IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MILTON ASH,	)	
Plaintiff,	)	CIVIL ACTION NO.
v.	)	97-AR-2179-S
ALABAMA DEPARTMENT OF YOUTH SERVICES, WALTER WOOD, in his official capacity, and DELEON FANCHER, in his official capacity,	)	
Defendants,	)	
UNITED STATES OF AMERICA,	)	
Intervenor.	)	

INTERVENOR'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

I. PRELIMINARY STATEMENT

In this action, plaintiff Milton Ash alleges that the Alabama Department of Youth Services discriminated against him by, inter alia, failing to accommodate his disability by refusing to repair exhaust leaks in automobiles he used on the job, refusing to enforce a no-smoking policy, and refusing to allow him to transfer to another shift,, in violation of Section 504 of the Rehabilitation Act of 1973, 42 U.S.C 794(a) ("Section 504"). Defendant will move for partial summary judgment concurrent with Intervenor's motion. Therefore, intervenor requests that the Court issue a briefing schedule so that it may have an opportunity to file a responsive brief once Defendants' arguments have been ascertained.

It is the intervenor's position that the Eleventh Amendment does not bar plaintiff's claims under Section 504 because defendant has waived its sovereign immunity by accepting federal funds. As demonstrated below, pursuant to the Spending Clause,[1] Congress validly conditioned receipt of federal financial assistance on waiver of States' immunity to private suits brought to enforce Section 504. 42 U.S.C. 2000d-7. By enacting Section 2000d-7, Congress put state agencies on clear notice that acceptance of federal financial assistance was conditioned on a waiver of their Eleventh Amendment immunity to discrimination suits under Section 504. In accepting federal funds, defendant agreed to these terms. As the Eleventh Circuit recognized in *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999) *rev'd on other grounds, Alexander v.*

---

[1] Article I, §8, cl. 1 of the United States Constitution provides:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

Sandoval, 532 U.S. 275, Section 2000d-7 is a valid exercise of the Spending Clause, and by accepting federal funds, a State waives its sovereign immunity.

II. ARGUMENT

A. CONGRESS VALIDLY CONDITIONED FEDERAL FUNDING ON A WAIVER OF ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), prohibits discrimination against persons with disabilities under "any program or activity receiving Federal financial assistance."[2] 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. States are free to waive their Eleventh Amendment immunity. *See College Sav. Bank v. Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 674 (1999). And "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 * * * acceptance of the funds entails an agreement to the actions." *Id*. at 686. Thus,

---

[2] Defendant denied accepting federal financial assistance. *See* Defendant's Answer to Amended Complaint at ¶ 4. However, extensive evidence was adduced in discovery to show Defendant received federal funds in each year since at least 1993. *See*, the Affidavit of Harold L. Jackson in Support of Intervenor's Motion for Partial Summary Judgment dated August 27, 2002, identifying discovery excerpts.

Congress may, and has, conditioned the receipt of federal funds on defendant's waiver of Eleventh Amendment immunity to Section 504 claims.

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

It is settled in the Eleventh Circuit that Section 2000d-7 is a clear statement that in accepting federal funds, the State of Alabama is subject to suits in Federal Court brought under Section 504. *Sandoval,* 197 F.3d 484 at 493-94.[3] The Eleventh Circuit explained in *Sandoval* that "[t]he provision's plain language manifests an unmistakable intent to condition federal funds on a state's waiver of sovereign immunity." *Sandoval*, 197 F.3d at 493. A history of Section 2000d-7 lends context to the Court's decision.

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 condition federal funding on States' waiver of Eleventh Amendment immunity for private Section 504 claims against state entities and reaffirmed that "mere receipt of federal funds" was insufficient to constitute a waiver. 473 U.S. at 246. But the Court stated that if a statute "manifest[ed] a clear intent to condition participation in the programs funded under the Act on a State's waiver of 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 to condition federal funding on States' waiver of Eleventh Amendment immunity to suit in federal court under Section 504 (and the other federal non-discrimination statutes tied to federal financial assistance)

[3] *Sandoval* dealt with Title VI of the Civil Rights Act of 1964. However the waiver provision at issue was the same provision at issue here: 42 U.S.C. 2000d-7.

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 would waive its immunity to suit 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 was the requirement that they consent to suit in federal court for alleged violations of Section 504 for those agencies that received any financial assistance.[5]

Thus, the Supreme Court, in *Lane* v. *Peña*, 518 U.S. 187, 200 (1996), 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. The Court of Appeals for this Circuit also made clear in *Sandoval*, that the "plain language" of 42 U.S.C. 2000d-7 "manifests an unmistakable intent to condition federal funds on a state's waiver of sovereign immunity." 197 F.3d at 493. Six other courts of appeals agree with Court of Appeals

---

[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 [S]tates that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment 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.

for the Eleventh Circuit. *See Litman* v. *George Mason University*, 186 F.3d 544, 554 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000) ("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)."); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, *opinion amended*, 271 F.3d 910 (9th Cir. 2001), *cert. denied*, 122 S.Ct. 2591 (2002)(Section 504); *Nihiser* v. *Ohio E.P.A.*, 269 F.3d 626, 628 (6th Cir. 2001) (Section 504), *cert. denied,* 122 S.Ct. 2588 (2002); *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) (Section 504), *cert. denied*, 533 U.S. 949 (2001); *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). The text and structure of 42 U.S.C. 2000d-7 makes clear that federal financial assistance is conditioned on both the nondiscrimination obligation under Section 504 and removal of Eleventh Amendment immunity.

Defendant cannot successfully rely upon an isolated decision in *Garcia* v. *SUNY Health Sciences Center*, 280 F.3d 98, 113 (2d Cir. 2001) to argue that its waiver was not knowing and voluntary. The Second Circuit in *Garcia* agreed that Section 2000d-7 "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity." 280 F.3d at 113. And it further agreed that, under normal circumstances, "the acceptance of funds conditioned on the waiver might properly reveal a knowing relinquishment of sovereign immunity." *Id*. at 114, n. 4. However, *Garcia* also held that Title II of the ADA did not validly abrogate the States' immunity and that the Section 504 waiver was not knowing because the state agency did not "know" in 1995 (the latest point the alleged discrimination in *Garcia* had occurred) that its waiver of immunity under Section 504 would have a substantial fiscal effect, rather than simply result in liability substantially similar to

that under Title II. According to the court, since "by all reasonable appearances state sovereign immunity [to claims of disability discrimination under the ADA] had already been lost" by virtue of the Title II abrogation, the State "could not have understood that in [accepting federal funds] it was actually abandoning its sovereign immunity from private damages suits" for the same disability discrimination under Section 504. *Id*. at 114.

The Second Circuit's conclusion about a knowing waiver is, in our view, incorrect. It is wrong because it ignores what every state agency did know from the plain text of Section 2000d-7 since it was enacted in 1986, that acceptance of federal funds constituted a waiver of immunity to suit for violations of Section 504. Section 504 was not amended or altered by the enactment of Title I of the ADA in 1990, and it was clear that plaintiff could sue under either statute. *See* 42 U.S.C. 12201(b) of the ADA (preserving existing causes of action). It is thus untenable to suggest that abrogation for suits under one statute is relevant to whether an entity waived its immunity to suits brought to enforce a distinct, albeit substantively similar, statute. *Garcia's* holding – that the waiver for Section 504 claims was effective until Title II went into effect and then lost its effectiveness until some point in the late 1990's, when a "colorable basis for a State to suspect" that the abrogation was unconstitutional developed, *see Garcia*, 280 F.3d at 114 n. 4, and has now regained its full effectiveness – creates an unprecedented patchwork of effective coverage. Thus, the "clear intent to condition participation in the programs funded" required by *Atascadero*, 473 U.S. at 247, *i.e.*, a clear statement in the text of the statute about the Eleventh Amendment and non-discrimination statutes tied to federal financial assistance, assured that defendant knew as a matter of law that it was waiving its immunity when it applied for and accepted federal financial assistance.

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

Congress may condition its spending 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 *Florida Prepaid* the Court reaffirmed the holding of *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), where the Court held that Congress could condition the exercise of one of its Article I powers (there, the approval of interstate compacts) on the States' agreement to waive their Eleventh Amendment immunity from suit. *Florida Prepaid*, 527 U.S. at 686. At the same time, the Court suggested that Congress had the authority under the Spending Clause to condition the receipt of federal funds on the waiver of immunity. *Ibid*.; *see also id.* at 678-679 n.2. The Court explained that unlike Congress's power under the Commerce Clause to regulate "otherwise lawful activity," Congress's power to authorize interstate compacts and spend money was the grant of a "gift" on which Congress could place conditions that a State was free to accept or reject. *Id*. at 687. The Eleventh Circuit recognized this principle in *Sandoval*, explaining that "under the Spending Clause power, the federal government may condition a waiver of state sovereign immunity upon the receipt of federal monies." 197 F.3d at 492.

Defendant cannot, based upon on *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) assert that Congress cannot, pursuant to its Article I powers, abrogate state sovereign immunity. Unlike the Commerce Clause power that was at issue in *Seminole Tribe*, "the Spending Clause power does not abrogate immunity through unilateral federal action. Rather,

States are free to accept or reject the terms and conditions of federal funds, much like any contractual power." *Sandoval*, 197 F.3d at 494, citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions"). Indeed, the Supreme Court in *Florida Prepaid* expressly distinguished the Spending Clause powers from other sections of Article I and reaffirmed that pursuant to its Spending Clause Powers Congress may condition participation in federal programs on an agreement to take certain actions that Congress otherwise could not require a State to take. 527 U.S. at 686. *Accord Dole*, 483 U.S. at 207 ("objectives not thought to be within Article I's 'enumerated legislative fields,' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.") *citing United States v. Butler*, 297 U.S. 1, 65 (1936).

3. Section 504 Is A Valid Exercise Of The Spending Power

The Supreme Court in *Dole* identified four limitations on Congress's Spending Power. First, the Spending Clause by its terms 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.'" *Ibid.* (quoting *Pennhurst*). 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.'" 483 U.S. at 207. And fourth, the obligations imposed by Congress may not induce a governmental recipient to violate any independent constitutional provisions. *Id*. at 209-211.

As this case comes before this Court, there is no dispute that (1) 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); *Dole*, 483 U.S. at 207 n.2 (noting substantial judicial deference to Congress on this issue); (2) the language of Section 504 makes clear that the obligations it imposes are a condition on the receipt of federal financial assistance, *see School Bd. of Nassau County v. Arline*, 480 U.S. 273, 286 n.15 (1987) (contrasting "the antidiscrimination mandate of § 504" with the statute in *Pennhurst*); and (3) Section 504 does not "induce the States to engage in activities that would themselves be unconstitutional." Dole, 483 U.S. at 210.

Section 504 meets the Dole "relatedness" 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 by "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. Both Title VI and Title IX have been upheld as valid Spending Clause legislation. In *Lau v. Nichols*, 414 U.S. 563 (1974), the Supreme Court held that Title VI, which the Court interpreted to prohibit a school district from ignoring the disparate impact its policies had on limited- English proficiency students, was a valid exercise of the Spending Power. "The 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." 414 U.S. at 569 (citations omitted).[6] The Court made a similar holding in *Grove City College v. Bell*, 465 U.S. 555 (1984). In *Grove City*, the Court addressed whether Title IX, which prohibits education programs or activities receiving federal financial assistance from discriminating on the basis of sex, infringed on 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.

These cases stand for the proposition that Congress has a legitimate interest in preventing the use of any of its funds to "encourage[], entrench [], subsidize[], or result[] in," *Lau*, 414 U.S. at 569 (internal quotation marks omitted), discrimination against persons otherwise qualified on the basis of criteria Congress has determined are irrelevant to the receipt of public services, such as race, gender, and disability. *See United States v. Louisiana*, 692 F. Supp. 642, 652 (E.D. La. 1988) (three-judge court) ("[T]he condition imposed by Congress on defendants [in Title VI], that they may not discriminate on the basis of race in any part of the State's system of public higher education, is directly related to one of the main purposes for which public education funds are expended: equal education opportunities to all citizens." (footnote omitted)). 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

[6] In *Alexander v. Sandoval*, 532 U.S. at 285, the Court noted that it has "rejected *Lau*'s interpretation of § 601 [of the Civil Rights Act of 1964, 42 U.S.C. 2000d] as reaching beyond intentional discrimination." The Court did not cast doubt on the Spending Clause holding in *Lau*.

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).[7]

[7] For other Supreme Court cases upholding as valid exercises of the Spending Clause conditions not tied to a particular spending program, *see 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"); *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).

III. CONCLUSION

For the foregoing reasons, the Eleventh Amendment does not bar this lawsuit against defendant Alabama Department of Youth Services.

Date: September 11, 2002

Respectfully submitted,

John Ashcroft
Attorney General of the United States

Ralph F. Boyd, Jr.
Assistant Attorney General
Civil Rights Division

Alice H. Martin
United States Attorney

_____

John Wodatch
Philip L. Breen
Allison Nichol
Harold L. Jackson
California State Bar No. 071325
M. Lucia Blacksher
Louisiana State Bar No. 26605
Disability Rights Section - NYA
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530
Telephone: (202) 305-7624
Facsimile: (202) 616-6862

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2002, I served a copy of the foregoing INTERVENOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT upon Defendant's counsel and Plaintiff's counsel in ASH V. ALABAMA DEPARTMENT OF YOUTH SERVICES, Civil Case No. 97-AR-2179-S, by sending it via first class U.S. Mail, postage pre-paid, to the following addresses:

Margaret L. Fleming
Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130-0152

Deborah A. Mattison
GORDON, SILBERMAN, WIGGINS & CHILDS
1400 South Trust Tower
Birmingham, AL 35203

Alice H. Martin, U.S. Attorney
Cindy Simmons, Civil Chief
Office of the U.S. Attorney
Northern District of Alabama
200 Vance Federal Building
1800 Fourth Avenue North
Birmingham, Alabama 35203

Dated this 11th day of September 2002

_____
HAROLD L. JACKSON
Disability Rights Section - NYA
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530