No. 98-1010

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THOMAS BRADLEY, as Natural Guardian of, and on behalf of David Bradley, a minor, individually and on behalf of themselves and all others similarly situated; DIANNA BRADLEY, as Natural Guardian of, and on behalf of David Bradley, a minor, individually and on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees

v.

ARKANSAS DEPARTMENT OF EDUCATION;
MIKE CROWLEY, individually and in his capacity as an employee of the Arkansas Department of Education,

Defendants-Appellants

WILLIFORD SCHOOL DISTRICT 39; JOHN DOES, 1-10,

Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES AS INTERVENOR

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PRELIMINARY STATEMENT

1. The order denying the defendants' motion for summary judgment on Eleventh Amendment grounds was rendered by the Honorable James M. Moody of the United States District Court for the Eastern District of Arkansas. The order is unreported.

2. Plaintiffs-appellees filed a complaint in the United States District Court for the Eastern District of Arkansas alleging, inter alia, that the defendant Arkansas Department of Education and one of its officials violated the Individuals with

Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq., and other federal statutes. For the reasons discussed in this brief, the district court had jurisdiction over the IDEA claim pursuant to 20 U.S.C. 1415(i)(3) and 28 U.S.C. 1331.

3. This appeal is from an interlocutory judgment entered on November 21, 1997. The Arkansas Department of Education and Mike Crowley, a state official, filed a timely notice of appeal on December 18, 1997. This Court has jurisdiction over the Eleventh Amendment issues raised in this appeal pursuant to 28 U.S.C. 1291. See Barnes v. Missouri, 960 F.2d 63, 64 (8th Cir. 1992) (per curiam) (denial of motion to dismiss on Eleventh Amendment grounds immediately appealable).

4. By filing this brief, the United States is exercising its right to intervene to defend the constitutionality of a federal statute. See 28 U.S.C. 2403(a).

STATEMENT OF THE ISSUE

The United States will address the following question:

Whether the statutory abrogation of Eleventh Amendment immunity for suits under the Individuals with Disabilities Education Act is a valid exercise of Congress' power under the Spending Clause or Section 5 of the Fourteenth Amendment.

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)

City of Boerne v. Flores, 117 S. Ct. 2157 (1997)

Board of Educ. v. Rowley, 458 U.S. 176 (1982)

Autio v. Minnesota, No. 97-3145, 1998 WL 162138 (8th Cir. Apr. 9, 1998)

Sections 1 and 5 of the Fourteenth Amendment

20 U.S.C. 1400, 1403(a)

STANDARD OF REVIEW

Because the constitutionality of the Individuals with Disabilities Education Act is a question of law, this Court reviews the district court's decision de novo. See United States v. Monteleone, 77 F.3d 1086, 1091 (8th Cir. 1996).

STATEMENT OF THE CASE

1. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq., was a congressional response to the wholesale exclusion of children with disabilities from public education. Congress' two-fold goal in enacting IDEA was to ensure that children with disabilities received an appropriate education, and that such an education took place, whenever possible, in the regular classroom setting. Board of Educ. v. Rowley, 458 U.S. 176, 192, 202-203 (1982); 20 U.S.C. 1412(a)(1) &

(a)(5).[1/] To assure that each child receives an appropriate education, Congress also conditioned the receipt of federal funds on detailed procedural requirements that guaranteed the participation of parents and experts before impartial decisionmakers. Id. at 182-183, 205-206; 20 U.S.C. 1415. Congress specifically authorized private plaintiffs to enforce these federal rights in federal court. Id. at 204-205; 20 U.S.C. 1415(i)(2), (i)(3).

In 1989, the Supreme Court held that IDEA was not clear enough to evidence Congress' intent to authorize private actions against state entities. See Dellmuth v. Muth, 491 U.S. 223, 232 (1989). In response, Congress amended the statute to add Section 1403, making it effective for violations occurring after October 30, 1990. See Pub. L. No. 101-476, tit. I, § 103, 104 Stat. 1106 (1990). Section 1403(a) provides in pertinent part:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter [20 U.S.C. 1400 - 1487].

20 U.S.C. 1403(a).

[1/] IDEA was reenacted, with amendments, on June 4, 1997. See Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37. These amendments do not substantively alter the statutory provisions at issue in this case and will be effective by July 1, 1998. Id. at tit. II, § 201, 111 Stat. 156. Because plaintiffs are seeking injunctive relief for future compliance with IDEA, statutory citations in this brief refer to IDEA in its 1997 recodification (which we have attached as an addendum) unless otherwise noted. Likewise, regulations to implement the reenacted IDEA have been proposed. See 62 Fed. Reg. 55,026 (1997). Because they have not been finally promulgated, regulatory citations in this brief refer to the 1997 version, which are not substantively different from those proposed.

2. This suit is a private action brought by Thomas and Dianna Bradley against the Arkansas Department of Education, the Williford School District, and others, on behalf of their son, David, who is autistic and attends school at Williford Special School District (Complaint ¶ 1). They raised claims under IDEA as well as other federal and local laws (Comp. ¶¶ 1, 4-9, 33-69).

Read in the light most favorable to plaintiffs, the gravamen of the complaint is that the State is not complying with its substantive obligation to ensure that the school district provide an appropriate education to their son (Comp. ¶¶ 4.C, 14-15, 57-58). See 20 U.S.C. 1412(a)(11); 34 C.F.R. 300.360 note. They also allege that the State is failing to comply with certain federal regulations implementing IDEA's "impartial due process hearing" requirement, 20 U.S.C. 1415(f) & (h), including that hearings must be concluded within 45 days of a request, and that States provide a mechanism for compelling the attendance of witnesses (Comp. ¶¶ 4.B, 13, 19-20). See 34 C.F.R. 300.512(a), 300.508(a)(2).

The Arkansas Department of Education and Crowley moved for summary judgment, arguing that they were immune from suit under the Eleventh Amendment based on the Supreme Court's decision in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). The district court denied the motion, holding that IDEA contained an express abrogation of Eleventh Amendment immunity, and that the abrogation was a valid exercise of Congress' power under Section

5 of the Fourteenth Amendment. This timely interlocutory appeal followed.

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action under IDEA by private plaintiffs against a State. Section 1403 of Title 20 contains an express statutory abrogation of Eleventh Amendment immunity for IDEA suits. This abrogation is a valid exercise of Congress' power under the Spending Clause to impose unambiguous conditions on States receiving federal funds. By enacting Section 1403, Congress put States on notice that accepting federal IDEA funds waived their Eleventh Amendment immunity to suits under IDEA.

In addition, Section 1403 is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment, which authorizes Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. As this Court recently reaffirmed in Autio v. Minnesota, No. 97-3145, 1998 WL 162138 (Apr. 9, 1998), Congress has broad discretion to enact whatever legislation it determines is appropriate to secure to all persons "the enjoyment of perfect equality of civil rights and the equal protection of the laws." Ex parte Virginia, 100 U.S. (10 Otto) 339, 346 (1879). Congress enacted IDEA in response to a pattern of discriminatory exclusion of children with disabilities from public schools. Congress' determination that this exclusion resulted in constitutionally cognizable injuries was based on a series of contemporaneous federal court cases, and was confirmed

by the Supreme Court's later decisions in Board of Education v. Rowley, 458 U.S. 176 (1982), and Smith v. Robinson, 468 U.S. 992 (1984), among others.

Nothing in City of Boerne v. Flores, 117 S. Ct. 2157 (1997), suggests that IDEA is in excess of Congress' Section 5 authority. City of Boerne reaffirmed that Congress has broad power under Section 5 of the Fourteenth Amendment to remedy and prevent discriminatory behavior by States. In enacting IDEA, Congress found that schools were excluding children with disabilities from public education, despite the fact that they could benefit from an appropriate education. In the years since enacting IDEA, Congress has continued to find that discrimination in education persists for children with disabilities. Thus under the standards established in City of Boerne, as articulated by this Court in Autio, IDEA is valid Section 5 legislation.

Whether viewed as an exercise of the Spending Power or Section 5 of the Fourteenth Amendment, the abrogation for IDEA suits is constitutional and the district court properly determined it has jurisdiction over this action.

ARGUMENT

20 U.S.C. 1403 VALIDLY REMOVES ELEVENTH AMENDMENT IMMUNITY FOR CLAIMS UNDER INDIVIDUALS WITH DISABILITIES EDUCATION ACT

In Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), the Supreme Court articulated a two-part test to determine whether Congress has properly abrogated States' Eleventh Amendment immunity:

> first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power.

Id. at 55 (citations, quotations, and brackets omitted).

Section 1403(a) of Title 20 provides that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter." Courts of appeals have properly characterized Section 1403 as meeting the requirement that Congress must unambiguously express in the text of the statute its intent to remove the Eleventh Amendment bar to private suits against States in federal court. See Marie O. v. Edgar, 131 F.3d 610, 617-618 (7th Cir. 1997); Beth V. v. Carroll, 87 F.3d 80, 88 (3d Cir. 1996). Indeed, the defendants concede (Br. 5) that Congress intended to remove its Eleventh Amendment immunity. The only question is whether it is a valid exercise of any of Congress' powers.

As explained more fully below, the defendants waived their Eleventh Amendment immunity to IDEA suits when they elected to accept federal funds after the effective date of Section 1403. Moreover, Congress properly abrogated Eleventh Amendment immunity from IDEA claims pursuant to its authority under Section 5 of the Fourteenth Amendment.

A. Defendants Waived Their Eleventh Amendment Immunity To IDEA Suits By Accepting Federal Funds After The Enactment Of Section 1403

Section 1403 may be upheld as a valid exercise of Congress' power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe

conditions for States that voluntarily accept federal financial assistance. Contrary to the defendants' implicit argument, the Supreme Court's decision in Seminole Tribe does not somehow prohibit such an exercise of the Spending Clause power. Indeed, it is well-settled that Congress may condition the receipt of federal funds on a waiver of Eleventh Amendment immunity when, as here, the statute provides unequivocal notice to the States of this condition.

States may waive their Eleventh Amendment immunity. See Seminole Tribe, 517 U.S. at 65; Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276 (1959); Premo v. Martin, 119 F.3d 764, 770-771 (9th Cir. 1997), cert. denied, 118 S. Ct. 1163 (1998); Hankins v. Finnel, 964 F.2d 853, 856 (8th Cir.), cert. denied, 506 U.S. 1013 (1992). Such waivers may be accomplished not only by state statute and on a case-by-case basis. A State may also "by its participation in the program authorized by Congress * * * in effect consent[] to the abrogation of that immunity." Edelman v. Jordan, 415 U.S. 651, 672 (1974); see also Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985) ("[a] State may effectuate a waiver of its constitutional immunity by * * * waiving its immunity to suit in the context of a particular federal program").

Atascadero, for example, held that Congress had not provided sufficiently clear statutory language to abrogate States' Eleventh Amendment immunity for claims under Section 504 of the Rehabilitation Act, 29 U.S.C. 794, which prohibits discrimination

on the basis of disability by recipients of federal funds. And it reaffirmed that "mere receipt of federal funds" was insufficient to constitute a waiver. 473 U.S. at 246-247. 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 consent to waive its constitutional immunity," the federal courts would have jurisdiction over States that accepted federal funds. Id. at 247; see also Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 153 (1981) (Stevens, J., concurring).

Section 1403 was crafted in light of the rule articulated in Atascadero. See 135 Cong. Rec. 16,916-16,917 (1989). And Section 1403 makes unambiguously clear that Congress intended the States to be amenable to suit in federal court if they accepted federal funds under IDEA. Cf. Lane v. Pena, 116 S. Ct. 2092, 2100 (1996) (acknowledging "the care with which Congress responded to our decision in Atascadero by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in 42 U.S.C. 2000d-7, which uses language identical to Section 1403). Thus, as the Ninth Circuit recently held in a case involving 42 U.S.C. 2000d-7's abrogation for claims under Section 504, such a statutory provision "manifests a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity." Clark v. California, 123 F.3d

1267, 1271 (9th Cir.), petition for cert. filed, 66 U.S.L.W. 3308 (Oct. 20, 1997) (No. 97-686).[2/]

Nor does Seminole Tribe preclude Congress from using its Spending Clause power to abrogate a State's Eleventh Amendment immunity. Although the effect is the same, when Congress acts under the Spending Clause, it does not abrogate Eleventh Amendment immunity. Instead, Congress conditions the receipt of federal funds on a waiver of that immunity by the States themselves. See Beasley v. Alabama State Univ., No. 96-T-473-N, 1998 WL 136119, at *8-*9 (M.D. Ala. Mar. 23, 1998). Section 1403 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 IDEA. See Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

[2/] The Seventh Circuit in Marie O. v. Edgar, 131 F.3d at 617-618, commented favorably on the waiver theory as applied to Section 1403 of IDEA, but did not make a definitive holding because the case could be decided on other grounds. It suggested, however, that Congress' use of the word "abrogation" in the title of the section ("Abrogation of state sovereign immunity") might introduce some ambiguity as to whether the provision could constitute a condition that the States waive their immunity. But the Supreme Court has used the terms "abrogation" and "waiver" inexactly in the past, see, e.g., Lane, 116 S. Ct. at 2099; Supreme Court of Va. v. Consumers Union, Inc., 446 U.S. 719, 738 (1980); Edelman, 415 U.S. at 672, so there is no reason to think Congress was intending to embody a substantive choice in the legislation by its use of the word "abrogation" in the section heading. Indeed, it is well-settled that section titles cannot limit the plain import of the text. See Minnesota Transp. Regulation Bd. v. United States, 966 F.2d 335, 339 (8th Cir. 1992).

To the extent defendant argues that Congress may not require the waiver of Eleventh Amendment immunity as a condition for receiving federal funds because it could not directly abrogate immunity under the Spending Clause, it is incorrect. The Supreme Court has explained that when exercising its Spending Clause power, there is no constitutional "prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly." South Dakota v. Dole, 483 U.S. 203, 210 (1987). Indeed, the Court held that even "a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants." Ibid. (citing Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947)). That is because, as this Court explained in the context of another federal spending program, such legislation "is not an attempt by Congress to directly displace * * * state [law]; rather, it is a condition on the receipt of federal funds. States that object to the condition can avoid it by choosing to forego federal funding. States that wish to continue funding their * * * programs with federal dollars must, however, be willing to accept Congress' conditions on the receipt of those funds." Gorrie v. Bowen, 809 F.2d 508, 519 (8th Cir. 1987) (citations omitted); see also Massachusetts v. Mellon, 262 U.S. 447, 480 (1923).

IDEA is a voluntary federal program. States apply for money on the condition that they will comply with IDEA and the Department of Education's regulations, and know that disputes regarding their compliance can be resolved in federal court. See Board of Educ. v. Rowley, 458 U.S. 176, 182-183 (1982); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 890-891 nn.7-8 (1984). At present, Arkansas, along with every other State, has elected to accept IDEA money. Since the defendants accepted federal funds after the effective date of Section 1403, they have waived their Eleventh Amendment immunity to suit in this case. See Clark, 123 F.3d at 1271; Beasley, 1998 WL 136119, at *9-*11. "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." Bell v. New Jersey, 461 U.S. 773, 790 (1983).

B. The Abrogation Of Eleventh Amendment Immunity Contained In Section 1403 Is A Valid Exercise Of Congress' Power Under Section 5 Of The Fourteenth Amendment

In addition, Section 1403 is also a valid abrogation of Eleventh Amendment immunity because it is an exercise of Congress' authority under Section 5 of the Fourteenth Amendment. Section 5 empowers Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. Citing the Supreme Court's recent decision in City of Boerne v. Flores, 117 S. Ct. 2157 (1997), the defendants contend (Br. 8-12) that IDEA is not "appropriate" legislation to "enforce" the Equal Protection Clause. In doing so, they misstate the proper analysis, as

evidenced by this Court's recent decision in Autio v. Minnesota, No. 97-3145, 1998 WL 162138 (8th Cir. Apr. 9, 1998), which upheld the Americans with Disabilities Act (ADA) against a similar challenge. They also ignore the four courts of appeals decisions upholding IDEA as a valid exercise of Congress' Section 5 authority. See id. at *4 n.5 (collecting cases from the First, Second, Fifth and Eleventh Circuits).

1. City of Boerne reaffirmed that "§ 5 is 'a positive grant of legislative power' to Congress." 117 S. Ct. at 2163. Under its Section 5 power, Congress may provide remedies for violations of the substantive provisions of Section 1, including the Equal Protection Clause. See Autio, 1998 WL 162138, at *3; Ex parte Virginia, 100 U.S. (10 Otto) 339, 345 (1879). As part of its power to provide such remedies, Congress may abrogate States' Eleventh Amendment immunity. In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court upheld the abrogation of States' Eleventh Amendment immunity in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., as "appropriate" legislation under Section 5. It explained that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." Id. at 456. In Seminole Tribe, the Court reaffirmed the holding of Fitzpatrick. See 517 U.S. at 59, 65-66, 71-72 n.15. Thus, even after Seminole Tribe, "§ 5 of

the Fourteenth Amendment [preserves] the authority of Congress to abrogate the states' Eleventh Amendment immunity." Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997).

Nor is Congress limited to abrogating immunity for those things that are already prohibited by the Equal Protection Clause itself. Under its Section 5 power, Congress has wide latitude to prohibit conduct, regardless whether the practices violate the Equal Protection Clause in and of themselves, so long as such prohibitions might reasonably be regarded as necessary to prevent or remedy conduct that would violate Section 1, or to make effective the rights assured in Section 1 of the Fourteenth Amendment. See Katzenbach v. Morgan, 384 U.S. 641, 652-653 (1966); City of Rome v. United States, 446 U.S. 156, 177 (1980); Oregon v. Mitchell, 400 U.S. 112 (1970); id. at 133-134 (opinion of Black, J.); id. at 144-147 (opinion of Douglas, J.); id. at 216 (opinion of Harlan, J.); id. at 233-236 (opinion of Brennan, White, Marshall, JJ.); id. at 283-284 (opinion of Stewart, J.).[3/]

City of Boerne reaffirmed that when enacting remedial or preventive legislation under Section 5, Congress is not limited to prohibiting unconstitutional activity. "Legislation which

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[3/] There was no opinion for the Court in Oregon v. Mitchell. Nevertheless, the Court unanimously upheld Congress' five-year ban on the use of literacy tests in state and national elections, although literacy tests are not per se invalid under Section 1 of the Fifteenth Amendment. See Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53-54 (1959). Justice Douglas relied on Section 5 of the Fourteenth Amendment; the other eight Justices of the Court relied on Section 2 of the Fifteenth Amendment. The enforcement language of those two provisions is identical.

deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." 117 S. Ct. at 2163. Thus even if not all the actions prohibited by IDEA would themselves be unconstitutional, Congress is free to act because there is "a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented." Id. at 2169.

2. Although Congress need not announce that it is legislating pursuant to its Section 5 authority, see Crawford, 109 F.3d at 1283, Congress declared that its intent in enacting IDEA was to "assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law." Pub. L. No. 94-142, § 3(a), 89 Stat. 775 (1975) (codified at 20 U.S.C. 1400(b)(9) (1988)); see also S. Rep. No. 168, 94th Cong., 1st Sess. 13, 22 (1975); H.R. Rep. No. 332, 94th Cong., 1st Sess. 14 (1975); Rowley, 458 U.S. at 198 & n.22.

When Congress re-enacted IDEA in 1997, it retained this finding, see 20 U.S.C. 1400(c)(6), and explained that it wished "to restate that the 'right to equal educational opportunities' is inherent in the equal protection clause of the 14th Amendment to the U.S. Constitution." S. Rep. No. 275, 104th Cong., 2d Sess. 31 (1996). Indeed, Congress expressly noted that "Eleventh Amendment immunity is waived by IDEA, which is a valid exercise of Congressional power under the 14th Amendment." H.R. Rep. No.

614, 104th Cong., 2d Sess. 4 (1996); see also S. Rep. No. 275, supra, at 25 ("The IDEA is founded in and secured by the 14th Amendment of the Constitution.").

Thus, Congress did not view IDEA as simply a Spending Clause statute imposing conditions for the receipt of federal funds. As Senator Harkin recently explained: "We recognized [in 1975] that the right of disabled children to a free appropriate public education is a constitutional right established in the early 1970's by two landmark Federal district court cases. * * * IDEA was enacted for two reasons: First, to establish a consistent policy of what constitutes compliance with the equal protection clause so that there would be no need to continue pursuing separate court challenges around the country. Second, to help States meet their constitutional obligations." 143 Cong. Rec. S4298 (daily ed. May 12, 1997). This understanding of IDEA was often reiterated during the 1997 reenactment debates. See, e.g., 143 Cong. Rec. S4357 (May 13, 1997) (Sen. Jeffords); id. at S4361 (May 13, 1997) (Sen. Harkin); id. at S4364 (May 13, 1997) (Sen. Frist); id. at S4403 (May 14, 1997) (Sen. Harkin); id. at S4410 (May 14, 1997) (Sen. Lott).

While declarations are not dispositive, neither should they be ignored. See Autio, 1998 WL 162138, at *2 (relying on congressional finding that it intended to exercise its power under the Fourteenth Amendment in determining that "the ADA was clearly enacted to enforce the Equal Protection Clause"). "Given the deference due 'the duly enacted and carefully considered

decision of a coequal and representative branch of our Government,'" a court is "not lightly [to] second-guess such legislative judgments." Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 251 (1990) (opinion of O'Connor, J.). As the Supreme Court reaffirmed in City of Boerne, "[i]t is for Congress in the first instance to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." 117 S. Ct. at 2172 (quoting Katzenbach, 384 U.S. at 651).

Thus, there is no need for this Court to decide whether every requirement of IDEA could be ordered by a court under the authority of the Equal Protection Clause. Congress "may enact legislation prohibiting conduct which a court itself may not deem unconstitutional." Autio, 1998 WL 162138, at *3. It is sufficient that Congress found that IDEA was appropriate legislation to redress the rampant discrimination it discovered in its decades-long examination of the question. Given Congress' superior factfinding ability and the attendant "wide latitude" to which it is entitled in exercising its Section 5 authority, City of Boerne, 117 S. Ct. at 2164, its findings that state and local governments excluded children with disabilities from public education, discussed below, are sufficient to sustain IDEA's abrogation as valid Section 5 legislation. "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and

authority to enforce equal protection guarantees." Fullilove v. Klutznick, 448 U.S. 448, 483 (1980) (opinion of Burger, C.J.).

3. This is not contrary to the holding of City of Boerne. The Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb et seq. (the statute at issue in City of Boerne) was enacted by Congress in response to the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990). Smith held that the Free Exercise Clause did not require States to provide exceptions to neutral and generally applicable laws even when those laws significantly burdened religious practices. See id. at 887. In RFRA, Congress attempted to overcome the effects of Smith by imposing through legislation a requirement that laws substantially burdening a person's exercise of religion be justified as in furtherance of a compelling state interest and as the least restrictive means of furthering that interest. See 42 U.S.C. 2000bb-1. As this Court explained in Autio, "the Court struck down [RFRA] under Section 5 of the Fourteenth Amendment because, in part, the 'legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.'" 1998 WL 162138, at *2 (quoting City of Boerne, 117 S. Ct. at 2169). The Court found that Congress was "attempting to * * * make a substantive constitutional change, rather than enforcing a recognized Fourteenth Amendment right." Ibid.

As such the Court found RFRA to be an unconstitutional exercise of Section 5. In City of Boerne the Court found that RFRA was "out of proportion" to the problems identified so that it could not be viewed as preventive or remedial. Id. at 2170. First, it found that there was no "pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith." Id. at 2171; see also id. at 2169 (surveying legislative record). It also found that RFRA's requirement that the State prove a compelling state interest and narrow tailoring imposed "the most demanding test known to constitutional law" and thus possessed a high "likelihood of invalidat[ing]" many state laws. Id. at 2171. While stressing that Congress was entitled to "much deference" in determining the need for and scope of laws to enforce Fourteenth Amendment rights, id. at 2172, the Court found that Congress had simply gone so far in attempting to regulate local behavior that, in light of the lack of evidence of a risk of unconstitutional conduct, it could no longer be viewed as remedial or preventive. As such, the Court found RFRA an unconstitutional exercise of Section 5. Id. at 2169-2170, 2172.

As discussed below, none of the specific concerns articulated by the Court apply to IDEA. But IDEA also differs from RFRA in a fundamental way. RFRA was attempting to expand the substantive meaning of the Fourteenth Amendment by imposing a strict scrutiny standard on the States in the absence of evidence of widespread use of constitutionally improper criteria. Not so

here. Moreover, unlike the background to RFRA -- which demonstrated that Congress acted out displeasure with the Court's decision in Smith -- there is no evidence that Congress enacted IDEA because of its disagreement with any decision of the courts applying any particular constitutional standards to claims by children with disabilities. To the contrary, as we show below, Congress was building on a string of court opinions that had expounded a constitutional right of disabled children to an "appropriate" education. Combined with its finding that children with disabilities had experienced a history of discriminatory treatment, IDEA falls within the core of Congress' remedial authority under Section 5.

4. Like the ADA, and unlike RFRA, IDEA "clearly chronicles and directly addresses the discrimination [children] with disabilities have experienced and the 'evils' those with disabilities continue to experience in modern day America." Autio, 1998 WL 162138, at *3. Congress enacted IDEA based on a well-documented history of past discrimination in education against children with disabilities.[4/] In enacting IDEA's

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[4/] Defendants criticize Congress (Br. 7-8) for failing to make a sufficient record of discrimination, as if Congress were a lower court that must make detailed findings of facts which this Court reviews for clear error. But "'Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.'" Turner Broad. Sys., Inc. v. FCC, 117 S. Ct. 1174, 1197 (1997); see also Fullilove v. Klutznick, 448 U.S. 448, 502-503, 506 (1980) (opinion of Powell, J., concurring). Rather, so long as this Court can "perceive[] a factual basis on which Congress could have concluded" that there was "'invidious discrimination in violation of the Equal Protection Clause,'" then this Court

(continued...)

predecessor in 1975, Congress found that one million disabled children were "excluded entirely from the public school system." 20 U.S.C. 1400(c)(2)(C). But outright exclusion was not the only injury suffered by children with disabilities. Some children were given permission to enter the schoolhouse, but were learning nothing because the schools failed to account for their disabilities. See Rowley, 458 U.S. at 191; id. at 213 n.1 (White, J., dissenting). Congress was acting in response to its finding that "millions of handicapped children 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to "drop out."'" Id. at 191 (quoting H.R. Rep. No. 332, supra, at 2). This state of affairs was rooted in decades of unwarranted discrimination against children with disabilities. See Marcia Pearce Burgdorf & Robert Burgdorf, Jr., A History of Unequal Treatment, 15 Santa Clara Lawyer 855, 870-875 (1975).

These conditions continue to exist. After extensive factfinding by the Executive and Legislative branches prior to the enactment of the ADA, see Coolbaugh v. Louisiana, 136 F.3d 430, 435-437 & n.4 (5th Cir. 1998), Congress found in 1990 that "discrimination against individuals with disabilities persists in such critical areas as * * * education." 42 U.S.C. 12101(a)(3) (emphasis added); accord 29 U.S.C. 701(a)(5). This finding is

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[4/](...continued)
must uphold IDEA as valid Section 5 legislation. City of Boerne, 117 S. Ct. at 2168; see also Oregon v. Mitchell, 400 U.S. 112, 216 (1970) (opinion of Harlan, J.).

supported by testimony credited by both houses of Congress about exclusion of people with disabilities from education. See S. Rep. No. 116, 101st Cong., 1st Sess. 7 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 29 (1990). This finding is also consistent with the conclusion of the United States Commission on Civil Rights, also before Congress, that tens of thousands of children with disabilities "continue to be excluded from the public schools, and others are placed in inappropriate programs." U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 28 & n.77 (1983); see also Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 413-414 (1991) (noting continued segregation of children with disabilities in education). In Autio, this Court held that Congress' ADA findings were based on "exhaustive fact finding" and were entitled to "significant deference." 1998 WL 162138, at *3 & n.4.

5. Congress tied these facts directly to the deprivations of constitutional rights. As explained by the Supreme Court in Rowley, the impetus for IDEA included two federal cases establishing that the States' failures to provide children a free public education appropriate to their needs was a constitutional violation. See 458 U.S. at 180 n.2, 192-200 (discussing Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972) and Pennsylvania Ass'n for Retarded Children v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972)). Indeed, when Congress enacted IDEA, plaintiffs were winning similar suits

across the nation. See Burgdorf & Burgdorf, supra, at 878 & n.136. The Supreme Court discussed the decisions in these cases with approval in Rowley and reaffirmed the constitutional basis of IDEA's "appropriate education" requirement in later cases. For example, the Supreme Court held that IDEA precluded Section 1983 claims based on the Equal Protection Clause because Congress intended IDEA to be the "vehicle for protecting the constitutional right of a handicapped child to a public education." Smith v. Robinson, 468 U.S. 992, 1013 (1984).[5/]

More generally, Congress' determination that discrimination against children with disabilities was a constitutionally cognizable problem was consistent with the Supreme Court's decision in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), in which the Court unanimously declared unconstitutional as invidious discrimination a decision by a city to deny a special use permit for the operation of a group home for people with mental retardation. A majority of the Court recognized that "through ignorance and prejudice [persons with disabilities] 'have been subjected to a history of unfair and often grotesque mistreatment.'" 473 U.S. at 454 (Stevens, J., concurring); see id. at 461 (Marshall, J., concurring in the judgment in part). The Court acknowledged that "irrational prejudice," id. at 450, "irrational fears," id. at 455 (Stevens,

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[5/] Congress later amended IDEA to permit Section 1983 claims because it did not intend for IDEA to be the exclusive remedy for Equal Protection violations. See 20 U.S.C. 1415(l); Marie O., 131 F.3d at 621-622.

J.), and "impermissible assumptions or outmoded and perhaps invidious stereotypes," id. at 465 (Marshall, J.), existed against people with disabilities in society at large and sometimes inappropriately infected government decision making.

While a majority of the Court declined to deem classifications based on disability as suspect or "quasi-suspect," it elected not to do so, in part, because it would unduly limit legislative solutions to problems faced by the disabled. The Court "underscored Congress's principal institutional competence in making decisions concerning the disabled's legal treatment," Autio, 1998 WL 162138, at *4, by acknowledging that "[h]ow this large and diversified group is to be treated under the law is a difficult and often technical matter, very much a task for legislators guided by qualified professionals." Cleburne, 473 U.S. at 442-443. It specifically noted with approval legislation such as IDEA, which aimed at opening up education to children with disabilities, and openly worried that requiring governmental entities to justify their efforts under heightened scrutiny might "lead [governmental entities] to refrain from acting at all." Id. at 444.

Nevertheless, it did affirm that "there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms," id. at 446, and found the actions at issue in that case unconstitutional. In doing so, it articulated several criteria

for making such determinations in cases involving disabilities. First, the Court held that the fact that persons with mental retardation were "indeed different from others" did not preclude a claim that they were denied equal protection; instead, it had to be shown that the difference was relevant to the "legitimate interests" furthered by the rules. Id. at 448. Second, in measuring the government's interest, the Court did not examine all conceivable rationales for the differential treatment of the mentally retarded; instead, it looked to the record and found that "the record [did] not reveal any rational basis" for the decision to deny a special use permit. Ibid.; see also id. at 450 (stating that "this record does not clarify how * * * the characteristics of [people with mental retardation] rationally justify denying" to them what would be permitted to others). Third, the Court found that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable * * * are not permissible bases" for imposing special restrictions on persons with disabilities. Id. at 448. Thus, the Equal Protection Clause of its own force already proscribes excluding persons with disabilities when the government has not put forward evidence justifying the difference or where the justification is based on mere negative attitudes.[6/]

[6/] Contrary to defendants' suggestion (Br. 8-9), neither the prohibitions of the Equal Protection Clause nor Congress' Section 5 authority is limited to suspect classifications. The Court in Cleburne made clear that government discrimination on the basis of disability is prohibited by the Equal Protection Clause when it is arbitrary. Although a majority declined to deem

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The Supreme Court has also recognized that the principle of equality is not an empty formalism divorced from the realities of day-to-day life, and thus the Equal Protection Clause is not limited to prohibiting unequal treatment of similarly situated persons. The Equal Protection Clause also guarantees "that people of different circumstances will not be treated as if they were the same." United States v. Horton, 601 F.2d 319, 324 (7th Cir.), cert. denied, 444 U.S. 937 (1979) (quoting Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law 520 (1978)). By definition, children with disabilities have a physical or mental impairment that substantially limits some of their abilities. 20 U.S.C. 1401(3)(A). Thus, as to some life activities, "the handicapped typically are not similarly situated to the nonhandicapped." Alexander v. Choate, 469 U.S. 287, 298 (1985). The Constitution is not blind to this reality and instead, in certain circumstances, requires more than simply identical treatment. While it is true that the "'Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same,'" Plyler v. Doe,

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[6/](...continued)
classifications on the basis of mental retardation as "quasi-suspect," it held that this did not leave persons with such disabilities "unprotected from invidious discrimination." 473 U.S. at 446. This Court in Autio reaffirmed that "[i]nvidious discrimination by governmental agencies . . . violates the equal protection clause even if the discrimination is not racial, though racial discrimination was the original focus of the clause. In creating a remedy against such discrimination, Congress was acting well within its powers under section 5 * * *." 1998 WL 162138, at *4 (quoting Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997)).

457 U.S. 202, 216 (1982), it is also true that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." Jenness v. Fortson, 403 U.S. 431, 442 (1971).[7/]

Thus, as this Court recognized in Autio, there is a basis in constitutional law for recognition that discrimination exists not only by treating people with disabilities differently for no legitimate reason, but also by treating them identically when they have recognizable differences. As the Sixth Circuit has explained in a case involving gender classifications, "in order to measure equal opportunity, present relevant differences cannot be ignored. When males and females are not in fact similarly situated and when the law is blind to those differences, there

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[7/] In a series of Supreme Court cases beginning with Griffin v. Illinois, 351 U.S. 12 (1956), and culminating in M.L.B. v. S.L.J., 117 S. Ct. 555 (1996), the Court has held that principles of equality are sometimes violated by treating unlike persons alike. In these cases, the Supreme Court has held that a State violates the Equal Protection Clause in treating indigent parties appealing from certain court proceedings as if they were not indigent. Central to these holdings is the acknowledgment that "a law nondiscriminatory on its face may be grossly discriminatory in its operation." 117 S. Ct. at 569 (quoting Griffin, 351 U.S. at 17 n.11). The Court held in these cases that even though States are applying a facially neutral policy by charging all litigants equal fees for an appeal, the Equal Protection Clause requires States to waive such fees in order to ensure equal "access" to appeal. Id. at 560. Nor is it sufficient if a State permits an indigent person to appeal without charge, but does not provide free trial transcripts. The Court has declared that the State cannot "extend to such indigent defendants merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal.'" Id. at 569 n.16 (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)); see also Lewis v. Casey, 116 S. Ct. 2174, 2182 (1996) (holding that State has not met its obligation to provide illiterate prisoners access to courts simply by providing a law library).

may be as much a denial of equality as when a difference is created which does not exist." Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 657 (6th Cir. 1981); see also Lau v. Nichols, 483 F.2d 791, 806 (9th Cir. 1973) (Hufstedler, J., dissenting from the denial of reh'g en banc), rev'd, 414 U.S. 563 (1974). Similarly, "'legislation . . . singling out the [disabled] for special treatment reflects the real and undeniable differences between the [disabled] and others,' thereby allowing the disabled equal protection from 'invidious discrimination.'" Autio, 1998 WL 162138, at *4 (quoting Cleburne, 473 U.S. at 442-447).

IDEA thus falls neatly in line with other statutes that have been upheld as valid Section 5 legislation. For when there is evidence of a history of extensive discrimination, as here, Congress may prohibit or require modifications of rules, policies and practices that tend to have an exclusionary effect on a class or individual, regardless of the intent behind those actions. In South Carolina v. Katzenbach, 383 U.S. 301, 325-337 (1966), and again in City of Rome v. United States, 446 U.S. 156, 177 (1980), both cited with approval in City of Boerne, the Supreme Court upheld the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect. See also City of Boerne, 117 S. Ct. at 2169 (agreeing that "Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal

Protection Clause"); United States v. City of Black Jack, 508 F.2d 1179, 1184-1185 (8th Cir. 1974) (stating that the discriminatory effects standard of the Fair Housing Act is a valid exercise of Congress' power under enforcement provision of Thirteenth Amendment), cert. denied, 422 U.S. 1042 (1975).[8/]

Not surprisingly, every court to consider the question is in agreement with the district court here that Congress' enactment of IDEA is "appropriate legislation" to enforce the Fourteenth Amendment. See David D. v. Dartmouth Sch. Comm., 775 F.2d 411, 421-422 (1st Cir. 1985), cert. denied, 475 U.S. 1140 (1986); Crawford v. Pittman, 708 F.2d 1028, 1037-1038 (5th Cir. 1983); Mitten v. Muscogee County Sch. Dist., 877 F.2d 932, 937 (11th Cir. 1989), cert. denied, 493 U.S. 1072 (1990); Counsel v. Dow, 849 F.2d 731, 737 (2d Cir.), cert. denied, 488 U.S. 955 (1988) (so holding and collecting older cases); Peter v. Johnson, 958 F. Supp. 1383, 1394 (D. Minn. 1997); Emma C. v. Eastin, 985 F. Supp. 940, 947 (N.D. Cal. 1997). Although some of these decisions pre-date City of Boerne, for the reasons discussed above they remain good law.

[8/] The defendants also appear to argue (Br. 11) that whatever the relation between the substantive provisions of IDEA and the Equal Protection Clause, the procedural requirements addressed in plaintiffs' summary judgment motion have no constitutional foundation. But Congress understood the procedural protections of IDEA to be critical to determine properly the appropriate education for each individual child with a disability. See Rowley, 458 U.S. at 205-206; Smith, 468 U.S. at 1011. Indeed, the federal court cases that were the impetus for IDEA also stressed the importance of timely and adequate procedures in assuring that each student receive an appropriate education. See Rowley, 458 U.S. at 193-194 nn.16 & 18.

CONCLUSION

The district court had jurisdiction over the plaintiffs' IDEA claims.

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CERTIFICATE OF SERVICE

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This appeal involves the jurisdiction of the federal courts to adjudicate claims against States for violations of the Individuals with Disabilities Education Act. If this Court determines that oral argument would be proper in this case, the United States believes that its presence would be appropriate. See 28 U.S.C. 2403(a).