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**DELLMUTH V. MUTH: CONGRESSIONAL ABROGATION OF
STATE SOVEREIGN IMMUNITY AND THE
EDUCATION FOR ALL HANDICAPPED
CHILDREN ACT**

INTRODUCTION

In *Dellmuth v. Muth*,¹ the Supreme Court held that the text of the Education for All Handicapped Children Act² ("EAHCA") did not display unmistakable congressional intent to abrogate state sovereign immunity. The Court created a bar to parental suits brought in federal courts against state educational agencies for violating the right of handicapped children to equal educational opportunities guaranteed by the EAHCA.

Yet in *Brown v. Board of Education*,³ the Supreme Court called education the most important function of state and local governments and required provision to all children on equal terms.⁴ This right to an equal educational opportunity should apply with equal force to handicapped children.⁵ Congress passed the EAHCA to provide all handicapped children with a free appropriate public education.⁶ The Act offers federal funds to states that guarantee an education to all handicapped children that is appropriate to their needs.⁷

To protect the right to an appropriate public education, the EAHCA grants anyone "aggrieved by the findings and decision"⁸ of a state or local educational agency the right to bring a civil action in federal court.⁹ This provision explicitly empowers courts to "grant such relief as the court determines is appropriate"¹⁰ and has been held to confer "broad discretion on the court[s]."¹¹

1. 57 U.S.L.W. 4720 (U.S. June 13, 1989).

2. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-1485 (1982 & Supp. IV 1986)).

3. 347 U.S. 483 (1954).

4. See *id.* at 493.

5. See *Board of Educ. v. Rowley*, 458 U.S. 176, 192-94 (1982) (citing *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) and *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971)).

6. Free appropriate public education is defined in the Act as special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate pre-school, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program. 20 U.S.C. § 1401(18) (1982).

7. See 20 U.S.C. § 1400(c) (1982). All fifty states and the District of Columbia now receive funds under the EAHCA. See *Honig v. Doe*, 108 S. Ct. 592, 597 n.1 (1988).

8. 20 U.S.C. § 1415(e)(2) (1982).

9. See *id.*

10. *Id.*

11. *Burlington School Comm. v. Department of Educ.*, 471 U.S. 359, 369 (1985). In *Burlington*, the Court held that retroactive relief in the form of tuition reimbursement

The EAHCA was passed pursuant to section five of the fourteenth amendment,¹² which grants Congress the power to lift the eleventh amendment's¹³ protection of state sovereign immunity by statute.¹⁴ The Court, however, has become increasingly reluctant to find that Congress intended to abrogate state immunity. In *Atascadero State Hospital v. Scanlon*,¹⁵ the Court held that the eleventh amendment precludes Congress from statutorily abrogating state immunity without "making its intention unmistakably clear in the language of the statute."¹⁶ Thus, federal courts must "be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment."¹⁷ Finally, Justice Kennedy, writing for the *Muth* Court, emphasized that the eleventh amendment requires evidence that is "both unequivocal and textual," stating that resort to legislative history to determine congressional intent is "irrelevant . . . unnecessary [and] futile."¹⁸

Muth resolved a conflict in the courts. Some courts had held that Congress abrogated state immunity in the EAHCA, given the EAHCA's provisions making the state responsible for enforcing the rights of handicapped children, and Congress' emphasis on the importance of those rights and guarantees.¹⁹ Other courts, however, held that the elev-

was available under the EAHCA. *See id.* In this case, however, the sovereign immunity issue did not arise because the state educational agency ordered the local board to reimburse the parents and the local board appealed to federal court. *See id.* at 363.

12. *See, e.g.,* Counsel v. Dow, 849 F.2d 731, 736 (2d Cir.) ("we conclude that the district court correctly determined that Congress enacted and amended the [EAHCA] pursuant to its enforcement powers under Section Five of the Fourteenth Amendment"), *cert. denied*, 109 S. Ct. 391 (1988); Fontenot v. Louisiana Bd. of Educ., 835 F.2d 117, 121 (5th Cir. 1988) ("The [EAHCA] was passed pursuant to the Spending Clause and the Equal Protection Clause of the Fourteenth Amendment."); David D. v. Dartmouth School Comm., 775 F.2d 411, 422 (1st Cir. 1985) (concluding that Congress "act[ed] under its fourteenth amendment powers"), *cert. denied*, 475 U.S. 1140 (1986).

13. The eleventh amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

In *Hans v. Louisiana*, 134 U.S. 1, 10 (1890), the Supreme Court held that the eleventh amendment also precluded suits against a state by its own citizens in federal court. *See id.*; *infra* notes 48-49 and accompanying text.

14. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

15. 473 U.S. 234 (1985).

16. *Id.* at 242.

17. *Id.* at 243.

18. *Muth*, 57 U.S.L.W. at 4722.

19. *See, e.g.,* *Muth v. Central Bucks School Dist.*, 839 F.2d 113, 129-30 (3d Cir.) (court of appeals affirmed district court award of tuition reimbursement against Pennsylvania), *rev'd sub nom.* *Dellmuth v. Muth*, 57 U.S.L.W. 4720 (U.S. June 13, 1989); Fontenot v. Louisiana Bd. of Educ., 835 F.2d 117, 120-21 (5th Cir. 1988) (parents awarded attorneys fees against state defendants); David D. v. Dartmouth School Comm., 775 F.2d 411, 421 (1st Cir. 1985) (Congress abrogated state sovereign immunity in the EAHCA), *cert. denied*, 475 U.S. 1140 (1986); Michael M. v. Board of Educ., 686 F. Supp. 995, 1002-03 (E.D.N.Y. 1988) (same); Antkowiak v. Ambach, 653 F. Supp. 1405, 1419 (W.D.N.Y. 1987) (same), *rev'd on other grounds*, 838 F.2d 635 (2d Cir.), *cert. denied*, 109 S. Ct. 133 (1988).

enth amendment precluded suits against the state for retroactive relief under the EAHCA because the EAHCA does not include a provision stating that Congress intends to abrogate state sovereign immunity.²⁰

This Comment discusses the *Muth* decision and concludes that its analysis is flawed. As the Third Circuit demonstrated, Congress intended to abrogate state sovereign immunity in the EAHCA. Part I introduces the EAHCA and its legislative history. Part II presents the history and current interpretation of the eleventh amendment. Part III argues that the EAHCA contains sufficient evidence of congressional intent to abrogate state sovereign immunity and concludes that the "novel" canon of statutory construction announced in *Muth* frustrates congressional intent.²¹

I. THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

Congress enacted the EAHCA²² in response to an increasing awareness of the educational needs of handicapped children.²³ The states had failed to meet those needs under the Education of the Handicapped Act,²⁴ the EAHCA's predecessor. The Subcommittee on the Handi-

20. See, e.g., *Kerr Center Parents Ass'n v. Charles*, 842 F.2d 1052, 1058-59 (9th Cir. 1988) (Congress did not abrogate state immunity in the EAHCA); *Gary A. v. New Trier High School Dist. No. 203*, 796 F.2d 940, 944 (7th Cir. 1986) (same); *Doe ex rel. Gonzales v. Maher*, 793 F.2d 1470, 1494 (9th Cir. 1986) (same); *Rose v. Nebraska*, 748 F.2d 1258, 1262 (8th Cir. 1984) (eleventh amendment bars award against state defendants), cert. denied, 474 U.S. 817 (1985); *Hiller v. Board of Educ.*, 687 F. Supp. 735, 745 (N.D.N.Y. 1988) (motion to amend complaint to add claim against state defendants for retroactive relief and punitive damages denied); *Gerasimou v. Ambach*, 636 F. Supp. 1504, 1511-13 (E.D.N.Y. 1986) (plaintiff's claim for transportation costs, witnesses, attorneys' fees and damages against the state Commissioner of Education barred by the eleventh amendment).

21. See *Dellmuth v. Muth*, 57 U.S.L.W. 4720, 4724 (U.S. June 13, 1989) (Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, dissenting).

22. 20 U.S.C. §§ 1400-1485 (1982 & Supp. IV 1986). The EAHCA, enacted in 1975, amended the Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970) (codified as amended at 20 U.S.C. §§ 1400-1485 (1982 & Supp. IV 1986)).

23. See S. Rep. No. 168, 94th Cong., 1st Sess. 5, reprinted in 1975 U.S. Code Cong. & Admin. News 1425, 1429. Congress also enacted the EAHCA in response to court decisions that established the right to education for handicapped children. See *id.* at 1429, 1430-31 (citing *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) ("PARC") and *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972)).

The *PARC* court held that the state of Pennsylvania could not deny mentally retarded children access to public schools, "[h]aving undertaken to provide a free public education to all of its children." *PARC*, 334 F. Supp. at 1259. Similarly, the *Mills* court held that the District of Columbia was required to provide every child of school age free and suitable public education regardless of the degree of impairment. See *Mills*, 348 F. Supp. at 878.

24. See S. Rep. No. 168, 94th Cong., 1st Sess. 7-8, reprinted in 1975 U.S. Code Cong. & Admin. News 1425, 1431-32; see also *Board of Educ. v. Rowley*, 458 U.S. 176, 180 (1982); Note, *Limitations Period for Actions Brought Under § 1415 of the Education for All Handicapped Children Act of 1975*, 56 Fordham L. Rev. 725, 727 n.16 (1988).

The Education of the Handicapped Act authorized grants "to the States and outlying areas to assist them in initiating, expanding, and improving programs for the education of

capped of the Committee on Labor and Public Welfare found that less than 50 percent of handicapped children were receiving appropriate education and that over a million children were completely excluded from public school systems.²⁵ Congress thus passed the EAHCA to "establish and protect the right to education for all handicapped children and to provide assistance to the States in carrying out their responsibilities . . . to provide equal protection of the laws."²⁶

States participating in the EAHCA must submit an application outlining their educational plans and policies to the Secretary of Education.²⁷ The states must identify and evaluate all handicapped children, setting priorities that guarantee that those children not receiving any education are served first.²⁸ The Act requires states to agree to provide full educational opportunities including, whenever possible, placement with children who are not handicapped.²⁹ The states are also responsible for allocating the federal funds received to intermediate or local districts and ensuring that these localities meet the Act's objectives.³⁰ If a state finds that a local district is failing to provide appropriate education to its handicapped children, it must stop the local district's funding³¹ and provide a free and appropriate education directly to the handicapped child.³²

Participating states also prepare individualized educational programs, which must be reviewed annually in consultation with each child's parents and teachers.³³ The Act emphasizes that each child's education is to be at "no cost to the child's parent."³⁴ Thus, the state or local agency must fund special education and related services in private institutions if

handicapped children." H.R. Rep. No. 332, 94th Cong., 1st Sess. 2 (1975). The Education of the Handicapped Act also established a Bureau of Education for the Handicapped and a National Advisory Committee on Handicapped Children. In addition, it authorized grants for regional resource centers, higher education programs, and for the establishment of research and development projects, and established a National Center on Educational Media and Materials for the Handicapped. *See id.* at 2-3.

25. *See* 121 Cong. Rec. 19,478, 19,486 (1975). The Subcommittee found that, although the number of handicapped children served had increased from 38 percent to 50 percent since 1970, only 3.9 out of 8.7 million handicapped children were receiving an appropriate education and that 1.75 million were not receiving any education. *See id.* (remarks of Senator Williams, Chairman of the Committee on Labor and Public Welfare).

26. S. Rep. No. 168, 94th Cong., 1st Sess. 13, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1437.

27. *See* 20 U.S.C. §§ 1412-1413 (1982).

28. *See* 20 U.S.C. § 1412(3) (1982).

29. *See* 20 U.S.C. § 1412(5) (1982); *see also* 121 Cong. Rec. 19,478, 19,483 (1975) (remarks of Senator Randolph); Note, *supra* note 24, at 727-28.

30. *See* 20 U.S.C. § 1414 (1982).

31. *See* 20 U.S.C. §§ 1411(c)(4)(A)-(B) and 1413(b)(2)(A) (1982).

32. *See* 20 U.S.C. § 1414(d) (1982).

33. *See* 20 U.S.C. § 1401(18-19) (1982). One court characterized this provision as "requir[ing] the state to treat each child as an individual, a human whose unique qualities and needs can be evaluated and served only by a plan designed with wisdom, care and educational expertise." *Crawford v. Pittman*, 708 F.2d 1028, 1030 (5th Cir. 1983).

34. S. Rep. No. 168, 94th Cong., 1st Sess. 10, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1434; *see* 20 U.S.C. § 1401 (1982).

an appropriate education cannot be obtained in the public system.³⁵

Congress established an elaborate administrative procedure for dissatisfied parents or guardians, including a due process hearing before an impartial officer of the state educational agency, intermediate educational unit or local educational agency.³⁶ Congress also granted parents the right to seek any relief deemed appropriate by the judge in federal court.³⁷

The Supreme Court attempted to limit a parent's right to seek relief for educational discrimination in 1984, holding in *Smith v. Robinson*³⁸ that the EAHCA was the only avenue available for an equal protection claim to free public education.³⁹ Congress reacted quickly, enacting the Handicapped Children's Protection Act⁴⁰ ("HCPA") to "reestablish im-

35. See 20 U.S.C. § 1413(a)(4)(B)(i) (1982).

36. See 20 U.S.C. § 1415(b)(2) (1982). In these hearings the parents have the following rights: the right to examine all records and to obtain an independent evaluation of their child; prior written notice whenever the local or state educational agency suggests or refuses to "initiate or change, the identification, evaluation or educational placement of the child or the provision of a free appropriate public education," 20 U.S.C. § 1415(b)(1)(c) (1982); an opportunity to present complaints with respect to any matter; the right to be represented by counsel, present evidence, confront adverse witnesses and to receive written findings of fact in the due process hearing; and the right to an impartial appeal. See 20 U.S.C. § 1415(b)(1)-(e)(1) (1982).

37. See 20 U.S.C. § 1415(e)(2) (1982). Section 1415(e)(2) provides: "Any party aggrieved by the findings and decision made . . . shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any . . . district court of the United States . . ." *Id.*

Some cases brought in federal court against a state under section 1415(b)(2) of the EAHCA arise when a parent, having questioned his child's individualized educational program and placed his child in a private school, seeks tuition reimbursement. See *infra* notes 94-106 and accompanying text (discussing *Muth v. Central Bucks School District*, 839 F.2d 113 (3d Cir.), *rev'd sub nom. Dellmuth v. Muth*, 57 U.S.L.W. 4720 (U.S. June 13, 1989)). In *S-1 v. Spangler*, 832 F.2d 294 (4th Cir. 1987), for example, parents sought reimbursement after enrolling their children in a private half-day special education program. See *id.* at 295-96.

EAHCA actions are also brought to force the state to fund recommended placements. In *Antkowiak v. Ambach*, 653 F. Supp. 1405 (W.D.N.Y. 1987), *rev'd on other grounds*, 838 F.2d 635 (2d Cir.), *cert. denied*, 109 S. Ct. 133 (1988), parents brought suit to require the state to order and pay for the placement of their daughter, Lara Antkowiak, in a residential treatment facility. See *id.* at 1406. The local school district recommended that Lara be placed in a residential facility and sought approval from the state agency. See *id.* at 1408-09. The state refused to approve the placement. See *id.* at 1409. Meanwhile, Lara was discharged from her earlier placement because her needs could no longer be met. See *id.* The approved list of placement facilities contained no other suitable facilities that could accept Lara and, therefore, her parents placed her in the residential facility at their own expense. See *id.* at 1410. The court ordered the state to place Lara at the requested facility immediately. See *id.* at 1417. The state was also ordered to reimburse Lara's parents for the tuition expenses they had incurred. See *id.* at 1419.

38. 468 U.S. 992 (1984).

39. See *id.* at 1013. Justice Brennan, dissenting, stated "Congress will now have to take the time to revisit the matter. And until it does, the handicapped children of this country whose difficulties are compounded by discrimination and by other deprivations of constitutional rights will have to pay the costs." *Id.* at 1031.

40. Pub. L. No. 372, 100 Stat. 796 (1986) (codified as amended at 20 U.S.C. § 1415(e)-(f) (1982 & Supp. IV 1986)).

portant rights repealed by the Supreme Court [which] . . . Congress had intended to be available to handicapped children."⁴¹ The HCPA expressly provided for district court jurisdiction without regard to amount in controversy, and the award of attorney's fees as part of the costs to the parent.⁴² Congress added section 1415(f) to the EAHCA to provide explicitly that "[n]othing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of handicapped children and youth"⁴³ Enforcement of these rights was further enhanced by providing for awards of attorneys' fees.⁴⁴ Despite the intention of Congress manifested through these additional protections, however, the Supreme Court concluded that the eleventh amendment bars retroactive relief when suit is brought against a state.⁴⁵

II. THE ELEVENTH AMENDMENT

The eleventh amendment provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."⁴⁶

41. *Handicapped Children's Protection Act: Hearings on H.R. 1523 Before the Subcommittee on Select Education of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. 7 (1986)(remarks of Rep. Williams). The Senate was equally disturbed. Senator Weicker, submitting the Senate report, stated:

The handicapped children of this country have paid the costs for two years now. But today we correct this error. In adopting this legislation, we are rejecting the reasoning of the Supreme Court in *Smith versus Robinson*, and reaffirming the original intent of Congress that the educational rights of handicapped children and their parents shall not go unprotected.

132 Cong. Rec. S9277 (daily ed. July 17, 1986) (statement of Sen. Weicker).

42. See 20 U.S.C. § 1415(e)(4)(A)-(G) (1982 & Supp. IV 1986).

43. 20 U.S.C. § 1415(f) (1982 & Supp. IV 1986).

44. See 20 U.S.C. § 1415(e) (1982 & Supp. IV 1986). Senator Weicker, co-author of the amendment, stated: "By restoring this right [to be awarded attorney fees and other reasonable expenses] we will once again demonstrate that handicapped people should be accorded the same protections as all other citizens of our Nation." 131 Cong. Rec. 21,390 (1985).

45. See *Dellmuth v. Muth*, 57 U.S.L.W. 4720 (U.S. June 13, 1989).

46. U.S. Const. amend. XI. The eleventh amendment was enacted to reverse the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), that section two of Article III of the Constitution permitted a citizen of South Carolina to bring suit against the state of Georgia for debt. See *id.* at 428. Not only did *Chisholm* question the very existence of state sovereign immunity, it left the states liable to suit over revolutionary war debts and confiscation of Tory property. See *id.* at 452 (Blair, J., concurring); P. Low & J. Jeffries, *Federal Courts and the Law of Federal State Relations* 773-74 (1987); Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Colum. L. Rev. 1413, 1438 (1975). Suits against South Carolina, Georgia, Virginia and Massachusetts were instituted immediately after the decision's announcement. See P. Low & J. Jeffries, *supra*, at 774. Reaction to the *Chisholm* decision was "swift and hostile." *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 484 (1987).

The amendment does not refer to suits brought by citizens against their own state.⁴⁷ Nevertheless, in *Hans v. Louisiana*,⁴⁸ the Supreme Court held that such suits were also barred by the eleventh amendment.⁴⁹

Amendments to the Constitution were introduced within days of the decision. See P. Low & J. Jeffries, *supra*, at 774; Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1058 (1983). Georgia enacted a statute which made enforcement of *Chisholm* a felony punishable by "death, without the benefit of clergy, by being hanged." P. Low & J. Jeffries, *supra*, at 774 (quoting 1 C. Warren, *The Supreme Court in United States History* 99 (1922)); Fletcher, *supra*, at 1058 (same); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 683 (1976).

Little agreement on the meaning of the eleventh amendment exists beyond the fact that it overturned *Chisholm*. Legislative history sheds no light on the eleventh amendment's meaning because it passed without debate in Congress. See Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa. L. Rev. 515, 541 (1978).

47. See U.S. Const. amend XI. The eleventh amendment does not provide immunity from suits involving all parties. See, e.g., *United States v. Mississippi*, 380 U.S. 128 (1965) (the United States may sue a state); *South Dakota v. North Carolina*, 192 U.S. 286 (1904) (a state may bring suit against another state); *Lincoln County v. Luning*, 133 U.S. 529 (1890) (a private citizen may bring suit against local government entities); see also Nowak, *supra* note 46, at 1414.

48. 134 U.S. 1 (1890).

49. See *id.* at 18-19. The Justices of the Supreme Court are divided as to the meaning of the amendment. See, e.g., *Welch v. Texas Dep't of Highways and Pub. Trans.*, 483 U.S. 468 (1987) (Justice Brennan, joined by Justices Blackmun, Marshall and Stevens, dissenting, disagreed with the interpretation of the eleventh amendment espoused by Justice Powell, joined by Justices O'Connor and White and Chief Justice Rehnquist; Justice Scalia declining to reach the issue); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (four Justices dissenting). In *Welch*, Justice Powell, joined by Chief Justice Rehnquist and Justices O'Connor and White, took the position that the amendment was intended to establish state sovereign immunity as a constitutional principle: "[I]t is firmly established that the Eleventh Amendment embodies a broad constitutional principle of sovereign immunity." See *Welch*, 483 U.S. at 486. This "fundamental principle" acts as a bar which limits the power of the federal courts to hear any suit brought against states by private citizens. See *id.* at 472; see also Fletcher, *supra* note 46, at 1033-34. According to this view, the eleventh amendment made explicit a concept of state sovereign immunity implicit in Article III. See *Welch*, 483 U.S. at 479 (citing Justice Marshall's concurring opinion in *Employees v. Department of Pub. Health and Welfare*, 411 U.S. 279 (1973)).

The dissent believed that the amendment only bars diversity suits brought against a state by citizens of another state or by aliens. See *id.* at 497. (Brennan, J., joined by Blackmun, Marshall, and Stevens, J.J., dissenting). *Hans v. Louisiana*, 134 U.S. 1 (1890), therefore, should not be interpreted to bar suits based on federal question jurisdiction. See *Welch*, 483 U.S. at 519-521 (Brennan, J., dissenting). Professors Field and Fletcher also accept the diversity interpretation—that Congress intended to remedy the Court's misreading of section two of article III as abrogating common law state sovereign immunity in diversity cases. See Field, *supra* note 46, at 538-39; Fletcher, *supra* note 46, at 1035.

Professors Low and Jeffries suggest a third view: the Federalism/Separation of Powers Interpretation. See P. Low & J. Jeffries, *supra* note 46, at 779. Advocates of this interpretation believe that the eleventh amendment only limits the law-making power of the federal courts: "Nothing in the language or the history of the eleventh amendment suggests that it must be construed to limit congressional power . . ." Tribe, *supra* note 46, at 693; see also Nowak, *supra* note 46, at 1440-53. According to Professor Nowak, the

A. *Exceptions to the Eleventh Amendment*

The eleventh amendment, however, is subject to a few exceptions. In *Ex Parte Young*,⁵⁰ the Court held that a suit for prospective injunctive relief against an official acting in violation of the fourteenth amendment was not barred by the eleventh amendment.⁵¹ The Court created a fiction in which the defendant's immunity from suit as a state official was "stripped" by his constitutional violation.⁵² This fiction was "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" ⁵³

In *Edelman v. Jordan*,⁵⁴ however, the Court held that the eleventh amendment barred retroactive relief because the state, and not the state official, was the real party in interest.⁵⁵ Retroactive relief, an impermissible raid on state treasuries, was more intrusive than prospective relief.⁵⁶ In a subsequent opinion, *Pennhurst State School & Hospital v. Halderman*,⁵⁷ the Court stated that the *Edelman* opinion recognized "that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States."⁵⁸ An extension of *Ex Parte*

crucial distinction is between Congress' power to create a private cause of action and judicial power to find an implied one. See Nowak, *supra* note 46, at 1414. The interpretation is based on the idea that the states surrendered their sovereignty to Congress in certain areas when they ratified the Constitution. See Tribe, *supra* note 46, at 684. Article III "was designed to permit the Congress to use the federal courts for any purpose legitimately within its article I powers." P. Low & J. Jeffries, *supra* note 46, at 779; see Nowak, *supra* note 46, at 1425. The relationship between the states and the federal government is Congress' concern, and not that of the federal courts because Congress, and not the courts, is accountable to both the states and the federal government. See P. Low & J. Jeffries, *supra* note 46, at 779-80; Tribe, *supra* note 46, at 694-95, 711; Nowak, *supra* note 46, at 1441.

50. 209 U.S. 123 (1908).

51. See *id.*

52. See *id.* at 159. Justice Peckham, explaining the fiction, stated:

The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity.

Id.

53. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex Parte Young*, 209 U.S. 123, 160 (1908)).

54. 415 U.S. 651 (1974).

55. See *id.* at 666-67. In *Edelman*, the court of appeals awarded welfare recipients retroactive relief in the form of wrongfully withheld benefits under a theory of equitable restitution. See *Jordan v. Weaver*, 472 F.2d 985, 993-94 (7th Cir. 1973), *rev'd sub nom. Edelman v. Jordan*, 415 U.S. 651 (1974); see also *Edelman*, 415 U.S. at 665. The Supreme Court reversed, holding that the retroactive payments were closer to an impermissible monetary award than the equitable relief permissible under *Ex Parte Young*. See *Edelman*, 415 U.S. at 666, 678. By limiting *Ex Parte Young* to less intrusive prospective relief, the Court hoped to provide a forum to ensure state compliance without raiding the state treasury by granting retroactive relief. See *id.* at 666 n.11, 667-68.

56. See *id.* at 666-68.

57. 465 U.S. 89 (1984).

58. *Id.* at 105. In *Pennhurst*, the Court held, *inter alia*, that the distinction between retroactive and prospective relief did not apply when suit was brought against state offi-

Young to permit the retroactive benefits sought by the plaintiffs in *Edelman* would “effectively eliminate the constitutional immunity of the States.”⁵⁹

B. Congressional Abrogation of the Eleventh Amendment

The eleventh amendment’s bar to recovery of retroactive relief is also lifted in other circumstances.⁶⁰ In *Fitzpatrick v. Bitzer*,⁶¹ for instance, the Court held that Congress can abrogate state sovereign immunity by enacting legislation pursuant to section five of the fourteenth amendment.⁶² In *Bitzer*, male employees of Connecticut alleged that changes in the state’s retirement benefit plan discriminated against them on the basis of their sex, in violation of Title VII of the Civil Rights Act of 1964.⁶³ The Court held that section five, which explicitly granted Congress the authority to enact legislation to enforce the fourteenth amendment, “necessarily limited” the eleventh amendment.⁶⁴ The states, by ratifying the fourteenth amendment, “clearly contemplate[d]” the subsequent limitations on their authority and thus consented to suit for money damages.⁶⁵

A finding that Congress statutorily abrogated state immunity pursuant

cials on the basis of state law because there was no need to balance the supremacy of federal law with state immunity. *Id.* at 106.

59. *Id.* at 105 (describing *Edelman v. Jordan*, 415 U.S. 651 (1974)).

60. For example, a state may consent to suit in federal court, thereby waiving its sovereign immunity. *See Clark v. Barnard*, 108 U.S. 436, 447-48 (1883); *see also Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985). In *Clark*, the Court found that Rhode Island had waived its immunity by voluntarily appearing in federal court. *See Clark*, 108 U.S. at 447-48.

A finding that a state consented to suit must be in “the most express language,” however, before a court can subject a state to retroactive relief. *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). This requirement precludes “constructive” consent to suit by receipt of federal funds or participation in a federally-regulated area. *See Scanlon*, 473 U.S. at 246-47.

61. 427 U.S. 445 (1976).

62. *See id.* at 456.

63. *See id.* at 448 & 448 n.1. Section 2000e-2(a) of Title VII, Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e-2(a) (1970)) provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

Id. at 255 (codified as amended at 42 U.S.C. § 2000e-2(a) (1970)).

64. *Bitzer*, 427 U.S. at 456. The enforcement clause provides that “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. Const. amend. XIV, § 5.

65. *Bitzer*, 427 U.S. at 453. The Court stated that the “legislation considered in each case was grounded on the expansion of Congress’ powers—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the States’ ratification of those Amendments, a phenomenon aptly de-

to the fourteenth amendment, however, requires evidence of congressional intent to do so. The standard used by the *Bitzer* Court was *Edelman's* "threshold fact of congressional authorization."⁶⁶ Title VII contained explicit references to the states, thus meeting the necessary threshold of congressional intent.⁶⁷

In *Atascadero State Hospital v. Scanlon*,⁶⁸ the Court required more than *Edelman's* "threshold fact of congressional authorization,"⁶⁹ holding that Congress must express its intent to abrogate the eleventh amendment in "unmistakable language in the statute itself."⁷⁰ *Scanlon* reversed

scribed as a 'carv[ing] out.'" *Id.* at 455-56 (quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1880)).

66. *Id.* at 452 (quoting *Edelman v. Jordan*, 415 U.S. 651, 672 (1974)). In *Edelman*, the Court held that Congress had not intended to abrogate state immunity in the Aid to the Aged, Blind or Disabled program of the Social Security Act, 42 U.S.C. §§ 1381-1383 (1982). See *Edelman v. Jordan*, 415 U.S. 651, 674 (1974).

The Seventh Circuit had considered Illinois' participation in the funding program to be a constructive waiver of its sovereign immunity. See *Jordan v. Weaver*, 472 F.2d 985, 995 (7th Cir. 1973), *rev'd sub nom.* *Edelman v. Jordan*, 415 U.S. 651 (1974); see also *Edelman*, 415 U.S. at 671. The Court, however, held that waiver by participation "turn[ed] on whether Congress had intended to abrogate the immunity in question." *Edelman*, 415 U.S. at 672. In the Social Security Act, "the threshold fact of congressional authorization to sue a class of defendants which literally includes States [was] wholly absent." *Id.*

67. See *Bitzer*, 427 U.S. at 452, 453 n.9. Congress, when amending Title VII of the Equal Opportunity Employment Act of 1972, 86 Stat. 103 (current version at 42 U.S.C. § 2000e to e-17 (1982)), had stricken an express exclusion of states in the definition of those subject to the Act and added those employed by state and local governments to the definition of employees. See *Bitzer*, 427 U.S. at 449 n.2; *infra* note 139 and accompanying text.

In *Hutto v. Finney*, 437 U.S. 678 (1978), the Court described *Bitzer's* holding as establishing Congress' "plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment." *Id.* at 693. The Court stated that in enacting the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified at 42 U.S.C. § 1988 (1982)), "Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the States." *Hutto*, 437 U.S. at 693-94. The congressional authorization in *Hutto* was present because the Civil Rights Attorney's Fees Awards Act applied to any action enforcing civil rights and was aimed primarily at the states. See *id.*

Section 1988 provides in part: "In any action or proceeding to enforce a provision of [the Civil Rights Acts], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1982).

Justice Powell, dissenting on the eleventh amendment issue, believed that the majority's finding of "authorization" did not satisfy the *Edelman* test. See *Hutto*, 437 U.S. at 705 (Powell, J., joined by Burger, C.J., concurring in part and dissenting in part). He advocated "statutory language sufficiently clear to alert every voting Member of Congress of the constitutional implications of particular legislation." *Id.* Without this statutory language, Justice Powell stated, the Court "undermine[d] the values of federalism served by the Eleventh Amendment by inferring from congressional silence an intent to 'place new or even enormous fiscal burdens on the States.'" *Id.* (quoting *Employees v. Department of Pub. Health and Welfare*, 411 U.S. 279, 284 (1973)).

68. 473 U.S. 234 (1985).

69. *Edelman*, 415 U.S. at 672.

70. *Scanlon*, 473 U.S. at 243.

a Ninth Circuit holding⁷¹ that section 504 of the Rehabilitation Act of 1973⁷² ("Rehabilitation Act") contained the authorization required by *Edelman* and *Bitzer*.⁷³ While recognizing that the eleventh amendment was necessarily limited by Congress' power to enforce the fourteenth amendment,⁷⁴ the Court stated that section 504 fell "far short of expressing an unequivocal congressional intent to abrogate the States' Eleventh Amendment immunity."⁷⁵ Unmistakable language was required to protect the "'constitutionally mandated balance of power' between the States and the Federal Government . . . adopted by the Framers to ensure the protection of 'our fundamental liberties.'"⁷⁶

Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, dissenting, agreed that if the doctrine was necessary to protect fundamental liberties, it would be "unobjectionable."⁷⁷ Justice Brennan, however, characterized the eleventh amendment doctrine as resting upon "flawed premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect."⁷⁸ Justice Brennan

71. *Scanlon v. Atascadero State Hosp.*, 735 F.2d 359 (9th Cir. 1984), *rev'd*, 473 U.S. 234 (1985).

72. Pub. L. No. 93-112, 87 Stat. 394 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (1982 & Supp. IV 1986)). Section 504 of the Rehabilitation Act provides: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (1982 & Supp. IV 1986)).

73. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 237 (1985). The court of appeals had held that the states' consent could be inferred from participation in programs funded under the Rehabilitation Act. *See Scanlon v. Atascadero State Hosp.*, 735 F.2d 359, 361 (9th Cir. 1984), *rev'd*, 473 U.S. 234 (1985). The court of appeals stated that the Rehabilitation Act, because it provided remedies against "any recipient of Federal assistance," 29 U.S.C. § 794(a) (1982), had the "threshold fact of congressional authorization" to sue the states. *Scanlon*, 735 F.2d at 361 (quoting *Edelman v. Jordan*, 415 U.S. 651, 672 (1974)).

74. *See Scanlon*, 473 U.S. at 238.

75. *Id.* at 247.

76. *Id.* at 242 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)). A second interest discussed by the Court was the limited jurisdiction of federal courts. *See id.* at 243. By holding that Congress intended to abrogate state immunity, the Court stated, federal courts necessarily expanded their own jurisdiction. *See id.*

77. *See id.* at 247 (Brennan, J., dissenting).

78. *Id.* at 248. Characterizing the doctrine as "pernicious," Justice Brennan stated:

In an era when sovereign immunity has been generally recognized by courts and legislatures as an anachronistic and unnecessary remnant of a feudal legal system, the Court has aggressively expanded its scope. If this doctrine were required to enhance the liberty of our people in accordance with the Constitution's protections, I could accept it. If the doctrine were required by the structure of the federal system created by the Framers, I could accept it. Yet the current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct. And the decision obstructs the sound operation of our federal system by limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority.

Id. at 302 (citations omitted).

contended that the majority, in the name of federalism, frustrated clear congressional intent.⁷⁹

Congress agreed. In 1986, Congress enacted an amendment to the Rehabilitation Act that provides in pertinent part that "[a] state shall not be immune under the Eleventh Amendment of the Constitution of the United States for a violation of [the Rehabilitation Act] or provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance."⁸⁰ As Justice Brennan pointed out in his *Muth* dissent, this amendment was enacted "because '[t]he Supreme Court's decision [in *Scanlon*] misinterpreted congressional intent It would be inequitable for Section 504 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 in issue."⁸¹ In *Muth*, the Court has repeated this error.

In *Muth*, as in *Scanlon*, the Court emphasized the eleventh amendment's importance to the constitutionally-required balance between the states and the federal government.⁸² This balance protects the interests of federalism and requires the courts to be certain of Congress' intent before subjecting the states to suit in federal court.⁸³ In *Bitzer*, the Court referred to the standard required to protect the interests of federalism as a "threshold fact of congressional authorization."⁸⁴ Subsequently, in *Quern v. Jordan*,⁸⁵ the Court held that 42 U.S.C. § 1983⁸⁶ did not "explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States."⁸⁷ Finally, in *Scanlon*, the Court required an expression of intent "to abrogate the Eleventh Amendment in unmistakable language in the statute itself" to protect the interests implicated by the eleventh amendment.⁸⁸

Scanlon did not set a new standard, but stated it differently, as did the

79. *See id.* at 252. Justice Brennan stated: "Given the unequivocal legislative history, the Court's conclusion that Congress did not abrogate the States' sovereign immunity when it enacted § 504 obviously cannot rest on an analysis of what Congress intended to do or on what Congress thought it was doing." *Id.*

80. Pub. L. No. 99-506, 100 Stat. 1845 (1986) (codified as amended at 42 U.S.C. § 2000d-7(a)(1) (1982 & Supp. IV 1986)).

81. *Dellmuth v. Muth*, 57 U.S.L.W. 4720, 4725 (U.S. June 13, 1989) (quoting S. Rep. No. 388, 99th Cong., 2d Sess. 27-28 (1986)).

82. *See Muth*, 57 U.S.L.W. at 4721-22; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-39 (1985).

83. *Id.* at 243.

84. *Bitzer*, 427 U.S. at 452 (citing *Edelman v. Jordan*, 415 U.S. 651, 672 (1974)).

85. 440 U.S. 332 (1979).

86. Pub. L. No. 96-170, 93 Stat. 1284 (1979) (codified as amended at 42 U.S.C. § 1983 (1982)).

87. *Quern*, 440 U.S. at 345. The Court distinguished *Bitzer's* finding of threshold authorization in Title VII. *See id.* at 344-45. *Hutto* was also distinguished because of its legislative "history focusing directly on the question of state liability," *id.* at 345 (quoting *Hutto v. Finney*, 437 U.S. 678, 698 n.31 (1978)), even though "the statutory language in *Hutto* did not separately impose liability on States in so many words." *Id.* at 344-45.

88. *Scanlon*, 473 U.S. at 243.

Bitzer and *Quern* courts. The Court has always required certainty of congressional intent to abrogate state sovereign immunity.⁸⁹ Writing for the majority in *Scanlon*, Justice Powell characterized the abrogation standard as consistent with *Quern* and *Edelman*, stressing that the Court would not temper the requirement of an unequivocal expression of congressional intent.⁹⁰ Justice Powell emphasized certainty of congressional intent, not a more restrictive standard for statutory interpretation.⁹¹

The *Scanlon* Court did not intend to limit the federal courts to the "four corners of a statute."⁹² As the Seventh Circuit, interpreting *Scanlon*, stated, "[t]he Court has never held . . . that a statute must expressly provide that it abrogates the states' immunity."⁹³ The test, therefore, is whether the federal courts are certain of Congress' intent, and not whether the EAHCA includes a provision expressly stating that Congress intended to abrogate state immunity.

III. WHETHER THE EAHCA ABROGATES STATE SOVEREIGN IMMUNITY

A. *The Muth Decision*

In 1983, Alex Muth, a "bright child" with a learning disability asked to be placed in mainstream classes.⁹⁴ Alex had some difficulties, however, and the school district recommended placement in classes for the handicapped.⁹⁵ His father challenged the suggested placement and requested a due process hearing pursuant to section 1415(b)(2),⁹⁶ placing his son in a private school for the learning disabled.⁹⁷ Initially, the hearing officer found that the district's proposed plan was inappropriate.⁹⁸ After the district modified its plan, however, the hearing officer decided in favor of the district and his decision was affirmed by the state Secre-

89. See *id.* at 242-43; *In re McVey Trucking*, 812 F.2d 311, 324 (7th Cir.), *cert. denied*, 108 S. Ct. 227 (1987); *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1036 (7th Cir. 1987). In *Scanlon*, Justice Powell stated: "[I]n determining whether Congress in exercising its Fourteenth Amendment powers has abrogated the States' Eleventh Amendment immunity, we have required 'an unequivocal expression of congressional intent.'" *Scanlon*, 473 U.S. at 240 (quoting *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)).

90. See *Scanlon*, 473 U.S. at 242.

91. See *Scanlon*, 473 U.S. at 238-40, 242-43.

92. Note, *Congressional Abrogation of State Sovereign Immunity*, 86 Colum. L. Rev. 1436, 1446 (1986).

93. *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1036 (7th Cir. 1987); see also *In Re McVey Trucking*, 812 F.2d 311, 324 (7th Cir. 1987) (the *Scanlon* test's essence is the requirement that the "federal courts . . . be certain of Congress' intent" (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (emphasis in original))).

94. See *Muth v. Central Bucks School Dist.*, 839 F.2d 113, 117 (3d Cir. 1988), *rev'd sub nom.* *Dellmuth v. Muth*, 57 U.S.L.W. 4720 (U.S. June 13, 1989).

95. See *id.*

96. See 20 U.S.C. § 1415(b) (1982 & Supp. IV 1986).

97. See *Muth*, 839 F.2d at 117.

98. See *id.* at 118.

tary of Education.⁹⁹ Mr. Muth appealed to the district court, naming the local school district and the Secretary of Education for the State of Pennsylvania as defendants.¹⁰⁰

In August 1986, the district court held that Pennsylvania's due process procedures were inadequate and ordered the district and the Secretary to reimburse the tuition costs incurred by Mr. Muth because of the delays caused by the due process flaws.¹⁰¹ In affirming the district court's order, the Third Circuit noted first that the EAHCA authorized federal courts to award any appropriate relief¹⁰² and that the Supreme Court had held that its provisions granted the courts broad, equitable discretion to award even retroactive relief.¹⁰³ The court then turned to the issue whether the eleventh amendment barred such an award against the Secretary of Education.¹⁰⁴ The Third Circuit found that the EAHCA and its legislative history left "no doubt that Congress intended to abrogate the [eleventh] amendment,"¹⁰⁵ following other courts that have taken the position that Congress intended to abrogate state immunity in enacting the EAHCA.¹⁰⁶ In both *Muth* and *David D. v. Dartmouth School Committee*,¹⁰⁷ the courts cited the preamble of the EAHCA as unmistakable language: "it is in the national interest that the Federal government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law."¹⁰⁸

Other courts, however, had held that the EAHCA did not satisfy the

99. *See id.*

100. *See id.* at 116.

101. *See id.* at 118.

102. *See id.* at 126 (quoting 20 U.S.C. § 1415(e)(2) (1982 & Supp. IV 1986)).

103. *See id.* (quoting *Burlington v. Department of Educ.*, 471 U.S. 359 (1985)).

104. *See id.* at 128.

105. *See id.*

106. *See, e.g., id.* at 129-30; *Fontenot v. Louisiana Bd. of Educ.*, 835 F.2d 117, 120-21 (5th Cir. 1988) (awarding parents attorneys fees against state defendants); *David D. v. Dartmouth School Comm.*, 775 F.2d 411, 421 (1st Cir. 1985) (stating that Congress abrogated state sovereign immunity in the EAHCA), *cert. denied*, 475 U.S. 1140 (1986); *Michael M. v. Board of Educ.*, 686 F. Supp. 995, 1002-03 (E.D.N.Y. 1988) (same); *Antkowiak v. Ambach*, 653 F. Supp. 1405, 1419 (W.D.N.Y. 1987) (same), *rev'd on other grounds*, 838 F.2d 635 (2d Cir.), *cert. denied*, 109 S. Ct. 133 (1988).

107. 775 F.2d 411 (1st Cir. 1985).

108. *Muth*, 839 F.2d at 128 (quoting 20 U.S.C. § 1400(b)(9) (1982)) (emphasis added); *David D.*, 775 F.2d at 421 (quoting 20 U.S.C. § 1400(b)(9) (1982)) (emphasis in original).

David D. and *Muth* also relied on the EAHCA's repeated references to state and local agencies. *See David D.*, 775 F.2d at 422; *Muth*, 839 F.2d at 129. The *Muth* court found this passage from *David D.* persuasive:

Under the federal Act and its implementing regulations, the State educational agency promises to ensure that it and its local educational agencies will provide at minimum a free appropriate public education. . . . The culmination of the state administrative appeals process is the right of any party 'aggrieved' by the decision or procedure employed to take the matter to either state or federal court. Obviously, since the state is responsible for guaranteeing that a child will receive both the substantive and procedural rights set forth in the Act, *Congress intended that the State should be named as an opposing party, if not the sole party, to the proceeding.*

“unmistakable language in the statute”¹⁰⁹ requirement imposed by *Scanlon* and thus did not manifest an intent to abrogate state sovereign immunity.¹¹⁰ In *Kerr Center Parents Association v. Charles*,¹¹¹ the Ninth Circuit held, without further discussion, that “Congress had not, in the EAHCA, expressed in unmistakable language its intent to abrogate states’ sovereign immunity pursuant to section [five] of the Fourteenth Amendment.”¹¹² In *Gary A. v. New Trier High School District No. 203*,¹¹³ the Seventh Circuit stressed that congressional abrogation must be “unmistakably clear in the language of the statute.”¹¹⁴ The court found that the EAHCA, like the Rehabilitation Act, included only “[a] general authorization for suit in federal court [and that] is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.”¹¹⁵

In reversing the Third Circuit, the Supreme Court conceded that “the [EAHCA’s] frequent reference to the States, and its delineation of the State’s important role in securing an appropriate education for handicapped children, make the States . . . logical defendants” yet held that this “permissible inference” was not “the unequivocal declaration” required for congressional abrogation.¹¹⁶

B. *The Necessity of Retroactive Relief*

Under *Young* and *Edelman*, suits against a state agency brought by a parent for prospective relief, such as a change in a child’s educational

Muth, 839 F.2d at 129 (quoting *David D.*, 775 F.2d at 422) (citations omitted, emphasis added)).

109. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985).

110. *See, e.g., Kerr Center Parents Ass’n v. Charles*, 842 F.2d 1052, 1058-59 (9th Cir. 1988) (enactment of EAHCA did not abrogate state’s eleventh amendment immunity); *Gary A. v. New Trier High School Dist. No. 203*, 796 F.2d 940, 944 (7th Cir. 1986) (Congress did not abrogate state immunity in the EAHCA, therefore state defendants immunized); *Doe ex rel. Gonzales v. Maher*, 793 F.2d 1470, 1494 (9th Cir. 1986) (“[The] language [of the EAHCA] simply does not pass muster under the stringent *Scanlon* test.”), *aff’d as modified on a separate issue sub nom. Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592 (1988) (Supreme Court declined to hear abrogation issue); *Rose v. Nebraska*, 748 F.2d 1258, 1262 (8th Cir. 1984) (eleventh amendment bars award against state defendants), *cert. denied*, 474 U.S. 817 (1985); *Hiller v. Board of Educ.*, 687 F. Supp. 735, 745 (N.D.N.Y. 1988) (denying motion to amend complaint to add claim against state defendants for retroactive monetary relief and punitive damages); *Gerasimou v. Ambach*, 636 F. Supp. 1504, 1511-13 (E.D.N.Y. 1986) (plaintiff’s claim for transportation costs, witnesses, attorneys fees and damages against state Commissioner of Education barred by the eleventh amendment).

111. 842 F.2d 1052 (9th Cir. 1988).

112. *Id.* at 1059; *see also Maher*, 793 F.2d at 1494.

113. 796 F.2d 940 (7th Cir. 1986).

114. *Id.* at 944 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). The court, quoting *Scanlon*, stated: “Noting that ‘the Eleventh Amendment implicates the fundamental constitutional balance between the Federal government and the States’, the Court held that Congress may abrogate the states’ immunity ‘only by making its intention unmistakably clear in the language of the statute.’” *Id.* (emphasis in original).

115. *Id.* (quoting *Scanlon*).

116. *See Dellmuth v. Muth*, 57 U.S.L.W. 4720, 4723 (U.S. June 13, 1989).

placement or for provision of additional services, clearly would not violate the eleventh amendment.¹¹⁷ Prospective relief, however, is often insufficient to protect a child's right to free and appropriate education.¹¹⁸ The EAHCA's extensive administrative appeals system can lead to years of delay.¹¹⁹ These lost years are critical to a child's development. Most parents, at least those financially able, do not choose to leave their child in an inadequate and inappropriate situation while waiting for administrative orders.¹²⁰ Therefore, the opportunity to seek retroactive relief is necessary to fully protect the rights guaranteed in the EAHCA. In order to grant retroactive relief, however, courts must find that Congress abrogated state sovereign immunity by enacting appropriate legislation pursuant to section five of the fourteenth amendment.¹²¹

C. Requirements for Abrogation of State Sovereign Immunity and the EAHCA

The first requirement for a finding of congressional abrogation is evidence that the EAHCA was enacted pursuant to section five of the fourteenth amendment. This determination requires a "discern[ible] . . . legislative purpose or factual predicate that supports the exercise of that

117. For example, in *David D. v. Dartmouth School Comm.*, 615 F. Supp. 639 (1984), *aff'd*, 775 F.2d 411 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986), the court found that the local districts' proposed individualized education program was insufficient and ordered the district to place the child in a more appropriate setting. *See id.* at 647-48. In *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983), the Court of Appeals for the Fifth Circuit ordered Mississippi to provide full-year instruction to handicapped children. *See id.* at 1035.

118. *See Burlington School Comm. v. Department of Educ.*, 471 U.S. 359, 370-71 (1985). Justice Rehnquist, for the Court, stated:

If the administrative and judicial review under the Act could be completed in a matter of weeks, rather than years, it would be difficult to imagine a case in which such prospective injunctive relief would not be sufficient. As this case so vividly demonstrates, however, the review process is ponderous.

Id. at 370.

119. In *Burlington*, the parent initially contested his child's placement in 1979. *See id.* at 362. The child and his parents went through several hearings even before the case went to federal court, where it was reversed and remanded twice. *See id.* at 366. The Supreme Court heard the case in 1985, nearly six years later. *See id.* at 359.

Additional examples include *Counsel v. Dow*, 849 F.2d 731 (2d Cir.), *cert. denied*, 109 S. Ct. 391 (1988) and *Antkowiak v. Ambach*, 838 F.2d 635 (2d Cir.), *cert. denied*, 109 S. Ct. 133 (1988), in which the plaintiffs initiated their suits three years prior to the circuit cases.

120. *See Burlington*, 471 U.S. at 370.

121. *See, e.g., Counsel v. Dow*, 849 F.2d 731, 736 (2d Cir.) ("we conclude that the district court correctly determined that Congress enacted and amended the [EAHCA] pursuant to its enforcement powers under Section Five of the Fourteenth Amendment"), *cert. denied*, 109 S. Ct. 391 (1988); *Fontenot v. Louisiana Bd. of Educ.*, 835 F.2d 117, 121 (5th Cir. 1988) ("The [EAHCA] was passed pursuant to the Spending Clause and the Equal Protection Clause of the Fourteenth Amendment."); *David D. v. Dartmouth School Comm.*, 775 F.2d 411, 421-22 (1st Cir. 1985) (concluding that Congress "acted pursuant to its fourteenth amendment powers"), *cert. denied*, 475 U.S. 1140 (1986).

power."¹²² Discernible legislative intent to invoke the fourteenth amendment's equal protection guarantee is evident in the statute itself. Section 1400(b)(9) expressly states that "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law."¹²³ As the Court indicated in *Scanlon* and reemphasized in *Muth*, however, evidence that Congress acted under the fourteenth amendment is not sufficient. Congress must also have intended to abrogate state sovereign immunity unequivocally and textually.¹²⁴

The EAHCA meets *Scanlon's* unmistakable language requirement. The Rehabilitation Act, at issue in *Scanlon*, did not refer specifically to the states,¹²⁵ although states and their subdivisions received a large percentage of federal funds.¹²⁶ Congress aimed the EAHCA, however, directly at the states and their localities,¹²⁷ not at "any recipient of federal assistance," the Rehabilitation Act's general authorization for suit.¹²⁸ Section 1400(b)(8) of the EAHCA provides: "State and local educational agencies have a responsibility to provide education for all handicapped children . . ." ¹²⁹ Unlike the Rehabilitation Act, Congress made the states responsible for ensuring that handicapped children receive the equal educational opportunity they are entitled to under the fourteenth amendment.¹³⁰ This authorization is distinguishable from the Rehabilitation Act's "general authorization," which *Scanlon* found insufficient to

122. See *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983).

123. 20 U.S.C. § 1400(b)(9) (1982); see *Muth v. Central Bucks School Dist.*, 839 F.2d 113, 128 (3d Cir.), *rev'd sub nom. Dellmuth v. Muth*, 57 U.S.L.W. 4720 (U.S. June 13, 1989); *David D. v. Dartmouth School Comm.*, 775 F.2d 411, 421 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986); *Michael M. v. Board of Educ.*, 686 F. Supp. 995, 1002-03 (E.D.N.Y. 1988).

124. *Muth*, 57 U.S.L.W. at 4722.

125. See *Scanlon*, 473 U.S. at 245-46.

126. See *id.* at 248 (Brennan, J., dissenting).

127. See 20 U.S.C. §§ 1400(b)-(c), 1401, 1415 (1982 & Supp. IV 1986).

128. 29 U.S.C. § 794(a)(2) (1982).

129. 20 U.S.C. § 1400(b)(8) (1982). The legislative history also refers to both state and local agencies. The Senate Report, discussing state agency findings of fact, states: "Actions may be brought in the district courts of the United States to appeal the determinations of the State educational agency . . ." S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 47, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1501.

130. See 20 U.S.C. § 1412(6) (1982); S. Rep. No. 168, 94th Cong., 1st Sess. 14, 17, 22, *reprinted in* 1975 U.S. Code Cong. and Admin. News 1425, 1438, 1441, 1446; Sen. Conf. Rep. No. 455, 94th Cong., 1st Sess. 39, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1492.

In support of the EAHCA, Senator Williams stated: "[T]hese provisions reinforce the right to education . . . by setting up a process by which State and local educational agencies may be held accountable for providing educational services for all handicapped children." 121 Cong. Rec. 19,492 (1975) (remarks of Senator Williams). The court in *David D. v. Dartmouth School Committee*, 775 F.2d 411 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986) found that "since the state is responsible for guaranteeing that a child will receive both the substantive and procedural rights set forth in the Act, Congress intended that the State should be named as an opposing party, if not the sole party, to the proceed-

abrogate sovereign immunity.¹³¹ The Rehabilitation Act's general authorization probably would not even meet *Edelman's* "threshold fact of congressional authorization" test.¹³² In contrast, the EAHCA's explicit emphasis on the states and their responsibilities should be sufficient evidence of congressional intent to abrogate state immunity. The *Muth* Court, however, characterized these obligations placed on the states as congressional "coy hints."¹³³

In *Fitzpatrick v. Bitzer*,¹³⁴ the Court applied *Edelman's* "threshold fact of congressional authorization" standard and found that Title VII abrogated state sovereign immunity.¹³⁵ The terms of the EAHCA, although arguably subject to a stricter test under *Scanlon*,¹³⁶ contain greater evidence of congressional intent to abrogate than Title VII.¹³⁷ Title VII prohibits discriminatory employment practices.¹³⁸ The *Bitzer* court's finding of congressional intent to abrogate was based on a 1972 amendment that struck an express exclusion of state and local governments in the definition of employer and added "individuals 'subject to the civil service laws of a State government, governmental agency or political subdivision'" to the definition of employees.¹³⁹

While Title VII is aimed generally at "employers,"¹⁴⁰ the EAHCA is aimed solely at states and their subdivisions.¹⁴¹ For example, the provision of procedural safeguards established by Congress in the EAHCA is the sole responsibility of "[a]ny State educational agency, any local educational agency, and any intermediate educational unit" receiving assistance under the Act.¹⁴² Federal courts should be permitted to hold the states liable for retroactive relief under the EAHCA because of the EAHCA's more specific aim at the states.

ing." *Id.* at 422; see also *Antkowiak v. Ambach*, 653 F. Supp. 1405, 1419 (W.D.N.Y. 1987), *rev'd on other grounds*, 838 F.2d 635 (2d Cir.), *cert. denied*, 109 S. Ct. 133 (1988).

131. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985).

132. See *Edelman v. Jordan*, 415 U.S. 651, 672 (1974).

133. See *Dellmuth v. Muth*, 57 U.S.L.W. 4720, 4722 (U.S. June 13, 1989).

134. 427 U.S. 445 (1976).

135. See *id.* at 452, 456.

136. See *supra* notes 89-93 and accompanying text.

137. See *infra* notes 138-142 and accompanying text.

138. See 42 U.S.C. § 2000e-2(a)(1) (1982).

139. See *Bitzer*, 427 U.S. at 448-49, 449 n.2 (quoting 42 U.S.C. §§ 2000e(b), § 2000e(f) (1970 Supp. IV) (current version at 42 U.S.C. § 2000e to e-17 (1982))); *supra* note 67 and accompanying text.

140. See 42 U.S.C. § 2000e-2 (1982).

141. See 20 U.S.C. §§ 1400, 1401, 1415 (1982 & Supp. IV 1986).

142. 20 U.S.C. § 1415(a) (1982). Section 1415(a) provides: "Any State educational agency, any local agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures . . . to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units." *Id.*

D. *The Importance of Legislative History in Determining Congressional Intent*

The function of the courts is to "construe the language [of a statute] so as to give effect to the intent of Congress."¹⁴³ In *Muth*, however, the Supreme Court held that the *Scanlon* test restricts a court's analysis to the language of the statute.¹⁴⁴ Yet *Scanlon*'s emphasis on certainty of congressional intent supports, not restricts, the traditional approach to statutory interpretation, which includes an examination of legislative history. As Justice Brennan pointed out, the rule of statutory construction announced by the *Muth* majority is a novel one.¹⁴⁵

In the past, the Supreme Court cautioned against plain meaning when such an interpretation would be contrary to the legislation's policy.¹⁴⁶ As one court stated:

If the words of the statute make no reference to a suit against a state, it is highly unlikely that we can be "certain" that Congress intended to create such a cause of action. However, *especially* where the statute expressly provides for a suit against a state, we will not hesitate to consult the legislative history to resolve any lingering uncertainty.¹⁴⁷

The *Scanlon* Court did not expressly prohibit references to legislative history. Arguably, the Court did not refer to the Rehabilitation Act's legislative history because the Act's failure to refer to the states was sufficient evidence of Congress' intent.

The Court has often examined legislative history when considering congressional abrogation of state sovereign immunity. In *Bitzer and Employees v. Department of Public Health and Welfare*,¹⁴⁸ later character-

143. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 542 (1940); *see also* *re McVey Trucking, Inc.*, 812 F.2d 311, 325 (7th Cir.), *cert. denied*, 108 S. Ct. 227 (1987); Note, *supra* note 92, at 1448.

144. *See Dellmuth v. Muth*, 57 U.S.L.W. 4720, 4722 (U.S. June 13, 1989). Justice Kennedy, for the majority, stated:

Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of [*Scanlon*] will not be met.

Id.

145. *See id.* at 4724, 4725.

146. *American Trucking Ass'ns*, 310 U.S. at 543-44 ("When aid to construction of the . . . statute, is available, there certainly can be no 'rule of law' which forbids its use . . .").

147. *McVey Trucking*, 812 F.2d at 324 (emphasis added).

148. 411 U.S. 279 (1973). The Court held that congressional intent could not be inferred absent "clear language that the constitutional immunity was swept away." *Id.* at 285. In *Employees*, state employees brought suit to recover overtime pay under section 216(b) of the Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1069 (codified as amended at 29 U.S.C. § 216(b) (1982)) ("FLSA"), on the grounds that FLSA reflected Congress' power to regulate work conditions under the Commerce Clause. *See Employees*, 411 U.S. at 281.

Section 216(b) provides that "[a]ny employer who violates the provisions of [section 6

ized by the Court as requiring an express statutory waiver for abrogation,¹⁴⁹ the majority looked to legislative history.¹⁵⁰

If, as the *Scanlon* Court suggested, protection of the eleventh amendment is premised on certainty,¹⁵¹ then reference to legislative history should be required.¹⁵² *Gomez v. Illinois State Board of Education*,¹⁵³ recognizing the importance of certainty of congressional intent, interpreted *Scanlon* to permit an inference of abrogation when any other reading of the Equal Educational Opportunities Act¹⁵⁴ ("EEOA") would nullify the statute's express terms.¹⁵⁵ The Seventh Circuit, interpreting the statute, found that "without the abrogation of sovereign immunity, state agencies would, in practice, vanish . . ."¹⁵⁶ The relevant definitions in the EEOA are nearly identical to their counterparts in the EAHCA.¹⁵⁷ An exami-

or section 7 of this Act] shall be liable to the employee or employees affected in the amount of their unpaid . . . compensation . . ." 29 U.S.C. § 216(b) (1982). The Court expressed concern that holding states liable under the FLSA would "implicate elevator operators, janitors, charwomen, security guards, secretaries, and the like in every office building in a State's governmental hierarchy." *Employees*, 411 U.S. at 285. The Court did indicate, however, that Congress can "place new or even enormous fiscal burdens on the States" under the Commerce Clause. *Id.* at 284.

Justice Brennan, however, dissented on the ground that both the FLSA and the Federal Employers' Liability Act were enacted under the Commerce Clause and therefore the States had "surrendered their sovereignty to that extent when they granted Congress the power to regulate commerce." *Id.* at 299 (Brennan, J., dissenting).

149. See *Quern v. Jordan*, 440 U.S. 332, 344 n.16 (1979). Justice Powell, for the Court in *Quern*, indicated that legislative history should be considered when looking for congressional intent. See *id.* at 345. The Court held that there was nothing in the legislative history to indicate that Congress had abrogated state immunity in 42 U.S.C. § 1983 (1982). *Id.*

150. See *Bitzer*, 427 U.S. at 449 n.2; *Employees*, 411 U.S. at 283-85.

151. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43 (1985).

152. As Justice Brennan argued, if the Court were "in fact concerned with Congress' intent it could not have adopted the strict drafting regulations it devises today, ruling out resort to legislative history and apparently also barring inferential reasoning from text and structure." See *Muth*, 57 U.S.L.W. 4720, 4724 (U.S. June 13, 1989) (Brennan, J., dissenting).

153. 811 F.2d 1030 (7th Cir. 1987).

154. Pub. L. No. 380, 88 Stat. 514 (1974) (codified at 20 U.S.C. §§ 1701-1758 (1982 & Supp. VI 1986)).

155. See *Gomez*, 811 F.2d at 1036.

156. See *id.* at 1037-38.

157. Both 20 U.S.C. § 1412 (1982) and 20 U.S.C. § 1703 (1982) are explicitly aimed at the states. Section 1412(1) of the EAHCA requires that "a State shall demonstrate to the Secretary that the following conditions are met: (1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1) (1982). Section 1703 of the EEOA provides that "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin . . ." 20 U.S.C. § 1703 (1982).

The EAHCA's and the EEOA's definitions of state educational agencies are identical. See 20 U.S.C. § 1401(7) (1982); *id.* § 3381(k). Section 1401(7) of the EAHCA and section 3381(k) of the EEOA define state educational agencies as "the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools." 20 U.S.C. §§ 1401(7), 3381(k) (1982).

The *Gomez* court went on to distinguish section 794 of the Rehabilitation Act from the EEOA: "Unlike, for example, 29 U.S.C. §§ 794 and 794a, 20 U.S.C. §§ 1703(f) and 1706

nation of the EAHCA's legislative history to support a finding of congressional intent to abrogate state immunity does not offend the basic principles of federalism encompassed by the eleventh amendment.

E. A Finding of Abrogation Comports with the Fundamental Principles of Federalism

The *Scanlon* Court feared that subjecting the states to suit would upset the balance of power between the states and the federal government and jeopardize "fundamental liberties."¹⁵⁸ According to the majority, the Framers believed that strong state governments were a necessary "counterpoise" to the federal government.¹⁵⁹ The states ratified the eleventh amendment to preserve this constitutional balance¹⁶⁰ and to protect their treasuries.¹⁶¹

The EAHCA was enacted to protect the equally fundamental constitutional principle of equal protection. Allowing a state to invoke sovereign immunity frustrates that purpose and the federal courts' "primary obligation to protect the rights of the individual that are embodied in the Federal Constitution."¹⁶² The fourteenth amendment clearly limits the power of the states.¹⁶³ When Congress acts pursuant to the fourteenth amendment to enforce equal protection guarantees, the states' interest in sovereign immunity, including their interests in protecting the public, must give way.¹⁶⁴ Congress originally attempted to protect the right of handicapped children to equal educational opportunities by a less intrusive manner in the Education of the Handicapped Act.¹⁶⁵ Yet, under this earlier act, "handicapped children [remained] 'either totally excluded from schools or [were] sitting idly in regular classrooms awaiting

do not simply provide relief against a general class of defendants that may or may not include the states and their agencies." *Gomez*, 811 F.2d at 1038. Yet six months earlier, in *Gary A. v. New Trier High School District No. 203*, 796 F.2d 940 (7th Cir. 1986), the Seventh Circuit held that the EAHCA was "similar in all relevant parts" to the Rehabilitation Act. *Gary A.*, 796 F.2d at 944.

158. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)).

159. See *id.* at 239 n.2.

160. See *id.*; *supra* note 49.

161. See *supra* note 46.

162. *Pennsylvania v. Union Gas Co.*, 57 U.S.L.W. 4662, 4669 (U.S. June 13, 1989) (Stevens, J., concurring).

163. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-54 (1976).

164. See *id.* at 454. The Court cited *Ex Parte Virginia*, 100 U.S. 339 (1880):

The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty.

Bitzer, 427 U.S. at 454 (quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1880)). Although the states still have an interest in the integrity of their treasuries, they are not as vulnerable as they were in 1793, when the states were near collapse because of their crushing Revolutionary War debts. See *supra* note 46.

165. See *supra* note 24.

the time when they were old enough to 'drop out.'"¹⁶⁶ This inequity required the increased protections of the EAHCA.¹⁶⁷

Judicial interpretation of congressional action also implicates the constitutional balance between the legislature and the judiciary.¹⁶⁸ Failure to give effect to Congress' intent is as dangerous to the Framers' conception of the constitutional plan as undermining sovereign immunity's "vital role."¹⁶⁹ Emphasis on certainty of Congress' intent protects the interests of federalism and the separation of powers.

The clear intent of Congress in enacting the EAHCA was to guarantee handicapped children the right to free and appropriate public education.¹⁷⁰ Congress made it the states' responsibility to provide an appropriate education at *no cost* to the child's parent.¹⁷¹ The view that Congress did not abrogate sovereign immunity simply because the Act does not say "we intend to abrogate" plainly conflicts with Congress' intent in the EAHCA.

CONCLUSION

Congress, in enacting the EAHCA, recognized the important national

166. Board of Educ. v. Rowley, 458 U.S. 176, 179 (1982) (quoting H.R. Rep. No. 332, 94th Cong., 1st Sess. 2 (1975)).

167. See *id.* The EAHCA's Conference Report emphasized that "Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school." S. Rep. No. 168, 94th Cong., 1st Sess. 9, reprinted in 1975 U.S. Code Cong. & Admin. News 1425, 1433.

168. See *In Re McVey Trucking, Inc.*, 812 F.2d 311, 325 (7th Cir.) (citing Note, *supra* note 92, at 1448), cert. denied, 108 S. Ct. 227 (1987).

169. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (quoting Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984)). As the Court has recognized, state sovereign immunity should be protected by the procedural safeguards provided by the Constitution, and not by "judicially-created limitations" on the power of the federal government. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985). The *Garcia* Court stated:

[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. . . . the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government.

Id. at 550-51.

170. See *supra* notes 125-142 and accompanying text.

171. See *Burlington School Comm. v. Department of Educ.*, 471 U.S. 359, 369-70 (1985). The states' financial responsibility includes placement in private facilities if an appropriate public placement is unavailable. See S. Rep. No. 168, 94th Cong., 1st Sess. 10, reprinted in 1975 U.S. Code Cong. & Admin. News 1425, 1434.

The Senate Report stated that "if a State or local educational agency has placed or referred [a] child to a private school or to another school or facility . . . because the State or local educational agency did not have an appropriate program for the child, then the State or local educational agency remains financially responsible for that child's education." See *id.* at 1456 (emphasis added).

interest in providing handicapped children with an equal educational opportunity. Prospective injunctive relief under the EAHCA is not a sufficient guarantee of a handicapped child's right to a free appropriate education. Congress' intent to subject the states to suit in federal court is unmistakably clear in the language of the statute. Holding that the eleventh amendment bars retroactive relief under the EAHCA, the *Muth* decision frustrates Congress' intent and violates a child's fundamental right to equal protection of the law. To ensure that all handicapped children have a free, appropriate public education available to them, Congress intended parents to have a complete remedy.

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