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DELLMUTH v. MUTH*: THE ELEVENTH AMENDMENT PIERCES THE LEGAL SHIELD OF EHA PROTECTION

The eleventh amendment of the United States Constitution prohibits federal jurisdiction in any suit brought against a state by a citizen of another state, or by a citizen of a foreign state.¹ Since its adoption in 1798,² the eleventh amendment has been extended through judicially created doctrine to prevent a citizen from suing his own state.³ One exception to the states' eleventh amendment

* 109 S. Ct. 2397 (1989).

1. U.S. CONST. amend. XI provides: "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."

2. The eleventh amendment was proposed by resolution of Congress on March 4, 1794, and declared to have been ratified by three fourths of the states in a message to Congress by President John Adams dated January 8, 1798. S. BLOOM, HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 63-64 (1941). Records in the Department of State show it was ratified by thirteen of the sixteen states and rejected by New Jersey and Pennsylvania. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1939 (1971).

3. The eleventh amendment was enacted in response to the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), in which a citizen of South Carolina instituted a breach of contract action in the Supreme Court against the State of Georgia. The Court entered a default judgment against Georgia when the state, refusing to recognize federal court jurisdiction, failed to defend the action. *Id.* at 480. The decision shocked the nation, causing an uproar that led to the enactment of the eleventh amendment. *Edelman v. Jordan*, 415 U.S. 651, 662 (1974). Commentators have advanced many theories to explain the strong support the proposed amendment received among the divergent and not yet clearly defined political parties. One theory is that the drafters were responding to the assumption of jurisdiction exhibited in *Chisholm* rather than endeavoring to bar damage actions against state governments. *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273 (1989) (Stevens, J., concurring); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (Brennan, J., dissenting).

In the almost one hundred years following *Chisholm*, the Supreme Court decided only one case governed by the eleventh amendment. See *Ex parte Madrazo*, 32 U.S. (7 Pet.) 627 (1833) (suit invoking federal court jurisdiction by a foreign citizen against Georgia). However, when the Reconstruction Era cases involving states' efforts to repudiate their post-Civil War debts began to deluge the Court, the Court responded to political exigency by extending the eleventh amendment to include the prohibition of suits against a state by a citizen of that state. 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. 423 (1983). For discussion of the history and development of the eleventh amendment, see Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983) (the eleventh amendment surveyed in the political context of its inception, development, and interpretation); Jackson, *The Supreme Court, the Eleventh Amendment and State Sovereign Immunity*, 98 YALE L.J. 1 (1988) (analysis of

protection⁴ arises out of the enforcement provision of section five of the fourteenth amendment,⁵ whereby, Congress may abrogate the states' sovereign immunity through appropriate legislation.⁶ The

eleventh amendment history in the context of appellate review); Lee, *Sovereign Immunity and the Eleventh Amendment: The Uses of History*, 18 URB. LAW. 519 (1986) (a comparison of the eleventh amendment and sovereign immunity views expressed by J. Brennan in *Atascadero* and J. Stevens in *Pennhurst State School & Hosp. v. Halderman* with the Court's decisions in *Hans v. Louisiana* and *Ex parte Young*, respectively); Orth, *The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power*, 83 U. ILL. L. REV. 423 (1983) (the judicial power established in *Marbury v. Madison* examined from the enactment of the eleventh amendment to the decision in *Ex parte Young*).

In *Hans v. Louisiana*, 24 F. 55 (C.C.E.D. La. 1885) the Circuit Court of Appeals maintained that a valid action is one initiated against an entity capable of being sued. Since the Court is powerless to move against a state and its treasury for enforcement of a money judgment, the state is not open to suit. *Id.* at 68. The Supreme Court affirmed, commenting further that the eleventh amendment "was intended to constitutionalize a pre-existing understanding of state immunity from suit." *Hans v. Louisiana*, 134 U.S. 1, 10 (1890). As a result of this doctrinal construction of the eleventh amendment, a private party cannot bring suit against a state without its consent. *Ex parte New York*, 256 U.S. 490 (1921). For a discussion of the exceptions, see *infra* note 4.

4. There are several exceptions to the eleventh amendment bar to federal court jurisdiction. See *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965) (a state may be sued by the United States); *Ex parte Young*, 209 U.S. 123 (1908) (citizens may sue officials in their individual capacities for prospective relief); *South Dakota v. North Carolina*, 192 U.S. 286, 315-21 (1904) (a state may be sued by another state); *Lincoln County v. Luning*, 133 U.S. 529 (1890) (amendment does not protect local government entities); but cf. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984) (pendant state law claims may not be adjudicated against a state in federal court); *Edelman v. Jordan*, 415 U.S. 651 (1974) (suit against official for damages not permitted where the state is the real party at interest); *New Hampshire v. Louisiana*, 108 U.S. 76 (1883) (suit barred where plaintiff state is merely acting as agent for citizen against the defendant state). The eleventh amendment does not prevail where a state has waived the privilege. *Clark v. Barnard*, 108 U.S. 436, 447 (1883). See, e.g., *Parden v. Terminal R.R. of Ala. State Docks Dep't.*, 377 U.S. 184 (1964) (immunity waived by participation in federal program wherein consent to suit is mandatory); *Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275 (1959) (a state may waive immunity by voluntary appearance in a federal court action); *Smith v. Reeves*, 178 U.S. 436, 441 (1900) (a state may waive immunity by state statute).

5. For the purposes of this casenote, the pertinent parts of the fourteenth amendment referred to are §§ 1 and 5. U.S. CONST. amend. XIV, provides as follows:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Id.

6. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (citing *Ex parte Virginia*, 100 U.S. 339 (1880)), the Court affirmed its earlier recognition that the substantive terms of the fourteenth amendment are directed to the states. Congress intentionally imposed limitations on the states by virtue of enacting the § 5 enforcement provision. *Fitzpatrick*, 427 U.S. at 454. The result of this legislative restraint diminishes the power of the states while inversely enlarging the power of Congress. *Id.*

United States Supreme Court has held that, under this provision, states are subject to suit in federal court only where Congress has expressed its intention to lift the veil of sovereign immunity.⁷ In *Dellmuth v. Muth*,⁸ the Supreme Court addressed the question of whether Congress, in enacting the Education of the Handicapped Act,⁹ abrogated the states' eleventh amendment sovereign immunity.¹⁰

The purpose of the Education of the Handicapped Act ("EHA") is to assure all handicapped children a free appropriate public education designed to meet their needs.¹¹ In furtherance of this goal, the EHA mandates that an authorized state educational agency create an individual education plan ("IEP") for each child,¹² the appropriateness of which parents or guardians may challenge through procedural safeguards provided for in the EHA.¹³

Russell A. Muth, Jr., challenged the appropriateness of the IEP developed for his learning disabled and emotionally impaired son¹⁴

7. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (no Congressional intent to abrogate immunity found in the language of the Rehabilitation Act); *Quern v. Jordan*, 440 U.S. 332 (1978) (42 U.S.C. § 1983 does not demonstrate intent to abrogate in the implicit and clear language of the statute); *Edelman v. Jordan*, 415 U.S. 651 (1974) (no intent to abrogate found in the language or history of the Social Security Act); *Employees of the Dep't. of Pub. Health and Welfare of Mo. v. Department of Pub. Health and Welfare of Mo.*, 411 U.S. 279 (1973) (no intent found that Congress lifted sovereign immunity under the Fair Labor Standards Act).

8. 109 S. Ct. 2397 (1989).

9. The Education of All Handicapped Children Act of 1975, 20 U.S.C. §§ 1400, amended by The Education of the Handicapped Act, 20 U.S.C. §§ 1400-1485 (1988).

10. *Muth*, 109 S. Ct. at 2398.

11. 20 U.S.C. § 1400(c). Additionally, it is the purpose of the EHA to assure handicapped children an education emphasizing special education and related services, to protect the rights of handicapped children and the rights of their parents, to assist states and local agencies in providing educational services to handicapped children, and to assess and assure the effectiveness of the education provided. *Id.*

12. 20 U.S.C. § 1414(a)(5) requires recipients of federal payments to establish an individualized education program for each handicapped child at the beginning of each school year then review and revise it at least annually. Section 1401(19) defines an individualized education program as a specially designed educational plan developed by a qualified representative of the local educational agency to meet the unique needs of handicapped children, their teachers and parents. It must include a statement of the child's present levels of educational performance, annual goals, specific educational services to be provided, the extent to which such child will be able to participate in regular educational programs, a time frame for the services, and evaluation procedures. *Id.*

13. 20 U.S.C. § 1415 establishes procedures to assure that handicapped children and their parents or guardians are guaranteed safeguards with respect to the provision of a free appropriate education.

14. 20 U.S.C. § 1401(1) defines a handicapped child as "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services." *Id.* This section was amended in 1983 to include within the term "handicapped children," children impaired by the inability to speak English. *Id.*

through an administrative due process hearing.¹⁵ Dissatisfied with the decision of the hearing officer, Muth appealed to the Pennsylvania Secretary of Education following the procedures outlined in the EHA.¹⁶ The Secretary remanded the case back to the hearing officer with instructions that the Central Bucks School District ("School District") revise the child's IEP.¹⁷ Prior to a final revision of the IEP, Muth enrolled his child in a private school for the learning disabled, and subsequently filed a complaint in the federal district court alleging violations of procedural and substantive due process.¹⁸

The United States District Court for the Eastern District of Pennsylvania granted Muth's motion for summary judgment holding that the State of Pennsylvania violated the hearing procedures of the EHA.¹⁹ In a separate hearing, the district court considered whether the School District's proposed IEP provided Muth's son with an appropriate free education. The district court found that the state's flawed administrative procedures excessively delayed the process, thus rendering an otherwise appropriate IEP inappropriate.²⁰ The court then entered an order reimbursing Muth for his son's tuition expense.²¹ On appeal, the Third Circuit affirmed both the district court's award for tuition reimbursement and its finding that the eleventh amendment did not bar that relief.²²

15. 20 U.S.C. § 1415(b)(2) provides a complainant an opportunity for an impartial due process hearing conducted by the State or local education agency. An employee of the education agency involved in the education or care of the child may not conduct the hearing. *Id.* Muth's son had been a student in the Central Buck School District attending classes for the learning disabled for a period of four years prior to filing suit in this matter. *Muth v. Central Bucks County School Dist.*, 839 F.2d 113 (3d Cir. 1988). In 1983, at Muth's request, his son was mainstreamed into regular classes on a trial basis. *Id.* at 117. The experiment failed and the school district proposed a revision of the child's IEP. *Id.* Muth requested a due process hearing, as provided for in the EHA, to determine whether the district was providing an appropriate education. *Id.*

16. 20 U.S.C. § 1415(c) permits a party aggrieved by the finding of the local agency to appeal to the state education agency which then conducts an impartial review and makes an independent decision. Although the hearing officer found that the IEP for the Muth child was inappropriate, he did not find that the district was incapable of providing an appropriate education. *Muth*, 839 F.2d at 118. Nor did the hearing officer honor Muth's request that the child be placed in a private school. *Id.*

17. See Brief for the Respondent at 6-10, *Muth v. Central Bucks School Dist.*, 839 F.2d 113 (3d Cir. 1988) (No. 87-1855) (detailed account of the process hearing, the decision, and Secretary's review).

18. 20 U.S.C. § 1415(e)(2) provides in part that any party aggrieved by the findings "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 State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." *Id.*

19. *Muth v. Smith*, 646 F. Supp. 280 (E.D. Pa. 1986), *aff'd sub. nom. Muth v. Central Bucks School Dist.*, 839 F.2d 113 (3d Cir. 1988), *rev'd sub nom. Dellmuth v. Muth*, 109 S. Ct. 2397 (1989).

20. *Muth*, 839 F.2d at 118.

21. *Id.*

22. *Id.* at 130.

The United States Supreme Court granted certiorari to resolve inconsistent findings among the lower courts on the issue of whether the EHA abrogates the states' sovereign immunity.²³ In reaching its determination, the Court examined the EHA statement of legislative purpose, the various duties and obligations imposed upon the states, the provision for judicial review, and the amendments to the EHA. In a five to four decision,²⁴ the Court concluded that the EHA makes no reference to either the eleventh amendment or state sovereign immunity.²⁵ The Court held that since the statutory language of the EHA fails to evidence an unmistakably clear congressional intent to abrogate the states' eleventh amendment sovereign immunity, suits against the states under the EHA are barred in federal court.²⁶

The Court began its inquiry by recognizing that Congress has the power under the fourteenth amendment to abrogate the states' eleventh amendment immunity.²⁷ The EHA was enacted pursuant to Congress' fourteenth amendment authority.²⁸ The Court expressed its concern, however, that Congress' power in this area not outweigh the principles of federalism underlying the eleventh amendment.²⁹ Endeavoring to strike a constitutional balance be-

23. *Muth*, 109 S. Ct. at 2398-2400. Compare *David D. v. Dartmouth School Comm.*, 775 F.2d 411 (1st Cir. 1985) (Congress effectively abrogated states' sovereign immunity in enacting the EHA) and *John H. v. Brunelle*, 631 F. Supp. 208 (D.N.H. 1986) (abrogation requirement met, local agency permitted to cross-claim against state) with *Gary A. v. New Trier High School Dist. No. 203*, 796 F.2d 940 (7th Cir. 1986) (suit against state under EHA barred by eleventh amendment; however, suit not barred against local school district); *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986) (eleventh amendment protects state from suit for damages under the EHA) and *Miener v. State of Mo.*, 673 F.2d 969 (8th Cir. 1982) (abrogation cannot be inferred in the absence of formal statement of abrogation or persuasive legislative history).

24. Justice Kennedy delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices White, O'Connor, and Scalia joined. Justice Scalia filed a concurring opinion. Justice Brennan filed a dissenting opinion, in which Justices Marshall, Blackmun, and Stevens joined. Justices Blackmun and Stevens also filed dissenting opinions.

25. *Muth*, 109 S. Ct. at 2402.

26. *Id.*

27. *Id.* at 2400 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

28. See, e.g., *David D. v. Dartmouth School Comm.*, 775 F.2d 411, 421-22 (1st Cir. 1985) (EHA enacted as fourteenth amendment legislation); *Parks v. Pavkovic*, 753 F.2d 1397, 1407 (7th Cir. 1985) (Congress enacted the EHA under fourteenth amendment authority); cf. *Smith v. Robinson*, 468 U.S. 992, 1009-13 (1984) (EHA a substitute for § 1983 equal protection claim); *Crawford v. Pittman*, 708 F.2d 1028, 1036 (5th Cir. 1983) (EHA enacted under both the fourteenth amendment and spending clause). But see *Hendrick Hudson School Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 190 n.11, 204 n.26 (1981) (discussing EHA in terms of the spending clause); *Silano v. Tirozzi*, 651 F. Supp. 1021, 1025 (D. Conn. 1987) (EHA is spending power legislation); *School Bd. v. Malone*, 662 F. Supp. 999, 1000-01 (E.D. Va. 1987) (EHA enacted under spending power).

29. *Muth*, 109 S. Ct. at 2400 (citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984)). In *Pennhurst*, the Court noted that there are inherent problems of federalism when one sovereign is subjected to the courts of another

tween the federal government and the states,³⁰ the *Muth* Court analyzed the EHA in terms of the abrogation policy established in *Atascadero State Hospital v. Scanlon*.³¹ The *Atascadero* Court examined the Rehabilitation Act of 1973 and redefined the test for determining when Congress has clearly abrogated the states' eleventh amendment immunity. Under *Atascadero*, "Congress must express its intention to abrogate the eleventh amendment in unmistakable language in the statute itself."³² The *Muth* Court applied this standard to the EHA.³³

The lower courts considered the textual language of the EHA preamble, the provision for judicial review, and the 1986 amendment as the basis for finding that the EHA met the *Atascadero* test.³⁴ Additionally, the district court found support for abrogation in the many references to the states with regard to their duties and obligations.³⁵ The Supreme Court, in its review of the statutory language, examined Congress' preamble statement that "it is in the national interest that the Federal Government assist the State and local efforts to provide programs to meet the educational needs of the handicapped children in order to assure equal protection of the laws."³⁶ However, the Court concluded that this language was meaningless in terms of an unmistakably clear statement abrogating sovereign immunity.³⁷

Next, the Court reasoned that the procedural safeguard provision giving aggrieved parties the right to judicial review of hearing decisions in any state court or district court "without regard to the

sovereign. *Pennhurst*, 465 U.S. at 99-100. Therefore, it is appropriate in such circumstances to rely on the principles of federalism underlying the eleventh amendment, i.e. sovereign immunity, to restrict federal jurisdiction. *Id.* The *Pennhurst* Court quoted *Hutto v. Finney*, 437 U.S. 677, 691 (1978) in referring to the "principles of federalism that inform the Eleventh Amendment." *Pennhurst*, 465 U.S. at 100. However, the *Hutto* Court was addressing the issue of whether awarding attorneys' fees in an action based on violations of the eighth and fourteenth amendments would violate the eleventh amendment rather than the issue of federal court jurisdiction addressed in *Pennhurst*. *Hutto*, 437 U.S. at 690. In that context, the *Hutto* Court observed that the principles of federalism do not prevent federal courts from imposing fines on state agencies refusing to adhere to an order of the court, nor are federal courts prevented from awarding attorney fees that serve the same purpose as a remedial fine. *Id.* at 691.

30. *Muth*, 109 S. Ct. at 2400 (citing *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985)).

31. 473 U.S. 234 (1985).

32. *Id.* at 243.

33. *Muth*, 109 S. Ct. at 2400-01.

34. *Muth v. Central Bucks School Dist.*, 839 F.2d 113, 128-30 (3d Cir. 1988).

35. *Id.* at 128-29.

36. 20 U.S.C. § 1400(b)(9).

37. *Dellmuth v. Muth*, 109 S. Ct. 2397, 2402 (1989). The Court concluded that the preamble language simply constituted a "general statement of legislative purpose." *Id.*

amount in controversy,"³⁸ did not imply the abrogation of sovereign immunity.³⁹ Nor did the 1986 amendment instructing courts not to reduce attorney fees in cases where the state had "unreasonably protected the final resolution" or violated the procedural safeguards,⁴⁰ constitute an express statement of congressional intent to abrogate immunity, because the states were not specifically named as potential parties.⁴¹ In the Court's view, these textual provisions were equivocal at best.⁴²

The lower courts used the EHA legislative history as a resource in determining whether the statute met the requirements set forth in *Atascadero*.⁴³ However, on review, the majority of the Court took the position that there is no point in exploring legislative history in the eleventh amendment abrogation context where Congress has not expressed its intention in the unmistakably clear language of the statute itself.⁴⁴ Hence, by definition, the statute fails the *Atascadero* test.⁴⁵ Furthermore, the Court assumed that Congress was well aware of the eleventh amendment doctrine when it enacted the EHA and would have demonstrated its intention to abrogate states' immunity if so resolved.⁴⁶ Absent a "perfect" confidence in Congress' intention to abrogate, the Court will not construe a federal statute to lift eleventh amendment protection.⁴⁷

In the Court's judgment, the EHA's specific references to various duties and obligations imposed upon the states simply underscore the important function the states serve in carrying out the EHA mandates.⁴⁸ The Court recognized that it is possible, under such circumstances, to infer that states would be logical defendants;

38. See *supra* note 18 and accompanying text for procedural safeguard provision.

39. *Muth*, 109 S. Ct. at 2402.

40. 20 U.S.C. § 1415(e)(4)(G).

41. *Muth*, 109 S. Ct. at 2402. The Court also noted that the amendment applied only to attorneys' fees and was not directly applicable to a suit for tuition reimbursement. *Id.*

42. *Id.*

43. *Muth v. Central Bucks School Dist.*, 839 F.2d 113, 128 (3d Cir. 1988). For specific references to EHA legislative history, see *Muth v. Smith*, 646 F. Supp. 280 (E.D. Pa. 1986).

44. *Dellmuth v. Muth*, 109 S. Ct. 2397, 2401 (1989).

45. *Muth*, 109 S. Ct. at 2402.

46. *Id.* at 2401.

47. *Id.* at 2401-02. Interestingly, the Court cites *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974), as analogous support for the proposition that a federal statute will not be construed to prevent judicial review of constitutional challenges without clear and convincing evidence of congressional intent. *Id.* Yet, the *Johnson* Court reached that conclusion after examining the legislative history of the 1970 amendment to the Veterans' Readjustment Benefits Act of 1966 for evidence of Congress' intent. *Johnson*, 415 U.S. 361 (1974). This seems incongruous in light of the Court's statement regarding the irrelevancy of legislative history.

48. *Muth*, 109 S. Ct. at 2402.

however, such an inference is not evidence of Congress' intent to make the states vulnerable to suit in federal court.⁴⁹ Resolved in its plan to abandon legislative history in favor of purely textual analysis, the Supreme Court concluded that the statutory language of the EHA lacked an unmistakably clear congressional intent to abrogate the states eleventh amendment sovereign immunity.⁵⁰

The *Muth* Court, in affirming its policy of purely textual statutory analysis, further narrowed the test for ascertaining congressional intent to abrogate state sovereign immunity without justification. The Court's decision to ignore the statute's legislative history in favor of a textual statement was incorrect for three reasons. First, it effectively frustrated the purpose of the EHA. Second, the Court failed to establish guidelines for determining what statutory language would sufficiently indicate an expression of congressional intent to abrogate sovereign immunity. Third, the Court relied on a doctrine of sovereign immunity derived from the eleventh amendment using the same principle of interpretation the Court eschewed in *Muth*.

The Court's decision to disregard legislative history undermines the goal of the EHA. Congress initiated the Education of the Handicapped Act upon finding that more than half of the eight million handicapped children in the United States lacked an equal educational opportunity.⁵¹ Realizing that the states were unable to bear the responsibility of providing appropriate educational services without financial support, Congress enacted the EHA to provide federal assistance to the states and to assure handicapped children equal protection of the law.⁵² Additionally, the congressional mandate assured handicapped children an enforceable right to a free appropriate public education.⁵³ However, the *Muth* Court's determination that the eleventh amendment immunized the states from suit in federal court dilutes the enforcement provision of the EHA.

While the EHA is not the sole avenue for judicial review,⁵⁴ par-

49. *Id.*

50. *Id.*

51. 20 U.S.C. § 1400(b)(1)-(9). Congress' findings reflect the number of handicapped children as of the 1975 enactment of the EAHCA, the earlier version of the EHA. *Id.*

52. *Id.*

53. See, e.g., *Smith v. Robinson*, 468 U.S. 992, 1010 (1984) (Congress intended that handicapped children have access to courts to enforce EHA entitlements); *Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley*, 458 U.S. 176 (1982) (discussion of the right to an appropriate education in light of EHA legislative history). See also S. REP. NO. 168, 94th Cong., 1st Sess. 2, reprinted in U.S. CODE CONG. & AD. NEWS 1425, 1430-33 (legislative declaration that right to equal education opportunity no longer an unenforceable goal).

54. The 1986 amendments to the EHA provide in part: "nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available

ents or guardians must now take a more circuitous and limited route through other statutes and constitutional provisions to assert state violations of the EHA.⁵⁵ Not only are the alternatives more restrictive in terms of the type of claim a party may assert, but also with respect to available relief.⁵⁶ Various remedies, including tuition re-

under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal Statutes protecting the rights of handicapped children and youth" 20 U.S.C. § 1415(f).

55. There are two other federal statutes offering handicapped children a judicial remedy. One prohibits persons acting under color of law from depriving a citizen of rights secured by the Constitution and laws. 42 U.S.C. § 1983 (1982). The other, section 504 of the Rehabilitation Act of 1973, prohibits discrimination against handicapped persons in any federal or federally assisted program. 29 U.S.C. § 794 (1982). See Wegner, *Educational Rights of Handicapped Children: Three Federal Statutes and an Evolving Jurisprudence. Part I: The Statutory Maze*, 17 J. LAW & ED. 387 (1988) (comparing the EHA, § 1983, and § 504).

56. Section 1983 does not grant substantive rights but acts as a vehicle for asserting rights found elsewhere, such as fourteenth amendment due process and equal protection claims. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979). While § 1983 permits suits for damages brought against local governments and their employees sued in their individual capacity, government officials and employees performing discretionary functions may be afforded qualified immunity. See *Harlow v. Fitzgerald*, 457 U.S. 800, 806-08 (1982). See also *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975). Furthermore, § 1983 does not abrogate eleventh amendment immunity. *Edelman v. Jordan*, 415 U.S. 651 (1974). See also *Quern v. Jordan*, 440 U.S. 332, 338-45 (1979) (reaffirming *Edelman* holding). Therefore, § 1983 fails with respect to claims against officials for monetary relief where payment is exacted from state funds. *Edelman*, 415 U.S. at 677.

Courts have consistently held that tuition reimbursement is a form of retrospective relief barred by the eleventh amendment. *Gary A. v. New Trier High School Dist. No. 203*, 796 F.2d 940, 944 (7th Cir. 1986) (eleventh amendment immunizes state from suit for tuition reimbursement); *Meiner v. Missouri*, 673 F.2d 969, 982 (8th Cir.), cert. denied, 459 U.S. 909 (1982) (tuition reimbursement barred by eleventh amendment as award for past breach of duty); *Ezratty v. Commonwealth of Puerto Rico*, 648 F.2d 770, 776 (1st Cir. 1982) (reimbursement barred under eleventh amendment); *Gerasimov v. Ambach*, 636 F. Supp. 1504, 1512-13 (E.D. N.Y. 1986) (relief paid from public funds barred); *Stemple v. Board of Educ. of Prince George's County*, 464 F. Supp. 258, 262 (D. Md. 1979) (reimbursement is relief for past breach of obligations). Thus, the handicapped litigant in a § 1983 action is limited to prospective relief where the state is the defendant.

Section 504 of the Rehabilitation Act focuses on the exclusion of handicapped individuals from programs, rather than the content of the programs. It pertains to more egregious conduct than the EHA. *Timms v. Metropolitan School Dist.*, 722 F.2d 1310, 1318 (7th Cir. 1983). As a result, parents must assert a significant denial of educational opportunity under a § 504 claim. Compare *Sanders v. Marquette Pub. Schools*, 561 F. Supp. 1361, 1368 (W.D. Mich. 1983) (§ 504 available to handicapped child denied an appropriate education). *John A. v. Gill*, 565 F. Supp. 372, 383-84 (N.D. Ill. 1983) (class of handicapped children allegedly denied appropriate education by reason of procedural delays held to have sufficient claim under § 504); *Patton v. Dumpson*, 498 F. Supp. 933, 936-41 (S.D. N.Y. 1980) (private right of action recognized under § 504 where child denied education solely on basis of his handicap) with *Powell v. Defore*, 699 F.2d 1078, 1081-82 (11th Cir. 1983) (exclusion of learning disabled child from regular classroom failed to show § 504 discrimination against an otherwise qualified individual) and *Monahan v. State of Neb.*, 687 F.2d 1164, 1170-71 (8th Cir. 1982) (bad faith or gross misconduct prerequisite for handicapped individual's § 504 claim).

Some courts have recognized a cause of action under § 504 for the discriminatory

imbursement, compensatory relief, and injunctive and declaratory relief, are essential in affording parents meaningful access to the courts to protect a handicapped child's rights.⁵⁷

The *Muth* Court correctly acknowledged the significant responsibilities the states assume under the EHA, yet failed to recognize that, in many situations, the state is the exclusive provider of services to handicapped children.⁵⁸ Granting the states an eleventh amendment shield renders the EHA potentially useless in such circumstances. If, as some courts have found, Congress successfully incorporated relevant state substantive and procedural law into the

or unequal treatment of handicapped individuals. See, e.g., *Students of Calif. School for the Blind v. Honig*, 736 F.2d 538, 547 (9th Cir. 1984), *vacated as moot*, 471 U.S. 148 (1985) (§ 504 required same safety standards in school for the blind as in regular schools). Other courts have seen no need to provide handicapped children with more than a free appropriate education). See, e.g., *Alamo Heights Indep. School Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1163 (5th Cir. 1986) (school district not required to provide handicapped child with a summer program offered to non-handicapped children where such was not included in child's IEP).

The 1986 amendments to the Rehabilitation Act abrogated the states' eleventh amendment immunity making damage awards available for state violations of the statute. Pub. L. No. 99-506, Title X, §1003, 100 Stat. 1845 (codified at 42 U.S.C. § 2000d-7 (Supp. 1989)). See *infra* note 67 and accompanying text for discussion of legislation in response to *Atascadero*. However, the Court has held that suits filed under section 504 seeking damage awards must allege intentional discrimination. *Guardians' Ass'n. v. Civil Service Comm.*, 463 U.S. 582 (1983). Assuming this requirement still applies, notwithstanding the 1986 amendments, handicapped claimants have yet another bridge to cross in order to access section 504 remedies for violations of rights guaranteed by the EHA.

57. Relief in the form of tuition reimbursements is critical to parental recovery for expenses incurred by necessarily placing a handicapped child in a private facility. *Burlington School Comm. v. Department of Educ.*, 471 U.S. 359, 370 (1985). See Wegner, *Educational Rights of Handicapped Children: Three Federal Statutes and an Evolving Jurisprudence. Part II: The Statutory Maze*, 17 J. LAW & ED. 625, 682-97 (1988) (examination of the substantive rights and remedies accorded handicapped children under § 1983, § 504, and the EHA). Compensatory relief is essential to counteract the adverse effect on children resulting from a school system's failure to provide mandated services. See Comment, *Compensatory Educational Services and the Education for All Handicapped Children Act*, 1984 WIS. L. REV. 1469. Declaratory and injunctive relief can be used to fix responsibility and to bring school districts into conformity with statutory requirements. For a treatise on remedies, see D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* (1973).

58. In many cases, the states operate special education facilities, such as schools for the deaf, blind, mentally retarded, and developmentally disabled, independently of local school districts. Brief of the American Civil Liberties Union, American Council for the Blind, American Society for Deaf Children, Children's Defense Fund, Disability Rights Education and Defense Fund, Mental Health Law Project, National Ass'n of Protection and Advocacy Systems, National Mental Health Consumers Ass'n, United Cerebral Palsy Ass'n, Inc., United Cerebral Palsy of N.Y.C., and Western N.Y. Disability Law Coalition as *amici curiae* at 8, *Dellmuth v. Muth*, 109 S. Ct. 2397 (1989) (No. 87-1855). Congress, recognizing that the states would frequently be direct providers of handicapped services, incorporated directives to that end in provisions of the EHA. 20 U.S.C. § 1411(c)(1)(2). The EHA further mandates that where a local agency has either failed to provide programs or is unwilling or unable to do so, the state must step in to assure that handicapped children receive a free appropriate education. 20 U.S.C. § 1411(c)(4)(A)(B), § 1414(d).

provisions of the federal statute,⁵⁹ a state not consenting to suit in its own courts may successfully evade judicial sanctions for violations of its own, as well as federal statutory law. Although there are mechanisms within the EHA and other administrative agencies to monitor and resolve problems of non-compliance,⁶⁰ they offer private citizens little chance for challenging administrative decisions.⁶¹ Without access to the courts, the aggrieved parents of handicapped children have limited enforcement power against a state violation of their EHA endowed rights.

The *Muth* Court confirmed its holding in *Atascadero* and sought to remove any doubt regarding the Court's test for finding congressional intent to abrogate sovereign immunity. Not only must Congress express its intention to abrogate in the "unmistakable language of the statute itself,"⁶² its expression must be "unequivocal and textual."⁶³ The Court did not explain what language would constitute the requisite clear statement of congressional intent.⁶⁴ Nor did the Court explain how a more restrictive test advances its concern for maintaining a constitutional balance between the states and the federal government.⁶⁵ Consequently, both Congress and prospec-

59. See *David D. v. Dartmouth School Comm.*, 775 F.2d 411, 419 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986) (Congress intertwined federal and state standards into the EHA); *Town of Burlington v. Department of Educ. of Mass.*, 736 F.2d 773, 785 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985) (state substantive law in compliance with the EHA supplements the Act).

60. The Federal Office of Special Education Programs reviews state plans for implementing the EHA, investigates complaints, and seek resolutions through administrative cease and desist orders, by withholding funds, or initiating judicial proceedings. See Wegner, *supra* note 57, at 690 (outlining administrative alternatives). Another administrative alternative for resolving complaints is available through state educational agencies pursuant to federal requirements governed by the Education Department General Administrative Regulations ("EDGAR"). *Id.* at 690-91. A third agency, the Office of Civil Rights, United States Department of Education, monitors programs, resolves complaints, and refers cases for judicial review where necessary. *Id.* at 691-92.

61. *Salvador v. Bennett*, 800 F.2d 97 (7th Cir. 1985) (no private right of action against the Secretary of Education's administrative act where not otherwise provided for by law); *Georgia Ass'n. of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1572-73 (11th Cir. 1983), *cert. denied*, 469 U.S. 1228 (1985) (no individual right to challenge state plan once adopted).

62. *Atascadero*, 473 U.S. at 243.

63. *Muth*, 109 S. Ct. at 2401.

64. The Court reaffirmed the position it took in *Atascadero* that a "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Id.* at 2402. Yet Justice Scalia, in his dissenting opinion, made it plain that the Court's "reasoning does not preclude congressional elimination of sovereign immunity in statutory text that clearly subjects states to suit for monetary damages, though without explicit reference to state sovereign immunity or the Eleventh Amendment." *Id.* at 2403.

65. The Court's concern for the constitutional balance has been expressed many times since its decision in *Marbury v. Madison* establishing judicial review. See H. BALL, CONSTITUTIONAL POWERS: CASES ON THE SEPARATION OF POWERS AND FEDERALISM (1980) (examination of legal and political relationships between the three branches of

tive litigants confront new problems.

At the time Congress enacted the EHA, it was unaware of the Court's current rules of statutory interpretation.⁶⁶ Congress is now faced with correcting inadequacies of past legislation where it originally intended to subject the states to federal court jurisdiction.⁶⁷ Additionally, Congress is challenged to improve its draftsmanship in designing future legislation to ensure that its legislative will prevails.⁶⁸ Short of using explicit language referring to the eleventh amendment or sovereign immunity, it is unclear what language would meet the judicial standard. Prospective litigants, unable to rely on previous standards of statutory construction, must develop new strategies for enforcing federal law against the states.⁶⁹

Finally, the *Muth* Court's decision that legislative history is irrelevant to a judicial inquiry into congressional intent conflicts with the Court's reliance on legislative history in developing its eleventh amendment doctrine. Whether the Court's interpretation of the eleventh amendment is rooted in a theory of jurisdictional limitation, sovereign immunity, or state sovereignty,⁷⁰ the fact remains

federal government and the problems of distribution of power between central and state governments). While the Court's concern has remained consistent, its test for weighing the federal-state balance has narrowed over the years. For a progression of cases dealing with the Court's balancing tests, see *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909) (test for Congressional intent found in the "most express language or by such overwhelming implications from the text as to leave no room for any other reasonable construction"); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (the clear and manifest intent of Congress may be evidenced in several ways including reasonable inference); *Employees of the Dept. of Pub. Health and Welfare of Mo. v. Department of Pub. Health and Welfare of Mo.*, 411 U.S. 279, 285 (1973) (legislative history failed to show Congressional intent to subject state to federal jurisdiction); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (unequivocal expression of congressional intent required to abrogate state immunity). Presumably, the Court's strong interest in the principles of federalism have been served by all its various tests.

66. *Muth*, 109 S. Ct. 2397, 2406 (1989) (Brennan, J., dissenting). See *Atascadero*, 473 U.S. 234, 255 n.7 (1985) (Brennan, J., dissenting) (the Court changed the rules for lawmaking after Congress had already enacted legislation).

67. Congress has previously amended legislation to correct judicial misinterpretation of legislative intent. The Handicapped Child Protection Act of 1986 was enacted in response to the Court's holding in *Smith v. Robinson*, 468 U.S. 992 (1984) that the EHA was the exclusive avenue for equal protection claims and that attorneys' fees unavailable in the EHA could not be obtained through § 1983 or § 504. H.R. REP. NO. 296, 99th Cong., 1st Sess., at 4 (1985). The amendments to the Rehabilitation Act expressly abrogating states' eleventh amendment immunity was enacted as a response to the Court's decision in *Atascadero*. 132 CONG. REC. S15105 (Oct. 3, 1986) (official report of the Department of Justice).

68. See *supra* note 65 for cases discussing legislative draftsmanship.

69. For an analysis of the effect of the *Atascadero* decision on existing federal and state statutes highlighting the enforcement language of the federal statutes and the waiver of immunity language in state statutes, see McClintock, *The Atascadero Rule: New Hurdle for Plaintiffs Suing States in Federal Court—A Practical Guide for Courts, Practitioners, Congress, and States*, 21 GONZ. L. REV. 47 (1985-86).

70. See Brown, *State Sovereignty Under the Burger Court—How the Elev-*

that the impact and amplification of the amendment has extended beyond the unmistakable language of the amendment itself.⁷¹

In *Hans v. Louisiana*,⁷² the Court determined that although the eleventh amendment, on its face, did not bar a citizen's suit against his own state in federal court, permitting such a suit would put a strain on the Constitution that the framers of the amendment never envisioned.⁷³ As Justice Marshall explained in *Employees of the Department of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri*,⁷⁴ prior to ratification of the Constitution, the framers understood that Article III limited federal judicial power.⁷⁵ The eleventh amendment was adopted to restore that original perception and to overturn the decision in *Chisholm v. Georgia*, which considered only the plain language of Article III.⁷⁶

Notwithstanding the narrowness of the eleventh amendment language, the Court has continued to develop its various theories of interpretation and application, supported by the amendment's underlying spirit of federalism.⁷⁷ However, the spirit and principles attributed to the eleventh amendment are found not in the language of the amendment, but in the legislative history of both the amendment and articles of the Constitution, the inferential reasoning drawn from the text, and the overall structure of the document.⁷⁸

Yet, the same canons of construction⁷⁹ applied to the eleventh amendment were useless in *Muth*. The Court specifically rejected

enth Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon, 74 GEO. L.J. 363 (1985), for a discussion of doctrinal differences in the theories of eleventh amendment jurisprudence.

71. See *supra* note 3 and accompanying text for a discussion of judicial expansion of the eleventh amendment.

72. 134 U.S. 1 (1890).

73. *Id.* at 15.

74. 411 U.S. 279 (1973) (Marshall, J., concurring).

75. *Id.* at 291-92.

76. *Id.* at 292.

77. *Id.* See *Welch v. Texas Dept. of Highways and Pub. Transp. Dept.*, 483 U.S. 468, 480 (1987) (Court has faithfully applied principles of eleventh amendment doctrine in developing case law). But see *Jackson, supra* note 3 (doctrinal underpinnings of eleventh amendment inconsistent with Court's development of eleventh amendment law).

78. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (Blackmun, J., dissenting) (the Court's holding in *Hans* broadened the scope of the eleventh amendment by reference to principles that inform the language, drawing inferences for words not present in the eleventh amendment). For a discussion of the history of the eleventh amendment and its subsequent interpretation and application, see 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 (1983); Gibbons, *supra* note 3; Jackson, *supra* note 3.

79. For an explication of the principles of statutory construction, see F. McCaffrey, *STATUTORY CONSTRUCTION* (1953); SUTHERLAND *STATUTORY CONSTRUCTION* (N. Singer 4th ed. 1985).

reliance on legislative history for finding congressional intent.⁸⁰ Nor would the Court permit reasonable inferences drawn from the text of the EHA to support a finding of legislative purpose to abrogate eleventh amendment immunity, regardless of its appreciable strength.⁸¹ The comprehensive structure of the EHA was of no value in ascertaining intent.⁸² Given the Court's statement that a determination of congressional intent is of paramount importance in interpreting statutory objectives,⁸³ it is paradoxical that the Court restricts the means available for achieving its goal.

CONCLUSION

In *Muth*, the Court reinforced its policy that unless Congress unquestionably expresses its legislative intent so that it is ascertainable in the precise and pertinent language of the statute itself, the Court will grant states the protection of the eleventh amendment. The impact of this policy extends to the Congress, the courts, the states, and the citizenry, but not alike. The Congress must draft and redraft to ensure its legislative objectives pass judicial muster. The federal courts are impeded in protecting citizens' rights embodied in federal law that fails to pass the *Muth* litmus test. The states retain a growing degree of autonomy from judicial consequences for state violations of federal law. The citizens lose the availability of the courts to redress state wrongs and provide relief. What handicapped children are left with is the enigma of a guaranteed but unenforceable right granted under federal law. The *Muth* Court's policy pierces the legal shield of the very persons the legislation was designed to protect.

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80. *Dellmuth v. Muth*, 109 S. Ct. 2397, 2401 (1989).

81. *Id.* at 2402.

82. *Id.* at 2403 (Brennan, J., dissenting).

83. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (it is incumbent on the Court to determine Congress' intent); *Smith v. Robinson*, 468 U.S. 992, 1012 (1984) (crucial consideration for the Court is Congressional intent); *Board of Educ. of Hendrick Hudson School Dist. v. Rowley*, 458 U.S. 176, 190 (1981) (Court would not meet its obligation to construe Congressional intent without examining statutory language and legislative history).