No. 98-1830

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

_____

JIM AND SUSAN C.,
individually and as parents and next friends of J.C.,

Plaintiffs-Appellees

v.

ATKINS SCHOOL DISTRICT,
ARCH FORD EDUCATION SERVICE COOPERATIVE,

Defendants

ARKANSAS DEPARTMENT OF EDUCATION,

Defendant-Appellant

_____

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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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 and Section 504 of the Rehabilitation 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).

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PRELIMINARY STATEMENT

1. The memorandum opinion and order denying the defendant's motion to dismiss on Eleventh Amendment grounds was rendered by the Honorable Garnett Thomas Eisele 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 violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq., and Section 504 of the Rehabilitation Act. For the reasons discussed in this brief, the

district court had jurisdiction over both claims pursuant to 28 U.S.C. 1331, and the IDEA claim additionally pursuant to 20 U.S.C. 1415(i)(3).

3. This appeal is from an interlocutory judgment entered on February 24, 1998. The Arkansas Department of Education filed a timely notice of appeal on March 12, 1998. 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 federal statutes. See 28 U.S.C. 2403(a).

STATEMENT OF THE ISSUES

The United States will address the following questions:

1. 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, 140 F.3d 802 (8th Cir. 1998)

Sections 1 and 5 of the Fourteenth Amendment

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

2. Whether the statutory abrogation of Eleventh Amendment immunity for suits under Section 504 of the Rehabilitation Act is a valid exercise of Congress' power under the Spending Clause or Section 5 of the Fourteenth Amendment.

Clark v. California, 123 F.3d 1267 (9th Cir.), petition for cert. filed, 66 U.S.L.W. 3308 (Oct. 20, 1997) (No. 97-686)

29 U.S.C. 791, 794

42 U.S.C. 2000d-7

STANDARD OF REVIEW

Because the constitutionality of the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act are questions 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

This suit is a private action brought by Jim and Susan C. against the Arkansas Department of Education, the Atkins School District, and others, on behalf of their child with autism. They raised claims under IDEA and Section 504 as well as the Fourteenth Amendment.

The Arkansas Department of Education moved to dismiss the suit, arguing that it was 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 both IDEA and Section 504 contained express abrogations of Eleventh Amendment immunity, and

that the abrogations were valid exercises 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 and Section 504 by private plaintiffs against a State. Both IDEA and Section 504 contain legislative provisions expressly manifesting Congress' intent that States not be protected by Eleventh Amendment immunity.

In our Brief as Intervenor in Bradley v. Arkansas Department of Education, No. 98-1010, which is consolidated with this appeal for argument and submission, we explained how Congress validly exercised its power under both the Spending Clause and Section 5 of the Fourteenth Amendment to remove States' Eleventh Amendment immunity for IDEA claims. These same arguments apply to Section 504 of the Rehabilitation Act, which prohibits discrimination against qualified individuals with disabilities by recipients of federal funds, and expressly provides that States shall not retain their Eleventh Amendment immunity for suits brought under the Act. See 29 U.S.C. 794(a); 42 U.S.C. 2000d-7.

Finally, defendant's argument that Section 504 does not apply to education services provided by a State because education is a "core function" is contrary to the text of the statute, as well as the consistent understanding of the Supreme Court and this Court.

ARGUMENT

Defendant challenges the validity of the abrogations of Eleventh Amendment immunity in two federal statutes: the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation 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). Both statutes meet the two-part test.

I

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

Defendant argues (Br. 9-16) that Congress lacks the power to abrogate States' Eleventh Amendment immunity for suits to enforce the Individuals with Disabilities Education Act (IDEA).

On May 14, 1998, this Court ordered this case consolidated with Bradley v. Arkansas Department of Education, No. 98-1010, and provided that the parties could incorporate the briefs filed in that case. In Bradley, the United States filed a Brief as Intervenor defending the constitutionality of 20 U.S.C. 1403(a), which 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" IDEA. As we explained in that brief, defendant waived its Eleventh Amendment immunity to IDEA suits when it 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. We incorporate by reference those arguments in this appeal.

II

42 U.S.C. 2000d-7 VALIDLY REMOVES ELEVENTH AMENDMENT IMMUNITY FOR CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT

Defendant also argues (Br. 16-18) that Congress lacks the power to abrogate Eleventh Amendment immunity for suits to enforce Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794. But for the same reasons discussed in our Bradley brief with regard to IDEA, Section 504 is a valid exercise of both the Spending Clause and Section 5 of the Fourteenth Amendment.

Section 504 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing] to discrimination" any person "by reason of her or his disability." 29 U.S.C. 794(a). This Court has held that individuals have a private right of action against entities receiving federal funds that violate this prohibition. See Lue v. Moore, 43 F.3d 1203, 1205 (8th Cir. 1994).

In 1985, the Supreme Court held that Section 504 was not clear enough to evidence Congress' intent to authorize private damage actions against state entities. See Atascadero State

Hosp. v. Scanlon, 473 U.S. 234, 245-246 (1985). In response to Atascadero, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845 (1986). Section 2000d-7 provides in pertinent part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

The Supreme Court has characterized Section 2000d-7 as meeting its 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 Lane v. Pena, 518 U.S. 187, 198-200 (1996); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 72 (1992); id. at 78 (Scalia, J., concurring); see also Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997).

A. Defendant Waived Its Eleventh Amendment Immunity To Section 504 Suits By Accepting Federal Funds After The Enactment Of Section 2000d-7

Section 2000d-7 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. Atascadero held that Congress had not provided sufficiently clear statutory language to abrogate States' Eleventh Amendment immunity for Section 504 claims. And

it reaffirmed that "mere receipt of federal funds" was insufficient to constitute a waiver. 473 U.S. at 246. But the Court stated that if a statute "manifest[ed] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," the federal courts would have jurisdiction over States that accepted federal funds. Id. at 247.

Section 2000d-7 was a direct response to the Supreme Court's decision in Atascadero. See 131 Cong. Rec. 22,344-22,345 (1985). And Section 2000d-7 makes unambiguously clear that Congress intended the States to be amenable to suit in federal court under Section 504 if they accepted federal funds. As the Department of Justice explained to Congress at the time the statute was being considered, "[t]o the extent that the proposed amendment is grounded on congressional spending powers, [it] makes it clear to states that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986). Section 2000d-7 thus embodies exactly the type of unambiguous condition discussed by the Court in Atascadero, putting States on express notice that part of the "contract" for receiving federal funds was the requirement that they consent to suit in federal court for alleged violations of Section 504. See Lane, 518 U.S. at 200 (acknowledging "the care with which Congress responded to our decision in Atascadero by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in Section 2000d-7). As we similarly argued in our Brief as

Intervenor in Bradley, since the defendant accepted federal funds after the effective date of Section 2000d-7, it has waived its Eleventh Amendment immunity to suit in this case. See also Litman v. George Mason Univ., No. Civ.A. 97-1755-A, 1998 WL 230941 (E.D. Va. May 7, 1998).

B. The Abrogation Of Eleventh Amendment Immunity Contained In Section 2000d-7 Is A Valid Exercise Of Congress' Power Under Section 5 Of The Fourteenth Amendment

In addition, Section 2000d-7 is a valid abrogation of Eleventh Amendment immunity because it is an exercise of Congress' authority under Section 5 of the Fourteenth Amendment. Although Congress need not invoke its Section 5 authority, see Crawford, 109 F.3d at 1283, Congress did so in enacting Section 2000d-7. See S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986); 131 Cong. Rec. 22,346 (1985); 132 Cong. Rec. 28,624 (1986). In Autio v. Minnesota, 140 F.3d 802 (1998), this Court upheld the abrogation of Eleventh Amendment immunity in the Americans with Disabilities Act (ADA) as valid Section 5 legislation. Section 504 imposes non-discrimination obligations similar to those of the ADA. See DeBord v. Board of Educ., 126 F.3d 1102, 1104-1105 (8th Cir. 1997), cert. denied, 118 S. Ct. 1514 (1998). This Court's holding in Autio governs the constitutional challenge at issue here.

Defendant does not address Autio, but instead seems to suggest (Br. 16-18) that even if Section 2000d-7 were constitutional, it is not sufficiently clear that Congress intended Section 504 and its abrogation to extend to public

education programs that receive federal funds. This is simply wrong. First, the plain language of Section 504 extends to "any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a) (emphasis added). "Program or activity" is defined to include "all of the operations of * * * a department, agency, special purpose district, or other instrumentality of a State." 29 U.S.C. 794(b)(1)(A) (emphasis added). Rejecting the view espoused in Amos v. Maryland Department of Public Safety and Correctional Services, 126 F.3d 589 (4th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3474 (Dec. 19, 1997) (No. 97-1113), the Supreme Court recently held that even assuming that management of state prisons is an "essential State function," similar language in the Americans with Disabilities Act "plainly covers state institutions without any exception that could cast the coverage of prisons into doubt." Pennsylvania Dep't of Corrections v. Yeskey, No. 97-634, 1998 WL 309065, at *2 (June 15, 1998).[1/]

Congress also manifested its intent that Section 504 cover education programs in an amendment to IDEA. In Smith v. Robinson, 468 U.S. 992, 1018, 1021 (1984), the Supreme Court found that "although both statutes [IDEA and Section 504] begin with an equal protection premise that handicapped children must be given access to public education," Congress did not intend to

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[1/] Moreover, the text of the statute makes clear that Congress envisoned that Section 504 would govern education by defining "program or activity" to include the operations of various public and private educational programs. 29 U.S.C. 794(b)(2), 794(b)(3)(A)(ii); see also 29 U.S.C. 701(a)(5) (Rehabilitation Act finding discussing continuing discrimination in education).

permit plaintiffs to "circumvent or enlarge on the remedies available under the [IDEA] by resort to § 504." Congress enacted 20 U.S.C. 1415(l) to overrule Smith. Section 1415(l) provides that nothing in IDEA "shall be construed to restrict or limit the rights, procedures, and remedies available under * * * title V of the Rehabilitation Act of 1973 [29 U.S.C. 791], or other Federal laws protecting the rights of children with disabilities."

Section 1415(l) "'was designed to "reestablish statutory rights repealed by the U.S. Supreme Court in Smith v. Robinson" and to "reaffirm, in light of this decision, the viability of section 504, 42 U.S.C. 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children."'" Digre v. Roseville Schs. Indep. Dist. No. 623, 841 F.2d 245, 250 (8th Cir. 1988) (quoting Mrs. W. v. Tirozzi, 832 F.2d 748, 754-755 (2d Cir. 1987)); see also Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 763 (3d Cir. 1995); Angela L. v. Pasadena Indep. Sch. Dist., 918 F.2d 1188, 1193 n.3 (5th Cir. 1990); Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 (2d Cir. 1990). This provision confirms Congress' understanding that Section 504 governs programs offering educational services to children with disabilities and its intent that individuals be able to enforce these rights independently of IDEA.

Finally, we note that the courts have always understood Section 504 to apply to education programs. The Supreme Court's first encounter with Section 504 arose in a case involving education. See Southeastern Community College v. Davis, 442 U.S.

397 (1979) (admissions to nursing school); see also School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (employment of school teacher with a disability). Similarly, this Court has consistently adjudicated Section 504 claims against schools. See, e.g., DeBord, 126 F.3d at 1104-1105; Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1376 (8th Cir. 1996); Heidemann v. Rother, 84 F.3d 1021, 1032 (8th Cir. 1996). Defendant's argument that all these cases were wrong to apply Section 504 to education programs is completely without merit.

CONCLUSION

The district court had jurisdiction over the plaintiffs' IDEA and Section 504 claims.

Respectfully submitted,

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