LIABILITY UNDER SECTION 1983

Schools Legal Service
Orange County Department of Education

June 2003

LIABILITY
UNDER
SECTION 1983

Printed in the United States of America

Inquiries regarding permission for use of material contained in this publication should be addressed to:

Ronald D. Wenkart
General Counsel
Orange County Department of Education
200 Kalmus Drive, P.O. Box 9050
Costa Mesa, CA 92628-9050

SCHOOLS LEGAL SERVICE STAFF
Ronald D. Wenkart, General Counsel
Claire Y. Morey, Counsel
Lysa M. Saltzman, Counsel
Karen T. Meyers, Counsel
Norma Garcia, Paralegal

I.

HISTORY AND BACKGROUND OF SECTION 1983

Section 1983 of Title 42 of the United States Code was originally enacted by Congress as Section 1 of the Ku Klux Klan Act of April 20, 1871. Its purpose was to enforce the provisions of the Fourteenth Amendment to the United States Constitution.[1] The Act is also known as the Civil Rights Act of 1871. Section 1983 states in part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. …"

Section 1983's primary objective was to provide a means to enforce the provisions of the Fourteenth Amendment. Proponents of the bill argued that the states had no process by which persons could obtain redress for violations of constitutionally guaranteed rights and that federal legislation was the means by which these rights could be enforced.[2] Although the activities of the Klu Klux Klan were the primary evil that the bill was designed to remedy, the bill was not directed solely against the Klan and its members, but also against those persons who, in representing a state, were unable or unwilling to enforce a state law. Thus the bill was intended to protect not only the rights of African Americans who had recently been freed from slavery, but also the rights of all citizens against state sponsored infringement of constitutional rights.[3]

For many years after its passage, few lawsuits were filed under Section 1983. However, beginning in the 1960's, Section 1983 was frequently relied upon to redress a number of issues.

II.

BASIS OF LIABILITY UNDER SECTION 1983

In Monroe v. Pape,[4] the United States Supreme Court ruled that officials of a governmental body may be sued under Section 1983. In Monroe, the police searched the wrong house without a search warrant. Even though narcotics were found in the house, the search was deemed to be improper and the individuals arrested in the house were released. The individuals then brought suit in federal court pursuant to Section 1983 alleging that the City of Chicago and the individual police officers had violated their rights against unreasonable search and seizure under the Fourth Amendment. The lower courts dismissed the suit. The United States Supreme

[1] Ch. 22, 17 Stat.13 (42nd Cong., 1st Sess.). See, also, Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 476 (1961).
[2] Cong. Globe, 42nd Cong., 1st Sess., 374-376 (1871) (Remarks of Congressman Lowe).
[3] Cong. Globe, 42nd Cong., 1st Sess., 335, 374-376.
[4] 365 U.S. 167, 81 S.Ct. 473 (1961).

Court reversed. The court went on to hold that the phrase "under color of" included acts of an official acting under color of state authority. [5]

To successfully prevail in an action under Section 1983, the courts have held that plaintiffs must allege and prove two essential elements. First, plaintiffs must show that the alleged conduct occurred under color of state law. Second, plaintiffs must show that the conduct deprived plaintiffs of rights, privileges, or immunities secured by the United States Constitution or a federal statute.[6]

In Monell v. Department of Social Services,[7] the United States Supreme Court held that a city is a person for purposes of Section 1983. However, a state is not a "person" for purposes of Section 1983.[8] In addition, state officials sued in their official capacities for damages or other retroactive relief are not persons for purposes of Section 1983.[9] However, the court noted that a plaintiff may sue a state official for injunctive relief because that is prospective relief.[10] While a state official may not be sued in their official capacity, the United States Supreme Court has held that state officials and local officials may be sued in their "personal" capacity where the suit seeks to impose individual, personal liability on the government officer for actions taken under color of state law with the badge of state authority.[11]

A plaintiff who brings an action under Section 1983 for violation of rights secured by the Fourteenth Amendment must establish that the violation resulted from state action and, thus, meets the statutory requirement of under "color of state law."[12] Independent contractors and other individuals who willfully participate in a joint activity with a state or a local agency may meet the requirements of acting under color of state law.[13]

Under Section 1983, a plaintiff must show that the challenged acts occurred under a governmental policy, custom or usage. In Adickes v. S.H. Kress & Co.,[14] the United States Supreme Court held that custom, for purposes of Section 1983, must have the force of law by virtue of the persistent practices of state officials. A political subdivision of the state may have a custom with force of law, even if that custom is not applied statewide.[15]

Plaintiffs may bring an action under Section 1983 if their rights privileges or immunities secured by federal statutory law were violated.[16] In Maine v. Thiboutot, the plaintiffs claimed that the State of Maine had deprived them of welfare benefits to which they were entitled under the federal Social Security Act. The Supreme Court rejected Maine's argument that the phrase secured by the constitution and laws in Section 1983 was limited to civil rights or equal

[5] Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961).
[6] Treatise on Constitutional Law, Section 19.16 (1999), pg. 64.
[7] 436 U.S. 658, 98 S.Ct. 2018 (1978).
[8] Will v. Michigan Department of State Police, 491 U.S. 58, 109 S.Ct. 2304 (1989).
[9] Id. at 70.
[10] Id. at 70, note 10.
[11] Hafer v. Melo, 502 U.S. 21, 112 S.Ct. 358 (1991).
[12] Lugar v. Edmondson Oil Company, 457 U.S. 922, 935, note 18, 102 S.Ct. 2744, 2753, note 18 (1982).
[13] West v. Atkins, 487 U.S. 42, 108 S.Ct. 2250 (1988); Adickes v. S.H. Kress & Co., 398 U.S. 144, 152-90 S.Ct. 1598, 1605 (1970).
[14] 398 U.S. 144, 90 S.Ct. 1598 (1970).
[15] Id. at 171.
[16] Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502 (1980).

protection laws. The Supreme Court held that the Section 1983 broadly included violations of federal statutory law as well as federal constitutional law.[17]

III.

IMMUNITY FROM LIABILITY

Certain officials are immune from liability under Section 1983. For example, judges acting in their judicial role and legislators acting in their legislative role are absolutely immune from liability for damages under Section 1983.[18] The courts have also recognized a qualified immunity defense under Section 1983. The scope of qualified immunity includes most state and local officials.[19]

In Wood v. Strickand,[20] the United States Supreme Court held that school board members were entitled to qualified immunity. The court held that if the official knew or reasonably should have known that the action taken would violate the constitutional rights of the plaintiffs or if the official took the action with the malicious intention to cause a deprivation of constitutional rights or injury to the plaintiff, then the official could be held liable under Section 1983. In determining whether qualified immunity applies, the courts must look to currently applicable law and determine whether the law was clearly established at the time the action in question occurred, and if so, the public official must show that because of extraordinary circumstances, he or she did not know, nor reasonably should have known, of the relevant standard.

In Wood v. Strickland, the school board members failed to give a due process hearing to students accused of mixing an alcoholic beverage with other liquid and serving it at a school function. The court found that the school board's disposition of the matter did not constitute a hearing and that the school board's expulsion of the students did not comply with clearly established law, and therefore, the student's rights were denied and the school board members could be held liable under Section 1983.[21]

In Wood v. Strickland, a lawsuit was filed against members of the school board and two school administrators under Section 1983, claiming that their federal constitutional rights to due process were infringed under color of state law by their expulsion from the school district on the grounds of their violation of a school regulation prohibiting the use or possession of intoxicating beverages at school or school activities. The compliant, as amended, sought compensatory and punitive damages, injunctive relief to resume school attendance, an injunction preventing the school district from imposing any sanctions as a result of the expulsion, an injunction restraining enforcement of the challenged regulations, as well as declaratory relief as to the constitutional invalidity of the regulation, and the expungement of any record of the student's expulsion.[22]

At the time of the expulsion, the students were sixteen years old and in the tenth grade. The students agreed to "spike" the punch at a school activity with malt liquor. They bought two

[17] Id. at 4.
[18] Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213 (1967); Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 283 (1951).
[19] Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 92 (1975).
[20] 420 U.S. 308 (1975).
[21] Ibid.
[22] Id. at 310.

ten ounce bottles and mixed it into the punch and the punch was served at the meeting without apparent effect.[23]

Ten days later the teacher in charge of the extracurricular activity heard something about the spiking of the punch and questioned the students involved. The students admitted their involvement to the teacher and then later admitted their involvement to the principal. The principal then suspended them from school for a two week period. At the first board meeting, the teacher and the principal recommended leniency. However, the superintendent of schools received a phone call from the teacher's husband, also a teacher at the high school, who reported that he had heard that one of the girls involved had been in a fight that evening at a basketball game. The superintendent informed the board members of the news but did not mention the name of the girl involved. The teacher and the principal then withdrew their recommendations of leniency and the members of the board voted to expel the girls from school for the remainder of the semester, a period of approximately three months.[24]

The board subsequently agreed to hold another meeting on the matter two weeks later. The girls, their parents and their legal counsel attended the second meeting. The girls admitted mixing the malt liquor into the punch with the intent of "spiking" it but asked the board to forego its rule punishing such violations by such substantial suspensions. Neither the teacher nor the principal were present at the meeting. The board voted not to change its policy and expelled the girls for the remainder of the semester.[25]

The court, in Wood v. Strickland, reviewed prior cases with respect to the scope of immunity protecting various types of governmental officials from liability for damages under Section 1983. The court noted that school board members function at different times in the nature of legislators and adjudicators in the school disciplinary process. The court noted that school boards are often faced with instances of civil disorder and confronted with student behavior causing or threatening disruption and that school board members have an obvious need for prompt action and decisions must be made in reliance on factual information supplied by others.[26]

The court noted that liability for damages for every action which is found subsequently to have been in violation of a student's constitutional rights and to have caused injury would unfairly impose upon school officials the burden of mistakes made in good faith in the course of exercising their discretion. The court noted that school board members must judge whether there has been a violation of school regulations and the appropriate sanctions for those violations. Denying any measure of immunity in these circumstances would not contribute to principled and fearless decisionmaking but to intimidation.[27] The court stated:

> "The imposition of monetary costs for mistakes which were not unreasonable in light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of

[23] Id. at 311.
[24] Id. at 311-312.
[25] Id. at 312-313.
[26] Id. at 319.
[27] Id. at 319.

> the school and the students. The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure."[28]

For these reasons, the United States Supreme Court felt that school officials including school board members and employees should be entitled to qualified immunity for action taken in the good faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances.[29]

The court stated:

> "Implicit in the idea that officials have some immunity – absolute or qualified – for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all."[30]

The court noted that a school official must be acting sincerely and with a belief that he or she is doing right to receive immunity. However, an act that violates a student's constitutional rights cannot be justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with the supervision of students' daily lives.[31] The Supreme Court concluded:

> "Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are 'charged with predicting the future course of constitutional law.' . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."[32]

The court went on to state that the regulation which used the term intoxicating beverage should not be required to be linked to the definition in state criminal statutes which might require a higher alcohol content. The court ruled that the lower courts could rely on the intent of the school board members who passed the regulation. The court reversed a Court of Appeals conclusion that the school board's interpretation of its own regulation was not reasonable and should be linked to the state criminal statute.[33] The Supreme Court stated:

> "But Section 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceeding or the proper

[28] Id. at 319-320.
[29] Id. at 321.
[30] Id. at 321.
[31] Id. at 321.
[32] Id. at 322.
[33] Id. at 325-326.

> construction of school regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members and Section 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees."[34]

The Supreme Court sent the matter back to the lower courts to determine whether the students had been denied procedural due process at the first school board meeting and whether the school district had cured the initial procedural deficiencies at the second board meeting based on the principles set forth in its decision.[35]

In Gomez v. Toledo,[36] the Supreme Court held that the defendant has the burden of pleading qualified immunity. The Supreme Court held that the defendant would know whether there are underlying facts which would support a qualified immunity defense. Therefore, it is reasonable to require the defendant to plead the defense of qualified immunity.[37]

In Davis v. Scherer,[38] the United States Supreme Court analyzed the issue of clearly established rights. The Supreme Court held that if, at the time of employee's conduct and the termination of his employment, there was no clearly established due process right that was violated, when the plaintiff was discharged without a pre-termination hearing, then it was not unreasonable under Fourteenth Amendment due process principles for the Florida Department of Highway Safety and Motor Vehicles to conclude that the employee had been provided with the fundamentals of due process. The court held that a plaintiff who seeks damages for violation of constitutional or statutory rights may overcome defendant officials' qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.[39]

In Davis, the employee was employed by the Florida Highway Patrol as a radio teletype operator and asked for permission from his employer to work as well for the local county sheriff as a reserve deputy. To avoid conflicts of interest, the Florida Highway Patrol required that all proposed outside employment of patrol members must be approved by the Department. Initially, the employee was granted permission to accept the part time work but a month later the permission was revoked. The employee continued to work at the second job despite the revocation of permission, explaining that he had invested too much money in uniforms to give up his part time work.

The court noted that under its previous decision in Harlow v. Fitzgerald,[40] state and local officials are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The court noted that state and local officials sued for constitutional violations do not

---

[34] Id. at 326.
[35] Id. at 327.
[36] 446 U.S. 635, S.Ct. 1920 (1980).
[37] Id. at 641.
[38] 468 U.S. 183, 104 S.Ct. 3012 (1984).
[39] Ibid.
[40] 457 U.S. 800, 102 S.Ct. 2727 (1982).

lose their qualified immunity merely because their conduct violates some statutory or administrative provision.[41]

The court noted, "Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation – of federal or of state law – unless that statute or regulation provides the basis for the cause of action sued upon."[42] The court stated:

> "We acknowledge of course that officials should conform their conduct to applicable statutes and regulations . . . Appellee's submission, if adopted, would disrupt the balance that our cases strike between the interests in vindication of citizen's constitutional rights and in public officials' effective performance of their duties. The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated . . . Yet, under appellee's submission, officials would liable in an indeterminate amount for violation of any constitutional right – one that was not clearly defined or perhaps not even foreshadowed at the time of the alleged violation – merely because their official conduct also violated some statute or regulation."[43]

In essence, the United States Supreme Court said that not every violation of a federal or state statute or regulation would give rise to liability for damages under Section 1983. The court went on to state:

> "Nor is it always fair, or sound policy, to demand official compliance with statute and regulation on paying of money damages. Such officials as police officers or prison wardens, to say nothing of higher level executives who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to plethora of rules, 'often so voluminous, ambiguous and contradictory, and in such flux that officials can only comply with or enforce them selectively.' In these circumstances, officials should not err always on the side of caution."[44]

The court concluded that a plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.[45]

IV.

DAMAGES UNDER SECTION 1983

In Carey v. Piphus,[46] the United States Supreme Court held that students could sue for damages under Section 1983 for a deprivation of their rights. In Carey, the students alleged that

[41] Id. at 191-194.
[42] Id. at 194, note 12.
[43] Id. at 194-195.
[44] Id. at 196.
[45] Id. at 197.
[46] 435 U.S. 247 (1978).

they had been suspended from school without due process of law. The court held that in order to recover substantial damages, the students must prove that they were actually deprived of a right, and since there was no proof of actual injury, the students were awarded $1.00 in damages each.

In Carey, students were suspended for twenty days for violating school rules against the use of drugs. The students claimed that they had not been smoking marijuana but were suspended over their protests. Despite the ruling of Goss v. Lopez, which held that an evidentiary hearing for suspensions in excess of ten days must be held, the school board suspended the students for twenty days without such hearings.[47]

Another student was suspended for twenty days for wearing an earring to school. The school district instituted a no earring policy to reduce gang violence.[48]

The federal district court ruled in favor of the students and ordered their reinstatement. The district court held that both students had been suspended without procedural due process and held that the school district was not entitled to qualified immunity from damages because they should have known that a suspension in excess of ten days without an adjudicative hearing or expulsion hearing would violate procedural due process.[49]

The Supreme Court granted a hearing to consider whether, in an action under Section 1983 for the deprivation of procedural due process, a plaintiff must prove that he or she was actually injured by the deprivation before they may recover substantial "nonpunitive" damages.[50] The court held that rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests and their contours are shaped by the interests they protect.[51] The court looked to the common law of torts and compensatory damages and was concerned that in some circumstances an award of damages for injuries caused by the suspensions would constitute a windfall rather than compensation.[52]

The court rejected the students' argument that damages should be presumed in cases involving deprivation of procedural due process.[53] The court held that students must show actual injury to recover compensatory damages but that if there was a violation of their procedural due process rights, they were entitled to nominal damages.[54] The court stated:

> "By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights."[55]

---

[47] Id. at 249.
[48] Id. at 250.
[49] Id. at 251.
[50] Id. at 253.
[51] Id. at 254.
[52] Id. at 260.
[53] Id. at 262-263.
[54] Id. at 266.
[55] Id. at 266.

The Supreme Court has held that punitive damages are available under Section 1983.[56] The court held that a jury could assess punitive damages in a 1983 action if the plaintiff showed that the defendant's conduct was motivated by evil motive or intent or that the defendant's conduct involved reckless or callous indifference to the federally protected rights of others.[57]

Equitable relief, including injunctive relief, is available under Section 1983.[58] In addition, Congress enacted the Civil Rights Attorneys Fees Awards Act of 1976 to authorize the award of attorney's fees under Section 1983.[59]

V.

PERSONAL LIABILITY UNDER SECTION 1983

Under Section 1983, school district employees may be sued in their personal or individual capacity. Under these circumstances, an employee or board member of a school district may be found to be individually liable even though the school district may not be. The plaintiff must show that the individual employee or school board member violated a clearly established law and that the individual exhibited a callous indifference for the rights of the plaintiff.[60] In Davis v. Scherer,[61] the Supreme Court held that:

> "Officials are shielded from liability for civil damages insofar as their conduct does not violate the clearly established statutory or constitutional rights of which a reasonable person would have known."[62]

In Hafer v. Melo,[63] the Supreme Court held that state officers may be personally liable for damages under Section 1983 based upon actions taken in their official capacities. The court held that the state officer's potential liability is not limited to acts under color of state law that are outside their authority or not essential to operation of state government, but also extends to acts within their authority and necessary to performance of governmental functions and Eleventh Amendment immunity does not erect barriers against suits to impose individual and personal liability on state officers under Section 1983. A similar rule would apply to local officials.

In Hafer, the United States Supreme Court rejected the argument that the language of Section 1983 does not authorize suits against state officers for damages arising from official acts. In 1988, Barbara Hafer sought election to the post of Auditor General of Pennsylvania. During the campaign, Hafer publicly promised to fire all employees on a list of twenty one employees given to her by the United States Attorney, James West. Hafer won the election and shortly after becoming Auditor General, she dismissed eighteen employees, including James Melo, on the basis that they "bought" their jobs. Melo and seven other terminated employees sued Hafer and West in federal district court. They asserted state and federal claims, including a claim under

[56] Smith v. Wade, 461 U.S. 30, 103 S.Ct. 1625 (1983).
[57] Id. at 56.
[58] See Millikin v. Bradley, 418 U.S. 717, 94 S.Ct. 3112 (1974).
[59] 42 U.S.C. section 1988.
[60] Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806 (1985).
[61] 468 U.S. 183, 104 S.Ct. 3012 (1984).
[62] Id. at 191.
[63] 502 U.S. 21, 112 S.Ct. 358 (1991).

Section 1983 and sought monetary damages. Another group of employees who lost their jobs filed suit as well and alleged that Hafer discharged them because of their affiliation with the Democratic Party and support for her opponent in the 1988 election. The district court consolidated the two actions and dismissed all their claims.[64]

The Court of Appeals for the Third Circuit reversed the district court's decision. The Court of Appeals held that while Hafer's power to hire and fire derived from her position as Auditor General, it said, a suit for damages based on the exercise of this authority could be brought against Hafer in a personal capacity because Hafer acted under color of state law. The Court of Appeals held that respondents could maintain a Section 1983 individual capacity suit against her.

The United States Supreme Court agreed to hear an appeal and sought to clarify the confusion about the distinction between personal capacity and official capacity lawsuits under Section 1983. The court held that official capacity lawsuits generally represent only another way of pleading an action against an entity of which an officer is an agent. Therefore, the court treats suits against state officials in their official capacity as suits against the state or local agency. When officials sued in this capacity in federal court die or leave office, their successors automatically assume their roles in the litigation. In official capacity suits, since it is the governmental entity and not the named official, the entity's policy or custom must have played a part in the violation of federal law. For the same reason, the only immunities available to the defendant in an official capacity action are those that the governmental entity possesses.[65]

Personal capacity suits, on the other hand, seek to impose individual or personal liability upon a governmental officer for actions taken under color of state law. To establish personal liability in a Section 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. While the plaintiff in a personal capacity lawsuit need not establish a connection to governmental policy or custom, officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law.[66]

State or local officers sued in their personal capacity come to court as individuals. A government official in the role of personal capacity defendant thus fits within the statutory term of person in Section 1983.[67]

The court rejected Hafer's argument that she should not be personally liable for any actions taken in her official capacity. The court concluded that only a very limited class of officials, including the President of the United States, legislators carrying out their legislative functions, and judges carrying out their judicial functions require complete protection from suit. The court held that state executive officials are not entitled to absolute immunity for their official actions and held that qualified immunity attaches to administrative employment decisions, even if the same official has absolute immunity when performing other functions.[68]

[64] Id. at 23.
[65] Id. at 25.
[66] Ibid.
[67] Id. at 26.
[68] Id. at 27-29.

The court also held that Eleventh Amendment immunity does not apply to suits to impose individual and personal liability on state officials under Section 1983. The court went on to state:

> "To be sure, imposing personal liability on state officers may hamper their performance of public duties. But such concerns are properly addressed within the framework of our personal immunity jurisprudence . . .
>
> We hold that state officials, sued in their individual capacities are 'persons' within the meaning of Section 1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under Section 1983 solely by virtue of the 'official' nature of their acts."[69]

VI.

THE AWARD OF SECTION 1983 DAMAGES UNDER THE IDEA

The federal appellate courts are split on whether parents of special education students and special education students may recover monetary damages under Section 1983 for statutory violations of the IDEA. In addition, at least one California court has ruled that a plaintiff may not recover monetary damages for a violation of the IDEA under Section 1983.[70]

The Second and Third Circuits have held that when Congress amended the IDEA, Congress intended to allow the parents of special education students to bring lawsuits under Section 1983.[71] However, the Fourth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits have held that the parents of special education children may not bring suit under Section 1983 for alleged violations of the IDEA.[72]

In Mrs. W. v. Tirozzi, the Court of Appeals held that prior to 1986, no express private right of action was found in the Education of the Handicapped Act (now IDEA).[73] In response to the Supreme Court's decision in Smith v. Robinson,[74] the Court of Appeals held that the Supreme Court added 20 U.S.C. section 1415(f), (now 1415(l)) to the IDEA. The court held that this statutory provision states that the provisions of the IDEA do not provide the exclusive avenue for redress available to disabled children and that Section 504 of the Rehabilitation Act of 1973 and 42 U.S.C. section 1983 and other constitutional or statutory provision may be used as remedies to enforce the IDEA educational rights subject to the IDEA's existing exhaustion requirements.[75]

---

[69] Id. at 31.
[70] White v. State of California, 195 Cal.App.3d 452, 471, 240 Cal.Rptr. 732 (1987).
[71] See, Mrs. W v. Tirozzi, 832 F.2d 748, 750, 42 Ed.LawRptr. 727 (2nd Cir. 1987); WB v. Matula, 67 F.3d 484, 492, 104 Ed.LawRptr. 28 (3rd Cir. 1995). See, also, 20 U.S.C. section 1415(f), now Section 1415(l).
[72] Sellers v. School Board, 141 F.3d 524, 529, 125 Ed.LawRptr. 1078 (4th Cir. 1998); Padilla v. School District No. 1, 233 F.3d 1268, 113 Ed.LawRptr. 559 (10th Cir. 2000); Charlie F. v Board of Education, 98 F.3d 989 (7th Cir. 1996); Heidemann v. Rother, 84 F.3d 1021 (8th Cir. 1996); Crocker v. Tennessee School Athletic Association, 980 F.2d 382, 79 Ed.LawRptr. 389 (6th Cir. 1992); Witte v. Clark County School District, 197 F.3d 1271 (9th Cir. 1999); Robb v. Bethel School District, 308 F.3d 1047 (9th Cir. 2002).
[73] Id. at 751.
[74] 468 U.S. 992, 1013, 104 S.Ct. 3457, 3469 (1984).
[75] Id. at 751.

In W.B. v. Matula, the Court of Appeals noted that Section 1983 does not confer substantive rights but redresses the deprivation of those rights elsewhere secured and that those rights may be created by the Constitution or a federal statute. The court held that plaintiffs may file a Section 1983 action to challenge federal statutory violations by state or local officials. However, the court noted that Section 1983 actions are impermissible when Congress intended to foreclose such private enforcement and that such intent is generally found either in the express language of a statute or where a statutory remedial scheme is so comprehensive that an intent to prohibit enforcement other than by the statute's own means may be inferred.[76]

In W.B. v. Matula, the court noted that the Supreme Court, in Smith v. Robinson, held that the IDEA was a comprehensive statute and the exclusive means by which parents and children could secure a free appropriate public education. In response to Smith, Congress amended the IDEA to add Section 1415(f) (now 1415(l)), a provision which establishes that the IDEA's provisions are not the sole means for redress available to disabled children and their parents.[77] The court, in W.B. v. Matula, went on to state that damages were an available remedy under Section 1983 and held that, " . . . as a matter of law, an aggrieved parent or disabled child is not barred from seeking monetary damages . . ."[78]

As indicated above, a number of appellate courts have held that parents of special education children may not bring damage suits under Section 1983 for alleged violations of the IDEA.[79]

In Sellers, the Court of Appeals reviewed the history of Section 1415(l) and noted that Section 1415(l), (formerly 1415(f)), does not expressly include Section 1983. The court noted:

> "Concededly, Section 1415(f), [now 1415(l)], overrules much of Smith's holding. The amendment specifically rejects the Smith court's interpretation of the EHA as precluding claims under the Constitution or the Rehabilitation Act that are virtually identical to EHA claims. But while Section 1415(f) explicitly preserves remedies under the Constitution, the Rehabilitation Act, and specified 'other' statutes, it simply fails to mention Section 1983. The reference to 'other' statutes protecting the rights of disabled children cannot naturally be read to include 42 U.S.C. Section 1983, a statute which speaks generally and mentions neither disability nor youth. By preserving rights and remedies 'under the Constitution,' Section 1415(f) does permit plaintiffs to resort to Section 1983 for constitutional violations, notwithstanding the similarity of such claims to those stated directly under the IDEA. But Section 1415(f) does not permit plaintiff to sue under Section 1983 for an IDEA violation, which is statutory in nature."[80]

The court went on to note that nothing in Section 1415(f) overrules the Supreme Court's decision in Smith to the extent that Smith held that Congress intended the IDEA to provide the sole remedies for violations of that same statute. If Congress meant to overrule Smith on this

[76] Id. at 493.
[77] Id. at 493.
[78] Id. at 495.
[79] See, Footnote 71.
[80] Id. at 530.

significant point, it certainly chose an oblique and essentially implausible means of doing so according to the court in Sellers.[81]

The court in Sellers also noted that the IDEA is a joint federal state program under Congress' spending power. In return for federal funds to aid the education of disabled children, participating states must meet certain statutory requirements. Since funding statutes operate much like contracts between the federal and state governments, the legitimacy of Congress' power to legislate under the spending power rests on whether the state voluntarily and knowingly accepted the terms of the contract. States cannot knowingly accept federal funding conditions unless they are accurately apprised of the requirements being imposed by the federal government. Therefore, if Congress desires to condition the state's receipt of federal funds it must do so unambiguously.[82]

The Court of Appeals in Sellers, went on to state that Section 1415(f) lacks the clarity required under the spending clause. The court noted that Section 1415(f) fails to state or even imply that Section 1983 suits may be brought for IDEA violations. Instead, it omits Section 1983 from its list of statutes. The Court of Appeals in Sellers stated that this omission is significant and that permitting the recovery of general damages through Section 1983 actions for IDEA violations would subject school boards to damages much greater than the potential liability for tuition reimbursement they currently face under IDEA itself.[83] The Court of Appeals stated:

> "Section 1415(f)'s vague language surely did not place States on notice of such sweeping and open-ended liability. If we were to permit section 1983 claims like the Sellers' to proceed, we would effectively blindside States with large and unanticipated penalties. Accordingly, we hold that Section 1415(f) fails to express unambiguously a congressional intent that IDEA violations also be remedied by Section 1983 . . . We hold that Sellers cannot sue under Section 1983 for alleged IDEA violations."[84]

In Padilla, the Court of Appeals agreed with the decision in Sellers and held that Section 1983 may not be used to remedy IDEA violations.[85] In Witte v. Clark County School District,[86] the Court of Appeals held that a plaintiff seeking monetary damages for physical and emotional abuse under Section 1983, Section 504 of the Rehabilitation Act[87] and the Americans with Disabilities Act (ADA)[88] were not required to exhaust their administrative remedies under the IDEA because " . . . ordinarily, monetary damages are not available under that statute."[89] The court noted that the plaintiffs had already resolved all other issues under the IDEA administrative processes and were seeking retrospective damages only.

---

[81] Id. at 530.
[82] Id. at 531-532.
[83] Id. at 532.
[84] Id. at 532.
[85] Padilla v. School District No. 1, 233 F.3d 1268 (10th Cir. 2000).
[86] 197 F.3d 1271 (9th Cir. 1999).
[87] 29 U.S.C. section 794.
[88] 42 U.S.C. sections 12101, et seq.
[89] 197 F.3d 1271, 1275 (9th Cir. 1999).

In Robb v. Bethel School District,[90] the Court of Appeals held that plaintiffs, in most cases must exhaust the IDEA administrative remedies. The court stated:

> "Because money damages are not 'available under' the IDEA . . . it might seem that a plaintiff can avoid the IDEA's exhaustion requirement merely by limiting the prayer for relief to money damages. But only one circuit court has so held. . . . A larger number of circuit courts have taken the opposite approach. . . .[91]

The court in Robb held that it is not the remedy sought but the underlying injuries that determine whether relief can be granted under the IDEA and administrative remedies must be exhausted. In Robb, the court held that the alleged loss of education due to the child being "pulled out" for tutoring should be addressed at an IDEA administrative hearing first to determine if remedies other than money damages would redress their grievance. The court stated:

> "We stated, in other words, that the '[p]laintiff in fact ha[d] used administrative procedures to secure the remedies that are available under the IDEA.' . . . Moreover, the plaintiff was seeking only retrospective damages, not damages to be measured by the cost of remedial services (such as those offered under the IDEA). . . . Finally, and perhaps most importantly, the plaintiff's allegations centered around physical abuse and injuries. We wrote, 'The remedies available under the IDEA would not appear to be well suited to addressing past physical injuries adequately; such injuries typically are remedied through an award of monetary damages.'. . . In Witte, neither the genesis nor the manifestations of the abuse were educational. . . . There was no reason to believe the plaintiff's injuries could be redressed to any extent by the IDEA's administrative procedures and remedies. So we permitted the plaintiff to avoid the IDEA's exhaustion requirement. We did not intend to chart a course away from the holdings of our sister circuits."[92]

The court went on to note:

> "The Robbs are in a very different position from the claimant in Witte. They have not taken full advantage of the IDEA administrative procedures to secure the remedies available thereunder. They do not claim physical injury. And they request money damages to compensate them for psychological and educational injuries the IDEA may remedy. . . . Because their injuries could be redressed to some degree by the IDEA's administrative procedures and remedies, the Robbs' complaint must be dismissed. We agree with our sister circuits that where, as here, a plaintiff has alleged injuries that could be redressed to some degree by the IDEA's administrative procedures and remedies, then the courts should require exhaustion of the administrative remedies."[93]

---

[90] 308 F.3d 1047 (9th Cir. 2002).
[91] Id. at 1049.
[92] Id. at 1052.
[93] Id. at 1052-1054.

VII.

THE ORDWAY DECISION

Recently, attorneys representing parents of special education children have been filing and threatening to file actions under Section 1983 against school district employees in their individual or personal capacity. As discussed above, a number of appellate courts, including the Ninth Circuit, have ruled that Section 1983 damages are not available for violations of the IDEA.[94] However, in a recent district court case, a federal district judge ruled that the parent of a special education student may recover damages against a director of student services under Section 1983.[95]

The court in Ordway based its decision on the language in Section 1415(f).[96] Section 1415(f), now Section 1415(l), states:

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

Although Section 1415(l) does not specifically refer to Section 1983 actions, the federal district court in Ordway ruled that parents of special education children may file an action under Section 1983. The court in Ordway noted:

> "One important result that flows from the determination that statutory violations of IDEA may support a Section 1983 action is the availability of damages for violation of IDEA. The court is mindful that a damages remedy for IDEA violations will have significant policy implications. However, by providing for Section 1983 to address IDEA violations, Congress appears to have intended this result. . . ."[97]

The court in Ordway went on to discuss Eleventh Amendment immunity. In previous cases, the Ninth Circuit has granted school districts Eleventh Amendment immunity as an arm of the state. The court in Ordway held that the Director of Student Services, as a school district employee, was entitled to Eleventh Amendment immunity in her official capacity.[98]

---

[94] Witte v. Clark County School District, 197 F.3d 1271 (9th Cir. 1999); Robb v. Bethel School District, 308 F.3d 1047 (9th Cir. 2002).
[95] Goleta Union Elementary School District v. Ordway, 166 F.Supp.2d 1287, 158 Ed.LawRptr. 254 (2001); see, also, Goleta Union Elementary School District v. Ordway, 248 F.Supp.2d 936 (C.D.Cal. 2002).
[96] 20 U.S.C. section 1415(f) (now 1415(l)).
[97] Id. at 1295-96.
[98] Id. at 1297; see, also Belanger v. Madera Unified School District, 963 F.2d 248 (9th Cir. 1992).

The court in Ordway went on to state that the Director of Student Services could be sued in her individual or personal capacity (despite the Ninth Circuit decisions in Witte[99] and Robb[100]) and that the employee may raise the defense of qualified immunity. The court in Ordway noted that public officials who carry out executive or administrative functions are protected from personal monetary liability so long as their actions do not violate clearly established federal statutory or constitutional standards which a reasonable person knew or should have known.[101] This standard turns on the objective reasonableness of the official's conduct.[102] The United States Supreme Court in Harlow v. Fitzgerald summarized the standard as follows:

> ". . . Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time this action was taken."[103]

The court in Ordway noted that government officials performing discretionary functions are entitled to qualified immunity when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

In Collins v. Jordan,[104] the Ninth Circuit established a two part test for determining whether a state official is entitled to qualified immunity:

> "The Court must first determine whether the plaintiff has alleged a violation of a right which is clearly established and stated with particularity . . . the plaintiff bears the burden of showing that the right he alleges to have been violated was clearly established . . . Second, the Court must consider whether, under the facts alleged, a reasonable official could have believed that his conduct was lawful . . . It is the defendant's burden to show that a reasonable . . . officer could have believed, in light of the settled law, that he was not violating a constitutional or statutory right."[105]

The threshold determination of whether the law governing the contested issue is clearly established is a question of law for the court.[106] The right the official is alleged to have violated must have been clearly established in a more particularized manner and the contours of the right must be sufficiently clear that a reasonable official would understand that what he or she is doing violates that right.[107]

In Ordway, the federal district court held that the Director of Student Services' conduct in transferring a special education student, at the request of the student's mother, from Goleta Valley Junior High School to La Colina Junior High School without investigation as to whether La Colina Junior High School would be an appropriate placement for the student, was a violation

---

[99] Witte v. Clark County School District, 197 F.3d 1271 (9th Cir. 1999).
[100] Robb v. Bethel School District, 308 F.3d 1047 (9th Cir. 2002).
[101] Id. at 1298; Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982).
[102] Id. at 818.
[103] Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034 (1987).
[104] 110 F.3d 1363 (9th Cir. 1996).
[105] Id. at 1369.
[106] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
[107] Goleta Union Elementary School District v. Ordway, 166 F.Supp.2d 1287, 1299 (C.D. Cal. 2001).

of clearly established law, even though the transfer of the special education student to a similar junior high school within the same school district was at the request of the child's mother. The court in Ordway found that the sole conduct at issue was the Director of Student Services' conduct in arranging a transfer of the special education student to La Colina Junior High in February, 1997. The court held that the contours of the right must be sufficiently clear. To make this determination, the court is required to survey the legal landscape and examine those cases that are most like the instant case.[108] The court in Ordway stated:

> "The Court finds that it was clearly established at the time that Rigby acted that school officials were under an obligation to fully assess a student before instigating a substantial change in the student's placement, such as a transfer of schools. … Title 34 C.F.R. section 104.35(a) clearly establishes that an evaluation must be conducted before any significant changes in a student's placement are instituted. In addition, placement decisions must be based upon the IEP. 34 C.F.R. section 300.552(a)(2). Thus the IEP must be developed before a placement is chosen. . . .
>
> "The Court finds that under clearly established law, Andrew's transfer from Goleta Valley to La Colina was an improper change in placement because it was made without the development of goals and objectives pursuant to an IEP, and without using the proper criteria for making placement decisions. The Court therefore finds that the law governing the conducted issue is clearly established, at least as related to Rigby's transfer of Andrew to La Colina Junior High School. Under IDEA and its enacting legislation, the law clearly required Rigby to conduct an assessment before changing Andrew's placement."[109]

The court went on to state that the Director of Student Services may, nevertheless, be entitled to qualified immunity if she could show that a reasonable official would not have known that the conduct in question would violate the student's clearly established rights. However, the court found that it was implausible that an official with the Director of Student Services level of responsibility would not know that it was unlawful to take action to change the placement of a disabled child based solely on the telephone call of a parent. The court held that the Director of Student Services should be familiar with the statutory requirements of the IDEA and that the IDEA and its implementing regulations do not allow a school official to transfer a special education student based solely on the telephone call of a parent. The court stated:

> "IDEA requires that the education of a disabled student be 'reasonably calculated' to provide a student with some educational benefit. Such calculation and planning appears to have been absent from Rigby's decision to transfer Andrew to La Colina. The Court finds that it is clear that a reasonable supervisory official familiar with the precision and scope of IDEA's requirements would know that the law required more than the simple accommodation of a parent's request. The Court finds that a reasonable official could not have believed that it was lawful to transfer Andrew Ordway to a different school

[108] Ibid.
[109] Id. at 1301-1302.

without first conducting an investigation into whether the transfer was a proper placement."[110]

VIII.

CHANGE OF PLACEMENT UNDER THE IDEA

The stay put provision of the Individuals with Disabilities Education Act (IDEA) is one of the most unique and controversial provisions of the IDEA. The stay put provision limits the ability of school administrators to unilaterally transfer or change the placement of special education students.

School administrators view the stay put rule as a hindrance or impediment to maintaining order and a safe environment in public schools. School administrators view the stay put rule as a blunt federal intrusion into their traditional authority to unilaterally make decisions at the local level. Parents and advocates for the disabled see the stay put rule as a check on the unfettered power of school administrators to transfer special programs without parental input and without consideration of the child's disability and special needs. Parents and advocates for the disabled cite past examples of abuses at the local level as justifying federal intervention.

The stay put provision, 20 U.S.C. section 1415(j) states:

> "Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardians otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed."

The federal regulations, 34 C.F.R. 300.513, contain similar language.

In Honig v.Doe,[111] the United States Supreme Court stated there were no legislative exceptions to the stay put rule and held that a special education student could not be suspended from school more than ten days without parental permission or a court order. As a result of this decision, districts have had to seek court orders when students bring guns or knives to school or engage in violent behavior.

The court in Honig stated:

> "The language of Section 1415(e)(3) is unequivocal. It states plainly that during the pendency of any proceedings initiated under the Act, unless the state or local educational agency and the parents or guardians of a disabled child otherwise agree, the child ***shall*** remain in the then current educational placement."

[110] Id. at 1303.
[111] 108 S. Ct. 592, 43 Ed. Law Rptr. 857 (1988).

Since the Honig decision, Congress has legislatively enacted exceptions to the stay put rule. These changes set forth in 20 U.S.C. section 1415(k) authorize school administrators to order a change in placement to an appropriate interim alternative educational setting under certain conditions. The unilateral authority granted to school administrators is severely limited and can only be exercised after a number of procedural hurdles have been overcome.

While the stay put provision of the IDEA may limit the ability of administrators to unilaterally change a special education student's educational placement, it does not prevent all transfers of students.[112] The Court of Appeals in Sherri A.D., held that the purpose of the stay put rule was to prevent the alteration of the child's educational placement during the pendency of a dispute under the IDEA, not alteration of the child's residence or the location of their educational program.[113] The court held that an educational placement for the purposes of the IDEA has not changed unless a fundamental change in or elimination of a basic element of the educational program has occurred.[114] In Lunceford, the Court of Appeals held that the transfer of a severely disabled special education student from one residential placement to another was not a change in educational placement even where the new placement could not provide the same high level of service with respect to the child's feeding program.[115]

In Lunceford v. District of Columbia Board of Education,[116] the Court of Appeals held that the transfer of a student from a private hospital to a government run institution which had the same day time education did not constitute a change in educational placement. The court held that there must be, at a minimum, a fundamental change in or elimination of a basic element of the education program in order for the change to qualify as a change in educational placement.[117]

In Weil v. Board of Elementary and Secondary Education,[118] the Court of Appeals held that the stay put provision of the IDEA applies only to changes in "educational placement" not physical location. The Court of Appeals stated:

> "We are not persuaded that the cited notice provisions were mandated in the instance of Kimberly's transfer from Cooley to Kiroli because that transfer did not constitute a change in 'educational placement' within the meaning of 20 U.S.C. section 1415(b)(1)(C). The programs at both schools were under OPSB supervision, both provided substantially similar classes, and both implemented the same IEP for Kimberly. We conclude that the change of schools under the circumstances presented in this case was not a change in 'educational placement' under section 1415."[119]

---

[112] See, Sherri A.D. v. Kirby, 975 F.2d 193, 77 Ed.Law Rptr. 655 (5th Cir. 1992), see, also Honig v. Doe, 108 S.Ct. 592, 606 (1988).
[113] Id. at 206.
[114] Id. at 206. See, also, Lunceford v. District of Columbia Board of Education, 745 F.2d 1577, 20 Ed.Law Rptr. 1075 (D.C. Cir. 1984).
[115] 745 F.2d 1577, 20 Ed. Law Rptr. 1075 (D.C. Cir. 1984).
[116] Ibid.
[117] Id. at 1582.
[118] 931 F.2d 1069, 67 Ed. Law Rptr. 482 (5th Cir. 1991).
[119] Id. at 1072.

In Concerned Parents and Citizens v. New York City Board of Education,[120] the Court of Appeals reversed a lower court decision barring the transfer of special education students to a number of other schools in the district. The district court found that the schools to which the students were transferred did not, in all respects, duplicate the "extremely innovative educational program" formerly provided to the handicapped children at P.S. 79. However, the Court of Appeals held that the reference to "educational placement" in Section 1415 refers to the general educational program in which a child is enrolled, rather than variations in the program itself. The Court of Appeals held that there are strong policy considerations for narrowly interpreting the meaning of educational placement in Section 1415. The Court of Appeals criticized the district court for considering the removal of any of the above programs at the school as constituting a change in educational placement requiring prior notice and a hearing under Section 1415. The Court of Appeals stated:

> "Such an interpretation of the Act would virtually cripple the board's ability to implement even minor discretionary changes within the educational programs provided for its students; that interpretation would also tend to discourage the board from introducing new activities or programs or from accepting privately sponsored programs. . .
>
> Thus, we conclude that the term 'educational placement' refers only to the general education program in which the handicapped child is placed and not to all various adjustments of the program that the educational agency, in the traditional exercise of its discretion, may determine to be necessary.
>
> Given this interpretation, we do not believe on the record before us that the transfer of students from P.S. 79 constituted a change in placement sufficient to trigger the prior notice and hearing requirements of Section 1415(b). . .
>
> Accordingly, we conclude that the board was not required under the Act to give parents of handicapped children at P.S. 79 prior notice and a full due process hearing before the transfer of such students to other regular schools within the district."[121]

In DeLeon v. Susquehanna Community School District,[122] the Court of Appeals held:

> "The touchstone in interpreting Section 1415 has to be whether the decision is likely to affect in some significant way the child's learning experience."[123]

In Thomas v. Cinnicinati Board of Education,[124] the Court of Appeals held that the term "current educational placement" refers to the last implemented placement of the child. An IEP

[120] 629 F.2d 751 (2nd Cir. 1980).
[121] Id. at 755-756.
[122] 747 F.2d 149, 21 Ed. Law Rptr. 24 (3rd Cir. 1984).
[123] Id. at 153.
[124] 918 F.2d 618, 64 Ed. Law Rptr. 43 (6th Cir. 1994).

that was developed or revised but had not been implemented would not constitute the current educational placement of the child.[125] The Court of Appeals stated:

> "Because the term connotes preservation of the status quo, it refers to the operative placement actually functioning at the time the dispute first arises. If an IEP has been implemented, then the program's placement will be the one subject to the stay put provision. And where, as here, the dispute arises before any IEP has been implemented, the current educational placement will be the operative placement under which the child is actually receiving instruction at the time the dispute arises . . . ."[126]

In Drinker, the Court of Appeals adopted the test in Thomas and held that where a dispute arises before the proposed IEP has been implemented, the current educational placement is the placement which is actually functioning when the "stay put" order is sought. The Drinker court held that while the "stay put" order is in effect and until a final order is entered by the district court, the school district must pay for the child's placement.[127]

However, where the parents have not appealed or disputed the school district's proposed change in placement, the parents may not invoke the "stay put" rule.[128] The court held that the parent must initiate a due process hearing alleging that the current educational placement is the appropriate placement and should not be changed as the school district has proposed. The court stated, "[t]o appeal a decision, which one otherwise has not disputed, in order to keep a child in a residential psychiatric program and avoid family conflict undermines the purposes of the 'stay put' provision of the Act."[129]

The courts have not applied the stay put rule to enjoin the closing of a school or to require the provision of transportation. In Tilton v. Jefferson County Board of Education,[130] the Court of Appeals held that where a state or local agency must discontinue a program or close a facility for purely budgetary reasons, the stay put rule of the IDEA does not apply. The court held that even though the parents had shown that the programs at alternative schools were not comparable to the original program since they did not provide year round instruction, the district court was not required to enjoin the closing of the original placement facility. Rather, the court held that the school district was required to provide the child with a free appropriate public education at another facility.

The federal district court in Brookline School Committee v. Golden,[131] held that modification of an after school program did not constitute a change in educational placement because it did not significantly affect the child's learning experience.

In DeLeon v. Susquehanna Community School District,[132] the Court of Appeals held that a change in the method of transportation of a severely disabled child to and from school did not

---

[125] Id. at 625.
[126] Id. at 625-626. See, also, Drinker v. Colonial School District, 78 F.3d 859, 867 (3rd Cir. 1996).
[127] Id. at 867.
[128] See, Tennessee Department of Mental Health and Mental Retardation v. Paul B., 88 F.3d 1466, 1473 (6th Cir. 1996).
[129] Id. at 1474.
[130] 705 F.2d 800, 10 Ed.Law Rptr. 976 (6th Cir. 1983).
[131] 628 F.Supp. 113 (D.Mass. 1986).
[132] 747 F.2d 149, 21 Ed.LawRptr. 24 (3rd Cir. 1984).

constitute a change in educational placement under the IDEA and could be instituted without affording parents a prior due process hearing.

IX.

PUBLIC AGENCY'S DUTY TO DEFEND EMPLOYEES UNDER SECTION 1983

The California Government Code provides that in civil actions, public agencies, including school districts, are required to provide a legal defense for public employees when the action is brought against them in their official or individual capacity on account of an act or omission in the scope of their employment for the school district. This duty would include the defense of Section 1983 lawsuits.[133]

Government Code section 995.2 states in part:

> "A public entity has the right to refuse to provide for the defense of a civil action or proceeding brought against an employee or former employee if the public entity determines any of the following:
>
> a) The act or omission was not within the scope of his or her employment;
>
> b) He or she acted or failed to act because of actual fraud, corruption or actual malice;
>
> c) The defense of the action or proceeding by the public entity would create a specific conflict of interest between the public entity and the employee or former employee . . ."

In Stewart v. City of Pismo Beach,[134] Stewart, a city police officer, participated in an undercover investigation of a bar called Harry's. The owners of the bar sued, alleging selective law enforcement and violation of their due process and equal protection rights under the United States Constitution. The city hired two attorneys to represent Stewart, the city council, chief of police and the other police officers named in the suit. Stewart, however, gave an interview to the plaintiff's investigator and signed a declaration indicating that Harry's had indeed been illegally targeted. Under Government Code section 995.2, the city did not have to continue to provide a defense for Stewart as he had created a conflict of interest and failed to cooperate with the defense attorneys.

The public entity may provide for a defense by using its own attorney, hiring other counsel or by purchasing insurance that requires the insurer to provide the defense. The public entity has no right to recover for the expenses of the defense from the employee.[135]

If an employee requests that the public entity provide a defense in a civil action and the public entity fails or refuses to provide the defense and the employee hires his own counsel, the

---

[133] Williams v. Horvath, 16 Cal.3d 834, 129 Cal.Rptr. 453 (1976).
[134] 42 Cal.Rptr.2d 382, 35 Cal.App.4th 1600 (1995).
[135] Government Code section 996.

employee is entitled to recover from the public entity reasonable attorney fees, costs and expenses. However, the employee is not entitled to reimbursement if the public entity establishes that the employee acted or failed ot act because of actual fraud, corruption or actual malice.[136]

In Williams v. Horvath,[137] the California Supreme Court held that the California Tort Claims Act,[138] is consistent with Section 1983, and that the State of California may defend and indemnify public employees sued in their individual or personal capacity in Section 1983 actions. The court stated:

> "There is nothing whatever in the language of Section 825 to suggest that governmental employees are to be indemnified only if the cause of action upon which liability was predicated had its source in the Tort Claims Act. On the contrary, the specific reference in Section 825 to any claim or action negates this inference.
>
> Nor, as an analysis of the leading federal cases shows, is there anything in Section 1983 which precludes a state from indemnifying public employees when liability is founded upon that section."[139]

The California Supreme Court noted that while indemnification allows a plaintiff to recover from the public entity for injuries inflicted by an employee of the public entity, the court held that there was nothing in the legislative history of Section 1983, as interpreted by the United States Supreme Court, that suggests that Congress wanted to limit recoveries by plaintiffs. The California Supreme Court noted that while Congress may have intended to limit recoveries brought directly against governmental entities under Section 1983, states may, on their own accord, defend and indemnify public employees by paying judgments under state law.

The California Supreme Court ruled that such state provisions were consistent with federal law. The court held that Congress did not intend to preclude a state from imposing vicarious liability as a matter of state law on public entities. The court held that state law provisions allowing indemnification do not obstruct the intent of Congress, but enhance the purpose of Section 1983 by ensuring that individuals will be able to recover any awards granted by the courts. The court stated:

> "A rule forbidding indemnification in Section 1983 actions would subject police officers to unlimited and unforeseeable personal liability for acts committed in the course and scope of employment. This liability would be dependent not on the degree of culpability of the acts themselves, but on the purely fortuitous circumstances of whether a given plaintiff chose to ground his complaint on the Tort Claims Act or on Section 1983. The employee's personal liability would thus be a matter totally beyond his control. The legislature can not have intended this haphazard result."[140]

---

[136] Government Code section 996.4.
[137] 16 Cal.3d 834, 129 Cal.Rptr. 453 (1976).
[138] Government Code section 815.
[139] Id. at 459.
[140] Id. at 462.

The court went on to state that in truly egregious cases, the indemnification statutes of state law expressly forbid reimbursement by the public entity. The court also listed a number of public policy considerations favoring indemnification:

1. The indemnification provisions facilitate the bringing of actions against erring public servants because the plaintiff is ensured that the financial resources of the public entity will stand behind the judgment.

2. Indirect public entity liability through indemnification will cause the public entity to exercise an additional degree of caution in the hiring and supervision of employees whose functions carry a greater risk of potential liability.

The California Supreme Court concluded that the indemnification provisions of the Tort Claims Act are applicable whether the actions brought under the Tort Claims Act or under Section 1983.[141]

CONCLUSION

In summary, under Section 1983, district employees may be held liable for constitutional or certain federal statutory violations if:

1. The alleged conduct occurred under color of state law; or

2. The conduct deprived plaintiffs of rights, privileges or immunities secured by the United States Constitution or a federal statute.

District employees may be sued in their official capacity or individual capacity. If an employee is sued in their official capacity, they may assert any defenses or immunities that the public agency possesses. If an employee is sued in their individual or personal capacity, they may assert the defense of "qualified immunity." To overcome the defense of "qualified immunity," the plaintiff must show:

1. The public official knew or reasonably should have known that the action taken would violate the constitutional rights of the plaintiff; or

2. The public official took the action with the malicious intention to cause a deprivation of constitutional rights or injury to the plaintiff.

The plaintiff must show that a clearly established standard existed at the time the conduct occurred. The plaintiff must also show the actual injury occurred to collect more than nominal damages.

[141] Id. at 462. See, also Choate v. County of Orange, 86 Cal.App.4th 312, 329, 103 Cal.Rptr.2d 339 (2001); Travino v. Gates, 99 F.3d 911 (9th Cir. 1996); Cunningham v. Gates, 229 F.3d 1271 (9th Cir. 2000); Brewster v. Shasta County, 275 F.3d 803 (9th Cir. 2001); Navarro v. Block, 250 F.3d 729 (9th Cir. 2001).

Not every violation of a federal statute gives rise to a lawsuit for damages under Section 1983. Most appellate courts, including the Ninth Circuit (which governs California) have ruled that monetary damages for violation of the IDEA are not available under Section 1983. One district court has refused to follow the Ninth Circuit precedent and has ruled that damages are available. The district court decision in Ordway is out of step with the majority of appellate decisions.

Whether or not damages are available for a violation of the IDEA, it should be noted that under California law, a public agency has a legal duty to defend and indemnify a public employee sued under Section 1983 in their individual or personal capacity. This means that except under extraordinary circumstances (e.g., a malicious or intentional act), any award of damages will be paid by the public agency, not the officer or employee.