WILLIAM R. YEOMANS
Acting Assistant Attorney General
JEREMIAH GLASSMAN
MICHAEL S. MAURER
GEOFFREY L.J. CARTER
ANDY LIU
U.S. Department of Justice
Civil Rights Division
Educational Opportunities Section
601 D Street, NW, Suite 4300
Washington, DC 20530
Telephone: (202) 305-4035
Facsimile: (202) 514-8337

ELLIOT ENOKI
United States Attorney
District of Hawaii
MICHAEL CHUN
Assistant U.S. Attorney
Room 6-100, PJKK Federal Building
300 Ala Moana Blvd.
Honolulu, Hawaii 96850-6100
Telephone: (808) 541-2850

Attorneys for the United States

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

STEPHEN L. and LAVERNE L., individually and as Guardians Ad Litem of AARON L., an incompetent adult,	)	CIVIL NO. 00-00338 DAE
Plaintiffs,	)	PLAINTIFF-INTERVENOR UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT BASED ON ELEVENTH AMENDMENT IMMUNITY
v.	)	
PAUL LEMAHIEU, in his official capacity as Superintendent of the Hawaii Public Schools; WILLIAM C. RHYNE, in his capacity as former Principal of Molokai High and Intermediate School; SARAH KALANI, in her capacity as former Principal	)	

of Molokai High and Intermediate)
School; LINDA PULELOA, in her)
official capacity as Principal)
of Molokai High and Intermediate)
School; and DEPARTMENT OF)
EDUCATION, STATE OF HAWAII,)
)
Defendants.)
)

TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

STEPHEN L. and LAVERNE L., individually and as Guardians Ad Litem of AARON L., an incompetent adult,	)	CIVIL NO. 00-00338 DAE
Plaintiffs,	)	PLAINTIFF-INTERVENOR UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT BASED ON ELEVENTH AMENDMENT IMMUNITY
v.	)	
PAUL LEMAHIEU, in his official capacity as Superintendent of the Hawaii Public Schools; WILLIAM C. RHYNE, in his capacity as former Principal of Molokai High and Intermediate School; SARAH KALANI, in her capacity as former Principal of Molokai High and Intermediate School; LINDA PULELOA, in her official capacity as Principal of Molokai High and Intermediate School; and DEPARTMENT OF EDUCATION, STATE OF HAWAII,	)	
Defendants.	)	

STATEMENT OF THE CASE

In this action, Stephen L. and LaVerne L., individually and as Guardians Ad Litem of Aaron L. (collectively, "plaintiffs"), have brought suit against the Department of Education of the State of Hawaii, as well as various current and former state officials (collectively, "defendants" or "the State") for alleged violations of Section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794, and the Individuals with Disabilities

Education Act ("IDEA"), 20 U.S.C. § 1401 et seq. Plaintiffs seek, inter alia, compensatory and punitive damages, as well as injunctive relief.

On April 3, 2001, the defendants filed a motion for partial summary judgment, arguing, among other things, that the Eleventh Amendment renders the State immune to suit in federal court under Section 504.[1] On April 19, 2001, the United States filed a motion requesting that the Court certify the constitutional issues presented in this case to the Attorney General pursuant to 28 U.S.C. § 2403(a). This Court granted the United States' motion and issued the requested certification on April 24, 2001. On May 17, 2001, the United States moved to intervene in this case to defend the constitutionality of Section 504 and argue that Eleventh Amendment does not bar the Section 504 claims asserted in this action.

STATEMENT OF THE ISSUE

Whether, by accepting federal financial assistance after the enactment of the Civil Rights Remedies Equalization Act, 42

[1] In their Notice of Hearing Motion for Partial Summary Judgment at page 2, paragraph 3, the defendants assert that they are also entitled to Eleventh Amendment immunity to suit under the IDEA. The defendants, however, do not develop or support their claim of immunity to suit under the IDEA in their partial summary judgment memorandum. The United States accordingly does not address the constitutionality of the IDEA in detail in this brief, but does note that the waiver of immunity arguments presented herein as to the plaintiffs' claims under Section 504 apply equally to the plaintiffs' claims under the IDEA. See infra at 4 n.2.

U.S.C. § 2000d-7 ("Section 2000d-7"), the defendants in this action have waived any Eleventh Amendment immunity to suit under Section 504 of the Rehabilitation Act of 1973.

SUMMARY OF ARGUMENT

The Eleventh Amendment does not bar the plaintiffs' Section 504 claims in this case. In Section 2000d-7, Congress put states on notice that accepting federal financial assistance would waive their Eleventh Amendment immunity to discrimination suits under Section 504. Section 2000d-7 is a valid exercise of Congress' power under the Spending Clause to impose unambiguous conditions for receiving federal financial assistance. Because the defendants in this action have accepted such assistance, and because Section 504 itself is valid Spending Clause legislation, the defendants have waived any Eleventh Amendment immunity to suit under Section 504.

ARGUMENT

By Accepting Federal Financial Assistance, The State Agencies In This Action Have Waived Any Eleventh Amendment Immunity To Suit Under Section 504 Of The Rehabilitation Act.

In this action, the State has asserted that the Eleventh Amendment renders it immune to suit in federal court under Section 504.[2] This Court should reject the State's claim of immunity because, as the Ninth Circuit already has recognized, a state agency such as the Department of Education of the State of Hawaii waives any Eleventh Amendment immunity to suit under Section 504 when it accepts federal financial assistance. See Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997)

---

[2] To the extent that the defendants also assert that the Eleventh Amendment provides them with immunity to suit under the IDEA, see, e.g., Defendants' Notice of Hearing Motion for Partial Summary Judgment at page 2, paragraph 3, they are incorrect. As with Section 504, the State waived any Eleventh Amendment immunity to suit under the IDEA by accepting federal financial assistance conditioned on such a waiver. See 20 U.S.C. § 1403(a) (stating that "[a] state shall not be immune under the eleventh amendment" to suit in federal court under the IDEA). Because the IDEA language regarding waiver of immunity is virtually identical to that found in 42 U.S.C. § 2000d-7, the reasoning in this memorandum concerning waiver of immunity to suit under Section 504 also applies to any Eleventh Amendment immunity claim the State might assert as to the IDEA. See infra at 4-11 (discussing Section 2000d-7, which contains language that parallels the language in 20 U.S.C. § 1403(a) regarding waiver of immunity); see also Board of Educ. of Oak Park and River Forest High Sch. Dist. No. 200 v. Kelly E., 207 F.3d 931, 935 (7th Cir.) (holding that state waived its Eleventh Amendment immunity to suit under the IDEA by accepting federal funds conditioned on such a waiver), cert. denied, 121 S. Ct. 70 (2000); Bradley v. Arkansas Dep't of Educ., 189 F.3d 745, 753 (8th Cir. 1999) (same), vacated in part on other grounds, Jim C. v. Arkansas Dep't of Educ., 197 F.3d 958 (1999).

(rejecting the State's claim of Eleventh Amendment immunity to suit under Section 504), cert. denied, 524 U.S. 937 (1998); see also Defendants' Memorandum of Law in Support of Motion for Partial Summary Judgment ("Defendants' Partial Summary Judgment Memorandum"), Attachment I (Supplemental Memorandum) at 12 (admitting that the Department of Education of the State of Hawaii accepts federal financial assistance). Contrary to the defendants' arguments, there is no basis for departing from the Ninth Circuit's holding in Clark regarding waiver of Eleventh Amendment immunity to suit under Section 504.[3]

---

[3] In its Partial Summary Judgment Memorandum, the State relies heavily on the Supreme Court's decision in Board of Trustees of the University of Alabama v. Garrett, 121 S. Ct. 955, 967-68 (2001), in which the Court held that Congress exceeded its authority under the Fourteenth Amendment when it attempted to abrogate states' Eleventh Amendment immunity to suit for monetary damages under Title I of the Americans with Disabilities Act. The decision in Garrett does not undermine the Ninth Circuit's holding in Clark regarding a state's ability to waive of Eleventh Amendment immunity to suit under Section 504 by accepting federal financial assistance. Further, since the Supreme Court in Garrett addressed only Title I of the ADA, the Ninth Circuit's holding in Clark, 123 F.3d at 1270, that Congress acted within its Fourteenth Amendment authority when it abrogated states' Eleventh Amendment immunity to suit under the Section 504, remains good law, and provides an alternative basis for rejecting the State's claim of Eleventh Amendment immunity in this case. See Patrick W. v. LeMahieu, No. 98-00843 at 10-11 (D. Haw. April 16, 2001) (order denying defendants' motion to dismiss on the basis of Eleventh Amendment immunity) (stating that the Supreme Court's decision in Garrett did not overrule the Ninth Circuit's decision in Clark), appeal docketed, No. 01-15944 (9th Cir. May 14, 2001). Finally, the Eleventh Amendment does not bar the plaintiffs' claims for injunctive relief because, as the defendants concede, private individuals "can enjoin state officials from committing violations of federal law" under the Supreme Court's decision in Ex Parte Young, 209 U.S. 123 (1908).

Section 504 prohibits discrimination against persons with disabilities under "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Section 2000d-7 of Title 42 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 . . . [and] title VI of the Civil Rights Act of 1964."

Section 2000d-7 may be upheld as a valid exercise of Congress's power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for state agencies that voluntarily accept federal financial assistance. It is well established that States are free to waive their Eleventh Amendment immunity. See College Sav. Bank v. Florida Prepaid Postsec. Educ. Expense Bd., 527 U.S. 666, 675 (1999) ("We have long recognized that a State's sovereign immunity 'is a personal privilege which it may waive at its pleasure.'"). Further, it is clear 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." Id. at 686. Cf. Cardenas

---

Defendants' Partial Summary Judgment Memorandum, Attachment I (Reply Memorandum) at 7 (recognizing the continued validity of such actions, notwithstanding the decision in Garrett).

v. Anzai, 128 F. Supp. 2d 704, 706 (D. Haw. 2001) (noting that Congress may abrogate a state's Eleventh Amendment immunity under a valid exercise of power, and also noting that a state may waive its immunity). Thus, Congress may (and has, in Section 2000d-7) condition the receipt of federal funds on states' waiver of Eleventh Amendment immunity to Section 504 claims.

A. *Section 2000d-7 Is A Clear Statement That Accepting Federal Financial Assistance Would Constitute A Waiver To Private Suits Brought Under Section 504*

Section 2000d-7 was enacted in response to the Supreme Court's decision in Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985). In Atascadero, the Court held that Congress had not provided sufficiently clear statutory language to remove States' Eleventh Amendment immunity for Section 504 claims, and reaffirmed that "mere receipt of federal funds" was insufficient to constitute a waiver. 473 U.S. at 246. The Court explained, however, that if a statute "manifest[ed] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," the federal courts would have jurisdiction over states that accepted federal funds. Id. at 247.

Section 2000d-7 makes unambiguously clear that Congress intended states to be amenable to suit in federal court under Section 504 (and the other federal non-discrimination statutes tied to federal financial assistance) if they accepted federal

funds.[4] Any state agency reading the U.S. Code would have known that after the effective date of Section 2000d-7 it could be sued in federal court for violations of Section 504 if it accepted federal funds. Section 2000d-7 thus embodies exactly the type of unambiguous condition discussed by the Court in Atascadero, putting states on express notice that part of the "contract" for receiving federal funds is the requirement that they consent to suit in federal court for alleged violations of Section 504 for those agencies that receive any financial assistance.[5]

---

[4] Congress recognized that the holding of Atascadero had implications for not only Section 504, but also Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, which prohibit race and sex discrimination in "program[s] or activit[ies] receiving Federal financial assistance." See S. Rep. No. 388, 99th Cong., 2d Sess. 28 (1986); 131 Cong. Rec. 22,346 (1985) (Sen. Cranston); see also United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605 (1986) ("Under . . . Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision.").

[5] The Department of Justice explained to Congress while the legislation was under consideration, "[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 eleventh amendment immunity." 132 Cong. Rec. 28,624 (1986). On signing the bill 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 any other public or private entities." 22 Weekly Comp. Pres. Doc. 1421 (Oct. 27, 1986), reprinted in 1986 U.S.C.C.A.N. 3554.

In Lane v. Peña, 518 U.S. 187, 200 (1996), the Supreme Court acknowledged "the care with which Congress responded to our decision in Atascadero by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in Section 2000d-7. Consistent with the Supreme Court's statement in Lane, the Ninth Circuit held in Clark, 123 F.3d at 1271, that the language in Section 2000d-7 "manifests a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity." Every court to address this issue has agreed with the Ninth Circuit's assessment of the language and intent expressed in Section 2000d-7. See Jim C. v. Arkansas Dep't of Educ., 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) (Section 504), petition for cert. filed, 69 U.S.L.W. 3686 (U.S. March 22, 2001) (No. 00-1488); Stanley v. Litscher, 213 F.3d 340, 344 (7th Cir. 2000) (Section 504); Pederson v. Louisiana State Univ., 213 F.3d 858, 875-876 (5th Cir. 2000) (Title IX); Sandoval v. Hagan, 197 F.3d 484, 493-494 (11th Cir. 1999) (Title VI), rev'd on other grounds, 121 S. Ct. 1511 (2001); Litman v. George Mason Univ., 186 F.3d 544, 554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000) (Title IX).[6]

[6] Courts also have held that the language in 20 U.S.C. § 1403 of the IDEA clearly manifests an intent to condition receipt of federal financial assistance on states' waiver of Eleventh Amendment immunity. See Kelly E., 207 F.3d at 935 (reaching this conclusion); Bradley, 189 F.3d at 753 (same).

The preceding line of cases makes it clear that waiver of Eleventh Amendment immunity to suit under Section 504 is simply part of the "contract" when a state accepts Congress' offer of federal financial assistance. Accordingly, this Court should reject the State's suggestion that any waiver of its Eleventh Amendment immunity must be unequivocally expressed by the State. See Defendant's Partial Summary Judgment Memorandum, Attachment I (Supplemental Memorandum) at 13. In so arguing, the State effectively asks this Court to ignore the fact that a state's acceptance of federal financial assistance that is offered on the condition that the state waive its Eleventh Amendment immunity to suit is sufficient, in and of itself, to constitute waiver. See College Sav. Bank, 527 U.S. at 686 (recognizing that a state may waive its Eleventh Amendment immunity in this manner); Clark, 123 F.3d at 1271 (finding waiver of immunity to suit under Section 504 due to acceptance of federal financial assistance); supra at 9-10 (collecting cases reaching the same conclusion under Section 504 and analogous statutes). The State has not provided any basis for departing from that well-established rule in this case, and thus its waiver of immunity must stand.

B. *Congress Has Authority To Condition The Receipt Of Federal Financial Assistance On The State Waiving Its Eleventh Amendment Immunity*

Congress may condition its offers of federal financial assistance on a waiver of Eleventh Amendment immunity. Indeed,

in Alden v. Maine, 527 U.S. 706, 755 (1999), the Court cited South Dakota v. Dole, 483 U.S. 203 (1987), a case involving Congress's Spending Clause authority, when it noted that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits." Similarly, in College Savings Bank, 527 U.S. at 686, the Court reaffirmed that Congress has the authority under the Spending Clause to condition the receipt of federal funds on the waiver of immunity. See also id. at 678-679 n.2 (expressing the same principle). The Court explained that unlike Congress's power under the Commerce Clause to regulate "otherwise lawful activity," Congress's power to spend money is the grant of a "gift" on which Congress may place conditions that a State is free to accept or reject. Id. at 687. Cf. Premo v. Martin, 119 F.3d 764, 769 (9th Cir. 1997) (State participation in Randolph-Sheppard Vending Stand Act constitutes a waiver of Eleventh Amendment immunity to suit in federal court for enforcement of arbitral awards issued under the Act), cert. denied, 522 U.S. 1147 (1998). Thus, Congress acted well within its power when, in Section 2000d-7, it informed states that, as a condition of receiving federal financial assistance, states would have to waive their Eleventh Amendment immunity to suit under Section 504 and other statutes.

C. *Section 504 Is A Valid Exercise Of The Spending Power*

In South Dakota v. Dole, the Supreme Court identified four limitations on Congress' Spending Power. First, by its terms, the Spending Clause requires that Congress legislate in pursuit of "the general welfare." 483 U.S. at 207. Second, if Congress conditions the States' receipt of federal funds, it "'must do so unambiguously . . . , enabling the States to exercise their choice knowingly, cognizant of the consequence of their participation.'" Id. (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). Third, the Supreme Court's cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" Id. (citation omitted). And fourth, the obligations imposed by Congress may not violate any independent constitutional provisions. Id. at 208.

In this case, the defendants maintain that Section 504 violates the second limitation outlined in Dole because the State was not aware of the consequences of its participation in Section 504. See Defendants Partial Summary Judgment Memorandum, Attachment I (Reply Memorandum) at 8-9. The defendants also contend that any waiver was the product of coercion. See id. (Supplemental Memorandum) at 11-13. Section 504 does not, however, violate any of the limitations set forth in Dole, and the defendants' argument as to coercion fails.

1. Beginning with the first spending power limitation identified in Dole, it is clear that the general welfare is served by prohibiting discrimination against persons with disabilities. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 443-444 (1985) (discussing Section 504 with approval). Indeed, the Court in Dole noted that the judicial deference to Congress is so substantial that there is some question "whether 'general welfare' is a judicially enforceable restriction at all." 483 U.S. at 207 n.2.

2. The language of Section 504 alone makes clear that the obligations it imposes are a condition on the receipt of federal financial assistance. See 29 U.S.C. § 794(a) (prohibiting discrimination on the basis of disability in programs or activities receiving federal financial assistance). Thus, the second Dole requirement is met. See School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 286 n.15 (1987) (contrasting "the antidiscrimination mandate of § 504" with the statute in Pennhurst). Moreover, Department of Education implementing regulations require that each application for financial assistance include an "assurance . . . that the program will be operated in compliance with this part." 34 C.F.R. §104.5(a) (referring to 34 C.F.R. Part 104 - "Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Federal Financial Assistance").

There is no merit to the State's claim that it did not know that its acceptance of federal funds came with certain conditions. Although the State complains that the general rule (expressed in Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 71 (1992)) that "the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute," creates uncertainty about the extent of liability that a state may face in suits under Section 504 (see Defendants' Partial Summary Judgment Memorandum, Attachment I (Reply Memorandum) at 8-9), that alleged uncertainty does not mean that the State was not aware of the consequences of its acceptance of federal funds. Instead, the general rule expressed in Franklin regarding "appropriate relief" is a clearly established part of the legal landscape that all states must take into account when they decide whether to accept federal financial assistance on condition of waiving Eleventh Amendment immunity. As always, the State remains free to decline Congress' offer of federal financial assistance. By continuing to accept federal funds, however, the State waived any Eleventh Amendment immunity to suit under Section 504, and effectively agreed to be subject

to the rule in Franklin.[7] The State cannot back away from that agreement now that it is in the midst of litigation.

3. Section 504 meets the third Dole requirement as well. Section 504 furthers the federal interest in assuring that no federal funds are used to support, directly or indirectly, programs that discriminate or otherwise deny benefits and services on the basis of disability to qualified persons.

Section 504's nondiscrimination requirement is patterned on Title VI and Title IX, which prohibit race and sex discrimination, respectively, in "programs" that receive federal funds. See NCAA v. Smith, 525 U.S. 459, 466 n.3 (1999); Arline, 480 U.S. at 278 n.2. Title IX has been upheld as valid Spending Clause legislation. Id. at 569 (citations omitted). For example, in Grove City College v. Bell, 465 U.S. 555 (1984), the Supreme Court addressed whether Title IX, which prohibits education programs or activities receiving federal financial assistance from discriminating on the basis of sex, infringed on

---

[7] The State also suggests that any waiver of immunity is invalid because the terms of the "contract" have been unilaterally altered by the amendments Congress has made to Section 504. See Defendants' Partial Summary Judgment Memorandum, Attachment I (Supplemental Memorandum) at 14-15. This argument also fails because the State has continued to accept federal financial assistance despite its knowledge of the amendments that have been made to Section 504, and by doing so knowingly has waived its Eleventh Amendment immunity. See supra at 7-12 (explaining that 42 U.S.C. § 2000d-7 puts states on notice of the consequences of their acceptance of federal financial assistance).

the college's First Amendment rights. The Court rejected that claim, holding that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." Id. at 575. See also Litman, 186 F.3d at 552 (recognizing, in a Title IX case, that "the attachment of conditions to grants made under the Spending Clause is a 'permissible method of encouraging a State to conform to federal policy choices'") (citation omitted). Courts also have held that Title VI is valid Spending Clause legislation. See Alexander v. Sandoval, 121 S. Ct. 1511, 1516 (2001) (reaffirming that "private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages"); Lau v. Nichols, 414 U.S. 563, 569 (1974) (noting, in a Title VI case, that "[t]he Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed").

These cases stand for the proposition that Congress has an interest in preventing the use of its funds to support, directly or indirectly, programs that discriminate or otherwise deny benefits and services to qualified persons because of race, sex, and disability. Thus, compliance with Section 504 is a valid condition on the receipt of all federal financial assistance.

Because this interest extends to all federal funds, Congress drafted Title VI, Title IX, and Section 504 to apply across-the-

board to all federal financial assistance. The purposes articulated by Congress in enacting Title VI, purposes equally attributable to Title IX and Section 504, were to avoid the need to attach nondiscrimination provisions each time a federal assistance program was before Congress, and to avoid "piecemeal" application of the nondiscrimination requirement if Congress failed to place the provision in each grant statute. See 110 Cong. Rec. 6544 (1964) (Sen. Humphrey); id. at 7061-7062 (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.[8] Thus, a challenge to such a cross-cutting non-discrimination statute fails under current Spending Clause law.

4. Section 504 does not "induce the States to engage in activities that would themselves be unconstitutional." Dole, 483 U.S. at 210. Neither providing meaningful access to people with disabilities nor waiving sovereign immunity violates anyone's

[8] For other Supreme Court cases upholding as valid exercises of the Spending Clause conditions not tied to particular spending program, see Salinas v. United States, 522 U.S. 52, 60-61 (1997) (upholding federal bribery statute covering entities receiving more than $10,000 in federal funds); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947) (upholding an across-the-board requirement in the Hatch Act that no state employee whose principal employment was in connection with any activity that was financed in whole or in part by the United States could take "any active part in political management").

constitutional rights. The defendants might argue that operating public schools is a "core state function" that precludes federal intrusion under principles of federalism. The Supreme Court, however, has held that "a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants." Id. This is because the federal government has not intruded into the defendants' schools. The State incurs these obligations only because it applies for and receives federal funds. Once a State elects to enter into that bargain, "[r]equiring [it] to honor the obligations voluntarily assumed as a condition of federal funding . . . simply does not intrude on [its] sovereignty." Bell v. New Jersey, 461 U.S. 773, 790 (1983); accord Massachusetts v. Mellon, 262 U.S. 447, 480 (1923) ("[T]he powers of the State are not invaded, since the statute imposes no obligation [to accept the funds] but simply extends an option which the State is free to accept or reject.").

5. Finally, there is no merit to the defendants' claim that Section 2000d-7's condition that state agencies waive their immunity is invalid because it is "coercive." The Ninth Circuit has questioned the viability of the coercion theory on at least two occasions, commenting in Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989), that "[t]he difficulty if not the impropriety of making judicial judgments regarding a state's financial

capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments." See also California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997) (observing that "no party challenging the conditioning of federal funds has ever succeeded under the coercion theory"), cert. denied, 522 U.S. 806 (1997).[9]

The State draws its coercion theory from language in Dole, where the Supreme Court observed that its "decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)); see also Defendants' Partial Summary Judgment Memorandum, Attachment I (Supplemental Memorandum) at 11 (quoting College Sav. Bank, 527 U.S. at 687 (quoting Dole)). The only case the Dole Court cited, however, was Steward Machine, a decision that expressed doubt about the viability of such a theory. 301 U.S. at 590 (finding no undue influence even "assum[ing] that such a concept can ever be applied with fitness to the relations between

[9] Other courts have recognized the inherent difficulties in determining whether a State has been "coerced" into accepting a funding condition. See Kansas v. United States, 214 F.3d 1196, 1202 (10th Cir.), cert. denied, 121 S. Ct. 623 (2000) (stating that "the coercion theory is unclear, suspect, and has little precedent to support its application"); Oklahoma v. Schweiker, 655 F.2d 401, 414 (D.C. Cir. 1981) ("The courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely a hard choice.").

state and nation"). Indeed, every congressional spending statute "is in some measure a temptation." Dole, 483 U.S. at 211. As the Court in Dole recognized, however, "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." Id. The Court in Dole thus reaffirmed the assumption, founded on "a robust common sense," that states voluntarily exercise their power of choice when they accept the conditions attached to the receipt of federal funds. Id. (quoting Steward Mach., 301 U.S. at 590).

Assuming arguendo that "coercion" is an independent and justiciable concept, any argument that Section 504 is coercive is inconsistent with Supreme Court decisions that demonstrate that states may be put to "difficult" or even "unrealistic" choices about whether to take federal benefits without the conditions becoming unconstitutionally "coercive."

In Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226 (1990), the Court interpreted the scope of the Equal Access Act, 20 U.S.C. 4071 et seq., which prohibits any public secondary schools that receive federal financial assistance and maintain a "limited open forum" from denying "equal access" to students based on the content of their speech. In rejecting the school's argument that the Act as interpreted unduly hindered local control, the Court noted that "because the Act applies only to public secondary schools that receive federal

financial assistance, 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, [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups." 496 U.S. at 241 (citation omitted). See also FERC v. Mississippi, 456 U.S. 742, 766-67 (1982) (upholding a statute that required states to choose between regulating in light of federal standards or having the field preempted so that they could not regulate at all, despite Court's acknowledgment that "the choice put to the States–that of either abandoning regulation of the field altogether or considering the federal standards – may be a difficult one"); North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532, 535-36 (E.D.N.C. 1977) (three-judge court) (federal law that conditioned the right to participate in "some forty-odd federal financial assistance health programs" on the creation of a "State Health Planning and Development Agency" that would regulate health services within the state was not coercive because the proposed requirement was not mandatory), aff'd mem., 435 U.S. 962 (1978).[10]

[10] The Supreme Court summarily affirmed the three-judge court's decision in Califano, thus making the holding binding on this Court. See Tully v. Griffin, Inc., 429 U.S. 68, 74 (1976).

These cases demonstrate that Congress can demand that states comply with federal conditions or make the "difficult" choice of losing all federal funds (Mergens), losing federal funds from many different longstanding programs (Califano), or even losing the ability to regulate certain areas (FERC), without crossing the line to coercion. Thus, the choice imposed by Section 504 is not "coercive" in the constitutional sense. State officials are constantly forced to make difficult decisions regarding competing needs for limited funds. While it may not always be easy to decline federal largesse, each department or agency of the state, under the control of state officials, is free to decide whether it will accept the federal funds with the Section 504 and waiver "string" attached, or simply decline the funds. See Grove City Coll., 465 U.S. at 575; Kansas, 214 F.3d at 1203-1204 ("In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the . . . requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be. Put more simply, Kansas' options have been increased, not constrained, by the offer of more federal dollars." (citation omitted)).

Because one of the critical purposes of the Eleventh Amendment is to protect the "financial integrity of the States," Alden, 527 U.S. at 750, it is perfectly appropriate to permit

each state to make its own cost-benefit analysis and determine whether it will, for any given state agency, accept the federal money with the condition that the agency can be sued in federal court, or forgo the federal funds available to that agency. See New York v. United States, 505 U.S. 144, 168 (1992). Once states have accepted federal financial assistance, however "[r]equiring 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).

CONCLUSION

For the foregoing reasons, this Court should hold that the Eleventh Amendment does not bar the plaintiffs' Section 504 claims against the defendants.

Respectfully submitted,

WILLIAM R. YEOMANS
Acting Assistant Attorney General
U.S. Department of Justice
Civil Rights Division
JEREMIAH GLASSMAN
MICHAEL S. MAURER
GEOFFREY L.J. CARTER
ANDY LIU
Educational Opportunities Section

ELLIOT ENOKI
United States Attorney
District of Hawaii

By _____
MICHAEL CHUN
Assistant U.S. Attorney

Attorneys for the United States

DATED: May 25, 2001, at Honolulu, Hawaii.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

STEPHEN L. and LAVERNE L., individually and as Guardians Ad Litem of AARON L., an incompetent adult,	)	CIVIL NO. 00-00338 DAE
	)	CERTIFICATE OF SERVICE
Plaintiffs,	)	
v.	)	
PAUL LEMAHIEU, in his official capacity as Superintendent of the Hawaii Public Schools; WILLIAM C. RHYNE, in his capacity as former Principal of Molokai High and Intermediate School; SARAH KALANI, in her capacity as former Principal of Molokai High and Intermediate School; LINDA PULELOA, in her official capacity as Principal of Molokai High and Intermediate School; and DEPARTMENT OF EDUCATION, STATE OF HAWAII,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document was duly mailed, on this date, addressed to the following:

Stanley E. Levin, Esq.
Davis, Levin, Livingston & Grande
400 Davis, Levin, Livingston & Grande Place
851 Fort Street
Honolulu, Hawaii 96813

Earl I. Anzai, Esq.

Russel A. Suzuki, Esq.
George S.S. Hom, Esq.
Anne Randolph, Esq.
Department of the Attorney General
235 S. Beretania Street, Room 304
Honolulu, Hawaii 96813

DATED: May 25, 2001, at Honolulu, Hawaii.

_____