immunity had not been considered in a fourteenth amendment context.[96] In light of *Atascadero*, however, it is doubtful that an implied waiver of immunity through ratification of the fourteenth amendment will be enough in these suits to override the eleventh amendment bar to suit in federal court. Although the court will still recognize implied waivers of state immunity under Section 5 of the fourteenth amendment, *Atascadero* appears to hold that the statute in question must also meet the "unmistakably clear language in the statute itself" test prior to abrogating a state's immunity.

III. The Eleventh Amendment and the Education for All Handicapped Children Act of 1975

A. Availability of Monetary Relief Under the EHA

The EHA provides aggrieved parties with a private right of action for relief pursuant to the procedural safeguards in section 1415 of the Act.[97] However, there has been continuing debate concerning whether retroactive monetary relief is available at all under the EHA, and if so,

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93. *Fitzpatrick*, 427 U.S. at 456.

94. *Id.* at 457-58. *See also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); McClintock, *supra* note 65, at 58-59.

95. *Fitzpatrick*, 427 U.S. at 453.

96. *See Fitzpatrick*, 427 U.S. 445; McClintock, *supra* note 65, at 70.

97. 20 U.S.C. § 1415 (1982). *See* Gary A. v. New Trier High School Dist. No. 203, 796 F.2d 940, 944 (7th Cir. 1986); Mountain View-Los Altos Union High School Dist. v. Sharron B.H., 709 F.2d 28, 29 (9th Cir. 1983).

what types of relief should be included in this category.[98] Therefore, a discussion of this broader debate is necessary prior to an analysis of the eleventh amendment bar to retroactive monetary relief under the Act.

The debate over the availability of retroactive monetary relief under the EHA centers on the meaning to be given the term "appropriate" as it is used in connection with relief to be granted under the Act.[99] Prior to 1985, some courts refused to hold that any form of monetary relief was available under the Act, or was available only under exceptional circumstances,[100] while other courts allowed retroactive monetary relief as the only remedy which could effectively redress violations of the Act.[101]

The prevailing standard for an award of monetary relief under the EHA during that time was expressed in *Anderson v. Thompson*.[102] The court there held that "Congress did not envision appropriate relief [under the EHA] generally to include a damage remedy. Instead, section [1415(e)(2)] appears to be the last of many procedural safeguards in a section aimed at ensuring proper placements and programs for handicapped children."[103] The court in *Anderson* took judicial notice of the developing status of the field of special education, and based its decision in part on its belief that handicapped educational programs would suffer if school officials and educational agencies feared monetary liability.[104] The decision in *Anderson*, however, was not absolute. The court recognized two exceptions to the general unavailability of damages under the Act: where a child's physical health would be endangered by the individualized educational program and where the defendant had acted in bad faith by his failure to comply with the procedural safeguards of the Act.[105]

The rule in *Anderson* was generally held by other courts to apply to all types of monetary relief, including tuition reimbursements for inappropriate educational placements, until the Supreme Court decision in *Burlington School Committee v. Department of Education*.[106] The

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98. *See supra* note 12 and accompanying text.

99. 20 U.S.C. § 1415(e)(2) (1982). *See supra* note 11.

100. *See, e.g.*, Colin K. v. Schmidt, 715 F.2d 1, 10 (1st Cir. 1983); Marvin H. v. Austin Indep. School Dist., 714 F.2d 1348, 1356 (5th Cir. 1983); Powell v. Defore, 699 F.2d 1078, 1081 (11th Cir. 1983); Miener v. Missouri, 673 F.2d 969, 979 (8th Cir. 1982); Anderson v. Thompson, 658 F.2d 1205, 1209-10 (7th Cir. 1981); Sanders v. Marquette Pub. Schools, 561 F. Supp. 1361, 1366 (W.D. Mich., N.D. 1983).

101. *See, e.g.*, Hurry v. Jones, 734 F.2d 879, 883 (1st Cir. 1984); Department of Educ., Hawaii v. Katherine D., 727 F.2d 809, 817 (9th Cir. 1983), *cert. denied*, 471 U.S. 1117 (1985).

102. 658 F.2d 1205 (7th Cir. 1981).

103. *Id.* at 1211.

104. *Id.* at 1213.

105. *Id.* at 1213-14.

106. 471 U.S. 359 (1985). *See, e.g.*, Marvin H. v. Austin Indep. School Dist., 714

Anderson rule for awarding monetary relief had been increasingly criticized by the circuits, particularly in the area of tuition reimbursements for inappropriate programs.[107] The Supreme Court resolved this issue by taking retroactive reimbursements out of the context of damages and finding them available as relief under the Act.[108]

In reaching its conclusion, the Court looked to the procedural safeguards found in the EHA. The Court discovered these safeguards included the right of parents to participate in the development of an individualized educational program (IEP), as well as the right for the child to challenge a program with which he disagrees in administrative and court proceedings.[109] The Court recognized that:

> Where as in the present case review of a contested IEP takes years to run its course—years critical to the child's development—important practical questions arise concerning interim placements of the child and financial responsibility for that placement.[110]

Prospective injunctive relief as a sole remedy was found to be inadequate by the Court, as parents who disagreed with a proposed IEP would then have only two choices: go along with the inappropriate IEP to the detriment of their child, or pay for what is determined later to be an appropriate placement.[111]

> If [prospective injunctive relief was the sole remedy], the parents' right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant "appropriate" relief Congress meant to include retroactive reimbursement to parents as an available remedy. . . . Reimbursement merely requires the [Burlington School Committee] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP.[112]

F.2d at 1354 (included tuition reimbursement as a type of damages); Mountain View-Los Altos Union High School Dist. v. Sharron B.H., 709 F.2d at 30 (same); Parker v. District of Columbia, 588 F. Supp. 518, 521 (D.D.C. 1983) (same).

107. *See, e.g., Department of Educ., Hawaii*, 727 F.2d at 816-18; Doe v. Brookline School Comm., 722 F.2d 910 (1st Cir. 1983).

108. *Burlington*, 471 U.S. at 370-71.

109. *Id.* at 361. *See* 20 U.S.C. §§ 1401(19), 1415(b), (d), (e) (1982).

110. *Burlington*, 471 U.S. at 361.

111. *Id.* at 370.

112. *Id.* at 370-71 (emphasis in original). *See* 34 C.F.R. § 300.403(b) (1984) (disagreements and questions of financial responsibility subject to *post-hoc* due process procedures).

Burlington thus establishes that at least one form of retroactive monetary relief, although not characterized by the Court as damages, is available under the EHA.

In addition, Congress recently authorized the award of attorney's fees as part of the costs to the parent of a handicapped child who is the prevailing party in a suit brought under the Act.[113] The Handicapped Children's Protection Act (HCPA) of 1986[114] was enacted to allow for both this award of attorney's fees and to "clarify the effect of the [EHA] on rights, procedures, and remedies under other laws relating to the prohibition of discrimination."[115] The HCPA was enacted in response to the 1984 Supreme Court decision in *Smith v. Robinson*.[116] *Smith* held that the EHA was the "exclusive avenue" by which a parent could assert an equal protection claim against a publicly financed educational agency.[117] The Court reached this conclusion through an analysis of the comprehensiveness and detail of the procedural safeguards found in the EHA and through "express congressional efforts to place primary responsibility on local and state educational agencies" for developing appropriate plans and individual educational programs.[118] This decision resulted in lower courts' dismissing equal protection claims brought under section 504 of the Rehabilitation Act and section 1983 of the Civil Rights Act, where the remedy found under the EHA was more clear and precise.[119]

Congress acted to correct this mistaken interpretation of their intent by explicitly amending the EHA to include awards of attorney's fees, as well as expressly allowing actions to be brought under both the EHA and other laws which protect the rights of handicapped children.[120] In

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113. 20 U.S.C.A. § 1415(e)(4)(B) (West Supp. 1988). This section provides:

> In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorney's fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

114. Pub. L. No. 99-372, 100 Stat. 796 (1986).

115. S. REP. No. 112, 99th Cong., 2d Sess. 1, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 1798, 1798 [hereinafter S. REP. No. 112].

116. 468 U.S. 992 (1984). *See* S. REP. No. 112 *supra* note 115, at 2.

117. 468 U.S. at 1009.

118. *Id.* at 1009-11.

119. *See, e.g.*, Miener v. Missouri, 800 F.2d 749, 754-55 (8th Cir. 1986); Alexopulos v. Riles, 784 F.2d 1408, 1410 (9th Cir. 1986).

120. 20 U.S.C.A. § 1415(f) (West Supp. 1988) provides:

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

the legislative history of the HCPA, it is clear that Congress intended states to be responsible for attorneys fees in appropriate cases.[121] Based on the foregoing, attorneys' fees, as well as retroactive tuition reimbursement, are clearly included as types of monetary relief now available under the EHA.

It is still unsettled whether money damages, apart from tuition reimbursements, are available under the EHA. Some courts have concluded that while the *Anderson v. Thompson* test is overruled as to the availability of tuition reimbursement, it is still viable on the broader question of availability of damages under the EHA.[122] Therefore, money damages could be awarded under the *Anderson* test in cases where: (1) an IEP endangers the life of a child; or (2) there has been a bad faith failure to comply with the procedural safeguards of the EHA.[123]

B. Abrogation of State Immunity from Suit in Federal Court Under the EHA

Since *Atascadero*, four circuits and several district courts have addressed the question of state immunity to suits brought under the EHA. These cases have split on the question of whether the language of the EHA satisfies the "unmistakable language" standard enunciated in *Atascadero*, and illustrate the difficulties of applying what "unmistakable language" really means.

In *Gary A. v. New Trier High School District No. 203*,[124] plaintiffs brought suit under the EHA against various state entities to obtain reimbursement for their child's educational expenses at a private residential facility.[125] The district court rejected the state defendants' eleventh amend-

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121. *See* S. REP. No. 112 *supra* note 115, at 13 (emphasis added):

> The [Senate Labor and Human Resources Committee] understands and intends that *State* and local agencies may not use funds made available to them under Part B of the EHA to pay attorney's fees or other costs incurred by parents that a court assesses against those agencies under the [HCPA]. Using these funds for those costs would divert scarce resources from direct services to handicapped children.

Note further that in 20 U.S.C.A. § 1415(e)(4)(G) (West Supp. 1988), Congress provided that the subsection dealing with reductions of attorney's fee awards would not apply in cases where the *State* or local educational agency unreasonably protracted the litigation.

122. *See, e.g.*, Silano v. Tirozzi, 651 F. Supp. 1021 (D. Conn. 1987); Gerasimou v. Ambach, 636 F. Supp. 1504, 1512 (E.D.N.Y. 1986).

123. *See supra* note 105 and accompanying text.

124. 796 F.2d 940 (7th Cir. 1986) (per curiam). *See also* Tonya K. v. Board of Educ., 847 F.2d 1243 (7th Cir. 1988) (reaffirmed the *Gary A.* decision).

125. *Gary A.*, 796 F.2d at 942. Plaintiffs also brought suit under the equal protection clause of the fourteenth amendment and state law, which claims were rejected by the district court.

ment defense and awarded the plaintiffs the costs of the child's education.[126] The Seventh Circuit reversed the district court, holding that in light of *Atascadero*, the state could not waive its immunity to suit in federal court by mere participation in a federally funded program.[127] Further, the court held that Congress had not effectively abrogated the state's immunity to suit in federal court under the EHA.[128] The court arrived at this conclusion by the bare finding that the EHA "is similar in all relevant parts" to section 504 of the Rehabilitation Act,[129] the statute at issue in *Atascadero*.[130] The court briefly noted three broad similarities between the Rehabilitation Act and the EHA, but refused to go beyond a facial comparison and examine the express statutory language of the EHA and the policy rationales which instigated the legislation's enactment.[131]

This cursory treatment of the EHA contrasts sharply with the Seventh Circuit's treatment of sufficient congressional abrogation only six months later in *Gomez v. Illinois State Board of Education*,[132] a case involving eleventh amendment immunity under the Equal Educational Opportunities Act of 1974 (EEOA).[133] In *Gomez*, the Seventh Circuit engaged in a complete statutory analysis and investigation of the EEOA to determine that its language did indeed abrogate a state's immunity to suit in federal court.[134] Instead of looking at broad similarities between two different statutes as the court did in *Gary A.*,[135] the Seventh Circuit instead looked to the EEOA's intended effect to hold that barring states from immunity to suit would render nugatory express terms of the Act.[136] This disparity in analysis is particularly disturbing because the similarities in language between the EHA and the EEOA are much closer than is the language between the EHA and the Rehabilitation Act.[137]

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126. *Id.*

127. *Id.* at 943. *See supra* notes 50-52 and accompanying text.

128. *Gary A.*, 796 F.2d at 944.

129. 29 U.S.C. § 794 (1982 & Supp. 1985).

130. *Gary A.*, 796 F.2d at 944.

131. *Id.* These broad similarities included: both statutes explicitly provide a private right of action for prospective relief for aggrieved parties; neither statute explicitly provides for retroactive relief; and both involve programs by which states receive federal assistance. *See infra* notes 168-89 and accompanying text.

132. 811 F.2d 1030 (7th Cir. 1987).

133. 20 U.S.C. § 1703(f) (1982).

134. *Gomez*, 811 F.2d at 1037-38. See *infra* notes 168-89 and accompanying text for a statutory construction of the EHA following the example of *Gomez*.

135. 796 F.2d at 940.

136. *Gomez*, 811 F.2d at 1038.

137. *See infra* notes 168-89 and accompanying text.

In another EHA case, *Doe ex rel. Gonzales v. Maher*,[138] the plaintiffs argued on appeal that the district court had erroneously dismissed their damage claims based on the EHA.[139] The Ninth Circuit, however, affirmed the district court on the basis of *Atascadero*.[140] The Ninth Circuit first found that California had not waived its immunity to suit in federal court based on the Supreme Court's holding in *Atascadero* that the California constitution did not specify California's intention to subject itself to suit in federal court.[141] The court then looked to the language of the EHA provision authorizing suits in federal court, and found that the language "simply does not pass muster under the stringent [*Atascadero*] test."[142] Finally, the court found the EHA did not expressly condition the state's right to receive funds on their willingness to waive their sovereign immunity.[143]

The Ninth Circuit, in determining whether a state's immunity to suit in federal court had been abrogated, thus looked at one provision of the EHA, which authorizes citizen suits in federal court, in isolation. Although the *Atascadero* decision imposes an "unmistakable language in the statute itself" standard on federal statutes before immunity will be found to have been abrogated, the opinion did not go so far as to state that this language must be found exclusively in the part of the statute authorizing citizen suits in federal court.[144]

Neither *Gary A.*[145] nor *Doe ex rel. Gonzales v. Maher*[146] came close to a complete statutory analysis of the EHA in arriving at their conclusions. However, the First Circuit in *David D. v. Dartmouth School Committee*,[147] also addressed the issue of whether the EHA effectively

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138. 793 F.2d 1470 (9th Cir. 1986), *aff'd on other grounds sub nom.* Honig v. Doe, 108 S. Ct. 592 (1988).

139. *Id.* at 1493. The major issue in this decision, which was recently addressed by the Supreme Court, was whether the EHA prohibits expulsion of handicapped students for misbehavior that is a manifestation of their handicap. Both the Ninth Circuit and the Supreme Court found such a prohibition.

140. *Id.* In doing so, the Ninth Circuit held that prior Ninth Circuit decisions which had found that California had waived its immunity to suit in federal court, such as: Students of Cal. School for the Blind v. Honig, 736 F.2d 538 (9th Cir. 1984) and Department of Educ. v. Katherine D., 727 F.2d 809 (9th Cir. 1984), no longer carried any force in light of *Atascadero*.

141. *Doe ex rel. Gonzales*, 793 F.2d at 1494. *See supra* notes 38-41 and accompanying text.

142. *Id.* The "language" referred to by the court is found at 20 U.S.C. § 1415(e)(2) (1982).

143. *Id.*

144. *Id. See supra* notes 50-52 and accompanying text.

145. 796 F.2d 940.

146. 793 F.2d 1470. *See* McClintock *supra* note 65, at 53 n.34. "Courts are faced with not only 'if' Congress 'said' abrogation, but 'where.'"

147. 775 F.2d 411 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986).

abrogated states' immunity from suit in federal court.[148] This case involved an appeal from a district court order using Massachusetts' higher special education standards, to place a seventeen-year old boy with Downs Syndrome in a private residential school.[149] Massachusetts argued on appeal that the district court erred in enforcing state substantive law against it absent a waiver of the state's eleventh amendment immunity to suit in federal court. The appellate court disagreed with Massachusetts' position.[150]

The First Circuit found that the EHA's language, which defines a "free appropriate education" as "special education and related services which . . . meet the standards of the state educational agency,"[151] explicitly incorporated state substantive law into the EHA; therefore, state substantive law could be reviewed by a federal court under its federal question jurisdiction pursuant to the Act, and was not a pendent state law claim which is barred by the eleventh amendment from federal court jurisdiction under *Pennhurst, II*,[152] a 1984 Supreme Court decision.[153] The court concluded such a holding withstood Massachusetts' eleventh amendment challenge even under the more rigorous rules of *Atascadero*.

The First Circuit focused on whether Congress effectively overrode the states' immunity to suit in federal court under the EHA and concluded that it did. The court distinguished the EHA from the statute in issue in *Atascadero*, the Rehabilitation Act, on the ground that in section 1400(b)(9) of the EHA[154] Congress expressly, as opposed to implicitly, declared that it was acting to assure equal protection of the law.[155] Further, the court noted that the Supreme Court had expressly recognized that the EHA was grounded on the equal protection clause of the fourteenth amendment. Section 1400(b)(9) of the EHA states:

> It is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.[156]

The court found this to mean state consent to suit is unnecessary under the EHA as a state has already waived a portion of its immunity through

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148. *Id.* at 414.
149. *Id.*
150. *Id.*
151. 20 U.S.C. § 1401(18)(B) (1982).
152. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984).
153. *David D.*, 775 F.2d at 417.
154. 20 U.S.C. § 1400(b)(9) (1982).
155. *David D.*, 775 F.2d at 421.
156. 20 U.S.C. § 1400(b)(9) (1982).

ratification of the fourteenth amendment, whereas the Court had made no similar finding regarding the Rehabilitation Act.[157]

Finally, the First Circuit distinguished the EHA from the Rehabilitation Act on the basis of its remedies.

> Unlike the remedies for violation of § 504 of the RHA, which are broadly directed by "*any* recipient of Federal assistance," and include a broad range of institutions and organizations, the EHA is directed to one class of actors: states and their political subdivisions responsible for providing public education. This accords with the most basic of political knowledge that free public education is provided by and under the aegis of the states.[158]

The First Circuit reasoned that because the state is responsible for guaranteeing both the substantive and procedural rights under the EHA, "Congress intended that the State should be named as an opposing party, if not the sole party, to [a court proceeding under the EHA]."[159]

Although the court in *David D.* did not directly address a suit for monetary relief against a state entity, its analysis of congressional abrogation of immunity under the EHA did demonstrate that where a statute is enacted pursuant to congressional authority under the fourteenth amendment to regulate state public education, Congress is exclusively addressing the states and intending to strip them of their eleventh amendment immunity to suit in federal court.

Education has been viewed by the Supreme Court in *Brown v. Board of Education*[160] as perhaps the most important function of state and local governments. Therefore, the importance of the right to an education has often tipped the balance between states and individuals in favor of individual rights. In *Griffith v. County School Board of Prince Edward County*,[161] the Supreme Court viewed the state's denial to students of a free, public education as a denial of equal protection of the laws as guaranteed by the fourteenth amendment, and as an act from which the states were not immune to suits in federal court under the eleventh amendment.[162] A denial of a free public education to the handicapped was the evil addressed by Congress under the EHA, therefore the states

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157. *David D.*, 775 F.2d at 421. *See* Smith v. Robinson, 468 U.S. 992, 1009 (1984).

158. *David D.*, 775 F.2d at 422 (emphasis in original). *See* 20 U.S.C. §§ 1412, 1413 (1982).

159. *David D.*, 775 F.2d at 442.

160. 347 U.S. 483, 493 (1954).

161. 377 U.S. 218 (1963).

162. *Id.* at 225, 228. *Cf.* Palmer v. Thompson, 403 U.S. 217, 221 (1970) (Supreme Court held closing of public swimming pools instead of desegregating them was not a denial of equal protection of the laws).

should not be immune from suits in federal court brought for violations of this Act. The Third Circuit and lower courts in fact have used *David D.*'s equal protection analysis to allow suits for monetary relief against state entities in federal court.[163]

This Note will now turn to an examination of the EHA's language, which has been ignored by most courts up to this point. The lack of full analysis of EHA language is disconcerting because close inspection demonstrates that Congress clearly intended to abrogate the states' eleventh amendment immunity to effectuate the purposes of the Act. It has not been disputed that based upon section 1400(b)(9) of the EHA and that section's interpretation in *Smith v. Robinson*,[164] the EHA was enacted pursuant to the enforcement authority of Section 5 of the fourteenth amendment.[165] Therefore, the EHA is not a mere funding statute, but creates an enforceable substantive right in handicapped children to a free appropriate public education.[166] This makes state consent to suit in federal court unnecessary as the state has waived its immunity through ratification of the fourteenth amendment.[167] Therefore, the EHA falls under the second category of cases in which eleventh amendment immunity can be abrogated to enforce the substantive provisions of the fourteenth amendment.

The statutory language of the EHA is replete with references to states and state agencies in addition to the equal protection language found in section 1400(b)(9). First, "State"[168] and "State educational agency"[169] are defined terms within the meaning of the Act. Further, the term "free appropriate public education" is defined as "special education and related services which . . . meet the standards of the State educational agency."[170]

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163. *See, e.g.*, Muth v. Central Bucks School Dist., 839 F.2d 113 (3d Cir. 1988); Barwacz v. Michigan Dep't of Educ., 674 F. Supp. 1296, (W.D. Mich. 1987); Antkowiak v. Ambach, 653 F. Supp. 1405 (W.D.N.Y. 1987); John H. v. Brunelle, 631 F. Supp. 208 (D.N.H. 1986).

164. 468 U.S. 992 (1984).

165. 468 U.S. at 1009-111; 20 U.S.C. § 1400(b)(9) (1982). *See David D.* 775 F.2d 940; Antkowiak v. Ambach, 653 F. Supp. at 1418.

166. *See* Honig v. Doe, 108 S. Ct. 592 (1988).

167. *See supra* notes 93-96 and accompanying text.

168. 20 U.S.C. § 1401(6) (1982 & Supp. 1985):

> The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

169. 20 U.S.C. § 1401(7) (1982):

> The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

170. 20 U.S.C. § 1401(18)(B) (1982). *See* David D. v. Dartmouth School Comm., 775 F.2d 411, 414 (1st Cir. 1986), *cert. denied*, 475 U.S. 1140 (1986).

Accordingly, unlike section 504 of the Rehabilitation Act which is addressed to any recipient of federal assistance, the EHA is exclusively addressing states and state agencies.

More importantly, section 1411 (entitled "Entitlements and allocations") deals exclusively with how federal funds are allotted to states under the EHA,[171] and how states must distribute those funds to local and intermediate educational agencies within that state.[172] Thus, in contrast to the Rehabilitation Act, where a variety of organizations and institutions receive funds under the Act, states are the only entities which directly receive funds under the EHA. The Supreme Court held in *Burlington* that local educational agencies must reimburse parents for inappropriate placements with funds distributed by the states to the local educational agencies pursuant to the Act.[173] To then state that a state agency is not liable for any reimbursement of similar federal funds for affirming an inappropriate placement is clearly an inconsistent result, as it can clearly be seen that all of these funds under the EHA are originally distributed solely to the several states. The Third Circuit has held in *Muth v. Central Bucks School District*[174] that the eleventh amendment does not bar state reimbursement of a child's educational expenses.[175] The court followed the rationale of the First Circuit in *David D. v. Dartmouth School Committee* that states and state agencies must be accountable for their actions under the EHA "because the EHA and its legislative history reflect the 'most basic of political knowledge that free public education is provided by and under the aegis of the state.'"[176]

Sections 1412, 1413 and 1414 of the EHA extensively address the affirmative duties placed on state educational agencies in order to maintain eligibility for funds provided under the EHA. For example, section 1412(6) provides:

> The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, . . . will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.[177]

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171. 20 U.S.C. § 1411(a)(1) (1982 & Supp. 1985).
172. *Id.* at §§ 1411(b) and (c).
173. *Burlington*, 471 U.S. at 370-71.
174. 839 F.2d 113 (3d Cir. 1988).
175. *Id.* at 129-30.
176. *Id.* at 129 (quoting David D. v. Dartmouth School Comm., 775 F.2d 411, 422 (1st Cir. 1985)).
177. 20 U.S.C. § 1412(6) (1982). *See supra* note 18.

Finally, section 1415(a) provides that "[a]ny *State* educational agency . . . which receives assistance under [the EHA] shall establish and maintain procedures [in accordance with this section] to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards."[178] Section 1415(e)(2) provides:

> Any party aggrieved by the findings and decision made under subsection (b) of this section [which provides for hearings on complaints by a *State*, local or intermediate educational agency] who does not have the right to an appeal under subsection (c) of this section, *and* any party aggrieved by the findings and decision under subsection (c) of this section [which applies exclusively to *State* review of local educational agency decisions], shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.[179]

Thus, an action under section 1415(e)(2) can only be maintained against state and local educational agencies. As the Seventh Circuit in *Gomez* found under the EEOA, to hold that Congress did not abrogate the state's eleventh amendment immunity from suits for monetary relief in federal court under the EHA would, in practice, make states and state agencies effectively able to avoid the federal enforcement of the procedural safeguards found in the EHA.[180] To argue that the procedural safeguards found in the EHA could still be enforced against state entities in state court is illusory. Congress clearly did not intend handicapped children's rights to a free appropriate public education to depend on their parent's choice of forum.[181] The First Circuit stated in *David D.* that:

> Congress contemplated, and due process requires, that a consistent body of law would be applied throughout all stages of the due process hearing system. Congress intertwined federal and state standards into one body of law, and did not leave EHA cases dependent upon whether an appeal is taken to a state or federal court.[182]

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178. *Id.* § 1415(a).

179. *Id.* § 1415(e)(2) (emphasis added).

180. *See* Gomez v. Illinois State Bd. of Educ., 811 F.2d 1038 (7th Cir. 1987).

181. *See* David D. v. Dartmouth School Comm., 775 F.2d 411, 419 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986).

182. *Id. Cf.* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957) (a similar type of incorporation of state and federal standards is found in the National Labor Relations Act, 29 U.S.C. § 301 (1982)).

Unlike statutes, such as the Rehabilitation Act, which provide for relief against "any recipient of Federal assistance,"[183] which recipients may or may not include states and their agencies, the EHA provides for suits against only the decisions of state, intermediate and local educational agencies.[184] Therefore, the EHA expressly contemplates that state and state agency decisions are to be the basis for suits in federal court.

Pursuant to the regulations promulgated under this Act, the state educational agency is characterized as the central point of responsibility and accountability under the EHA, so that failure to deliver services or violations of handicapped children's rights are squarely the responsibility of the state agency.[185] The Supreme Court held in *Hutto v. Finney*[186] that the Civil Rights Attorney's Fees Awards Act of 1976 (section 1988)[187] abrogated state immunity to suit in federal court because section 1988 "primarily applies to laws passed specifically to restrain state action."[188] The EHA's primary and *only* application is to restrain state action to assure a free appropriate education for handicapped children. To hold the states unaccountable for their acts in this situation would clearly render nugatory the express terms of the Act.[189]

The conclusion that Congress effectively abrogated states' immunity from suit in federal court is further strengthened by the recent passage of two federal statutes. The first, the Handicapped Children's Protection Act of 1986, was discussed above and was enacted to reestablish Congress' original intent that parents of handicapped children "must be able to access the full range of available remedies in order to protect their handicapped children's educational rights under the EHA."[190] Further, pursuant to Congress' enactment of section 1415(f) to the EHA, as part of the Handicapped Children's Protection Act of 1986,[191] there is now an express private right of action in the EHA.[192]

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183. 42 U.S.C. § 2000d-7 (1982 & Supp. 1986).

184. 20 U.S.C. §§ 1400-1485 (1982 & Supp. 1985).

185. Assistance to States for Education of Handicapped Children, 34 C.F.R. § 300.600 (1988). *See* S. REP. No. 168, 94th Cong., 1st Sess. 24 (1975).

186. 437 U.S. 678 (1977).

187. Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified at 42 U.S.C. § 1988 (1982)).

188. *Hutto*, 437 U.S. at 693-94. *See* United States v. Union Gas Co., 792 F.2d 372, 377-78 (3d Cir. 1986) (Third Circuit held that *Hutto* retained its precedential value even after *Atascadero* because it was not overturned).

189. *See, e.g.*, 20 U.S.C. § 1415(e)(2). It would indeed be an awkward reading of this section to interpret it as meaning a judicial review of local hearing appeals under 20 U.S.C. § 1415(b)(2) could be heard in state or federal court, while judicial review of state hearing appeals under 20 U.S.C. § 1415(c) could only be heard in state court, because a request for monetary relief might be involved which would take away federal jurisdiction.

190. S. REP. No. 112, 99th Cong., 1st Sess. 17 (1985), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 1798, 1806 (additional views of Senators Kerry, Kennedy, Pell, Dodd, Simon, Metzenbaum, and Matsunga).

191. 20 U.S.C.A. § 1415(f) (West Supp. 1988).

192. *See* Mrs. W. v. Tirozzi, 832 F.2d 748, 751 (2d Cir. 1987).

The second is the civil rights remedies provision included in the Rehabilitation Act Amendments of 1986.[193] In this amendment, states' eleventh amendment immunity was abrogated under the Rehabilitation Act as well as several other statutes. This provision was seen by Senator Lowell Weicker, one of the co-sponsors of the Amendments, as a provision to close "a gap in civil rights protections by allowing individuals to enforce their rights in Federal court when State or State agency actions are at issue."[194]

This amendment is important because it legislatively overruled the decision in *Atascadero* as it applied to the Rehabilitation Act. Congress made it clear during the enactment of this amendment that it was overruling the Supreme Court's misinterpretation of congressional intent under the Rehabilitation Act.[195] This bolsters the *Atascadero* dissent's view that perhaps the special statutory draftsmanship rules in the area of eleventh amendment immunity are in fact being used by the Court to ignore true congressional intent.[196]

IV. Conclusion

The impact of the *Atascadero* "express waiver-abrogation" requirement reaches not only the EHA, but all existing federal statutes as well as all state constitutional and statutory provisions. As for state constitutional and statutory provisions, a state must now specifically indicate a willingness to be sued in federal court. *Atascadero* thus clearly implicates that a general waiver of immunity in a state constitution or statute is no longer sufficient. *Atascadero*, and the subsequent decision of the Court

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192. *See* Mrs. W. v. Tirozzi, 832 F.2d 748, 751 (2d Cir. 1987).

193. Pub. L. 99-506, § 1003, 100 Stat 1807, 1845 (1986) (codified at 42 U.S.C.A. § 2000d-7 (West Supp. 1988)) provides:

> (1) A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 794 of Title 29, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) area available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

194. 132 Cong. Rec. S12,096-97 (daily ed. September 8, 1986) (statement of Sen. Weicker).

195. *See, e.g.*, 132 Cong. Rec. S12,099 (daily ed. September 8, 1986) (statement of Sen. Simon).

196. *See supra* notes 61-62 and accompanying text.

in *Welch*, have also eliminated a constructive waiver of a state's immunity based on its participation in federally funded or regulated activities unless Congress expressly conditions participation in the federal program on a state's waiver of immunity.

However, the Court continues to recognize congressional abrogation of immunity under fourteenth amendment legislation where Congress unmistakably expresses its intent to abrogate the immunity within the statute itself. Although this test is more stringent than prior tests for abrogation, its standard is not unambiguous.

The right to an education is one of our nation's most cherished and ardently protected rights. In the EHA, Congress sought to protect the handicapped from the denials of a free public education that stymied their advancement and potential. Congress tied the EHA's protection to a comprehensive scheme of substantive rights enforceable through detailed procedural safeguards. Congress further realized that citizens would need to enforce the mandate of the Act privately, and, therefore, it amended the Act to award attorney's fees to prevailing plaintiffs.

Congress enacted the EHA to assure the handicapped were guaranteed equal protection of the laws under the fourteenth amendment. Although a state's amenability to suits under the EHA would inevitably impinge upon their state autonomy, a far greater harm will occur if the courts refuse to hold states accountable for their acts, as states are primarily and ultimately responsible for instituting the Act's programs and policies. Overtechnical application of the rules of statutory draftsmanship used to find abrogation must not be used by the courts to undermine the express intent of Congress to ensure the handicapped both an equal right to a free public education and an access to the full range of available remedies to protect that right.

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