U.S. Department of Justice

Civil Rights Division

Department of Justice
Civil Rights Division - Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403

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: *Miller* v. *Texas Tech Univ. Health Scis. Ctr.*, No. 02-10190

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 two of the four issues raised by Texas in the instant case. Thus, we recommend that the en banc Court schedule oral argument on the remaining issues in this case.

In its brief before the en banc Court in the instant case, Texas 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, on four

distinct fronts, two of which were disposed of by this Court in *Pace*, and two of which remain to be decided.

First, Texas claims (TX En Banc Br. at 7-24) that Section 504 and 42 U.S.C. 2000d-7 fail the Supreme Court's "clear statement rule" because they indicate Congress's intent to abrogate States' immunity to Section 504 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. That argument was considered and specifically rejected by this Court in *Pace*. See *Pace*, 2005 WL 546507, at *6 ("Just because particular language may or may not function with equal efficacy under both exceptions to Eleventh Amendment immunity, does not mean that it fails the clear-statement rule. * * * For the purpose of the clear-statement rule, § 2000d-7 – janus-faced as it may be – poses no constitutional impediment to our finding valid waiver by consent.").

Second, Texas claims (TX En Banc Br. 40-42) that, even if federal funds were clearly conditioned on a State's waiver of its Eleventh Amendment immunity to claims under Section 504, Texas 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, Texas argues (TX En Banc Br. 24-27) that Sections 504 and 2000d-7 fail the "relatedness" prong of the test for valid Spending Clause legislation set out by the Supreme Court in *South Dakota* v. *Dole*, 483 U.S. 203 (1987). The en banc Court in *Pace* specifically declined to address that argument because the state defendant in that case had not raised it. See *Pace*, 2005 WL 546507, at *5 (declining to address the relatedness prong of the *Dole* analysis). For the reasons stated in our brief before the en banc Court, the United States believes that Congress's conditioning a State's acceptance of federal funds on compliance with the requirements of Section 504 and on waiver of immunity to Section 504 claims satisfies *Dole*'s relatedness test. Because we set forth our argument on this issue at pages 15-21 of our brief before the en banc Court, we do not repeat that argument here.

Finally, Texas argues (TX En Banc Br. 28-40) that the state defendant in this case could not have waived its Eleventh Amendment immunity to Section 504 claims because it "had no specific authority under state law to waive that immunity." Although Louisiana raised this argument in its brief before the en banc Court in *Pace*, the United States urged the Court not to consider the argument because Louisiana failed to raise it before the panel. In its opinion in *Pace*, the Court did not mention this argument. Thus, it remains undecided in this Circuit.

For the reasons stated on pages 21-30 of our brief before the en banc Court, the United States believes that the University's purported lack of state law authority does not, as a matter of federal law, prevent the University from effecting a valid waiver of its sovereign immunity by accepting federal funds.

In summary, two issues remain to be decided in this case by the en banc Court: (1) whether Sections 504 and 2000d-7 satisfy the "relatedness" prong of the *Dole* analysis, and (2) whether the state defendant's authority to waive Eleventh Amendment immunity by accepting federal funds was sufficient as a matter of federal law.

Respectfully submitted,

R. ALEXANDER ACOSTA
Assistant Attorney General

JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys
Department of Justice
Civil Rights Division, Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 305-7999

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:

Bradley W. Howard
Brown & Fortunato
905 South Fillmore, Suite 400
Amarillo, Texas 79105

Martin J. Cirkiel
Cirkiel & Associates, P.C.
1901 E. Palm Valley Blvd.
Round Rock, TX 78664

J. Curnin
Stroock & Stroock & Lavan LLP
180 Maiden Ln., Fl. 17
New York, NY 10038

Amy Warr
Office of the Attorney General for the State of Texas
300 W. 15th Street, 10th Floor
Wm P. Clements Bldg
Austin, TX 78701

_____
SARAH E. HARRINGTON
Attorney