



U.S. Department of Justice

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April 22, 2005

BY OVERNIGHT MAIL

Charles R. Fulbruge, III, Clerk
United States Court of Appeals for the Fifth Circuit
U.S. Courthouse, Room 102
600 Camp Street
New Orleans, LA 70130

Re: *Johnson v. Louisiana Dep't of Educ.*, No. 02-30318
August v. Mitchell, No. 02-30369

Dear Mr. Fulbruge:

The United States submits this supplemental letter brief in response to the Court's order, dated March 10, 2005, requesting the views of the parties on the application to this case of the Court's recent en banc decision in *Pace v. Bogalusa City School Board*, No. 01-31026, 2005 WL 546507 (5th Cir. Mar. 8, 2005). As detailed below, we believe that the decision in *Pace* resolves all of the issues validly raised by Louisiana in the instant case.¹ Thus, we recommend that the en banc Court issue an opinion consistent with *Pace*. In the alternative, if the Court

¹ As explained below, Louisiana raised an argument – about the agency's authority under state law to waive its immunity – in its en banc brief that it failed to raise before the panel. Because it failed to raise that argument before the panel, we believe Louisiana waived its right to raise it before the en banc Court.

believes there is an issue remaining to be decided, we recommend that the Court hold this case pending a decision by the en banc Court in *Miller v. Texas Tech University Health Sciences Center*, No. 02-10190, which raises any issue potentially still in play in the instant case.

In its brief before the en banc Court in the instant case, Louisiana challenged the validity of its waiver of Eleventh Amendment immunity to claims under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794, and under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, on six distinct fronts, five of which were disposed of by this Court in *Pace*, and the last of which was not validly raised before the en banc Court.

First, Louisiana claims (LA En Banc Br. 14-22) that Section 504, 42 U.S.C. 2000d-7, and the IDEA fail the Supreme Court's "clear statement rule" because they indicate Congress's intent to abrogate States' immunity to Section 504 and IDEA claims rather than to condition a State's acceptance of federal funds on the State's waiver of its immunity to claims under Section 504 and the IDEA. That argument was considered and specifically rejected by this Court in *Pace*. See *Pace*, 2005 WL 546507, at *6 ("We conclude that the conditions contained in § 2000d-7 and § 1403 are unambiguous, as required by *Dole*.").

Second, Louisiana claims (LA En Banc Br. 12-14, 40-46) that, even if federal funds were clearly conditioned on a State's waiver of its Eleventh Amendment immunity to claims under Section 504 and the IDEA, Louisiana could not have knowingly waived its immunity because it did not really know that it had any immunity to waive. This argument, too, was considered and specifically rejected by this Court in *Pace*. See *Pace*, 2005 WL 546507, at *6-*9.

Third, Louisiana argues (LA En Banc Br. 23-26) that Congress may not use its powers under the Spending Clause to induce a State to waive its Eleventh Amendment immunity where Congress could not abrogate that immunity pursuant to its powers under Section 5 of the Fourteenth Amendment. That argument was considered and rejected as "frivolous" by this Court in *Pace*. See *Pace*, 2005 WL 546507, at *9.

Fourth, Louisiana asserts (LA En Banc Br. 26-32) that conditioning the receipt of federal funds on a state agency's waiver of its Eleventh Amendment immunity is an "unconstitutional condition" and therefore invalid. This Court considered and rejected that argument in *Pace* as well, finding that the unconstitutional conditions doctrine is "inapplicable" here. See *Pace*, 2005 WL 546507, at *9-*10.

Fifth, Louisiana argues (LA En Banc Br. 32-39) that conditioning receipt of federal funds on a state agency's waiver of its immunity to Section 504 and IDEA claims is unconstitutionally coercive. Again, this Court in *Pace* specifically considered and rejected this argument. See *Pace*, 2005 WL 546507, at *10.

Finally, Louisiana argued in its brief before the en banc Court (LA En Banc Br. 46-47) that the state defendant in this case could not have waived its Eleventh Amendment immunity to Section 504 and IDEA claims because the Louisiana Department of Education was not authorized under state law to waive its immunity. As was true in *Pace*, Louisiana failed to assert this argument in its initial briefs before the panel, raising it for the first time in its brief to the en banc Court. This Court declined to address the argument in its en banc decision in *Pace* and should do so here as well. In any event, this argument has been validly raised by Texas in the pending en banc case of *Miller v. Texas Tech University Health Sciences Center*, No. 02-10190, obviating the need for the Court to consider it separately here.

In summary, every one of the five issues validly raised by Louisiana before this en banc Court have been decided by the Court in *Pace*, and this Court should therefore affirm the district court's finding that the State waived its immunity to the plaintiffs' claims. The remaining issue – the state law authority question – is

not validly before this en banc Court. The United States recommends that the en banc Court issue an opinion in this case that is consistent with *Pace*. In the event that the Court believes the state law authority question is validly before the en banc Court, it should hold this case pending a decision in *Miller*, in which that question and another question are validly before the en banc Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on April 22, 2005, two copies of the foregoing Supplemental Letter Brief for the United States as Intervenor was sent by overnight mail to the following counsel of record:

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