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Educ - Powell v Ridge

POWELL v. RIDGE --- TALKING POINTS

--The Government's brief in this case takes the position that the complaint filed by the City of Philadelphia and other plaintiffs states a claim under Title VI regulations that should be considered by the courts, and not dismissed on its face.

--The Department of Education's Title VI regulations prohibit recipients of federal funds, including states, from using criteria or methods of administration that have the effect of subjecting individuals to discrimination based on race.

--The City's complaint alleges that the state has administered its formula for state aid to elementary and secondary education in a manner that has resulted in discrimination based on race, both through factors in the state formula itself and considering the state system for funding education, taken as a whole. The complaint also asserts that the state was able to foresee that changes in its formula would decrease aid to school districts serving predominantly minority students. It thus raises an issue of intentional discrimination, as well as issues of disparate impact based on race.

--The Department believes these issues warrant consideration by the trial court. The plaintiffs should have an opportunity to develop their theories and the facts and the defendants should have an opportunity to challenge them and to justify any disparities that are established, consistent with well-established civil rights principles found in Title VI and its implementing regulations.

THE WHITE HOUSE
WASHINGTON

To: Elena Kagan

From: Eldridge Cooney

Here's how the brief came out. See especially p. 26.

Also, there are the ED talking points. They haven't received any questions yet.

Educ-Powell v Ridge

II

PLAINTIFFS' COMPLAINT STATES A CLAIM FOR VIOLATION OF THE DEPARTMENT OF EDUCATION'S TITLE VI REGULATIONS

A court may dismiss a complaint for a failure to state a claim only when it is certain that the allegations, and all the inferences fairly drawn from those allegations, cannot state a claim under any legal theory. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Applying this generous standard, plaintiffs' complaint should not have been dismissed at this stage.

A complaint need only contain "a short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). "Generally, under the liberal notice pleading practices in federal civil cases, a claimant 'does not have to set out in detail the facts upon which the claim for relief is based, but must merely provide a statement sufficient to put the opposing party on notice of the claim.'" Foulk v. Donjon Marine Co., 144 F.3d 252, 256 (3d Cir. 1998).

After surveying defendants' practices in funding public education in Pennsylvania, the complaint alleges that defendants' "funding policies and practices wrongfully discriminate against African-American, Hispanic, Asian and other minority students in the School District by utilizing criteria and methods that have had the foreseeable effect of subjecting such students to discrimination because of their race, color, or national origin, by disproportionately denying them necessary support for their education" (J.A. yy ¶ 73). The Department of Education's Title VI regulations proscribe "utiliz[ation of] criteria or methods of

administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." 34 C.F.R. 100.3(b)(2). The broad language of the regulations encompasses complaints regarding the "criteria or methods" of programs funding public education. See Campaign for Fiscal Equity, Inc. v. New York, 655 N.E.2d 661, 670 (N.Y. 1995).[8/] Plaintiffs' complaint has put defendants on notice of the circumstances that are involved in the claim, and has alleged that defendants' actions are in violation of federal law. Nothing more is required. See Frazier v. SEPTA, 785 F.2d 65, 66-67 (3d Cir. 1986) (federal rules permit "great generality" in stating the basis of plaintiff's claim); Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998). By purporting to look behind these allegations to divine plaintiffs' "actual" complaint, the district court prematurely and inappropriately terminated the litigation.

In their appellate brief, plaintiffs have identified several potential theories of liability under the Title VI regulations, each of which needs to be explored more fully on remand. We address them briefly to explain why plaintiffs' more specific allegations are also sufficient at this stage to support

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[8/] The Department of Education has made clear, in interpreting these Title VI regulations with reference to vocational education programs receiving federal assistance, that "[r]ecipients may not adopt a formula or other method for the allocation of Federal, State, or local vocational education funds that has the effect of discriminating on the basis of race, color, [or] national origin." 34 C.F.R. Pt. 101, App. B, Pt. III.B.

potential claims for violating the Title VI regulation.[9/]

A. Plaintiffs' Factual Allegations Support An Inference Of Intentional Discrimination In Violation Of The Title VI Regulation

Plaintiffs allege that defendants have in recent years persistently changed the state revenue formula so that each year, when the Commonwealth increases the amount of aid it distributes to local school districts, it provides a much smaller per capita increase in predominantly minority school districts than in predominantly white districts (J.A. 39-40 ¶¶ 56-61). Moreover, plaintiffs allege that the Commonwealth adopted these changes, which have reduced each year the share of state education funds distributed to minority districts, "with prior knowledge of [their] discriminatory consequences on students based on race" (J.A. 35, 40 ¶¶ 47, 59, 60). These allegations support an inference that the Commonwealth devised and changed its funding formula with the intent of causing disproportionate harm to predominantly minority districts, in violation of the Title VI prohibition on intentional discrimination.

As plaintiffs explain (Br. 35), based on these allegations, a factfinder would be entitled to infer that defendants took

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[9/] In the district court, the United States argued as amicus curiae that the "benefit" provided by the Commonwealth's financing system was an "education," see Lau v. Nichols, 414 U.S. 563, 568 (1974), and that defendants' failure to take into account the increased cost of providing such an education in predominantly minority school districts such as Philadelphia also stated a claim. Plaintiffs have expressly disavowed that argument (Br. 30), and thus we do not press it in this appeal. See DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 731 (3d Cir.) ("'amicus may not frame the issues for appeal'"), cert. denied, 516 U.S. 916 (1995).

these actions, which they were aware would harm predominantly minority districts, at least in part because of "purposeful" discrimination. See Hunter v. Underwood, 471 U.S. 222, 231-232 (1985) (in order to show intentional racial discrimination, plaintiffs need not show that racial minorities were the only class intended to be burdened, or that race was the only reason for the decision); cf. Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061 (3d Cir. 1996) (en banc) (disbelief of defendant's proffered reasons combined with other evidence permits factfinder to conclude that there was intentional discrimination), cert. denied, 117 S. Ct. 2532 (1997). As the facts alleged in the complaint could permit a factfinder to conclude that defendants engaged in intentional discrimination, this case should be remanded to give plaintiffs the opportunity to prove these allegations.

B. Plaintiffs Have Alleged That The Commonwealth Provides Funds For Education In A Manner That Has A Discriminatory Impact On Predominantly Minority Districts In Violation Of The Title VI Regulation

Plaintiffs allege that predominantly minority school districts receive "less Commonwealth treasury revenues per student than school districts with higher white enrollments and the same level of poverty" (J.A. 37-38 ¶¶ 53-54). On its face that states a claim that the Commonwealth is distributing its funds to school districts in a manner that has a discriminatory impact on the basis of race.

Intervenors asserted in the district court that predominantly minority school districts in fact receive more

state revenues per pupil than many predominantly white school districts, and the district court appears to have relied in part on that assertion in finding that the complaint failed to state a claim (App. 32). If that factual assertion could properly be considered at this stage, which is doubtful, and if it is true, it would nevertheless not be dispositive. Plaintiffs allege that the state formula contains a factor that increases aid to less wealthy districts (J.A. 36 ¶ 49), and it follows that a minority district, if poor, might well receive more funding per capita than a white district that happened to be wealthy. They allege, however, that after controlling for poverty -- a factor the Commonwealth clearly deems relevant to funding -- the formula distributes less state revenues per capita to predominantly minority school districts than to predominantly white districts (J.A. 37-39 ¶¶ 53-55).

This disparity may be the result of one or more factors in the formula, perhaps as yet unknown to the plaintiffs, with an unjustified discriminatory impact on the basis of race.[10/] This case should be remanded so that plaintiffs have the opportunity to discover the causes of this disparity in state funds between

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[10/] The fact that plaintiffs did not identify the factors in the formula that have a disparate impact is not dispositive at this stage of the proceedings. See Menkowitz v. Pottstown Memorial Med. Ctr., 154 F.3d 113, 124 (3d Cir. 1998) ("a plaintiff generally need not explicitly allege the existence of every element in a cause of action if fair notice of the transaction is given and the complaint sets forth the material points necessary to sustain recovery"); cf. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657-658 (1989) (noting that discovery will normally be necessary to permit plaintiffs to identify with specificity causes of disparate impact).

predominantly minority districts and others, controlling for poverty.

Even if predominantly minority districts benefit from a subsidy for poverty, they may be disadvantaged on the basis of race if other factors in the formula unjustifiedly diminish the benefits received by minority populations. In Connecticut v. Teal, 457 U.S. 440, 455-456 (1982), for example, the Supreme Court held that a Title VII disparate impact suit about promotions was not barred simply because defendants could show that minorities ultimately were promoted at a higher rate than whites. Instead, the Court held that plaintiffs could challenge any portion of the promotions process that disparately excluded minorities from consideration. The Teal holding has been applied in Title VI disparate impact cases. See Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1420 (11th Cir. 1993); Meek v. Martinez, 724 F. Supp. 888, 905-906 (S.D. Fla. 1987) (finding that various components of funding distribution formula violated Title VI regulations). Indeed, this Court applied Teal in a case analogous to this one in Wilmore v. City of Wilmington, 699 F.2d 667 (1983). In Wilmore, plaintiffs challenged a promotions process under Title VII that ranked people based on the combined weight of three separate factors. In response to the district court's suggestion that the disparate impact of one factor could not be challenged because it was balanced out by the results of another, this Court explained "[t]his reasoning penalizes minorities for doing well on one part of the exam and overlooks

how much better their overall test results would have been if they had not been so handicapped on that part of the exam." Id. at 675.

Moreover, plaintiffs allege that the Commonwealth has the duty to provide each child with an education (J.A. 24 ¶ 20), that it has delegated that duty to each school district (J.A. 24 ¶ 20), and that it has authorized and encouraged school districts to raise monies locally through property taxes for that purpose (J.A. 35 ¶ 47). Plaintiffs also allege that the state system for funding education, taken as a whole, has a disparate impact on predominantly minority school districts (J.A. 37, 39, 40, 42-43 ¶¶ 52, 56, 60, 65, 66). At least in some circumstances, these allegations may state a claim under the disparate impact regulation.

Any policy which may have a disparate impact may be justified: even if plaintiffs do make that showing, defendants have an opportunity to demonstrate "substantial legitimate justification[s]" for the disparities. Elston, 997 F.2d at 1407. Finally, if there is a significant racial disparity and no legitimate justification, defendants will have the opportunity to propose a remedial plan. Lawyer v. Department of Justice, 117 S. Ct. 2186, 2193 (1997). Defendants are not required by Title VI to use any particular method of funding public education. By accepting federal funds, however, they have agreed not to administer their program in a manner that results in unjustified discriminatory effects.

POWELL v. RIDGE --- TALKING POINTS

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THE WHITE HOUSE
WASHINGTON

To:

Elena Kagan

From:

Eddie Lorenzi

U.S. District court
brief in Powell v Ridge

Eden - Powell v Ridge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID POWELL, et al.

Plaintiffs

v.

THOMAS J. RIDGE, et al.

Defendants

C.A. No. 98-CV-1223

BRIEF OF THE UNITED STATES AS
AMICUS CURIAE AND BRIEF IN INTERVENTION
IN OPPOSITION TO DEFENDANT INTERVENORS'
MOTION TO DISMISS OR FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

On June 17, 1998, the United States filed its Motion for Leave to Participate as Amicus Curiae, Memorandum in Support, and Brief as Amicus Curiae in the above-captioned action. The United States realleges and incorporates these pleadings herein by reference. Accordingly, we will not repeat in the instant brief either the Interest of the United States, or the Background of the case prior to the intervention and Motion to Dismiss or for Judgment on the Pleadings of defendant intervenor state legislators Jubelirer, Ryan, Rhoades, and Stairs.

On May 6, 1998, four Pennsylvania legislators moved to intervene as defendants in the above-captioned case, and the court granted the unopposed motion on June 3, 1998. On July 2, 1998, the defendant intervenor legislators filed their Motion to Dismiss or for Judgment on the Pleadings, and Brief in Support, pursuant to Rules 12(b)(1), (6), (c), Fed. R. Civ. P. (Def. Bf.).

In that Motion to Dismiss and Brief in Support, defendant intervenor legislators allege: 1) that under Alexander v. Choate, 469 U.S. 287 (1985), plaintiffs' factual allegations fail to state a disparate impact claim; 2) the disparate impact regulation, 34 C.F. R. § 100.3(b)(2), is unlawful because it exceeds the authority delegated by statute to the U.S. Department of Education; 3) plaintiffs' complaint is barred by the Eleventh Amendment; 4) Eleventh Amendment immunity has not been abrogated; 5) plaintiffs' claim under 42 U.S.C. §1983 should be dismissed if the claim under the underlying federal statute, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. ("Title VI"), is dismissed, and the claim under §1983 is also barred by the Eleventh Amendment; and, 6) plaintiffs lack standing. In accordance with the United States' statement of interest set forth in our Brief as Amicus Curiae, in the capacity of proposed amicus curiae the United States will address grounds 1 through 3, supra. See Def. Bf. ¶¶ A-C at 14-29. In its capacity as proposed intervenor, the United States will address the grounds of defendant intervenors' Motion and Brief which involve abrogation of Eleventh Amendment immunity. See Def. Bf. ¶ D at 29 - 32.

For the reasons set forth below, this Court should hold that Plaintiffs' complaint states a claim and the suit is not barred by the Eleventh Amendment.

ARGUMENT

I. PLAINTIFFS HAVE STATED A CLAIM UNDER TITLE VI REGULATIONS BASED ON THE ALLEGATIONS THAT PENNSYLVANIA'S SCHOOL FUNDING POLICIES AND PRACTICES HAVE IMPERMISSIBLE DISCRIMINATORY EFFECTS ON STUDENTS ENROLLED IN THE PHILADELPHIA SCHOOL DISTRICT.

The issue presented upon a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., is, simply, whether the plaintiff has stated an actionable claim, assuming, as the Court must, that the complaint's allegations are true. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); see Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993); Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). To state a claim for a violation of the Title VI regulations, the provisions at issue here, a plaintiff must allege that the challenged practice has a sufficiently adverse racial impact. NAACP v. Medical Center, Inc., 657 F.2d 1322, 1331 (3d Cir. 1981) (en banc); Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, 754 n. 3 (5th Cir. 1989); Georgia State Conference of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518, 1523 (M. D. Ala. 1991).

The plaintiffs' complaint meets this standard by alleging, among other facts, that:

- "The Commonwealth receives federal financial assistance for the support of public education in Pennsylvania." Complaint, ¶34.
- "When Commonwealth treasury revenues per pupil are analyzed by the amount of poverty in school districts across the Commonwealth . . . , school districts with higher proportions of non-white students receive less Commonwealth treasury revenues than districts with higher proportions of white students. On average, for 1995-96, for two school districts with the same level of poverty as measured by AFDC, the school district with

higher non-white enrollment received $52.88 less per pupil for each increase of 1% in non-white enrollment." Id., ¶55 (emphasis in original).

- "The Commonwealth Defendants' funding policies and practices wrongfully discriminate against . . . minority students in the School District . . . by disproportionately denying them necessary support for their education, in violation of the Title VI implementing regulations applicable to federal education programs." Id., ¶73.

Through these allegations, the plaintiffs have adequately pleaded that the Commonwealth's school financing policies and practices have a disproportionate impact on the Philadelphia School District, (PSD), whose student population is overwhelmingly non-white. The plaintiffs should therefore have the opportunity to develop and introduce evidence establishing a prima facie violation of the Title VI discriminatory effects regulations.

Defendant intervenors argue, relying on the Supreme Court's decision in Alexander v. Choate, 469 U.S. 287, that a claim for funding to ensure equal educational opportunities is not actionable under the Title VI regulations. Defendant intervenors are wrong.[1] Briefly summarized, Choate involved a challenge under Section 504 of the Rehabilitation Act to a Tennessee Medicaid rule that reduced the limit on inpatient hospital visits from 20 to 14 days per year. During a bench trial, the plaintiffs showed that 27% of disabled patients required more than 14 days of care, compared to only 8%

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[1]Defendant intervenors also suggest that the plaintiffs' disparate impact claim fails on its face because the Commonwealth's funding policies have an impact on white students as well as minority students in the PSD. Def. Bf. at 18. But an actionable disproportionate impact, by definition, need not be confined to a minority group. See Sandoval v. Hagan, 1998 WL 295891 (M.D. Ala. June 5, 1998) (finding disparate impact on the basis of national origin where not every person adversely affected by English-only policy was from a country of origin other than the United States).

of similarly situated non-disabled patients. The district court found, however, that the plaintiffs did not establish a prima facie case under Section 504 and that, consequently, Tennessee did not have to afford disabled patients a greater number of hospital days than it did to non-disabled patients. Jennings v. Alexander, 518 F. Supp. 877, 882 (M.D. Tenn. 1981), rev'd, 715 F.2d 1036 (6th Cir. 1983), rev'd sub nom. Choate, supra. The Supreme Court agreed, holding that, in assessing a Section 504 violation, a fund recipient need only provide "meaningful access to the benefit the [federal fund recipient] offers." Choate, 469 U.S. at 301. It found that the 14-day limitation would not deny the plaintiffs "meaningful and equal access" because they received the benefit equally with non-disabled persons. Id. at 306.

Defendant intervenors' attempt to analogize this case to Choate fails in several respects, all fatal to their motion to dismiss. Consequently, as demonstrated below, Choate should not be considered "controlling precedent" in this case. See Def. Bf. at 19.

A. Choate was decided in a different procedural posture.

Choate was decided with the benefit of a full evidentiary record; the plaintiffs were permitted to present their case to the district court. Following a bench trial, the district court dismissed the plaintiffs' claims, finding that they had failed to carry their burden of establishing that the 14-day limitation had a disproportionate impact on disabled persons, or of showing a causal connection between the existence of a disability and the need for hospital care in excess of 14 days. Jennings v. Alexander, 518 F. Supp. at 881-82; see also Choate, 469 U.S. at 302 n. 22 ("The record does not

contain any suggestion that the illnesses uniquely associated with the handicapped or occurring with greater frequency among them cannot be effectively treated, at least in part, with fewer than 14 days' coverage.").

Here, of course, there is no evidentiary record yet; defendant intervenors seek to dismiss the plaintiffs' complaint at the outset. Plaintiffs have met the threshold requirements of alleging facts that constitute a violation of the Title VI discriminatory effects regulations. For example, they allege that Commonwealth school districts with more than 50% minority student population received less in Commonwealth treasury revenues than districts with higher white enrollment with the same poverty level. Complaint ¶ 54. Moreover, Plaintiffs allege that the PSD receives 33.1% less in Commonwealth revenue than the average of Commonwealth school districts with the same poverty level. Id., ¶53; see also id., ¶ 55. Plaintiffs should have a full opportunity to develop the record in order to establish that the Commonwealth's funding policies disproportionately harm the predominantly minority Philadelphia School District. Cf. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657-658 (1989) (noting that discovery will normally be necessary to permit plaintiffs to identify with specificity causes of disparate impact).

B. Choate did not involve a claim under Title VI.

Title VI and Section 504 are different statutes having different objectives and different histories. Indeed, for these reasons, the Court in Choate cautioned that "too facile an assimilation of Title VI law to Section 504 must be resisted." Id. at 293 n. 7. Congress was aware that discrimination against disabled persons manifested itself

differently than that against racial minorities, the former being more a product of "benign neglect" than animus. Id. at 295 ("Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference — of benign neglect.").[2] Fundamental to this difference is that, by definition, persons with disabilities have a physical or mental impairment that substantially limits one or more major life activities. As to that life activity at least, "the handicapped typically are not similarly situated to the nonhandicapped." Id. at 298.

Many neutral rules will have a disparate impact on a discrete subset of the class of "disabled" persons because the rules, crafted for nondisabled persons, interact with the objective conditions that make a person fit the category of "disabled." Thus, in Choate, the Court attempted to set limits on the degree of accommodation required under Section 504 so that "each recipient of federal funds [would not be required] to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped." 469 U.S. at 298.

In contrast to a disability, racial categories are not defined by any inherent characteristic other than race itself. Neutral factors that discriminatorily affect racial minorities do so not simply because persons are in that classification. Instead, these disparate effects result from the interaction of race with the long history of discrimination, segregation and prejudice against racial minorities. The vestiges of this

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[2]The Court also recognized that not all discrimination against disabled persons stems from innocent intentions. See id. at 295 n. 12 (citations omitted) ("To be sure, well-cataloged instances of invidious discrimination against the handicapped do exist").

system continue to this day. Because of the legacy of racial discrimination, policies that have a discriminatory effect on racial minorities are properly subject to a different -- and more stringent -- standard than those applied to disabled persons.

Not surprisingly then, the courts of appeals have never adopted Choate as the model for addressing Title VI discriminatory effects claims. Instead, they have drawn the standards from Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., (Title VII), which prohibits racially discriminatory employment practices.[3] Title VII has long been understood to proscribe any facially neutral policies that had unjustified discriminatory effects against racial minorities, not just those that bar "meaningful access." See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). The legacy of discrimination is one of the primary justifications for this standard. See Reynolds v. Alabama Dep't of Transp., 4 F. Supp.2d 1092, 1109 (M.D. Ala. 1998) ("One would have to close one's eyes to a century of this country's history to not know that, before the enactment of Title VII in 1964 — and even for a long time thereafter . . . intentional discrimination against African-Americans was the way of life throughout much of this land and, indeed, was the rule of law at state and local levels in the South.").[4] In the

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[3]See, e.g., Butts v. NCAA, 600 F. Supp. 73, 75 (E.D. Pa.), aff'd on other grounds, 751 F.2d 609 (3d Cir. 1984); New York Urban League v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995); Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 n. 14 (11th Cir. 1993); Latinos Unidos de Chelsea en Accion v. Secretary of Hous. & Urban Dev., 799 F.2d 774, 777 (1st Cir. 1986); United States v. Texas, 793 F.2d 636, 648 (5th Cir. 1984); Larry P. v. Riles, 793 F.2d 969, 982 n. 9 (9th Cir. 1984); Sandoval v. Hagan, 1998 WL 295891 at *57.

[4]The legacy of discrimination, as the Reynolds court stated, is not confined to the South. The Philadelphia School District itself formerly segregated students by race. See Complaint, ¶ 37.

instant case, plaintiffs assert that, although the Commonwealth's funding formula may be facially neutral, that formula has unjustified discriminatory effects on school districts with higher minority enrollment. See Complaint, ¶¶ 47-52; Plaintiffs' Opposition to Defendant Intervenors' Motion to Dismiss at 16-18 (filed Aug. 20, 1998).

Defendant intervenors attack plaintiffs' Complaint, alleging that the PSD is getting more than its per capita share of state funding.[5] See Def. Bf. at 9 ("[T]he School District receives almost 18 percent of the Commonwealth's subsidy for basic education, even though the School District has only 12 percent of the public school students. . . ."). However, Title VII is not only about the "bottom line," but also about a process free from facially neutral factors that unjustifiedly restrict opportunities for minority populations. Thus, even assuming, arguendo, that defendant intervenors' contention is correct, applying Title VII standards, a plaintiff can state a disparate impact claim even if by some measures racial minorities as a group are receiving a benefit at the same or better rates than whites as a group. In Connecticut v. Teal, 457 U.S. 440 (1982), the Supreme Court held that a Title VII disparate impact suit about promotions was not barred simply because the defendants could show that minorities ultimately were promoted at a higher rate than whites. Instead, the Court held that

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[5]Plaintiffs dispute this contention. They offer data showing that between 1992 and 1996, Commonwealth revenues to majority-white school districts increased by an average of $800 per pupil while revenues to school districts with at least 75% non-white enrollment increased by an average of $150. The PSD, with an 80% minority enrollment, received an increase of only $84 per pupil. Complaint, ¶¶, 56-58. Given these disputed factual allegations concerning funding, it would be premature for this Court to grant dismissal without affording plaintiffs the opportunity to develop evidence on this issue.

plaintiffs could challenge any portion of the promotions process that disparately excluded minorities from consideration. Id. at 455-56.

The Third Circuit followed Teal in Wilmore v. City of Wilmington, 699 F.2d 667 (3d Cir. 1983), and permitted the plaintiffs to challenge a promotions process under Title VII that ranked people based on the combined weight of three separate factors (an oral examination that counted for 60%, a written examination for 30%, and an experience factor for 10%). Blacks performed better than whites on the oral examination, but less well on the written examination; of the 62 whites and 10 blacks (14%) who applied, eight whites and one black (11%) were promoted. The Third Circuit ruled in the plaintiffs' favor, holding that it was sufficient to show that use of the written examination had a disparate impact on minorities. 699 F.2d at 674-75. In response to the district court's suggestion that the disparate impact of the written test could not be challenged because it was balanced out by the results of the oral test, the court explained "[t]his reasoning penalizes minorities for doing well on one part of the exam and overlooks how much better their overall test results would have been if they had not been so handicapped on that part of the exam." Id. at 675.

Likewise, in this case, the inquiry should not end at the "bottom line" of state revenues provided to the Philadelphia School District, compared to other districts, but should examine whether the Commonwealth is using factors in its formula that unjustifiably reduce the amount of money flowing toward predominantly minority school districts. See Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1420 (11th Cir. 1993) (rejecting argument that attendance "zone jumping" by white students could not

cause disparate impact when it did not alter the overall racial compositions of the transferor and transferee schools); Meek v. Martinez, 724 F. Supp. 888, 905-06 (S.D. Fla. 1989) (finding that various components of funding distribution formula violated Title VI regulations). Although the Commonwealth is not required to use any particular factors in its funding formula, as a condition of accepting federal funds, the Commonwealth cannot use criteria that unjustifiedly result in discriminatory effects. The plaintiffs sufficiently state a claim by alleging that specific elements of the Commonwealth's aid formula adversely effect the PSD and its overwhelmingly minority student population.[6]

C. **Choate involved a different benefit.**

The benefit at issue in Choate was not access to education. Thus, the Court's failure to find a Section 504 violation where the state provided the same hospital stay to all Medicaid patients does not lead to the conclusion that Title VI is satisfied where the educational benefit is alleged to be "uniformly distributed." See Def. Bf. at 17. Indeed, the Supreme Court has found that providing the identical educational benefit does not satisfy Title VI unless that benefit ensures equal and meaningful access for all students to the educational program provided by the state. Lau v. Nichols, 414 U.S. 563, 568 (1974).

At issue in Lau was whether the San Francisco Unified School District was meeting its obligations under Title VI by "uniformly distributing" English textbooks,

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[6]For example, plaintiffs allege that the Commonwealth's funding formula fails to account for population density and poverty level in distributing funds to individual school districts. Complaint, ¶¶ 47-49.

English instruction and English visual aids to English and non-English speaking children alike. The Court found that Title VI was not satisfied under these circumstances: "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." Lau v. Nichols, 414 U.S. at 566. To the contrary, the district's practices were at the heart of conduct prohibited by Title VI: "[i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from [San Francisco's] school system which denies them a meaningful opportunity to participate in the educational program — all earmarks of the discrimination banned by the [Title VI] regulations." Id. at 568.[7]

The benefit at issue here is not simply money, but money to ensure that Pennsylvania's school districts are able to provide equal and meaningful access for all students to the educational program provided by the state. The best evidence of that fact is the funding formula itself. The formula has evolved over the years, but it specifically accounts for the level of poverty in each district, as well as the ability of the district to raise funds. Complaint, ¶¶ 48-49. The Pennsylvania courts have recognized that the legislature has created this program to meet its constitutional obligation to

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[7]While the Supreme Court has not identified access to education as a fundamental constitutional right, it has recognized the prohibitive toll incurred in denying educational opportunities to children. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982) (striking down Texas statute denying access to education to illegal immigrant school-age children because, without the opportunity to receive an education, these children were destined to remain impoverished).

"provide maintenance and support of a thorough and efficient system of public education." Pa. Const. art. III, §14. It is designed to assure that school districts receive sufficient funds to educate students in light of their needs and fiscal capacity. See Danson v. Casey, 382 A.2d 1238, 1242 (Pa. Commw. Ct. 1978), aff'd, 399 A.2d 360 (Pa. 1979); O'Donnell v. Casey, 405 A.2d 1006, 1009 (Pa. Commw. Ct. 1979) (rejecting state constitutional challenges, based on equal protection and due process clauses, to earlier Commonwealth education funding formulae). The "benefit" of this program, then, is not simply a per capita grant, but instead is an assurance that each school district receives sufficient funds so that, combined with its own revenues, it can provide each student equal and meaningful access to the educational program provided by the state.

In determining whether such meaningful access is being provided, it may be appropriate to focus on, for instance, the demands on social services in addition to education on an urban area's tax base,[8] the "buying power" of the education dollar in an urban school district,[9] or the special education and physical plant needs that must

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[8]The concept of "municipal overburden" refers to the fact that large cities must devote a large percentage of their tax revenues to address "big city" problems. See, e.g., Shortchanging Children: The Impact of Fiscal Inequity on the Education of Students at Risk, House Comm. on Educ. & Labor, 101st Cong., 2d Sess. 9 (Comm. Print 1990).

[9]For example, the National Center for Education Statistics ("NCES"), a federal research agency, estimates that it costs approximately 15% more to hire teachers in Philadelphia than in other parts of Pennsylvania. NCES, Public School Teacher Cost Differences Across the United States at 62 (Oct. 1995). In this sense, defendant intervenors' attempt to analogize the hospitalization benefit in Choate to the education benefit in the instant case misses the mark. While one can argue that the benefit in Choate, 14 days of hospitalization, was identical anywhere in Tennessee, it is far more

be addressed in such a district.[10] In short, as Pennsylvania law and Lau make clear, the Commonwealth is required to ensure that all schoolchildren have equal and meaningful access to the educational program provided by the state; the plaintiffs' allegations that the Commonwealth fails to do so state an actionable Title VI claim.

II. THE TITLE VI DISCRIMINATORY EFFECTS REGULATION IS CLEARLY WITHIN THE SCOPE OF THE ENABLING STATUTE.

Defendant intervenors contend that the discriminatory effects regulation promulgated by the U.S. Department of Education pursuant to Title VI is unlawful because Title VI "is limited to intentional discrimination," and this regulation "go[es] far beyond intentional discrimination and impose[s] an 'effects' test unrelated to the intent of the federal grant recipient." Def. Bf. at 20. Defendants' contention is without merit.

The discriminatory effects regulation is clearly within the scope of the enabling statute. In Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983), the proposition that regulations prohibiting discriminatory effects are valid Title VI implementation regulations clearly garnered the approval of a majority of the Court.[11]

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difficult to argue that one dollar in education funding purchases the same services in Philadelphia as in rural Pennsylvania.

[10]Fourteen percent of Philadelphia students are eligible for special education programs, compared with the national average of 10%. Council of Great City Schools, National Urban Education Goals: 1992-93 Indicators Report at xviii, 207 (Sept. 1994). Studies have shown that special education programs are over twice as costly as mainstream education programs. NCES, Disparities in Public School District Spending 1989-90 at 6-7 (Feb. 1995).

[11]Defendant intervenors rely on a concurring opinion in Guardians which did not garner the support of a majority of the Court. Defendant intervenors' reliance on Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), is also puzzling. That decision was reached prior to the Supreme Court's holding in Guardians, and Ernst is mentioned

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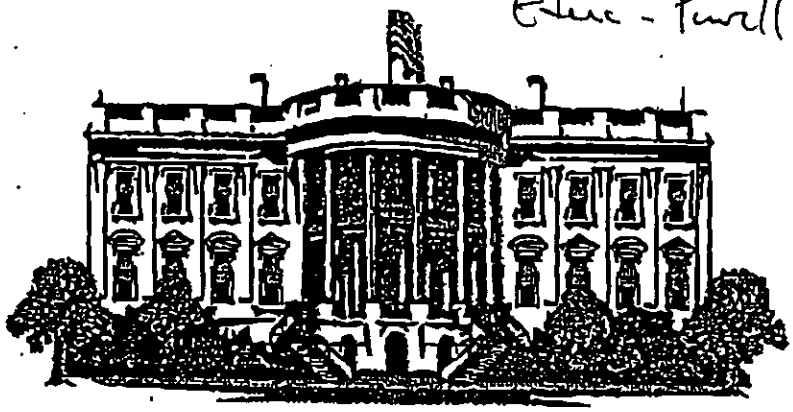

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A. Plaintiffs Factual Allegations Support an Inference of Intentional Discrimination in Violation of the Title VI Regulation

Plaintiffs allege that defendants have in recent years persistently changed the state revenue formula so that each year, when the state increases the amount of aid it distributes to local school districts, it provides a much smaller per capita increase in predominantly minority school districts than in predominantly white districts. Complaint ¶¶ 56-61. Moreover, plaintiffs allege that the state adopted these changes, which have reduced each year the share of state education funds distributed to minority districts, "with prior knowledge of [their] discriminatory consequences on students based on race." Complaint ¶¶ 47, 59, 60. These allegations support an inference that the state devised and changed it funding formula with the intent of causing disproportionate harm to predominantly minority districts, in violation of the Title VI prohibition on intentional discrimination.

As plaintiffs explain (Br. 35), based on these allegations, a factfinder would be entitled to infer that defendants took these actions, which they were aware would harm predominantly minority districts, at least in part because of "purposeful" discrimination. See Hunter v. Underwood, 471 U.S. 222, 231-32 (1985)(in order to show intentional racial discrimination, plaintiffs need not show that racial minorities were the only class intended to be burdened, or that race was the only reason for the decision); cf. Sheridan v. E.I. DuPont de Nemours & Co, 100 F.3d 1061 (3d cir. 1996)(en banc)(disbelief of defendant's profferred reasons combined with other evidence permits factfinder to conclude that there was intentional discrimination), cert. denied, 117 S.Ct. 2532 (1997). As the facts alleged in the complaint could permit a factfinder to conclude that defendants engaged in intentional discrimination, this case should be remanded to give plaintiffs the opportunity to prove these allegations.

B. Plaintiffs Have Alleged that the State Provides Funds to Education in a Manner that Has a Discriminatory Impact on Predominantly Minority Districts in Violation of the Title VI Regulation

Plaintiffs allege that predominantly minority school districts receive "less Commonwealth treasury revenues per student than school districts with higher white enrollments and the same level of poverty." Complaint ¶¶ 53-54. On its face that states a claim that the state is distributing its funds to school districts in a manner that has a discriminatory impact on the basis of race.

Intervenors [who? not U.S.?] asserted in the district court that predominantly minority school districts in fact receive more state revenues per pupil than many predominantly white school districts, and the district court appears to have relied in part on that assertion in finding that the complaint failed to state a claim (slip op. at 16, paragraph before "C", near end). If that factual assertion could properly be considered at that stage, which is doubtful, and if it is true, it would nevertheless not be dispositive. Plaintiffs allege that the state formula contains a factor that increases aid to less wealthy districts. Complaint ¶ 49, and it follows that a minority district, if poor, might well receive more funding per capita than a white district that happened

to be wealthy. They allege, however, that after controlling for poverty -- a factor the state clearly deems relevant to funding -- the formula distributes less state revenues per capita to predominantly minority school districts than to predominantly white districts. ¶¶ 53-55

This disparity may be the result of one or more factors in the formula, as yet unknown to the plaintiffs, with an unjustified discriminatory impact on the basis of race.[1] This case should be remanded so that plaintiffs have the opportunity to discover the causes of this disparity in state funds between predominantly minority districts and others, controlling for poverty.

Even if predominantly minority districts benefit from a subsidy for poverty, they may be disadvantaged on the basis of race if other factors in the formula unjustifiedly diminish the benefits received by minority populations. In Connecticut v. Teal, 457 U.S. 440, 455-456 (1982), for examples, the Supreme Court held that a Title VII disparate impact suit about promotions was not barred simply because defendants could not show that minorities ultimately were promoted at a higher rate than whites [pick up Teal discussion "Instead" from text, to end of paragraph.]

Moreover, it may be appropriate in this case to analyze the state's direct contribution to school financing in light of the diffences among school districts in their ability to raise money for schools. Plaintiffs allege that the state has the duty to provide each child with an education, Complaint ¶ 20, that it has delegated that duty to each school district, Complaint ¶ 20, and that it has authorized and encouraged school districts to raise monies locally through property taxes for that purpose, Complaint ¶ 47. Plaintiffs also allege that the predominantly minority school districts are unable to raise as much money locally as predominantly white districts. Complaint ¶¶ 52, 56, 60, 65, 66. At least in some circumstances, these allegations may state a claim that the state system for funding education, taken as a whole, violates the disparate impact regulation.

Of course, if plaintiffs succeed in showing that the state's method of funding education has a disparate and adverse impact on minority districts, that will by no means be the end of the inquiry. Defendants will then have an opportunity to articulate any "substantial legitimate justification" for the disparity. Elston, 997 F.2d at 1407. Finally, if there is a significant racial disparity and no legitimate justification, defendants will have the opportunity to propose a remedial plan. Lawyer v. Department of Justice, 117 S.Ct. 2186 (1997) Defendants are not required by Title VI to use any particular method of funding public education. By accepting federal funds, however, they have agreed not to administer their program in a manner that results in unjustified discriminatory effects.

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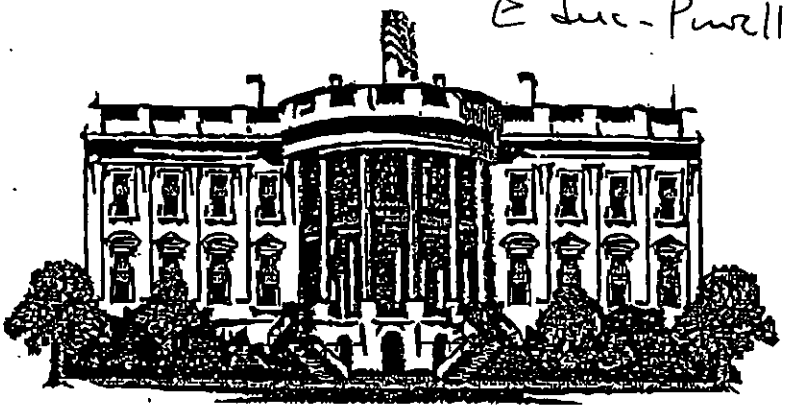

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state

any policy which has a disparate impact may be justified; but it

Often

Relevant factors could include the relationship of the state's direct financing to the local districts' revenue streams

in appropriate cases

Add:

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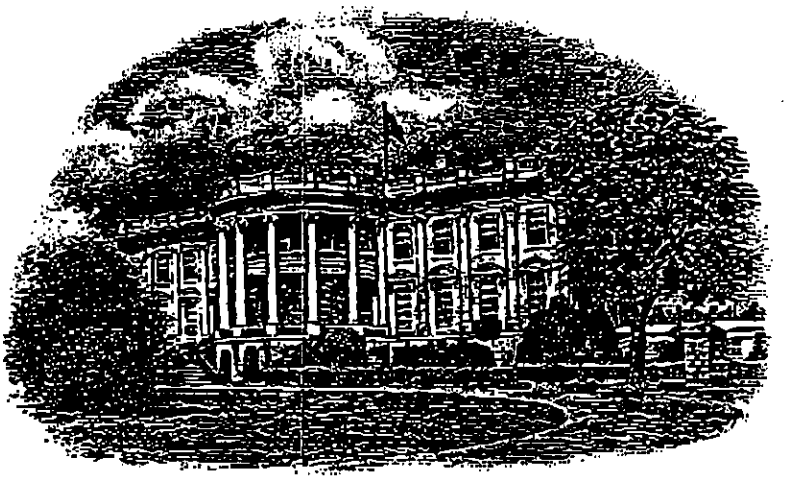

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how much better their overall test results would have been if they had not been so handicapped on that part of the exam." Id. at 675.

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