**IN THE UNITED STATES DISTRICT COURT**
**FOR THE**
**EASTERN DISTRICT OF VIRGINIA**

**RICHMOND DIVISION**

| | | |
|---|---|---|
| **MICHAEL "GLENN" WHITE, *et. al.*** | ) | |
| **Plaintiffs** | ) | |
| | ) | |
| **v.** | ) | **Case No. 3:00CV386** |
| | ) | |
| **VIRGINIA BOARD OF EDUCATION; *et. al.*,** | ) | |
| **Defendants.** | ) | |

**PLAINTIFF'S BRIEF IN OPPOSITION TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

**Recent Procedural History**

On February 5, 2001, the plaintiff filed a Motion for Summary Judgment seeking attorney's fees and costs in the amount of $13,419.00, plus interest, for the earlier litigation during the administrative proceeding, and an additional award of fees and costs for the action in this Court.

The Motion was "accompanied by a written brief" in accordance with the Rules of the United States District Court for the Eastern District of Virginia. Rule (7)(E)(1) states that:

> 7(E)(1) Briefs Required:
>
> All motions . . . shall be accompanied by a written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of authorities upon which the movant relied. Unless otherwise directed by the Court, the opposing party shall file a responsive brief and such supporting documents as are appropriate, with eleven (11) days after service and the moving party may file a rebuttal brief within three (3) days after the service of the opposing party's reply brief.

A responsive brief was due within eleven days after service. Counsel for the defendant confirmed receipt of the Motion. A responsive brief was not filed, the defendant did not respond,

and the plaintiff's Motion is unopposed. The relief requested in an unopposed Motion should be granted.

A sketch of an Order granting Judgment to the plaintiff has been presented to this Court.

On February 27, 2001 counsel for the defendant mailed to plaintiff's counsel a detailed Motion for Summary Judgment that was evidently intended to serve as both a Motion and Brief in support of the Motion. The Motion was not accompanied by a written brief, in violation of Rule 7(E)(1). This Brief is the Plaintiff's Brief in Opposition to the Defendant's Motion for Summary Judgment.

**Course of Proceedings**

A discussion of the course of the proceedings of this instant case must include an explanation about the prior state court case of *Henrico County Public Schools v. White.*

On May 30, 1997, a special education due process hearing due process hearing was requested on behalf of Glenn White against Henrico County Public Schools. Tuition reimbursement and prospective tuition for Glenn's education at The New Community School was sought. The testimony concluded on November 18, 1997. Five months later, on April 15, 1998, the hearing officer rendered an adverse decision against Glenn White. The decision was appealed to a State Level Review Officer. The Review Officer heard additional evidence and on July 10, 1998 reversed the findings of the Hearing Officer. He ordered that Glenn's tuition at TNCS by paid by Henrico County Public Schools. (See attached Exhibit A) Henrico County appealed the decision to the Circuit Court of Henrico County. The Circuit Court, without hearing evidence and in utter disregard of the principles established in *Doyle v. Arlington County Sch. Bd.,* 953 F.2d 100 (4th Cir. 1991), issued a cursory letter opinion reversing the Review Decision,

stating that: "I do not find that the procedures used by the County in developing their programs prevented the child from receiving appropriate educational benefits." (See attached Exhibit B)

A Notice of Hearing and detailed Motion to Reconsider was filed with the Court. The Court canceled the hearing, summarily struck the Motion to Reconsider, and entered a Final Order (see attached **Exhibit** C) which has been appealed to the Virginia Court of Appeals.

**IDEA amended**
**Proposed Regulations / Final Regulations**

In 1997, the Individuals with Disabilities Education Act was amended. On October 22, 1997, the U. S. Department issued proposed regulations in Volume 62, page 55025 of the Federal Register. Proposed regulation 34 C.F.R. § 300.514(c), at page 55101, stated that

> (c) If the decision of a hearing officer in a due process hearing or a review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section.

On March 11, 1999 the regulations were adopted. The above regulation was modified slightly and now reads:

> Child's status during proceedings.
> (c) If the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section.

Each adopted regulation contained a detailed explanation in the Federal Register. The explanation to 34 C.F.R. § 300.514(c) was included in pages 12615 and 12616 of the Federal Register and stated:

> Paragraph (c) is based on **long-standing judicial interpretation** of the Act's pendency provision that when a State hearing officer's or State review official's decision is in agreement with parents that a change in placement is appropriate, that decision constitutes an agreement by the State agency and the parents for purposes of determining the child's current placement during subsequent appeals. See, *e.g., Burlington School*

> *Committee* v. *Dept. Of Educ.,* 471 U.S. 359, 371 (1985); *Susquenita School District* v. *Raelee S.,* 96 F.3d 78, 84 (3rd Cir. 1996); *Clovis Unified* v. *Office of Administrative Hearings,* 903 F.2d 635, 641 (9th Cir. 1990). Paragraph (c) of this section incorporates this interpretation. However, this provision does not limit either party's right to seek appropriate judicial review under § 300.512, it only shifts responsibility for maintaining the parent's proposed placement to the public agency **while an appeal is pending** in those instances in which the State hearing officer or State review official determines that the parent's proposed change of placement is appropriate.
>
> The term ''current placement'' is not readily defined. While it includes the IEP and the setting in which the IEP is implemented, such as a regular classroom or a self-contained classroom, the term is generally not considered to be location-specific. In addition, it is not intended that a child with disabilities remain in a specific grade and class pending an appeal if he or she would be eligible to proceed to the next grade and the corresponding classroom within that grade. (Emphasis added.)

Despite this long standing judicial interpretation, the Virginia Department of Education and Board of Education had never required a local education agency to implement a decision rendered by a Review Officer. The plaintiff requested that the State require the County to implement the decision of the Review Officer.

On August 9, 1999, five months after the regulations were adopted, in accordance with 34 C.F.R. § 300.514(c) Brenda Briggs, of the Virginia Department of Education issued a comprehensive, well-reasoned directive to Henrico County. She directed the school district to "Submit payment to the private placement in accordance with the review officer's decision, thereby providing for Michael's (Glenn's) tuition during the pendency of the appeal in accordance with the requirements of the newly enacted legislation of June 4, 1997, and its implementing regulations of May 11, 1999" (sic March 11, 1999) and to provide documentation "which verifies payment in accordance with the reviewing officer's order." (Complaint Exhibit F, page 8)

This letter was the first time in the history of special education law, practice and procedure in Virginia that the Virginia Department of Education ordered a school district to implement the decision of a Review Officer.

The County refused. Without explanation, the State reversed themselves. A special education due process hearing on behalf of Glenn White was requested against the Virginia Department of Education and Virginia Board of Education seeking to hold the defendants responsible for Glenn's tuition at The New Community School.

On January 17, 2000, oral argument was held before the Hearing Officer. The defendants argued that Virginia is a Commonwealth and, unlike individual States, a "Commonwealth" does not have authority over local school districts. The defendants asserted that:

> The Virginia constitution vests primary authority for education in local school boards.
> . . .
> But in Virginia, by the constitution, Article 8 of the constitution, the authority for running the local public schools and providing a free education is the responsibility of the local school divisions. Excuse me. (See Complaint Exhibit I, transcript of January 17, 2000 Oral Argument, page 50)

The defendants also argued that the established caselaw and regulation were invalid.

> . . . I submit that the new federal regulation (34 C.F.R. § 300.514) exceeds the statutory authority granted to the United States Department of Education under the IDEA.
> . . .
> U. S. Department of Education's promulgation of Section 300.514(c) exceeded the statutory authority by providing an alternative process by which to establish a stay-put placement that is not found in the IDEA and contradicts the governing statute. Therefore, the regulation should not be applied to this case and the parents' request for funding of the stay-put placement should be denied. (Complaint Exhibit I, pages 50-52)

The Hearing Officer did not agree. On February 7, 2000 he issued a ruling in favor of the plaintiffs, finding that:

> The Commonwealth has been inventive in mixing and matching State and Federal law and procedures when one or the other suits its aims. Nor can this Hearing Officer address the issue raised concerning the U.S. Department of Education alleged promulgation of CFR 300.514 (c) in violation of the IDEA by extending the regulation beyond the

underlying statutory authority. I would note, however, that under federal administrative law and court procedures there are several avenues, administrative and legal, for an affected party to protest and challenge new regulations. There is nothing in this record to show that the Commonwealth challenged CFR 300.514(c) nor has any case been cited to this Hearing Officer as evidence that the Commonwealth has legally challenged the promulgation and implementation of this particular regulation. Silence in the federal regulatory scheme implies (albeit with possible apprehension and reservations) consent and a failure to challenge, administratively or legally, generally reduces the options for a party to complain at a later date. (Page 5)

The Hearing Officer discussed the stay put rule of 34 C.F.R. § 300.514(c):

Paragraph (c) of §300.514 is based upon long standing judicial interpretations of IDEA's pendency provision that when a SLRO's decision is in agreement with the parents that a change in placement is appropriate, that decision constitutes an agreement by the State agency and the parents for purposes of determining the child's current placement during subsequent appeals. See Burlington School Committee V. Dept. of Educ., 471 U.S. 359, 371(1985); Susquenita School District V. Raelee S., 96 F.3d 78 (1996), Board of Educ. of Oak Park and River Forest High Sch. V Ill. St. Bd. Of Educ., 28 IDELR 716, Manchester Sch. Dist. V. Williamson, 17 EHLR 1.

Courts have taken the position that Congress could not have intended the stay-put provision to prevent a child from receiving an appropriate education pending an appeal process. They reasoned that this would run counter to the intent of the statute which was to protect children during the pendency of an appeal. The Court in Board of Educ. of Oak Park and River Forest High Sch., (supra) in a case with similar facts as this case, reinforced the notion that the stay-put provisions require compliance with the hearing officer's determination in favor of the parents during the pendency of an appeal. This Court holds that, under Burlington (supra) once a final state education administrative decision rules that the parent's placement is the appropriate placement, it becomes the "then current educational placement" within the meaning of §1415(e)(3). (Page 7)

The Hearing Officer explained that a State Education Agency can be a sole defendant in a special education due process hearing:

In a landmark decision, our own Fourth Circuit spoke to the issue of the SEA as a defendant and to its potential liabilities in special education litigation. Gadsby by Gadsby v. Grasmick, 109 F. 3d 940 (4th Cir. 1997). In Gadsby, the Fourth Circuit held that a State Department of Education can be a defendant in a special education case that began with a dispute between the parents and the LEA finding that the state department would be held liable for a private school placement. The Court held that the SEA had ultimate responsibility under 34.C.F.R. 1414(d)(1) and direct payment of money headed for the LEA would have to be used to pay for services to handicapped persons. Although the SEA's primary responsibility is supervisory, it can not escape ultimate responsibility for the failure to comply with IDEA and its regulations pursuant to 20 U.S.C. § 1412(6). The

> Court stated: "Therefore, it seems clear that an SEA may be held responsible if it fails to comply with its duty to assure that IDEA's substantive requirements are implemented." The Court continued . . . "Our conclusion that an SEA may be held liable under IDEA where the state fails to provide a free appropriate public education to a child with a disability is buttressed by the legislative history of § 1412(6). This legislative history indicates that § 1412(6) was included in the statute to "assure a single line of responsibility with regard to the education of handicapped children." Gadsby, 25 IDELR 621 at 628. (Page 9-10)
>
> Therefore, it appears to this Hearing Officer that the Commonwealth, if it fails to act herein, does so at its own peril. The Fourth Circuit has spoken to the key areas herein clearly. The trend of federal court decisions, IDEA amendments and regulatory actions since 1983 to the present support the parents' position in this matter. (Page 10)

The Hearing Officer held that "the parents have substantially prevailed herein." In his closing paragraph, he stated:

> Therefore, in light of all of the foregoing, it is hereby ORDERED that the Virginia State Department of Education shall reimburse, or cause to be reimbursed, the parents of Glenn White for the tuition expense (upon the parents presentation of proof of cost) at the New Community School for the school year of 1999-2000 and shall pay, or cause to be paid, the tuition for any future school year that Glenn White attends that school, until such time as the appropriate Virginia or federal court makes a final determination of the rights and responsibilities of the parties in White V. Henrico County Public Schools, currently pending with the Circuit Court of Henrico County, Virginia. (Page 11)

The language of the Code of Federal Regulations has since been adopted by Virginia. The new regulation now states that:

> If the decision of a hearing officer agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the local educational agency and the parents for purposes of maintaining the child's placement during the pendency of any administrative or judicial proceeding . . .

Glenn White prevailed and was awarded relief from the Hearing Officer. The defendant complied with the decision and paid Glenn's tuition for the past (1999-2000) and present (2000-2001) academic years, an amount in excess of $25,000.00. The issue pending before the Court of Appeals is related to reimbursement for tuition paid by the parents to TNCS prior to last year.

The sole issue pending before this Court is the plaintiff's request for reimbursement of attorneys fees for the litigation against the Virginia Board and Virginia Department of Education.

In refusing to pay attorney's fees, the defendant filed a Motion for Summary Judgment asserting that Glenn White was not a prevailing party in the suit against the Virginia Department and Virginia Board of Education and that Section 1403 of IDEA is unconstitutional.

**LAW**
**Plaintiff Prevailed**

The defendant complied with the Order of Hearing Officer Davis and paid the child's tuition. Glenn remains at TNCS where he continues to receive an appropriate education. He prevailed.

The defendant argued that:

> In this case, the plaintiffs do not have "prevailing party" status under the standard set by the Fourth Circuit Court of Appeals because the "relief' they obtained was temporary, interim and interlocutory in nature. It was only to last "until such time as the appropriate Virginia or federal court makes a final determination of the rights and responsibilities of the parties in White V. Henrico County Public Schools, currently pending with the Circuit Court of Henrico County, Virginia." (Defendant's Motion, page 13)

Two years of tuition paid by the defendants to the school is neither temporary, interim, or interlocutory in nature. The tuition represents more than dollars - it allowed Glenn White to be taught how to read, write, spell, and do arithmetic. It also represents a reversal in the practice and policy of the Virginia Department of Education. If the State Department of Education will not require a local education agency to comply with the decision of a Hearing Officer or Review Officer, as the ultimate state agency in charge, they must ensure that the child with a disability receives a free appropriate education.

This also represents a reversal in the prior position of the defendants "that the new federal regulation (34 C.F.R. § 300.514) exceeds the statutory authority granted to the United States

Department of Education under the IDEA." The defendant incorporated the essence of this regulation into the Virginia Regulations.

Glenn White was the prevailing party in the earlier special education due process litigation against the defendants.

**20 U.S.C. § 1403 of The Individuals with Disabilities Education Act**
**A State is not Immune Under the Eleventh Amendment**

IDEA expressly states that states are not immune from suit in Federal Court. The remedies in a suit against the state are the same as the remedy against another public entity. The statute is clear:

> 20 U.S.C. §1403 - Abrogation of State Sovereign Immunity
>
> (a) In General - 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 Act.
>
> (b) Remedies - In a suit against a State for a violation of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as those remedies are available for such a violation in the suit against any public entity other than a State.
>
> (c) Effective Date - Subsections (a) and (b) apply with respect to violations that occur in whole or part after the date of the enactment of the Education of the Handicapped Act Amendments of 1990.

Despite the plain language of the statute, the defendant asserts that:

> Although Congress' attempt to abrogate the Eleventh Amendment in the IDEA is unconstitutional, this Court must still address the question of whether the Eleventh Amendment has been waived. Quite simply, the mere receipt of federal funds does not constitute a waiver of the Eleventh Amendment. (Defendant's Motion, page 11)
>
> Because the IDEA was passed pursuant to the Article I Spending Clause power, abrogation of the Eleventh Amendment for IDEA claims for attorney's fees is constitutionally impossible. Under the circumstances, this Court should declare that 20 U.S.C. § 1403 is unconstitutional insofar as it purports to abrogate the States' Eleventh Amendment immunity for the IDEA claims for attorney's fees. (Defendant's Motion, page 12):

The defendant relies in part the recent U. S. Supreme Court ruling in *Bd. of Trustees of Univ. of Ala. V. Garrett*, 531 U.S. ___, 991240 (2001). The defendant noted that:

> Most recently, . . . the Supreme Court, in an opinion by Chief Justice Rehnquist, upheld states' sovereign immunity against damage suits brought under Title I of the Americans With Disabilities Act of 1990. It held that in assessing whether civil rights legislation enacted under § 5 of the Fourteenth Amendment legitimately subjects nonconsenting States to suit in federal court, Congress must specifically "identify a pattern of irrational state discrimination . . . against the disabled." (Brief at page 9)

In *Garrett*, state employees sued their employer seeking damages for claimed violations of ADA. ADA does not require "special accommodations" for the disabled. It requires employers to make facilities accessible to and usable by disabled individuals. It exempts employers from making "reasonable accommodations" if that would impose an "undue hardship" on the employer.

The Court did not hold that a state government is exempt from installing ramps and curb cuts for the disabled. It simply stated that state employees cannot obtain money damages for violations of ADA. The court noted that "there must be a pattern of discrimination by the States which violates the Fourteenth Amendment and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here ..."(At para 64, www.versuslaw.com)

IDEA was enacted because:

> (B) more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity; (C) 1,000,000 of children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers; . . . (20 U.S.C. § 1400(c)(2)(B), (C))

Congress found a "pattern a irrational state discrimination against the disabled." As a condition of States receiving funds from the U. S. Department of Education, states have agreed

to waive their Eleventh Amendment immunity. Unlike the IDEA, compliance with ADA is not impacted by the receipt or non receipt of federal funds.

The pattern of ongoing discrimination and violations of law by states against children with disabilities is ongoing and pervasive.

On January 25, 2000 the National Council of Disability published the IDEA Compliance Report, entitled "Back to School on Civil Rights." The National Council on Disability is an independent federal agency. (29 U.S.C. § 780) (Portions of the Report, attached to the initial Complaint as Exhibit J) It reported that:

> Almost a quarter of a century following passage of the Individuals with Disabilities Act (IDEA), students with disabilities and their families still commonly face obstacles to securing the free appropriate education (FAPE) that the law promises. The impact of noncompliance with IDEA is difficult to overestimate . . . The stress of working with a recalcitrant school system that [does] not want to work with a parent to educate a disabled child can be tremendous. (Exh. J, page 57)
>
> Parents have a reasonable expectation that the federal and state agencies charged with monitoring and enforcement will do their jobs. (Page 60)
>
> As a result of 25 years of non-enforcement by the Federal Government, parents are still a main enforcement vehicle for ensuring compliance with IDEA. (Finding #II.1B) (Page 70)

The National Council on Disability reported that the Commonwealth of Virginia was "Noncompliant" in monitoring local education agencies. Of thirty-three subcategories assessed, Virginia was "Compliant" in only three categories. (Exh. J, page 327)

**Caselaw**

On March 21, 1997, in *Gadsby v. Grasmick*, 109 F.3d 940, 25 IDELR 621 ($4^{th}$ Cir. 1997), the Fourth Circuit, held that the state has primary responsibility for ensuring that a child with a disability receives a free appropriate public education. The remedy against the state includes

"reimbursement costs." Reimbursement is not narrowly defined to exclude reimbursement for attorney's fees expended to secure an appropriate education.

> Our conclusion that an SEA may be held liable under IDEA where the state fails to provide a free appropriate public education to a child with a disability is buttressed by the legislative history of § 1412(6). This legislative history indicates that § 1412(6) was included in the statute to "assure a single line of responsibility with regard to the education of handicapped children." S. REP. NO. 94-168, at 24 (1975). Therefore, we hold that the SEA is ultimately responsible for the provision of a free appropriate public education to all of its students and may be held liable for the state's failure to assure compliance with IDEA. (At IDELR 628)
> . . .
> Having held that an SEA may be held liable under IDEA for the failure to provide a free appropriate public education, the next question we must address is whether MSDE may avoid liability for **reimbursement** costs otherwise appropriate under *Burlington* and *Carter* on the basis that BCPS failed to comply with Maryland State laws and regulations enacted in compliance with IDEA. (At IDELR 628)
> . . .
> Because the remedy of reimbursement for private school tuition is an equitable remedy imposed at the discretion of the district court and held to be appropriate by the Supreme Court in *Burlington* and *Carter*, as noted above, there is no statutory language specifically authorizing such a remedy, much less designating what governmental entity must pay the costs of reimbursement and when. Therefore, we "must examine the statute as a whole, giving due weight to design, structure, and purpose as well as to aggregate language." (At IDELR 629)

The Court explained that the individual states, as a condition of receiving federal funds, must submit a state plan that they will comply with IDEA. According to the "stop-gap" measure, the state is ultimately responsible in issue of non-compliance with the IDEA.

> As set forth above, Congress carefully delineated responsibilities under IDEA, delegating specific duties to the SEA and specific duties to the IDEA, while placing ultimate responsibility for compliance with the SEA. Within this scheme, the SEA has supervisory authority and is responsible, for example, for administering federal IDEA funds and establishing policies and procedures to ensure local compliance with IDEA. See 20 U.S.C. § 1413. To receive federal funds, the SEA must submit a state plan to the Secretary of Education setting forth its programs for compliance with IDEA. See id. § 1413(a). By contrast, the LEA applies to the SEA for IDEA funds, and the LEA is responsible for the direct provision of services under IDEA, including the development of an IEP for each disabled student. See 20 U.S.C § 1414. In addition to these provisions designating certain duties as the SEA's and certain duties as the LEA's, Congress included a stop-gap measure, under which the SEA is ultimately responsible for non-compliance with IDEA. See 20 U.S.C. § 1414(d)(1). (At IDELR 629)

Query - if the state violates the law, or refuses to enforce the law, is a U. S. District Court limited in determining the relief and award to another party? The Fourth Circuit responded:

> In contrast to these very specific provisions delineating each agency's responsibilities under IDEA and providing for certain procedural safeguards, IDEA's remedial provision simply provides that the district court has the authority to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). As the Supreme Court has recognized, this language "confers broad discretion on the court." *Burlington*, 471 U.S. at 369.
>
> **There is nothing in either the language or the structure of IDEA that limits the district court's authority to award reimbursement costs against the SEA, the LEA, or both in any particular case.** By contrast, both the language and the structure of IDEA suggest that either or both entities may be held liable for the failure to provide a free appropriate public education, as the district court deems appropriate after considering all relevant factors. See *Carter*, 510 U.S. at 16 ("Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors.. . ."). (At IDELR 628)

Despite the plain language of *Gadsby*, the defendants argued immunity at the due process level before the Hearing Officer. As noted above, the Hearing Officer commented that:

> The Commonwealth has been inventive in mixing and matching State and Federal law and procedures when one or the other suits its aims.

After *Gadsby*, other state Departments of Education became defendants in special education due process hearings. The states argued that they were immune. During the past two years, the Seventh, and Eighth Circuits, and a Pennsylvania District Court addressed the issues of the Eleventh Amendment and immunity for state departments of education.

On June 14, 1999, in *Mauney v. Arkansas Department of Education*, No. 98-1721, 30 IDELR 668 (8th Cir., 1999), the Court noted that the sole argument presented by the State of Arkansas and the Arkansas Department of Education was:

> [T]hat because Congress does not have the power under section five of the Fourteenth Amendment to pass legislation such as the IDEA, the purported abrogation of states' Eleventh Amendment immunity in § 1403 of that Act is ineffectual and therefore the state and the ADE are not proper parties to the suit. We conclude that Congress had both the

power and intent to abrogate Eleventh Amendment immunity and therefore affirm the district court's determination that it has jurisdiction over the appellants. (At IDELR 668)

The Court discussed the intent to abrogate state immunity.

A court may not find congressional intent to abrogate state immunity absent "unmistakable language." *Atascadero*, 473 U.S. at 239-40. Congress' intent to abrogate state immunity is patent in the IDEA. Section 1403(a) of the Act was adopted by Congress in response to the Supreme Court's determination in *Dellmuth v. Muth*, 491 U.S. 223, 231, 109 S.Ct. 2397 (1989), that the then-EHA did not contain an unequivocal declaration such as would support "with perfect confidence [the conclusion] that Congress in fact intended in 1975 to abrogate sovereign immunity." The amended Act 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." 20 U.S.C. § 1403(a) (1998); see also *Straube v. Florida Union Free Sch.*, 801 F.Supp. 1164, 1171 (S.D.N.Y. 1992) ("The IDEA abrogates the Eleventh Amendment for violations occurring in whole or in part after October 30, 1990."). The amended Act thus satisfies the first part of the *Seminole Tribe* test. (At IDELR 670)

. . .

The second part of the *Seminole Tribe* test stems from the Court's determination that although Congress may not abrogate Eleventh Amendment immunity pursuant to its Commerce Clause power, see 517 U.S. at 66-67 (overturning *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273 (1989)), it may do so when exercising its enforcement power under section 5 of the Fourteenth Amendment, see 517 U.S. at 59 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56, 96 S.Ct. 2666 (1976)). The narrow question in this case, then, is that begged by the holding in Seminole Tribe: the extent of Congress' power to enact legislation under section 5 of the Fourteenth Amendment. (At IDELR 670)

The Court discussed the history of the Act and it purpose to remedy the exclusion of children with disabilities from public schools.

The Supreme Court's treatment of the Act's legislative history in *Rowley* neatly encapsulates the various concerns that informed the Act's passage. See 458 U.S. at 191-97. The House Report emphasized "exclusion and misplacement," and members of the Senate remarked that "'all too often, our handicapped citizens have been denied the opportunity to receive an adequate education'" and "'have been excluded from the educational opportunities that we give to our other children.'" Id. at 191 & n. 13 (quoting 121 Cong. Rec. 19494, 19502, 23708 (1975)). The extensive factual basis adduced from the record and previous judicial decisions establish that the IDEA was intended to remediate very real and valid congressional concerns. (At IDELR 671)

The Court concluded that Section 1403 is a waiver of immunity and stated that: "We find more persuasive the reasoning of the Supreme Court and the Ninth Circuit, and would thus characterize § 1403 as "an unambiguous waiver of the States' Eleventh Amendment immunity."

Two months later, on August 31, 1999, the Eighth Circuit again addressed the issue. In *Bradley ex rel. Bradley v. Arkansas Dept. of Educ.*, 189 F. 3d 745, 31 IDELR 26, (8th Cir. 1999) the Eighth Circuit held that:

> . . . When it enacted §§ 1403 and 1415, Congress provided a clear, unambiguous warning of its intent to condition a state's participation in the IDEA program and its receipt of federal IDEA funds on the state's waiver of its immunity from suit in federal court on claims made under the IDEA. We therefore hold in accordance with *Mauney* that Arkansas waived its Eleventh Amendment immunity with respect to IDEA claims when it chose to participate in the federal spending program created by the IDEA. (At IDELR 105)

On March 24, 2000, the Seventh Circuit stated that these Eleventh Amendment arguments in special education litigation are "are feeble, individually and collectively." *Board of Educ. of Oak Park v. Kelly E. by Nancy E.*, ____ F. 3d _____, 32 IDELR 62 (7th Cir. 2000) In *Oak Park*, the school district sued the state seeking to recover reimbursement costs. The state argued that they were immune. The Court explained:

> Illinois, as appellant in the Oak Park case and appellee in the Palatine case, leads off with a flurry of objections to the very possibility of litigation. Local school districts lack standing, the state insists; if they suffer injury in fact, they do not meet prudential standards for adjudication; and if the local districts may sue, still the state is not a proper defendant given the eleventh amendment. None of these arguments was presented in the district court -- though if they establish an absence of subject-matter jurisdiction we must consider them anyway. But they are feeble, individually and collectively. (At IDELR 186)
> **. . .**
> Section 604(a) of the IDEA, 20 U.S.C. § 1403(a), 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." Language this direct satisfies the clear-statement requirement. Illinois contends that abrogation exceeds Congress' powers under § 5 of the fourteenth amendment . . . but this is beside the point. Having enacted legislation under its spending power, Congress did not need to rely on § 5. **States that accept federal money, as Illinois has done, must respect the terms and conditions of**

> **the grant.** ***South Dakota v. Dole*****, 483 U.S. 203 (1987). One string attached to money under the IDEA is submitting to suit in federal court.** *Bradley v. Arkansas Department of Education*, 189 F.3d 745, 752-53 (8th Cir.), rehearing en banc granted on a different issue, 197 F.3d 958 (1999) (argued January 14, 2000). Although § 604(a) does not use words such as "consent" or "waiver," it is hard to see why that should matter. Congress did what it could to ensure that states participating in the IDEA are amenable to suit in federal court. That the power comes from the spending clause rather than (as Congress may have supposed) the commerce clause or the fourteenth amendment is not relevant to the issue whether the national government possesses the asserted authority. Otherwise we require the legislature to play games ("guess which clause the judiciary will think most appropriate"). What matters, or at least should matter, is the extent of national power, rather than the extent of legislative prevision. Thus we hold that states must take the bitter with the sweet; having accepted the money, they must litigate in federal court. . . But if the IDEA itself entitles a local school district to reimbursement from a state, then the eleventh amendment does not stand in the way. (Emphasis added) (At IDELR 186)

Three Circuits, the Fourth, Seventh and Eighth, have held that the state is not immune.

On May 8, 2000, a Pennsylvania school district joined the state department of education as a third party defendant in ongoing special education litigation. In *John T. by T. and Joan T. v. Delaware County Intermediate Unit,* ___ F. Supp. ___, 32 IDELR 142, (E.D. PA 2000), the Pennsylvania Department of Education (PDE) argued that, under the Eleventh Amendment, the State was immune from suit. Relying on legislative history and caselaw from the U. S. Supreme Court, the District Court held that:

> PDE argues that: 1) a state agency cannot be held to answer in federal court for violations of state law under the Eleventh Amendment to the United States Constitution; and 2) the Pennsylvania Constitution precludes an agency from exceeding its allotted appropriation. A state agency can be sued for violations of federal law despite the Eleventh Amendment when Congress clearly and unequivocally expresses its intent to make states liable. See *Welch v. Texas Dept. of Highways & Pub. Transp*., 483 U.S. 468, 475 (1987). Congress expressly abrogated the states, sovereign immunity for suits brought in federal court under the IDEA. See 20 U.S.C. § 1403(a) ("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."). PDE will only be liable to DCIU to the extent required by the IDEA; PDE is not immune under the Eleventh Amendment to this action by DCIU under the federal IDEA. (At IDELR 462)

No United States District Court or United States Court of Appeals has held that a state has an Eleventh Amendment immunity from a suit under IDEA. The defendant's request that this Court "should declare that 20 U.S.C. § 1403 is unconstitutional insofar as it purports to abrogate the States' Eleventh Amendment immunity for IDEA claims" (Defendant's Brief, page 14) is without merit and contrary to established caselaw.

## CONCLUSION

The State initially told Henrico County Public Schools to obey the longstanding judicial policy of implementing an adverse decision of a Review Officer, even while the case was on appeal. This was a departure from over twenty years of contrary practices. The County refused and, without explanation, the State acquiesced. Perhaps the State was afraid to litigate against the County. Perhaps that the new State Superintendent was a former Assistant Superintendent from Henrico County caused the State to shift their position.

At a special education due process hearing against the State, the defendant absurdly argued that the March 11, 1999, new federal special education regulations were invalid. Later they adopted the language of that regulation as their own. The State lost the due process hearing, did not appeal, and now argues that the parents did not prevail.

Despite the plain language of *Gadsby* and 20 U.S.C. § 1403, the State now argues that the law is invalid.

The State, by implication, is requesting this Court to reverse prior rulings of the 4$^{th}$, 7$^{th}$ and 8$^{th}$ Circuits, and also hold that Section 1403 is unconstitutional.

The State has maintained an ongoing pattern of delay, refusal, and abject unwillingness to accept and follow the law. This should not be condoned by this Court.

As requested in the Plaintiff's Memorandum in Support of the Plaintiff's Motion for Summary Judgment, the plaintiff, by counsel, respectfully requests that this Court make a finding that the State has advanced frivolous defenses either out of abject ignorance or for the sake of delay. The Plaintiff further request that this Court award the plaintiff attorney's fees and costs in the amount of $13,419.00, plus interest, for the earlier litigation during the administrative proceeding, and an additional award of fees and costs for the action in this Court.

MICHAEL "GLENN" WHITE, *et. al*.
By Counsel

__________________________p.q.

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CERTIFICATE

I, Peter W. D. Wright, hereby certify that on this 6th day of March, 2001, I mailed a copy of this Motion to the office of Joan Murphy, counsel for the defendants.

________________________________
Peter W. D. Wright

Exh. A is Review Officer frazier

exh b is harris letter opinion

exh c is motion to reconsider

log in verdict and searches etc.

March 4,

On June 14, 1999, in *Mauney v. Arkansas Department of Education*, No. 98-1721, 30 IDELR 668 (8th Cir., 1999),

*Bradley ex rel. Bradley v. Arkansas Dept. of Educ*., 189 F. 3d 745, 31 IDELR 26, (8$^{th}$ Cir. 1999) the Eighth Circuit held that:

arguments in special education litigation are "are feeble, individually and collectively." *Board of Educ. of Oak Park v. Kelly E. by Nancy E*., ____ F. 3d _____ xxx _, 32 IDELR 62 (7$^{th}$ Cir. 2000) In *Oak Park*, the

as a third party defendant in ongoing special education litigation. In *John T. by Paul T. and Joan T. v. De*