IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ESTATE OF ANDREW JEFFREYS, et al.,	:	
Plaintiffs,	:	Hon. William G. Bassler
v.	:	CIVIL ACTION
STATE OF NEW JERSEY, et al.,	:	DOCKET NO. 95-6155 (WGB)
Defendants.	:	

INTRODUCTION

With this brief, Amici Curiae seek to bring to the Court's attention the critical role that the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq. ("IDEA"), Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq. ("the ADA") and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504") play in enforcing the rights of persons with disabilities, with an emphasis on the rights of children with disabilities to an appropriate education.

Defendants' Motion to Dismiss the IDEA, the ADA and Section 504 claims on Eleventh Amendment immunity grounds goes well beyond affecting the rights of Plaintiff Andrew Jeffreys who tragically passed away while fighting to obtain the educational services to which he was entitled. It affects all children with disabilities who encounter the State's failure to provide them with an appropriate education. And indeed, it affects all persons with disabilities in New Jersey who are being denied the benefits of any state services and programs or are being discriminated against by the State by reason of their

disabilities. If the State is found to be immune from suit under IDEA, the ADA and Section 504, persons with disabilities will be unable to invoke any federal non-discrimination laws against the State and will have virtually no way to hold the State accountable for its actions.

Persons with disabilities have suffered much discrimination at the hands of the State. We cannot let the clock be turned back on their rights.

INTEREST OF AMICI CURIAE

Amici Curiae are organizations concerned about the civil rights of persons with disabilities. Amici bring to this matter an enormous wealth of experience and expertise, especially in the area of educating children with disabilities. They have devoted substantial resources to eradicating discrimination against persons with disabilities.

Amici are deeply dismayed about the State's attempt to shield itself from liability in this case by arguing that Congress did not have the right to enact the sections of IDEA, Section 504 and the ADA that allow private citizens to sue states. Amici believe that the State's position is wrong as a matter of law and urge this Court to deny the State's Motion to Dismiss. Amici herewith supplement the legal arguments set forth in the Plaintiff's brief and in the brief of the Intervener United States Department of Justice by advising this Court of the state-based discrimination faced by persons with disabilities and the need for persons with disabilities to be able to avail themselves of the remedies afforded by IDEA, the ADA and Section 504 to redress the discrimination.

THE ALLIANCE FOR DISABLED IN ACTION, INC. ("ADA") is a private not-for-profit Center for Independent Living controlled by people with disabilities whose mission is to support and promote choice, self-direction and independent living in the lives of people with

disabilities. ADA provides persons with disabilities with information and referral, peer support, home and community-based support, individual and systems advocacy and instruction in independent living, while providing the entire community with information and research services, sensitivity and awareness workshops and consultations regarding the Americans with Disabilities Act.

THE ALLIANCE FOR THE BETTERMENT OF CITIZENS WITH DISABILITIES ("ABCD") is a statewide organization representing eleven member agencies: Arc of Morris County, Cerebral Palsy of Essex & West Hudson Counties, Cerebral Palsy League of Union County, Cerebral Palsy of Monmouth & Ocean Counties, Cerebral Palsy of North Jersey, Disabilities Resource Center of Atlantic & Cape May Counties, Matheny School and Hospital, Passaic County Elks Cerebral Palsy Center, Spectrum for Living, Spina Bifida Association of New Jersey and United Cerebral Palsy of Hudson County. ABCD members provide an array of community services to more than 5,000 people with developmental disabilities and their families and provide educational materials to 20,000 New Jerseyans. ABCD's mission is to assist people with multiple physical and developmental disabilities to have the opportunity to attain the highest level of purpose and independence with dignity.

THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY ("ACLU-NJ") is a non-profit, non-partisan membership organization devoted to protecting basic civil liberties and civil rights of all New Jersey residents, and extending those rights to groups that have traditionally been denied them. Included among these rights are the rights of individuals with disabilities and the right to education. Founded in 1960, the ACLU-NJ has close to 8,000 members in the State of New Jersey. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 and which is now composed of

approximately 275,000 members nationwide.

THE ARC OF NEW JERSEY is the largest non-profit advocacy organization for people with mental retardation and their families in New Jersey. It is a parent-directed membership organization with more than 6,000 member families. It is affiliated with The Arc, a national organization on mental retardation with more than 1,200 chapters and 140,000 members nationwide. The Arc of New Jersey is comprised of a state office and 19 local county chapters providing services in 21 counties.

BECOMING EDUCATED AND MOTIVATED ABOUT EDUCATION ("BEAM") is a grassroots parent support group in Burlington County. Established in 1992 by concerned parents of children with special needs, BEAM has provided special education support and networking opportunities, and has advocated for children's access to the community, both socially and educationally. Monthly training workshops offer parents timely information concerning disability issues.

THE CENTER FOR LAW AND EDUCATION is a national legal and advocacy support organization representing parents and students in efforts to improve the quality of public education for low-income children and youth. Since its founding in 1969, the Center has worked to vindicate the rights of all students with disabilities to full and equal opportunity in public education through participation in litigation, legislative and administrative advocacy, the provision of technical assistance to other attorneys, and training for attorneys, parents and other advocates. The Center has participated as counsel and as amicus curiae in numerous cases implicating rights under IDEA, including Florence County School District No. 4 v. Carter, 510 U.S. 7 (1993) and Honig v. Doe, 484 U.S. 305 (1988).

THE EDUCATION LAW CENTER ("ELC") is a not-for-profit law firm in New Jersey specializing in education law. Since its founding in 1973, ELC has acted on behalf of disadvantaged students and students with disabilities to achieve education reform, school improvement and protection of individual rights. ELC seeks to accomplish these goals through research, public education, technical assistance, advocacy and legal representation. In addition to serving as lead counsel to 300,000 urban school children who are the plaintiffs in New Jersey's school funding case, Abbott v. Burke, ELC provides a full range of direct legal services to parents involved in disputes with public school officials. ELC serves approximately 600 individual clients each year, primarily in the area of special education law.

THE ESSEX COUNTY BAR ASSOCIATION ("ECBA") is an organization of 3,000 member attorneys. Organized in 1899, ECBA is the largest county bar in New Jersey and also the most diverse. Since its inception, ECBA has enthusiastically implemented programs and aggressively embraced positions to meet the needs and concerns of the Essex County legal community and the community-at-large. Its Committee on the Rights of Persons with Disabilities, in existence since 1984, is the only disability rights committee in the state. The committee engages in education and advocacy on behalf of persons with disabilities.

THE JERSEY CITY SPECIAL EDUCATION PARENTS COUNCIL has a membership of over 700 parents of, and care-givers to, children who receive special education and related services. The Council provides training to parents to advocate for the interest of their children with disabilities. The trainings are enhanced by a bi-monthly newsletter and meetings five times a year. The Council provides direct advocacy and

support to parents, including accompanying parents to special education meetings regarding their children.

THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, INC. (“NAPAS”) is a voluntary membership association which facilitates coordination among protection and advocacy agencies (“P&A’s”), and represents their interests before Congress and the executive branch of government. The P&A's are a federally mandated system in each state and territory which provides protection of the rights of persons with disabilities through legally based advocacy. Approximately 30% of all advocacy work done by the P&As is in the area of special education. NAPAS has long been recognized as a key player in the disability rights movement, helping to develop significant disability coalitions and policies on the national level.

THE NEW JERSEY COALITION FOR INCLUSIVE EDUCATION, INC. (“NJCIE”), established in 1995, is a nonprofit association with a membership of several hundred parents and professionals, whose mission is to promote education for children with disabilities in general education settings in their neighborhood schools. NJCIE advocates for inclusive classrooms where students recognize each other's individual differences and strive to support one another's efforts. Among its activities, NJCIE provides resources and information on the benefits of inclusive education, opportunities for collaborative networking of parents and professionals, and workshops in techniques and strategies to support students and teachers in classrooms, schools and districts across the state.

NEW JERSEY PARENT ADVOCACY, TRAINING AND HELP (“NJ PATH”), founded over four years ago, provides training for parents of children with disabilities. NJ PATH offers telephone support to parents attempting to advocate for the special education

rights of their children, and assists parents in writing advocacy letters and participating in special education meetings.

THE RUTGERS SCHOOL OF LAW-NEWARK SPECIAL EDUCATION CLINIC provides free legal representation to indigent parents of children with disabilities seeking appropriate educational programs and services for their children. The Clinic has been in existence since January 1995 and has handled cases seeking both injunctive relief and monetary damages.

THE STATEWIDE PARENT ADVOCACY NETWORK ("SPAN") is New Jersey's federally-funded Parent Training and Information Center, pursuant to 20 U.S.C. § 1482. SPAN provides training and technical assistance to over 25,000 parents and professionals annually, on issues such as special education, school reform, standards, Title I, rights of homeless and immigrant students, bilingual services, discipline and positive behavioral supports, parent involvement and parent-professional collaboration.

ARGUMENT

PERSONS WITH DISABILITIES FACE PERSISTENT DISCRIMINATION FROM STATES, AND MUST HAVE ACCESS TO THE PROTECTIONS OF IDEA, THE ADA AND SECTION 504

A. Persons with disabilities are discriminated against relentlessly

When Congress passed the most recent anti-discrimination law for persons with disabilities in 1990, the landmark Americans with Disabilities Act, Congress recognized that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. §

12101(a)(2). Discrimination was found to "persist[] in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting and access to public services." 42 U.S.C. § 12101(a)(3). The forms of discrimination faced include "outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. § 12101(a)(5). Critically, Congress noted as grounds for the passage of the ADA that persons with disabilities have "often had no legal recourse to redress" discrimination, 42 U.S.C. § 12101(a)(4), and that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency." 42 U.S.C. § 12101(a)(8).

The discrimination and segregation of children with disabilities in education in this country pre-dates its founding. Deborah Deutsch Smith, Introduction to Special Education, Third Edition (1998). In 1975, when Congress enacted the predecessor statute to IDEA, the Education for All Handicapped Children Act, P.L. 94-142 ("EAHCA"), it laid out the stark reality of the time: "[M]ore than one-half of the [over eight million[1]] children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity," 20 U.S.C. § 1400(c)(2)(B), and "1,000,000 of the children with disabilities in the United States were excluded entirely from

[1] S. Rep. No. 94-168, 94th Cong., 1st Sess. 8 (1975); H.R. Rep. No. 94-332, 94th Cong., 1st Sess. 7 (1975).

the public school system...." 20 U.S.C. § 1400(c)(2)(C). See also S. Rep. No. 94-168, 94th Cong., 1st Sess. 8 (1975) (1.75 million children with disabilities received no educational services at all); H. R. Rep. No. 94-332, 94th Cong., 1st Sess. 7, 26, 34 (1975) (the special education needs of most of the 8 million children with disabilities were not being met); Board of Education v. Rowley, 458 U.S. 176, 191 (1982) ("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."' [citation omitted]").

Sadly, Congress noted in amending the EAHCA in 1990 that "[i]n the 11 [sic] years since the implementation of P.L. 94-142, there has been no significant change nationwide in the use of segregated facilities to educate children with disabilities." H. R. Rep. No. 101-544, 101st Cong., 1st Sess. 27 (1990). See also Point C, infra.

B. Education is fundamental for children with disabilities, and states area responsible for the delivery of education services to children with disabilities

The Supreme Court has consistently recognized the importance of an education for all children. In Brown v. Board of Education, 347 U.S. 483, 493 (1954), an emphatic court stated:

> Education is perhaps the most important function of state and local governments. ... It is required in the performance of our most basic public responsibilities .... It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him[/her] for later ... training, and in helping him[/her] to adjust normally to his[/her] environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he[/she] is denied the opportunity of an education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

In Plyler v. Doe, 457 U.S. 202, 222-223, 238-239 (1982), the Court averred:

> The inability to read and write will handicap the individual deprived of a basic education each and ever day of his[/her] life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.
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> ...
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> The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.
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> ...
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> These children thus have been singled out for a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment.

The fundamental nature of an education for children with disabilities is the underpinning of IDEA and its predecessor statute. See S. Rep. No. 94-168, 94th Cong., 1st Sess. (1975).

When it first enacted the EAHCA, Congress recognized that states must be given the all-important role of educating children with disabilities. In fact, Congress provided states with the "sole responsibility" for educating children with disabilities, S. Rep. No. 94-168, 94th Cong., 1st Sess. 14 (1975), to "assure a single line of responsibility" which is of "paramount importance." Id. at 24. See also Kruelle v. New Castle County School District, 642 F.2d 687, 696 (3d Cir. 1981). Congress established that states "are responsible for insuring the implementation of and compliance with provisions of the Act, and for the general supervision of educational programs for handicapped children within the State." Id. at 17. See also Rowley 458 U.S. at 183; Beth V. v. Carroll, 87 F.3d 80, 82 (3d Cir. 1996);

20 U.S.C. § 1400(c)(6). In order to receive federal financial assistance, a state must have in effect uniform policies and procedures to ensure that the requirements of IDEA are met, and must accept responsibility for implementing those policies and procedures. 20 U.S.C. §§ 1401(8)(B), 1412. Although "states are given considerable latitude in establishing the applicable standards," they must comply with the "floor mandated by federal law." Geis v. Board of Educ., 774 F.2d 575, 581 (3d Cir. 1985).

More specifically, a participating state under IDEA is required to have in effect a policy assuring that a free and appropriate public education is provided to "all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." 20 U.S.C. § 1412(a)(1)(A). The state must ensure that all requirements of IDEA are met, and that all educational programs for children with disabilities in the state "are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities," and "meet the educational standards of the [state]." 20 U.S.C. § 1412(a)(11)(A). The state is responsible for demonstrating to the United States Secretary of Education compliance with IDEA's requirements for administering federal funds to each local educational agency ("LEA"), or school district, and for supervising "implementation of policies and procedures to ensure that each LEA expends the funds in a manner consistent with the purpose and substantive provisions of IDEA." Gadsby v. Grasmick, 109 F.3d 940, 943 (4th Cir. 1997); 20 U.S.C. §§ 1412(a) and 1413(a).

The state must ensure that students in need of services are identified and evaluated, 20 U.S.C. § 1412(a)(3), provided with an appropriate "individualized education program," 20 U.S.C. § 1412(a)(4) and provided services in the "least restrictive

environment." 20 U.S.C. § 1412(a)(5). The state must establish procedural safeguards, 20 U.S.C. § 1412(a)(6), and must ensure that there exists an adequate supply of qualified personnel who are properly trained to meet the needs of children with disabilities, and are kept up-to-date on research, best practices and technology. 20 U.S.C. §§ 1412(a)(14), 1453(c)(3)(D). In addition, the state must ensure that interagency coordination is in effect between the state's educational agency and any other agency involved in providing any services necessary for educating children with disabilities. 20 U.S.C. § 1412(a)(12).

Where the state is given such a major role, it must also be held accountable. If the state fails to establish cooperative agreements among educational agencies and other states, as in the case at bar, affected students with disabilities must be able to take legal recourse against the state under IDEA, the ADA and Section 504. See Kruelle, 642 F.2d at 697 (the burden for "coordinating efforts and financial arrangements" for a child's education is on the state). Similarly, if the state fails to adhere to any of its other enumerated responsibilities, federal actions must be available to right the wrongs. It simply will not remedy violations of children's rights to bring suits against local educational agencies when their role is limited and states are vested with such significant powers and responsibilities.

Several courts have held states liable to plaintiffs because they are the entity ultimately responsible for the education of children with disabilities. See , e.g., Gadsby, 109 F. 3d. at 953. Other courts have condemned states for abuse of their oversight function. In Corey H. v. The Board of Education of the City of Chicago, 995 F. Supp. 900 (N.D. IL.1998), the State Board of Education was found to have repeatedly failed to ensure that the school district had sufficient guidelines and resources in order to place children with

disabilities in the least restrictive environment on a systemic basis. The court noted that "courts have consistently found against state agencies...that have attempted to deny responsibility for the systematic failure of local school districts to provide necessary educational services." Id. at 912 (citations omitted) . The court in Cordero v. Pennsylvania Department of Education, 795 F. Supp. 1352, 1362 (M.D. Pa. 1992) made a similar finding, noting that "with regard to the state's liability in this action, the fact that local agencies are not performing up to par or that parents are not fulfilling their duties becomes irrelevant. It is the state's obligation to ensure that the systems it put in place are running properly and that if they are not, to correct them."

Numerous other court cases highlight the need to allow suits against states to go forward to rectify other ills solely of the state's making and regarding matters for which the state alone has responsibility. In Battle v.. Commonwealth of Pennsylvania, 629 F.2d 269 (3d Cir. 1980), the Third Circuit held that the state's inflexible application of a policy establishing a maximum 180 day school year violated the rights of members of the plaintiff class to individualized education programs. The Eleventh Circuit found that the state of Florida was violating the free and appropriate education provisions of IDEA by charging the class of children with developmental disabilities maintenance fees related to their residential educational placements. Jenkins v. State of Florida, 931 F.2d 1469 (11th Cir. 1991). In Kotowicz v. Mississippi State Board of Education, 630 F.Supp. 925 (D. Miss. 1986), plaintiffs were successful in their challenge to the composition of the state administrative review team and their failure to support their decision with specific findings of facts and conclusions of law. The Ninth Circuit recognized in Kerr Center Parents Assoc. v. Charles, 897 F.2d 1463 (9th Cir. 1990) that children who were placed in a facility for

persons with mental retardation by the state were to have their education at that facility paid for by the state.

Not only are states responsible for ensuring that local educational agencies provide appropriate education to those children with disabilities who are served locally, but the states are also directly responsible for the special education of thousands of children in state-operated schools, including schools operated in prisons and jails across the country. In New Jersey, in addition to the approximately 200,000 children with disabilities for whom local educational agencies have some responsibility[2], over 1,800 children with disabilities are educated in state-operated facilities such as the Marie Katzenbach School for the Deaf and the A. Harry Moore Laboratory School, and in prison and jail facilities throughout the state.[3] Local educational agencies play absolutely no role for these individuals and it is therefore imperative that such children can bring actions against the State to enforce their federal rights, if warranted. See Doe v. Maher, 793 F.2d 1470, 1492 (9th Cir. 1986), aff'd sub nom. Honig v. Doe, 484 U.S. 305, 329 (1988) (finding that if a child is better served in a state facility than a local one, the state department of education must take responsibility for him); Todd D. by Robert D. v. Andrews, 933 F.2d 1576, 1583 (11th Cir. 1991), reh'g denied, 943 F.2d 1316 (11th Cir. 1991) (same); Donnell C. v. The Illinois State Board of Education, 829 F. Supp. 1016 (N.D. Ill. 1993) (denying the state defendant's motion to dismiss in a class action by school age pretrial detainees who alleged denial of appropriate special

[2] New Jersey Department of Education, Office of Special Education Programs, Special Education: A Statistical Report for the 1997-98 School Year ("NJ Statistical Report"), Appendices A-D.

[3] New Jersey Department of Education, Office of Special Education Programs, Data Forms DTO1PUB and DTO4LPUB (9-27-99).

education while in county jails).

In addition, where districts have been found incapable of providing educational services to their residents, states may take over the provision of such services. In New Jersey, pursuant to N.J.S.A. 18A:7A-34, the State is currently running the educational programs in Newark, Jersey City and Paterson which serve over 11, 000 students with disabilities.[4] The State is solely liable for the education of children in state-operated districts, and when children with disabilities in these schools face problems in obtaining an appropriate education, they must be able to bring an action against the State under IDEA, the ADA or Section 504.

C. States have consistently failed to provide persons with disabilities with an appropriate education

Justice Marshall, joined by Justices Brennan and Blackmun in City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985) traces the history of "state-mandated segregation and degradation" back to the latter part of the 19th century which "in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were build to warehouse the retarded for life; the aim was to halt reproduction of the retarded and 'nearly extinguish their race.' Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them." 473 U.S. at 462-463 (citations and footnotes omitted).

[4] Statistical Report, Appendices A-D.

It was not until 1898 that any attempts to educate children with disabilities in public schools were made and they resulted in segregated classrooms. The first special class for "backward children" was established in the public schools of Providence, Rhode Island, and similar classes were established across the country, shortly thereafter. Stanley Vitello and Ronald Soskin, Mental Retardation: Its Social and Legal Context, 49 (1985). With the invention of intelligence tests in the early 1900's, there was a dramatic increase in the number of children labeled as "morons" and assigned to "fool classes" in the public schools. Id. These "morons" were children with mental retardation who were considered "trainable." Those with more severe retardation remained excluded until the 1950's when they received education services in a segregated environment, while those with the most severe retardation were denied an education until the 1970's when they too were finally provided educational services in a segregated environment. Id. at 50. Efficacy studies in the 1950's and 1960's proved definitively that children with retardation received no significant benefit, either academically or socially, from special class placement, and in fact, the studies showed that such placements were detrimental to the children. Id.

In New Jersey, state-ordered segregation of children with retardation can be traced back as far as 1915 when the legislature provided for the admission to the Vineland Institution of "mentally defective ... children of all ages and grades...." 1915 N.J. Laws 278 ch. 151 § 2. And it was not until 1992, effective 1993, that New Jersey repealed its statutes allowing educational agencies unfettered discretion to wholly exclude children classified as having a disability. N.J.S.A. 18A:46-16 to 18A:46-18.1, repealed by L.1992, c. 129, § 2, eff. July 1, 1993.

Virtually every other state also had exclusionary school statutes. S. Sarason & J.

Doris, Educational Handicap, Social Policy and Social History (1979); P. Tylor & L. Bell, Caring for the Retarded in America (1984); J.W. Trent, Inventing the Feebleminded (1994). In 1958, the Supreme Court of Illinois held that neither the state constitution nor statutes regarding public education of children required the state to provide an education free of charge to a child with mental impairments. The Department of Public Welfare v. Haas, 15 Ill. 2d 204, 154 N.E. 2d 265 (1958). Until 1969, a North Carolina statute actually made it a crime for a parent to "persist in forcing ... [the] attendance" of a child with disabilities in public school after s/he was excluded. N.C. Sess. Laws, ch. 584, amending N.C. Gen. Stat. §115-165 (1965). A 1975 Ohio statute allowed a child to be excluded from education if "his bodily or mental condition does not permit his attendance at school ...." Ohio Rev. Code Ann. §3321.04. An Iowa statute similarly provided that "[a] local board may exclude any child from school if it judges that he is too immature or abnormal to benefit from school, or that his presence may be injurious to the health or morals of other pupils." Iowa School Code § 282.3.

Indeed the EAHCA was passed in response to Congress' recognition that the states had not been appropriately educating children with disabilities. See, e.g., Rowley, 458 U.S. at 191 (citing H. R. Rep. No. 94-332, p. 2 (1975) and S. Rep. No. 94-168, p. 8 (1975)). As the Supreme Court noted in Rowley, 485 U.S. at 180, 192, School Committee of Burlington v. Department of Education, 471 U.S. 359, 373 (1985) and Honig, 484 U.S. at 309-310 (1988), the impetus for IDEA came from Pennsylvania Association for Retarded Children v. Commonwealth, 334 F.Supp. 1257 (E.D. Pa. 1971) and 343 F.Supp. 279 (1972) ("P.A.R.C.") which dealt with the state's exclusion of children with disabilities from public

schools.[5]

The legislative history of EAHCA sets out the status of state laws regarding education of children with disabilities in 1975. Several states had no mandates in place, while others mandated only selected programs. Many states limited the educational services to children with certain types of disabilities (most often omitting coverage for persons with mental retardation), while many states limited the ages of covered children. S. Rep. No. 94-168, 94th Cong., 1st Sess. 20, 21 (1975). Congress highlighted the following problems in educating children with disabilities:

> (1) the misuse of appropriate identification and classification data within the educational process ...; 2) discriminatory treatment as the result of the identification of a handicapping condition; and 3) misuse of identification procedures or methods which results in erroneous classification of a child as having a handicapping condition.

Id. at 26-27.

Unfortunately, the passage of the EAHCA did not eradicate discrimination against children with disabilities in education. In 1983, the United States Commission on Civil Rights reported 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). A 1991 survey of the integration of persons with disabilities recognized children

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[5] The Honig court also recognized that by the time the EAHCA was enacted in 1975, legal challenges to similar exclusionary practices had been brought in 27 other states, Honig, 484 U.S. at 310; see also S. Rep. No. 94-168, 94th Cong., 1st Sess. 6 (1975), at least 13 of which involved states as defendants.

with disabilities continued to be segregated in education. Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 413-414 (1991).

In 1994-1995, more than half of the students with disabilities nationwide spent less than 80% of their school day in general education classes and only 9.7% of those students with mental retardation were served at all in regular classes. U.S. Department of Education, Nineteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, http://www.ed.gov/offices/OSERS/OSEP (1997). The statistics were virtually unchanged for 1995-1996. U.S. Department of Education, Twentieth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, http://www.ed.gov/offices/OSERS/OSEP (1998) ("USDOE Twentieth Annual Report").

In 1994, New Jersey was found to still be segregating its students with disabilities -- "Segregation begins early and continues through the school years." New Jersey Developmental Disabilities Council, Separate and Unequal: The Education of Children with Disabilities in New Jersey, p.1 (1994) ("Separate and Unequal"). A follow-up report in 1996 by the Council, a fellow state agency, gave New Jersey's Department of Education an "F" for their failure to even develop a plan to integrate students with disabilities. New Jersey Developmental Disabilities Council, The Education of Students with Disabilities: Report Card on the State of New Jersey, p. 3 (1996).

The Developmental Disabilities Council found that 99.9% of the 6,082 children who were classified as "preschool handicapped" in 1991 in New Jersey were placed in segregated "disability only" preschool programs. Separate and Unequal at 1. In 1992, New Jersey was ranked last in the nation in including children with mental retardation in general

education classrooms. The Arc, The Arc's Report Card on Including Children with Mental Retardation in Regular Education (1992). In 1995-96, nationally, 25.91% of all students with disabilities ages 6-21 were educated in a segregated environment, while New Jersey exceeded the average with 28.65% segregation for this group. USDOE Twentieth Annual Report, Table AB2. Nationally, 4.24% of students with orthopedic impairments ages 6-21 were placed in segregated facilities, with New Jersey placing 21.75% of such students in segregated facilities. Id. 78.81% of students with deaf-blindness ages 6-21 across the country were segregated, while 88.63% of such students were segregated in New Jersey. Id.

In recent monitoring of state compliance with IDEA, the United States Department of Education, Office of Special Education and Rehabilitative Services ("USDOE"), uncovered myriad abuses of the rights of children with disabilities, including rampant segregation or failure to educate in the "least restrictive environment."[6] Shockingly, every state today remains out of compliance with its IDEA mandates. See National Council on Disability, Unequal Protection Under Law: Back to School on Civil Rights (September, 1999 Draft).

In its 1993 monitoring, the USDOE found that New Jersey did not appropriately supervise the special education programs in the state, particularly those related to educational placements in the least restrictive environment, provision of appropriate educational services and confidentiality of student records. A 1995 follow-up visit by the USDOE again found failures in the areas of least restrictive environment and appropriate

[6] The monitoring reports are available at http://www.ed.gov/offices/OSERS/OSEP/monrepts/index.html.

services, especially "related services," as well as failures to ensure that transitional services were provided. The 1998 visit found "continued noncompliance in each of the[se] areas...." USDOE Monitoring Report, February 1999.

The USDOE found noncompliance in other states including failures to a) ensure that services were provided in the least restrictive environment, b) provide transition services, c) provide extended year services, d) provide appropriate services to children in correctional facilities, e) timely investigate complaints, f) timely provide parents with notice of changes in education services, g) monitor providers of early intervention services, h) provide comprehensive, multidisciplinary evaluations and assessments, i) ensure the timely delivery of services, j) implement a monitoring system k) ensure that parents received written notice of procedural safeguards and that parents are involved in meetings related to their children's education, and l) ensure that children receive a full day's educational services.

Where states have historically discriminated against children with disabilities and continue to discriminate against children with disabilities, it is imperative that these children have the ability to take full legal recourse against the states under IDEA, the ADA and Section 504.

D. IDEA, the ADA and Section 504 are critical for protecting the rights of persons with disabilities

The Supreme Court has consistently recognized that the availability of all appropriate remedies for statutory and constitutional violations "has deep roots in our jurisprudence." Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 66 (1992) (citing Davis v. Passman, 442 U.S. 228, 246-247 (1979)). See also W.B. v. Matula, 67 F.3d 484,

494 (3d Cir. 1995) (citing the "traditional presumption in favor of all appropriate relief" articulated in Franklin); Bell v. Hood, 327 U.S. 678, 684 (1946) ("[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."). The presumption that "for every right there should be a remedy," Marbury v. Madison, 1 Cranch 137, 162-163 (1803), which originated in the English common law, 3 W. Blackstone, Commentaries 23 (1783), lies at the heart of our jurisprudence.

IDEA, the ADA and Section 504 call for a full panoply of remedies including injunctive relief and monetary damages. 20 U.S.C. § 1415 (as interpreted by Matula, supra); 42 U.S.C. § 12133; 29 U.S.C. § 794a(a)(2). See also S. Rep. No. 101-204, 101st Cong., 1st Sess. 10 (1990) (re IDEA); H. R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, 98, 164, 165, 48, 52 (1990) (re the ADA); H. R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, 83 (1990) (the ADA and Section 504 are to be read consistently). These remedies must continue to be available against states, especially in the education arena where the state is the primary actor in assuring that children with disabilities receive appropriate education.

When passing the EAHCA, Congress recognized the importance of allowing for lawsuits under the Act. It mandated that states create an entity for insuring compliance with the Act, but specifically noted that "it does not intend the existence of such an entity to limit the right of individuals to seek redress of grievances through other avenues, such as bringing civil action in Federal or State courts to protect and enforce the rights of handicapped children...." S. Rep. No. 94-168, 94th Cong., 1st Sess. 26 (1975). And as Congress recognized when it adopted the current sovereign immunity abrogation language in 1990, "[i]t would be inequitable for EHA to mandate State compliance with its provisions

and yet deny litigants the right to enforce their rights in Federal courts when State or State agency actions are at issue." H. R. Rep. No. 101-544, 101st Cong., 1st Sess. 12 (1990); S. Rep. No. 101-204, 101st Cong., 1st Sess. 10 (1989). Congress noted that the abrogation provision was intended to overcome the Supreme Court's "misinterpret[ation of] Congressional intent" when they denied a claim for tuition reimbursement against a state in Dellmuth v. Muth, 491 U.S. 223 (1989). S. Rep. No. 101-204, 101st Cong., 1st Sess. 10 (1989). Critically, Congress averred that "[i]n 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 such remedies are available for such a violation in a suit against any public entity other than a state." Id.

The Third Circuit has recognized that "private suits are integral to enforcement of IDEA," Beth V. v. Carroll, 87 F.3d 80, 88 (1996), noting that its holding that plaintiffs had a private right of action under IDEA to pursue a claim against the state for failing to investigate and timely resolve complaints, was consistent with Congress' view that a private action is "one of the principal enforcement mechanisms of the rights guaranteed under IDEA...." Id.

Court-ordered relief has always been critical to the abilities of persons with disabilities to enforce their constitutional, statutory and common law rights. This is especially true in the education arena. While children with disabilities might continue to be able to obtain relief against state officials pursuant to Ex Parte Young, 209 U.S. 123 (1908) if the State's sovereignty claims were upheld, that relief would not encompass monetary damages given the fact that Edelman v. Jordan, 415 U.S. 651 (1974) limited Ex Parte Young relief to prospective injunctive relief. Children with disabilities must be able to obtain

all necessary relief if states are denying them the right to an appropriate education.

Declaratory and injunctive relief are available to compel educational agencies to do something they are not doing or to prevent them from doing something they are doing. Kara W. Edmunds, Notes: Implying Damages under the Individuals with Disabilities Education Act: Franklin v. Gwinnett County Public Schools Adds New Fuel to the Argument, 27 Ga. L. Rev. 789, 797 (1993). An educational agency which has not evaluated a child for special education eligibility can be ordered to do so, and an agency that wrongly attempts to educate a child with disabilities in a segregated setting can be ordered to move the child to an appropriate setting. Declaratory and injunctive relief, however, are of no value for students who have "aged out" of the educational system, and do not compensate for damages resulting from the deprivation. They are also unlikely to have a great deterrent effect as they merely declare wrongdoing and mandate that educational agencies do what they should have done all along. Id. at 834. A remedy's deterrent effect is critical because, given the costs of appropriately educating children with disabilities, educational agencies may intentionally fail to provide services in order to cut costs. Id.

Compensatory education, a discreet form of injunctive relief, see, e.g., Burr v. Ambach, 863 F.2d 1071, 1079 (2d Cir. 1988), vacated sub nom. Sobel v. Burr, 492 U.S. 92 (1989), reaff'd, 888 F.2d 258 (2d Cir. 1989), cert. denied, 494 U.S. 1005 (1990), is another available remedy. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990), cert. denied, 499 U.S. 923 (1991). It attempts to make up for past denials of appropriate education. Sheila K. Hyatt, The Remedies Gap: Compensation and Implementation under the Education for all Handicapped Children Act, 17 N.Y.U. Rev. L. & Soc. Change 689, 731 (1990). It is

unlikely, however, to adequately address derelictions of great magnitude, especially where the dereliction occurred early in a child's life, since early learning is recognized as the cornerstone of an appropriate education for students with disabilities. See, e.g. 20 U.S.C. § 1431; Edmunds, supra at 839-840. It may be impossible for a child who was denied years of appropriate education to make up for lost time. Moreover, compensatory education cannot redress such injuries as emotional distress, reduction in potential earnings and lost economic opportunity. Like injunctive and declaratory relief, it will not aid the student who is no longer involved in the educational system. As compensatory education is a less costly remedy than monetary damages, its deterrent effect is unlikely to be great. Edmund, supra at 840; Hyatt, supra at 731.

Some students will obtain relief from reimbursement for monies laid out for the appropriate education denied to them by the educational agency, a remedy which the Supreme Court clearly distinguished from "damages" as it "merely requires the ... [educational agency] to belatedly pay expenses that it should have paid all along...." Burlington, 471 U.S. at 370-371. See also Board of Educ. v. Diamond, 808 F.2d 987, 993 (3d Cir. 1986). Such a remedy, of course, is only available to those who have the means to suffer out-of-pocket losses. It is unavailable for such injuries as emotional distress and it is not available to those who are no longer in the school system. Deterrent effect here is also unlikely to be great as the educational agency is merely paying after-the-fact what it should have paid earlier on, perhaps even saving money in the process.

Monetary damages are a critical form of relief. In addition to being available to those who are no longer involved in the educational system, monetary damages are available to compensate for emotional distress, reduction in potential earnings and loss of economic

opportunity. Monetary damages are also arguably the best deterrent to state non-compliance with federal mandates. Steven J. Schwartz, Damage Actions as a Strategy for Enhancing the Quality of Care of Persons with Mental Disabilities, 17 N.Y.U. Rev. of L. & Soc. Change 651, n.147 (1990); Edmunds, supra at 804-805, 826-827. A state that faces the threat of costly and lengthy litigation is likely to comply with the mandates to ensure the appropriate education of students with disabilities. Indeed, in the case at bar, the only remedy available to the estate of Andrew Jeffreys is monetary damages for the multitude of educational deprivations Andrew Jeffreys experienced.

If the rights of persons with disabilities to access state services is to have any meaning, persons with disabilities must be allowed to seek injunctive, declaratory, compensatory and monetary damages from the state in appropriate circumstances.

CONCLUSION

For the reasons set forth herein and in the briefs of the Plaintiff and the Intervener, United States Department of Justice, Defendants' motion should be dismissed in its entirety.

Respectfully submitted,

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