UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

M.C., V.C. and L.C., individually, and L.C., as Guardian on behalf of M.C.,	)	HONORABLE ALFRED J. LECHNER, JR.
	)	Civil Action No. 99-5011 (AJL)
Plaintiffs,	)	Oral Argument Requested.
v.	)	
FORT LEE BOARD OF EDUCATION, et al.,	)	
Defendants.	)	

UNITED STATES' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Bill Lann Lee
Acting Assistant Attorney General
Civil Rights Division

John L. Wodatch, Chief
Renee M. Wohlenhaus, Deputy Chief
Philip L. Breen, Special Legal Counsel
John A. Russ IV, Trial Attorney
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 66738
1425 New York Ave., 4th floor
Washington, D.C. 20035-6738
ph: (202) 353-7738
JR-5858
Attorneys for Plaintiff-Intervenor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES & REGULATIONS

LEGISLATIVE HISTORY

INTRODUCTION

The United States has intervened in this action to address the constitutionality of Title II of the Americans with Disabilities Act ("ADA"),[1] Section 504 of the Rehabilitation Act ("Section 504"),[2] and the Individuals with Disabilities Education Act ("IDEA").[3] In their motion to dismiss, Defendants argue that the Eleventh Amendment bars claims under these statutes by private individuals against the State and that Congress exceeded its authority under § 5 of the Fourteenth Amendment in abrogating State sovereign immunity under these laws. In light of the Supreme Court's recent grant of certiorari on this issue in the context of the ADA, the United States requests that the Court hold in abeyance any decision on Congress' authority under the Fourteenth Amendment to abrogate state sovereign immunity under each of these statutes challenged on that basis in the present case. The Supreme Court's decision, however, should not affect traditional Spending Clause analysis. Because Defendants have accepted federal funds, the Court may still find that Defendants have waived their sovereign immunity under the Rehabilitation Act and the IDEA, and that therefore the

---

1/ 42 U.S.C. §§ 12131 et seq.

2/ 29 U.S.C. § 794.

3/ 20 U.S.C. § 1400 et seq.

Eleventh Amendment does not bar Plaintiffs' claims under those statutes.

I. IN LIGHT OF THE SUPREME COURT'S RECENT GRANT OF CERTIORARI IN ALSBROOK AND DICKSON, THIS COURT SHOULD HOLD IN ABEYANCE ANY DECISION AS TO WHETHER CONGRESS PROPERLY ABROGATED STATE SOVEREIGN IMMUNITY UNDER THE FOURTEENTH AMENDMENT

In Seminole Tribe of Fla. v. Florida, the Supreme Court articulated a two-part test to determine whether Congress has properly abrogated States' Eleventh Amendment immunity from suit in federal court by individuals: "first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power." Seminole, 517 U.S. 44, 55 (1996) (citations, quotations, and brackets omitted). Defendants concede that the ADA, the Rehabilitation Act, and IDEA satisfy the first requirement, see Defs.' Br. at 27, but challenge Congress' power under the Fourteenth Amendment to enact these statutes.

After Seminole, the Supreme Court held in City of Boerne v. Flores that, for legislation to be a valid exercise of Congress' Fourteenth Amendment power, it must be linked to constitutional violations, and its remedies must be "congruent and proportional" to the evils sought to be addressed. Boerne, 521 U.S. 507, 520 (1997). The Court explained that the authority to enforce the Fourteenth Amendment is a broad power to remedy past and present

discrimination and to prevent future discrimination, id. at 517-18, and it reaffirmed that Congress can prohibit activities that themselves are not unconstitutional in furtherance of its remedial scheme, id. at 518, 525-27, 532, acknowledging that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies." Id. at 519-20; see also Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 644 (2000); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2206 (1999).

The Third Circuit has yet to address this issue in the context of the ADA, the Rehabilitation Act, and IDEA.[4] Applying the Seminole and Boerne standard, however, the vast majority of federal circuit courts have found the ADA to be congruent and proportional to the discrimination it seeks to remedy, and thus a valid exercise of congressional power. See Garrett v. University of Alabama at Birmingham, 193 F.3d 1214, 1218 (11th Cir. 1999),

---

[4/] Cf. Wheeling & Lake Erie Ry. Co. v. Public Util. Comm'n of Pa., 141 F.3d 88 (3d Cir. 1998) (upholding the abrogation of immunity in an Act designed to prevent discriminatory taxation of railroads under the Equal Protection Clause), cert. denied, 120 S. Ct. 323 (1999).

petition for cert. filed (Jan. 24, 2000); Dare v. State of Cal., 191 F.3d 1167, 1176 (9th Cir. 1999); Martin v. Kansas, 190 F.3d 1120, 1127 (10th Cir. 1999); Muller v. Costello, 187 F.3d 298, 309-10 (2d Cir. 1999); Seaborn v. Florida, 143 F.3d 1405, 1406 (11th Cir. 1998); Kimel v. State Bd. of Regents, 139 F.3d 1426, 1433, 1442-43 (11th Cir. 1998), aff'd in part (as to the Age in Employment Discrimination Act), 120 S. Ct. 631 (2000), cert. granted sub nom. (as to the ADA issue), Florida Dep't of Corrections v. Dickson, 2000 WL 46077 (Jan. 21, 2000); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998); Clark v. California, 123 F.3d 1267, 1270-71 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir.); see also Torres v. Puerto Rico Tourism Co., 175 F.3d 1, 6 n.7 (1st Cir. 1999) (in dictum).[5] Likewise, circuit courts have upheld the Rehabilitation Act's abrogation of sovereign immunity. See Garrett, 193 F.3d at 1218 (11th Cir.); Clark, 123 F.3d at 1269 (9th Cir.); Crawford, 115 F.3d at 483 (7th Cir.). But see Bradley v. Arkansas Dep't of Educ., 189 F.3d 745, 752, 756 (8th Cir.

[5/] But see Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (en banc), cert. granted, 2000 WL 63302 (Jan. 25, 2000). Cf. Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698, 708 (4th Cir. 1999), petition for cert. filed, 68 U.S.L.W. 3164 (Sept. 8, 1999) (striking down an ADA regulation as exceeding Congress' authority).

1999) (holding that the Rehabilitation Act and IDEA exceeded Congress' authority under the Fourteenth Amendment), reh'g en banc granted in part, opinion vacated in part, Jim C. v. Arkansas Dep't of Educ., 197 F.3d 958 (8th Cir. 1999).

On January 21 and 25, 2000, the United States Supreme Court granted petitions for certiorari in two cases to decide whether Congress' enactment of the ADA was a proper exercise of its authority to enforce § 5 of the Fourteenth Amendment, and thus whether the ADA's abrogation of States' sovereign immunity is valid. See Alsbrook v. Arkansas, 2000 WL 63302 (Jan. 25, 2000) (No. 99-423); Florida Dep't of Corrections v. Dickson, 2000 WL 46077 (Jan. 21, 2000) (No. 98-829). The Court has consolidated the two cases, will hear oral argument in April 2000, and is expected to issues its decision by July 2000. The Supreme Court's ruling in Dickson and Alsbrook will likely control this Court's disposition of the issue of Congress' authority under the Fourteenth Amendment to allow private suits for monetary damages under the ADA against States,[6] and its reasoning may also impact

---

[6/] The Eleventh Amendment does not bar private lawsuits seeking prospective injunctive relief for ongoing violations of federal law, under the doctrine of Ex parte Young, 209 U.S. 123 (1908). See J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1287 (10th Cir. 1999); Nelson v. Miller, 170 F.3d 641, 647 (6th Cir. 1999);

the same Fourteenth Amendment issue as to the Rehabilitation Act and IDEA. See, e.g., Crawford, 115 F.3d at 483; McDonald v. Pennsylvania Dep't of Pub. Welfare, 62 F.3d 92, 94-95 (3d Cir. 1995).

The United States therefore respectfully requests that this Court stay its ruling on the abrogation issue for the ADA, § 504, and IDEA until the Supreme Court has issued its decision in Dickson and Alsbrook. After such time, the United States requests the opportunity to file a supplemental brief as to the impact of that decision on the question of Congress' power to abrogate States' sovereign immunity under these three statutes.

II. BECAUSE THE REHABILITATION ACT AND IDEA VALIDLY REQUIRE WAIVER OF SOVEREIGN IMMUNITY AS A CONDITION OF RECEIVING FEDERAL FUNDS, THE ELEVENTH AMENDMENT DOES NOT BAR PLAINTIFFS' CLAIMS UNDER THOSE STATUTES, PURSUANT TO CONGRESS' SPENDING CLAUSE AUTHORITY

The Supreme Court's expected decision in Dickson and Alsbrook should not affect the Supreme Court's traditional Spending Clause analysis. Therefore, even without addressing the question of whether Congress has validly abrogated state sovereign immunity under its Fourteenth Amendment powers, the Court can and should find that Defendants have waived their sovereign immunity under the Rehabilitation Act and IDEA by

---

Armstrong v. Wilson, 124 F.3d 1019, 1025 (9th Cir. 1997).

accepting federal funds, see 42 U.S.C. § 2000d-7 (Rehabilitation Act); 42 U.S.C. § 1403 (IDEA), and that therefore the Eleventh Amendment does not bar Plaintiffs' claims under these two statutes. See, e.g., Sandoval v. Hagan, 197 F.3d 484, 500 n.15 (11th Cir. 1999) (declining to reach congressional abrogation claim after holding that State agency waived its sovereign immunity by accepting federal funds).

It is well settled that under its Spending Clause power Congress may condition the receipt of federal funds on a waiver of Eleventh Amendment immunity.[7] See Seminole, 517 U.S. at 65; see also Litman v. George Mason Univ., 186 F.3d 544, 555 (4th

---

[7/] Congress' interest that its funds do not support or further discrimination applies across-the-board to all federal financial assistance. Congress therefore ensured that Title VI, Title IX, and Section 504 (all covered under 42 U.S.C. § 2000d-7's waiver provision) apply to all federal funding, rather than adding separate nondiscrimination provisions in a piecemeal fashion to each grant statute. See 110 Cong. Rec. 6544 (1964) (Sen. Humphrey); id. at 7061-62 (Sen. Pastore); id. at 2468 (Rep. Celler); id. at 2465 (Rep. Powell). Certainly there is no distinction of constitutional magnitude between a nondiscrimination provision attached to each appropriation and a single provision applying to all federal spending.

Cir. 1999) (Title IX of the Civil Rights Act is a valid exercise of Congress' Spending Clause authority), petition for cert. filed 68 U.S.L.W. 3263 (Oct. 5, 1999). A State may "by its participation in the program authorized by Congress . . . in effect consent[] to the abrogation of that immunity." Edelman v. Jordan, 415 U.S. 651, 672 (1974); see also Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985) ("A state may effectuate a waiver of its constitutional immunity by . . . waiving its immunity to suit in the context of a particular federal program"); Delaware Dep't of Health & Soc. Servs. v. United States Dep't of Educ., 772 F.2d 1123, 1138 (3d Cir. 1985) (Eleventh Amendment does not insulate States that voluntarily participate in program to benefit blind vendors). "[S]tates are free to accept or reject the terms and conditions of federal funds much like any contractual party." See Sandoval, 197 F.3d at 494. The Supreme Court recently restated this maxim in College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.:

> [W]e have held . . . that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions. . . . Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts.

119 S. Ct. 2219, 2231 (1999).

Seminole Tribe does not preclude Congress from using its Spending Clause power to remove a State's Eleventh Amendment

immunity. Although the effect is the same, when Congress acts under the Spending Clause, it does not abrogate Eleventh Amendment immunity. Instead, Congress conditions the receipt of federal funds on a waiver of that immunity by the States themselves. The Supreme Court has explained that when Congress exercises its Spending Clause power, there is no constitutional "prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly." South Dakota v. Dole, 483 U.S. 203, 210 (1987); College Sav. Bank, 119 S. Ct. at 2231.[8] Indeed, the Court held that even "a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants." Dole, 483 U.S. at 210. Courts have also recognized that, "in the exercise of its spending power Congress may be more protective of given minorities than the Equal Protection Clause itself requires." Board of Educ. v. Califano, 584 F.2d 576, 588 n.38 (2d Cir. 1978), aff'd, Board of Ed. v. Harris, 444 U.S. 130 (1979).

[8/] The Dole Court upheld Congress' conditioning the receipt of federal highway funds on States' increasing the minimum drinking age to 21. Dole, 483 U.S. at 206. The funds distributed in Dole, money to build and maintain highways, were at best indirectly related to the imposition of a minimum drinking age.

The waiver provision governing the Rehabilitation Act, 42 U.S.C. § 2000d-7, provides that

> A State shall not be immune under the Eleventh Amendment of the Constitution . . . from suit in federal court for a violation of section 504 of the Rehabilitation Act of 1973, 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.

The Supreme Court has characterized this language as "an unambiguous waiver of the States' Eleventh Amendment immunity." Lane v. Pena, 518 U.S. 187, 200 (1996); see also, Litman, 186 F.3d at 554 (concluding that "Congress succeeded in its effort to codify a clear, unambiguous, and unequivocal condition of waiver of Eleventh Amendment immunity in 42 U.S.C. § 2000d-7(a)(1)"); Clark, 123 F.3d at 1271 (interpreting this language to mean that "[b]ecause California accepts federal funds under the Rehabilitation Act, California has waived any immunity under the Eleventh Amendment"). In Litman, the Fourth Circuit explicitly rejected a state defendant's argument that

> the statute "must say something like 'as a condition of receiving federal funds under this Act, the States agree to waive their Eleventh Amendment immunity.'" The only difference between [defendant's] proffered language and that employed in § 2000d-7(a)(1) is that the former is cast in the affirmative (i.e., "the States agree to waive") and the

> latter in the negative (i.e., "a State shall not be immune"). But this difference in phrasing is of no constitutional import. Using negative rather than affirmative language does not alter the plain meaning of § 2000d-7(a)(1)—that is, by accepting Title IX funding [covered by § 2000d-7] a state agrees to waive its Eleventh Amendment immunity.

Litman, 186 F.3d at 554.

Indeed, § 2000d-7 was a direct response to the Supreme Court's decision in Atascadero State Hospital, 473 U.S. at 247, in which the Court found that in an earlier version of the statute, Congress had not provided sufficiently clear language to abrogate States' Eleventh Amendment immunity for Rehabilitation Act claims. See 131 Cong. Rec. 22,344-22,345 (1985). Section 2000d-7 makes unambiguously clear that Congress intended the States to be amenable to suit in federal court under the Rehabilitation Act if they accepted federal funds. See Lane, 518 U.S. at 200 (acknowledging "the care with which Congress responded to our decision in Atascadero by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in § 2000d-7).

Thus, § 2000d-7 embodies exactly the type of unambiguous condition discussed in Atascadero, by putting States on express notice that part of the "contract" for receiving federal funds

was the requirement that they consent to suit in federal court for alleged violations of the Rehabilitation Act.[9] As the Department of Justice explained to Congress at the time the statute was being considered, "[t]o the extent that the proposed amendment is grounded on congressional spending powers, [it] makes it clear to states that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986). Circuit courts have held that § 2000d-7 "manifests a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity." Litman, 186 F.3d at 555 (4th Cir.); Clark, 123 F.3d at 1271 (9th Cir.).

Only one court has cast doubt on the validity of § 2000d-7's waiver, Bradley, 189 F.3d 745 (8th Cir. 1999), and the Eighth Circuit en banc has subsequently vacated those portions of

---

9/ The Rehabilitation Act is effective only when the State elects to receive federal funds. See United States Dep't of Transport. v. Paralyzed Veterans of Am., 477 U.S. 597, 599 (1986); Beth V. v. Carroll, 87 F.3d 80, 82 (3d Cir. 1996). "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding . . . simply does not intrude on their sovereignty." Bell v. New Jersey, 461 U.S. 773, 790 (1983). See also discussion at 15-18, infra.

Bradley dealing with Spending Clause issues. See Jim C. v. Arkansas Dep't of Educ., 197 F.3d 958 (8th Cir. 1999) (en banc). Bradley represented an unprecedented break from Spending Clause jurisprudence. As the Fourth Circuit recently noted, "[n]o court . . . has ever struck down a federal statute on grounds that it exceeded the Spending Power." Virginia v. Browner, 80 F.3d 869, 881 (4th Cir. 1996), cert. denied, 519 U.S. 1090 (1997); Oklahoma v. Schweiker, 655 F.2d 401, 406 (D.C. Cir. 1981) ("we have been unable to uncover any instance in which a court has invalidated a funding condition"). Among the conditions long upheld as valid Spending Clause legislation are those that demand that recipients assure that their programs will not discriminate. Section 504's nondiscrimination requirement is patterned on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., which prohibit race and sex discrimination by programs [10] that receive federal funds, respectively.[11] School Bd. of Nassau County v. Arline, 480 U.S. 273, 278 n.2 (1987). Both Title VI

[10/] Title IX applies specifically to educational programs.

[11/] "Section 504 [of the Rehabilitation Act] expressly incorporates Title VI remedies, see 29 U.S.C. § 794(a)(2), and consistently has been construed as being similar to Title VI for statutory construction purposes." Sandoval, 197 F.3d at 501.

and Title IX have been upheld as valid exercises of Congress' spending power. See, e.g., Grove City College v. Bell, 465 U.S. 555, 575 (1984) (in the context of Title IX, observing that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept"); Lau v. Nichols, 414 U.S. 563, 569 (1974) (upholding Title VI, noting that "[t]he Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here."); Sandoval, 197 F.3d at 501 (upholding Title VI). These cases stand for the proposition that Congress has an interest that none of its funds are used to support, directly or indirectly, programs that discriminate or otherwise make inaccessible their benefits and service to qualified persons.

Bradley based its criticism of the Rehabilitation Act on language from the Supreme Court's recent College Savings decision. See Bradley, 189 F.3d at 757 (quoting College Sav. Bank, 119 S. Ct. at 2231). In College Savings, the Supreme Court warned that "the financial inducements offered by Congress might be so coercive as to pass the point at which pressure turns to compulsion," although College Savings did not involve Spending Clause legislation. 119 S. Ct. at 2231 (internal quotation marks and citations omitted). "The coercion theory," however, "has

been much discussed but infrequently applied in federal case law, and never in favor of the challenging party." Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989). Even if the coercion theory applied here, the Rehabilitation Act's conditions imposed on receipt of federal funds clearly would not constitute coercion as the Supreme Court has interpreted that term. See, e.g., Board of Educ. v. Mergens, 496 U.S. 226, 241 (1990) ("A school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this may be an unrealistic option, Congress clearly sought to prohibit schools from discriminating . . . and that obligation is the price a federally funded school must pay. . . ."); Paralyzed Veterans of Am., 477 U.S. at 605 ("Under . . . § 504, Congress enters into an arrangement in the nature of a contract with recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision.").

To the extent Bradley found the Rehabilitation Act's conditions coercive because the Act's coverage applies to all programs and activities that receive federal funds, see 29 U.S.C. § 794, the Supreme Court has not applied such a nexus requirement in any Eleventh Amendment waiver case.[12] Even assuming arguendo

---

[12/] The case cited by Bradley for this proposition, New York v. United States, 505 U.S. 144 (1992), did not involve an Eleventh

that a nexus requirement applies, Bradley's holding is based on the erroneous premise that "§ 504 mandates that [the state] waive its Eleventh Amendment immunity to all claims arising under § 504 if its receives any federal funding." Bradley, 189 F.3d at 757. That misreads Section 504's definition of "program or activity." Congress has defined the term "program or activity" in § 504 to mean, for general governmental entities, "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance." 29 U.S.C. § 794(b)(1)(A); 42 U.S.C. § 2000d-4a(1)(A); 20 U.S.C. § 1698(1)(A). In doing so, Congress chose not to require the entire State to comply if it accepted any federal funds. Instead, as the plain language of the statute makes clear,

---

Amendment challenge. In New York, a federal funding scheme for radioactive waste required the States to take title to radioactive waste unless they regulated entities producing such waste according to federal standards. The New York Court imposed a nexus requirement under the Tenth Amendment, because Congress' funding scheme forced the States to regulate other entities on its behalf. The Rehabilitation Act employs no such tactic; its ensures the States that are federal funding recipients do not discriminate on the basis of disability in their own actions.

Congress determined that, in general, States should be able to choose on an “agency” or “department” basis whether to accept federal funds and the attendant obligation to make their programs and activities nondiscriminatory and accessible.

Reading the statute to require an all-or-nothing choice described in Bradley is contrary to the interpretation of every other court of appeals that has addressed the issue, each of which has concluded that coverage under this subsection extends only to the "agency" or "department" that accepted the federal funds. See, e.g., Association of Mexican-American Educators v. California, 195 F.3d 465, 474-75 (9th Cir. 1999); Nelson v. Miller, 170 F.3d 641, 653 n.8 (6th Cir. 1999); O'Connor v. Davis, 126 F.3d 112, 117 (2d Cir. 1997), cert. denied, 118 S. Ct. 1048 (1998); Lightbourn v. County of El Paso, 118 F.3d 421, 426-427 (5th Cir. 1997), cert. denied, 118 S. Ct. 700 (1998); Schroeder v. City of Chicago, 927 F.2d 957, 962 (7th Cir. 1991). Prior to the now-vacated panel opinion in Bradley, the Eighth Circuit itself had recognized that "[f]or State and local governments, only the department or agency which receives the aid is covered." Klinger v. Department of Corrections, 107 F.3d 609, 615 (8th Cir. 1997) (quoting S. Rep. No. 64, 100th Cong., 2d Sess. 4 (1987)); accord Thomlison v. City of Omaha, 63 F.3d 786, 789 (8th Cir. 1995) ("Because the definition of program or activity covers all the operations of a department, here the Public Safety

Department, and part of the Department received federal assistance, the entire Department is subject to the Rehabilitation Act."). On signing the Rehabilitation Act Amendments of 1986 into law, President Reagan similarly explained that the Act "subjects States, as a condition of their receipt of Federal financial assistance, to suits for violation of Federal laws prohibiting discrimination on the basis of handicap, race, age, or sex to the same extent as other public or private entities." 22 Weekly Comp. of Pres. Docs. 1421 (Oct. 27, 1986), reprinted in 1986 U.S.C.C.A.N. 3554.

As for the IDEA, its waiver provision, § 1403, provides that

> (a) A State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal Court for violation of this chapter.
> (b) In a suit against a State for violation of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public entity other than a State.

20 U.S.C. § 1403. The Eighth Circuit in Bradley held that this provision, read in conjunction with § 1415, "provided a clear, unambiguous warning of [Congress'] intent to condition a state's participation in the IDEA program and its receipt of federal IDEA funds on the state's waiver of its immunity from suit in federal court on claims made under the IDEA." See Bradley, 189 F.3d at 753. Cf. Beth V., 87 F.3d at 82 (3d Cir.) (noting that the IDEA

"authorizes federal funding for states providing the special education that the statute requires, but funding is contingent on state compliance with its array of substantive and procedural requirements, 20 U.S.C. § 1412"). Furthermore, there can be no dispute that Defendants have validly waived their sovereign immunity under IDEA. IDEA's waiver provision has not been invalidated by any court. Cf. Beth V, 87 F.3d at 82 (describing IDEA "as a model of 'cooperative federalism'").

Thus, both IDEA's and the Rehabilitation Act's waiver provision are valid, and Defendants have waived their sovereign immunity under these statutes by accepting federal funds.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court hold in abeyance its decision as to whether the abrogations of State sovereign immunity in the ADA, the Rehabilitation Act, and IDEA are valid exercises of Congress' Fourteenth Amendment enforcement power. We also request, however, that the Court find that Defendants have validly waived their sovereign immunity for actions alleging discrimination under the Rehabilitation Act and IDEA. The Court should therefore deny Defendants' Motion to Dismiss on Eleventh Amendment grounds as to Plaintiffs' claims under the Rehabilitation Act and IDEA.

Dated: February ___, 2000

Respectfully Submitted,

Robert J. Cleary
United States Attorney
District of New Jersey

Bill Lann Lee
Acting Assistant Attorney General
Civil Rights Division

_____

Michael A. Chagares
Chief, Civil Division
U. S. Attorney's Office
Federal Building
970 Broad Street, 7th Floor
Newark, New Jersey 07102
(973) 645-2700

_____

John L. Wodatch, Chief
Renee M. Wohlenhaus, Deputy Chief
Philip Breen, Special Legal Counsel
John A. Russ IV, Trial Attorney
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 66738
1425 New York Ave., 4th floor
Washington, D.C. 20035-6738
(202) 353-7738