No. 98-2096

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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DAVID POWELL, et al.,

Plaintiffs-Appellants

v.

THOMAS J. RIDGE, et al.,

Defendants-Appellees

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

_____

# BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS AND URGING REVERSAL

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## INTEREST OF THE UNITED STATES

This case presents the issue whether a person may enforce valid regulations promulgated by the U.S. Department of Education to implement Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. Because of the inherent limitations on administrative enforcement mechanisms and on the litigation resources of the United States, the United States has an interest in ensuring that both Title VI and its implementing regulations may be enforced in federal court by private parties acting as "private attorneys general." Such private suits are critical to ensuring optimal enforcement of the mandate of Title VI and the regulations. See Cannon v. University of Chicago, 441 U.S. 677, 705-706 (1979) (permitting private citizens to sue under Title VI is "fully consistent with -- and in some cases even necessary to

-- the orderly enforcement of the statute").

This appeal also involves the construction of regulations issued by the Department of Education. The Department of Education disburses over a half a billion dollars in federal funds each year to Pennsylvania for education programs and is responsible for administrative enforcement of Title VI regulations against fund recipients. 42 U.S.C. 2000d-1. The Department of Justice coordinates the enforcement of Title VI by executive agencies. See Executive Order No. 12250, 45 Fed. Reg. 72,995 (1980). The Department of Justice also has authority to enforce Title VI in federal court upon a referral by an agency that extends federal assistance to an education program or activity. This appeal may thus significantly affect both Departments' enforcement responsibilities. The United States participated as amicus curiae in the district court.

## STATEMENT OF THE ISSUES

The United States will address the following questions:

1. Whether private plaintiffs may sue a recipient of federal funds, under 42 U.S.C. 1983 or through an implied private right of action, to enforce the requirement, embodied in regulations implementing Title VI, that recipients not administer their programs in a manner to cause unjustified discriminatory effects on the basis of race.

2. Whether plaintiffs' allegations state a claim under the Title VI regulations.

## STATEMENT OF THE FACTS

According to the allegations of the complaint, which at this stage must be taken as true and read in the light most favorable to plaintiffs, Pennsylvania contains 500 school districts (J.A. 37-38 ¶ 53). Pennsylvania has delegated to the Philadelphia School District its responsibility to educate school-age children residing in the city (J.A. 24 ¶ 20). Philadelphia educates a predominantly non-white student body, and in fact educates nearly half of the non-white students in Pennsylvania (J.A. 25 ¶¶ 23-24). Pennsylvania receives federal financial assistance for education (J.A. 28-30 ¶¶ 34-35). Pennsylvania has established a system of funding public education that depends upon a combination of locally generated revenues authorized by the Commonwealth (primarily property taxes), state funds, and federal funds (J.A. 35 ¶ 47). We will discuss plaintiffs' remaining allegations at appropriate points in the brief.

## SUMMARY OF ARGUMENT

A regulation promulgated by the Department of Education to implement Title VI prohibits recipients of federal funds from using criteria or methods of administering their programs that have the effect of subjecting individuals to discrimination because of their race, color, or national origin. This valid substantive regulation is enforceable through 42 U.S.C. 1983. There is thus no need to resolve the question -- addressed by this Court in Chester Residents Concerned for Quality Living v.

Seif, 132 F.3d 925 (1997), vacated as moot, 119 S. Ct. 22 (1998) -- whether it can also be enforced through an implied private right of action. In any event, Chester Residents correctly implied such a private right of action, and should be reinstated as the law of this circuit. Permitting private plaintiffs to enforce the discriminatory effects regulation is consistent with the statutory provisions providing for administrative review of recipients' activities, and will further the purposes of Title VI by assuring that persons can seek effective redress for their injuries.

The district court erred in holding that plaintiffs' complaint failed to allege a violation of the Title VI regulations. The overarching allegations of the complaint are sufficient to meet the short, plain statement of the claim required at this early stage. Plaintiffs' complaint contains claims that require further investigation on remand. First, that the defendants' actions were the result, at least in part, of purposeful race discrimination. Second, that the current funding formula uses factors that unjustifiably shift Commonwealth funding away from school districts with larger minority populations. Third, that the funding system as a whole has unjustified discriminatory effects on school districts with high minority enrollments. Under the generous standard by which a complaint is reviewed on a motion to dismiss, the district court erred in dismissing this action.

ARGUMENT

I

PLAINTIFFS MAY ENFORCE THE DISCRIMINATORY EFFECTS STANDARD CONTAINED IN THE DEPARTMENT OF EDUCATION'S TITLE VI IMPLEMENTING REGULATIONS

Congress enacted 42 U.S.C. 2000d, as Title VI of the Civil Rights Act of 1964. Section 2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 2000d-1 provides that "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity * * * is authorized and directed to effectuate the provisions of section 2000d of this title * * * by issuing rules, regulations, or orders of general applicability." 42 U.S.C. 2000d-1. To coordinate Title VI implementation, compliance, and enforcement activities of Federal agencies, Congress vested the President with the authority to approve all such regulations. Ibid. "Shortly after the enactment of Title VI, a Presidential task force produced model Title VI enforcement regulations specifying that recipients of federal funds not use 'criteria or methods of administration which have the effect of subjecting individuals to discrimination.'" Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 618 (1983) (Marshall, J.) (quoting 45 C.F.R. 80.3(b)(2) (1964)). Following the promulgation of the initial regulations, "every Cabinet department and about 40 federal agencies adopted Title VI

regulations prohibiting disparate-impact discrimination." Guardians, 463 U.S. at 592 n.13 (White, J.).

Both counts of plaintiffs' complaint alleged that defendants violated 34 C.F.R. 100.3(b)(2). That provision prohibits the "utiliz[ation of] criteria or methods of administration [by recipients] which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." This discriminatory effects regulation is within the scope of the enabling statute. Although the Supreme Court's decision in Guardians is comprised of six separate opinions, the proposition that regulations prohibiting discriminatory effects are valid Title VI implementation regulations clearly garnered the approval of a majority of the Court. See 463 U.S. at 584 n.2 (White, J.), 623 n.15 (Marshall, J.), 642-645 (Stevens, Brennan, Blackmun, JJ.). In Alexander v. Choate, 469 U.S. 287, 293 (1985), a unanimous Court confirmed that "actions having an unjustifiable disparate impact on minorities [can] be redressed through agency regulations designed to implement the purposes of Title VI."

C. Title VI Discriminatory Effects Regulations May Be Enforced Through 42 U.S.C. 1983

Count II of the complaint sought to enforce this valid regulation pursuant to 42 U.S.C. 1983. In order to seek redress through Section 1983, a plaintiff must assert that a "person" acting under the color of state law violated a "right" secured by federal law. See Blessing v. Freestone, 117 S. Ct. 1353, 1359 (1997). Once a plaintiff identifies a federal right, a "presumption" of enforcability under Section 1983 arises, that

can only be rebutted "if Congress 'specifically foreclosed a remedy under § 1983.'" Id. at 1360.

1. The district court dismissed Count II on the ground that state officials sued in their official capacities are not "persons" for purposes of Section 1983. While that is true when state officials are being sued for damages, the Supreme Court has made clear "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 n.10 (1989) (citations omitted). Thus, the district court's dismissal of Count II cannot be upheld on that ground.

2. In the district court, defendants raised a number of alternative arguments why the regulations could not be enforced through Section 1983, but none are persuasive. Federal substantive (also known as legislative) regulations have "the 'force and effect of law.'" Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979),[1/] and thus can create rights enforceable through

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[1/] A substantive regulation is a one that (1) is based on a delegation of an express grant of authority by Congress; (2) implements the statute; and (3) "affect[s] individual rights and obligations." Id. at 302-303. The effects regulations meet these requirements. First, Title VI contains a "delegation of the requisite legislative authority by Congress" to establish substantive regulations. Chrysler Corp., 441 U.S. at 304, 305 n.35. Second, a majority of the Justices in Guardians held that the effects regulations are a valid implementation of the statute. Third, the rules affect the "obligations" of fund recipients and the "rights" of persons Title VI protects. Although not expressly applying this test, a majority of the

(continued...)

Section 1983. See West Virginia Univ. Hospitals, Inc. v. Casey, 885 F.2d 11, 18 (3d Cir. 1989) ("valid federal regulations as well as federal statutes may create rights enforceable under section 1983"), aff'd on other grounds, 499 U.S. 83 (1991); Alexander v. Polk, 750 F.2d 250, 259 (3d Cir. 1984) (same); accord Loschiavo v. City of Dearborn, 33 F.3d 548, 551 (6th Cir. 1994), cert. denied, 513 U.S. 1150 (1995); Samuels v. District of Columbia, 770 F.2d 184, 199-200 (D.C. Cir. 1985).

The discriminatory effects regulation, like the statute it implements, is intended to benefit plaintiffs. See Cannon v. University of Chicago, 441 U.S. 677, 694 (1979). The plain language of the regulation makes clear that the requirement is mandatory. See 34 C.F.R. 100.3(b)(2). Finally, courts are competent to enforce a discriminatory effects standard under Title VI. See, e.g., NAACP v. Medical Ctr., Inc., 657 F.2d 1322 (3d Cir. 1981) (en banc); see also Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3rd Cir. 1977) (adjudicating discriminatory effects claim under Fair Housing Act), cert. denied, 435 U.S. 908 (1978). These three conditions are sufficient to create a "right" enforceable under Section 1983. See Blessing, 117 S. Ct. at 1359.

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[1/](...continued)
Justices in Guardians viewed the effects regulations promulgated under the statute to be substantive regulations. See 463 U.S. at 643 (Stevens, Brennan, Blackmun, JJ.) (regulations "have the force of law"), 611 n.5 (Powell, Burger, Rehnquist, JJ.) (discussing agencies' "lawmaking power"), 613-615 (O'Connor, J.) (analyzing regulations as "legislative regulations" that "hav[e] the force of law").

A majority of the Justices in Guardians clearly thought that the disparate effects regulations were enforceable through Section 1983. Justice Stevens, writing for himself and two others, would have granted plaintiffs relief under Section 1983 without deciding whether there was also a private right of action to enforce the regulations. See 463 U.S. at 638 n.6, 645 n.18 (Stevens, Brennan, Blackmun, JJ.). Justice Powell, writing for himself and Chief Justice Burger, expressed the opinion that the only means of enforcing the regulations would be through Section 1983. Id. at 608 n.1;[2/] see also Larry P. v. Riles, 793 F.2d 969, 986 (9th Cir. 1984) (Enright, J., concurring in part) ("the Title VI regulations in Guardians Association were enforced pursuant to a suit under 42 U.S.C. § 1983").

3. Because Title VI does not expressly limit Section 1983 actions, defendants must make the "difficult showing that allowing § 1983 actions to go forward in these circumstances 'would be inconsistent with Congress' carefully tailored scheme.'" Blessing, 117 S. Ct. at 1362. Defendants argued in the district court that the statutory provision providing for agency enforcement of the regulations through fund cut-off and

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[2/] Justice Powell and Chief Justice Burger's rejection of an implied private right of action to enforce the regulation is consistent with their position that Title VI itself could not be enforced through a private right of action, id. at 608-610, a position that six other Justices and this Court have firmly rejected. Id. at 594-595 (White, Rehnquist, JJ.), 625-626 (Marshall, J.), 635-636 (Stevens, Brennan, Blackmun, JJ.); NAACP v. Medical Ctr., Inc., 599 F.2d 1247, 1250 n.10 (3d Cir. 1979). Thus, Justice Powell's unsupported statement on this issue is entitled to little weight if this Court elects to revisit the implied right of action issue discussed infra.

other means precluded private enforcement through Section 1983. But this Court rejected a similar claim in Casey, explaining that empowering a federal agency to cut-off funds "gives no indication" of Congress' intent "to supplant a section 1983 remedy." 885 F.2d at 22. The Supreme Court has reached the same conclusion in its most recent Section 1983 cases. See Blessing, 117 S. Ct. at 1363 (so holding and collecting cases).[3/]

Not surprisingly, this Court has permitted plaintiffs to invoke Section 1983 to enforce regulations under schemes patterned on Title VI. In W.B. v. Matula, 67 F.3d 484 (1995), this Court held that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and its implementing regulations could be enforced through Section 1983. Id. at 494. Given that Section 504 incorporates the "remedies and procedures" of Title VI, 29 U.S.C. 794a(a)(2), there is no reason for a different result under Title VI and its regulations.[4/]

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[3/] In the only two cases in which the Court has found a remedial scheme comprehensive enough to displace the Section 1983 remedy, Congress had created express private rights of actions that a plaintiff could invoke. See Blessing, 117 S. Ct. at 1362-1363. Here, by contrast, although anyone may file a complaint with the administrative agency alleging a violation of the regulations, the complainant is not a party to (and often times is not a participant in) the administrative proceedings. See Cannon, 441 U.S. at 707 n.41.

[4/] In Matula, this Court noted that Congress had responded to the Supreme Court's decision in Smith v. Robinson, 468 U.S. 992 (1984) -- which had held that Section 504 claims involving education for children covered by the Individuals with Disabilities Education Act (IDEA), as well as some constitutional claims brought under Section 1983, were precluded by the express right of action Congress created under IDEA -- by enacting 20 U.S.C. 1415(f), which provided that nothing in IDEA "shall be

(continued...)

4. Defendants also suggested in the district court that only the entity that receives the funds, not the officials who administer the funds sued in their official capacities, are appropriate defendants under Title VI's private right of action. They argued that permitting suits under Section 1983 to proceed against state officials sued in their official capacities would permit suits against defendants Congress did not intend to be liable.

But official-capacity suits are a pleading device for suing the entity for whom the official works. See Acierno v. Cloutier, 40 F.3d 597, 608 (3d Cir. 1994) (en banc) ("a suit against elected officials in their official capacit[ies] is functionally a suit against the government entity"). Thus, it is well-established in cases brought under Section 1983 that a plaintiff may name state or local officials in their official capacities as defendants in lieu of (or in addition to) the state or local entity itself. See Hafer v. Melo, 502 U.S. 21, 25 (1991); Kentucky v. Graham, 473 U.S. 159, 165 (1985); Gregory v. Chehi,

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[4/](...continued)
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 children and youth with disabilities." 67 F.3d at 494. That statute reversed the holding of Smith by providing that the express cause of action under IDEA was not intended to exclude reliance on other rights and remedies otherwise available, thus permitting a suit under Section 504 to enforce its provisions, and a suit under Section 1983 to enforce constitutional rights. But nothing in that statute affected the relationship between Section 504 and Section 1983. Thus, the holding of Matula that Section 504 rights can be enforced through Section 1983 cannot be distinguished from this case on the basis of Section 1415(f).

843 F.2d 111, 120 (3d Cir. 1988). The device evolved as a means of circumventing sovereign immunity limitations imposed on suits directly against government entities. See, e.g., Ex parte Young, 209 U.S. 123 (1908); United States v. Lee, 106 U.S. 196 (1882). In such suits, even though officials are the nominal defendants, the entity is the real party in interest, and all the injunctive relief runs against the entity. For example, if Governor Ridge were to leave office, he would no longer be a party to the lawsuit in his official capacity; his successor would be automatically substituted as a party. See Fed. R. App. P. 43(c)(1). Thus, under the case law, "a plaintiff need not join the governmental unit itself as a defendant to impose liability against it, but may sue the individual official in his official capacity, so long as the governmental unit the official represents is given notice and an opportunity to be heard." Gegenheimer v. Galan, 920 F.2d 307, 310 (5th Cir. 1991).

There is no reason why this pleading device cannot be used in cases involving Title VI. Courts have often applied the official capacity suit outside the realm of Section 1983. Thus, in Balgowan v. New Jersey, 115 F.3d 214 (1997), this Court permitted plaintiffs to sue a state official in his official capacity for a declaratory judgment under the Fair Labor Standards Act when the suit could not proceed against the state in its own name. See also Welch v. Lang, 57 F.3d 1004, 1010-1011 (11th Cir. 1995) (treating suit against officials sued in official capacity as suit against entity under Equal Pay Act and

Title VII); Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451 n.2 (5th Cir. 1994) (same under Title VII); Riordan v. Kempiners, 831 F.2d 690, 694-695 (7th Cir. 1987) (Posner, J.) (same under Equal Pay Act).

In Matula, this Court approved suing officials in their official capacities under Section 504, a statute modeled on Title VI. Matula involved a suit against school officials in their individual and official capacities. This Court held that "claims against defendants in their official capacities are equivalent to claims against the government entity itself," 67 F.3d at 499, and specifically noted that plaintiffs' failure to name the entity as a defendant did not prevent them from maintaining the action. Id. at 499 n.8. The Fifth Circuit has also specifically so held under Section 504, see Brennan v. Stewart, 834 F.2d 1248, 1251-1252 (5th Cir. 1988); Helms v. McDaniel, 657 F.2d 800, 806 n.10 (5th Cir. 1981), cert. denied, 455 U.S. 946 (1982), and many other courts of appeals have permitted Title VI actions to proceed against state officials in their official capacities as a matter of course. See, e.g., Fuller v. Rayburn, 161 F.3d 516, 518 (8th Cir. 1998).

The Eleventh Circuit is the only court of appeals that has expressed a view to the contrary, but its jurisprudence on the question has been inconsistent. Consistent with Matula, the Eleventh Circuit held in Lussier v. Dugger, 904 F.2d 661, 670 n.10 (1990), that a suit under Section 504 could proceed against state officials sued in their official capacities. However, in

Floyd v. Waiters, 133 F.3d 786, 789 (11th Cir.), vacated and remanded, 119 S. Ct. 33 (1998), the court held that only entities, and not officials in their official capacities, can be sued under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., another statute patterned on Title VI. Floyd did not explain why the general rule that official-capacity suits are an appropriate means of bringing suit against an entity was inapplicable to Title IX cases, and could cite no appellate authority supporting its holding.[5/] Because it contains no persuasive analysis, and is contrary to Matula and the weight of authority, we urge this Court to reject Floyd and find that this action can proceed under Section 1983 against defendants in their official capacities.[6/]

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[5/] The Floyd court improperly relied on Smith v. Metropolitan School District, 128 F.3d 1014 (7th Cir. 1997), cert. denied, 118 S. Ct. 2367 (1998). Smith held that Title IX did not extend to suits against persons in their individual capacities. Id. at 1019. But Smith also held that those officials who had sufficient "administrative control" over a program could be sued in their official capacities, while finding that the defendant in that case did not have such control under state law. Id. at 1020. Accepting the allegations of the complaint in this case as true (J.A. 26-28 ¶¶ 27-30), no such impediment exists here. Smith also recognized, as we argue in the text, that a suit against an appropriate official in his official capacity is the equivalent of suing the entity itself for these purposes. Id. at 1021 n.3.

[6/] Pfeiffer v. Marion Center Area School District, 917 F.2d 779 (3d Cir. 1990), is not to the contrary. In Pfeiffer, this Court held that the private right of action under Title IX "subsumed" a Section 1983 claim to enforce the Equal Protection Clause. But the question whether a statute precludes a constitutional claim requires a different analysis from whether a statute contains a sufficiently comprehensive remedial scheme to preclude enforcement of the statutory rights through Section 1983. See Michael A. Zwibelman, Why Title IX Does Not Preclude Section 1983

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D. Persons Have A Private Right Of Action To Enforce The Discriminatory Effects Regulations

The district court held that Title VI's implied private right of action also encompasses suits for violations of the discriminatory effects regulation (App. 21-24). But if this Court holds that the regulation is enforceable through Section 1983, there is no reason to reach this issue. See Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 278, 283 n.20 (3d Cir. 1996) (finding suit permissible under Section 1983 made it unnecessary to decide if private right of action was available).

In any event, the district court properly followed this Court's decision in Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 937 (1997), vacated as moot, 119 S. Ct. 22 (1998), that "private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964." Although no longer binding circuit precedent, the Chester Residents opinion represents the

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[6/] (...continued)
Claims, 65 U. Chicago L. Rev. 1465, 1468-1470 (1998) (contrasting requirements). In any event, to the extent Pfeiffer could be read to hold that the existence of a private right of action under a statute can preclude reliance on Section 1983, it has been significantly narrowed by later cases. See Matula, 67 F.3d at 494 (holding that Section 504 may be enforced through a private right of action and Section 1983); Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 278-279 (3d Cir. 1996) (permitting suit to enforce IDEA rights under Section 1983 without resolving whether private right of action existed under the statute). Moreover, that reading of Pfeiffer would only be relevant if (contrary to defendants' contentions) there were a private right of action to enforce the regulation.

considered judgement of three appellate judges acting on what was, at that point, a live case and controversy. It thus retains its persuasive authority. See Polychrome Int'l Corp. v. Krigger, 5 F.3d 1522, 1534 (3d Cir. 1993); Finberg v. Sullivan, 658 F.2d 93, 100 n.14 (3d Cir. 1981) (en banc) ("Even if a decision is vacated, however, the force of its reasoning remains, and the opinion of the Court may influence resolution of future disputes."). In addition, as this Court noted in Chester Residents, its holding was consistent with every other court of appeals to consider the issue. Id. at 936-937 (collecting cases from the First, Second, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits). "In light of such an array of precedent, we would require a compelling basis to hold otherwise before effecting a circuit split." Wagner v. PennWest Farm Credit, ACA, 109 F.3d 909, 912 (3rd Cir. 1997).

No such "compelling basis" exists here. In the district court, defendants and intervenors raised three major challenges to this Court's reasoning in Chester Residents, none of which should be found persuasive. First, defendants and intervenors argued that because the regulations go beyond what is prohibited by the statute, they cannot be the basis for a private right of action. But valid regulations are often prophylactic in nature, see United States v. O'Hagan, 117 S. Ct. 2199, 2217 (1997), and the right of action implied from the statute can serve as a gateway for the enforcement of such regulations. See Angelastro v. Prudential-Bache Secs., Inc., 764 F.2d 939, 946-947 (3d Cir.),

cert. denied, 474 U.S. 935 (1985). "Such a conclusion was, of course, entirely consistent with the Court's recognition in J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964), that private enforcement of Commission rules may '[provide] a necessary supplement to Commission action.'" Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975) (emphasis added).

The courts of appeals have applied a "general rule" that a "private right of action may be implied from administrative regulations as well as from federal statutes, provided the private right of action may be inferred from the enabling statute." Lowrey v. Texas A & M Univ. Sys., 117 F.3d 242, 250 n.10 (5th Cir. 1997); see, e.g., Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 419-425 (D.C. Cir. 1992) (R.B. Ginsburg, J.); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 536 (9th Cir. 1984); Ashbrook v. Block, 917 F.2d 918, 926 (6th Cir. 1990). This is consistent with the common sense notion that "if Congress intended to permit private actions for violations of the statute, 'it would be anomalous to preclude private parties from suing under the rules * * *'" implementing the statute. Angelastro, 764 F.2d at 947. Chester Residents was correct in applying this well-established legal analysis to the regulation at issue.

Second, defendants and intervenors argued that Section 602 sets out the exclusive means for enforcing the regulations promulgated to enforce Section 601. But the procedural requirements in Section 602 are designed to limit the Executive

Branch -- which some in Congress believed had an undue advantage because of its greater resources and feared would capriciously deny needed funds to entities -- and were not directed at actions taken by the federal judiciary in suits by private persons after a full hearing on the merits. If defendants and intervenors were correct in their reading of the statute and legislative history, then the private right of action to enforce the prohibition on intentional discrimination (which the federal government also enforces through the procedures laid out in Section 602) would also be barred, a result clearly foreclosed by Cannon.

Third, defendants and intervenors attempted to diminish the import of the legislative history of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), discussed by this Court in Chester Residents. They characterized it as "subsequent legislative history," and noted that much of the discussion of the discriminatory effects regulations came from opponents of the Act's expanded coverage. But Chester Residents was following the well-accepted rule that when there is evidence that Congress understood that a private right of action was available under a statutory scheme, and amends the statute without demonstrating any intent to disapprove of such suits, it has ratified that private right of action. See Herman & MacLean v. Huddleston, 459 U.S. 375, 386 (1983); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 381-382 (1982); see also Cannon, 441 U.S. at 687 n.7; Lindahl v. OPM, 470 U.S. 768, 787-788 (1985). And while much of the discussion of private

enforcement of the discriminatory effects regulations came from opponents to the bill, "they are nevertheless relevant and useful, especially where, as here, the proponents of the bill made no response." Arizona v. California, 373 U.S. 546, 583 n.85 (1963).[7/]

Defendants and intervenors were unable to articulate a compelling basis for the district court to discard the holding of Chester Residents and reject the result reached by the other circuits that have addressed the question. Should this Court reach the issue, it should thus reaffirm the holding of Chester Residents.

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[7/] Intervenors also argued that the Section 602 procedures are needed to allow agencies to apply their expertise to the questions presented. But courts have gained proficiency in adjudicating disparate impact cases through experience with Title VII and Fair Housing Act cases. And when such specialized expertise is required, a court may request the United States to participate as amicus curiae or ask the relevant agency to initiate an investigation. Compare Cheyney State College Faculty v. Hufstedler, 703 F.2d 732, 737 (3d Cir. 1983) (agencies do not have "primary jurisdiction" over violations of Title VI), with NAACP, 599 F.2d at 1249-1250 (district court directed agency to review actions for compliance with Title VI), and Cannon, 441 U.S. at 688 n.8.

II

PLAINTIFFS' COMPLAINT STATES A CLAIM FOR VIOLATION OF THE DEPARTMENT OF EDUCATION'S TITLE VI REGULATIONS

A court may dismiss a complaint for a failure to state a claim only when it is certain that the allegations, and all the inferences fairly drawn from those allegations, cannot state a claim under any legal theory. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Applying this generous standard, plaintiffs' complaint should not have been dismissed at this stage.

A complaint need only contain "a short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). "Generally, under the liberal notice pleading practices in federal civil cases, a claimant 'does not have to set out in detail the facts upon which the claim for relief is based, but must merely provide a statement sufficient to put the opposing party on notice of the claim.'" Foulk v. Donjon Marine Co., 144 F.3d 252, 256 (3d Cir. 1998).

After surveying defendants' practices in funding public education in Pennsylvania, the complaint alleges that defendants' "funding policies and practices wrongfully discriminate against African-American, Hispanic, Asian and other minority students in the School District by utilizing criteria and methods that have had the foreseeable effect of subjecting such students to discrimination because of their race, color, or national origin, by disproportionately denying them necessary support for their education" (J.A. yy ¶ 73). The Department of Education's Title VI regulations proscribe "utiliz[ation of] criteria or methods of

administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." 34 C.F.R. 100.3(b)(2). The broad language of the regulations encompasses complaints regarding the "criteria or methods" of programs funding public education. See Campaign for Fiscal Equity, Inc. v. New York, 655 N.E.2d 661, 670 (N.Y. 1995).[8/] Plaintiffs' complaint has put defendants on notice of the circumstances that are involved in the claim, and has alleged that defendants' actions are in violation of federal law. Nothing more is required. See Frazier v. SEPTA, 785 F.2d 65, 66-67 (3d Cir. 1986) (federal rules permit "great generality" in stating the basis of plaintiff's claim); Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998). By purporting to look behind these allegations to divine plaintiffs' "actual" complaint, the district court prematurely and inappropriately terminated the litigation.

In their appellate brief, plaintiffs have identified several potential theories of liability under the Title VI regulations, each of which needs to be explored more fully on remand. We address them briefly to explain why plaintiffs' more specific allegations are also sufficient at this stage to support

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[8/] The Department of Education has made clear, in interpreting these Title VI regulations with reference to vocational education programs receiving federal assistance, that "[r]ecipients may not adopt a formula or other method for the allocation of Federal, State, or local vocational education funds that has the effect of discriminating on the basis of race, color, [or] national origin." 34 C.F.R. Pt. 101, App. B, Pt. III.B.

potential claims for violating the Title VI regulation.[9/]

A. Plaintiffs' Factual Allegations Support An Inference Of Intentional Discrimination In Violation Of The Title VI Regulation

Plaintiffs allege that defendants have in recent years persistently changed the state revenue formula so that each year, when the Commonwealth increases the amount of aid it distributes to local school districts, it provides a much smaller per capita increase in predominantly minority school districts than in predominantly white districts (J.A. 39-40 ¶¶ 56-61). Moreover, plaintiffs allege that the Commonwealth adopted these changes, which have reduced each year the share of state education funds distributed to minority districts, "with prior knowledge of [their] discriminatory consequences on students based on race" (J.A. 35, 40 ¶¶ 47, 59, 60). These allegations support an inference that the Commonwealth devised and changed its funding formula with the intent of causing disproportionate harm to predominantly minority districts, in violation of the Title VI prohibition on intentional discrimination.

As plaintiffs explain (Br. 35), based on these allegations, a factfinder would be entitled to infer that defendants took

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[9/] In the district court, the United States argued as amicus curiae that the "benefit" provided by the Commonwealth's financing system was an "education," see Lau v. Nichols, 414 U.S. 563, 568 (1974), and that defendants' failure to take into account the increased cost of providing such an education in predominantly minority school districts such as Philadelphia also stated a claim. Plaintiffs have expressly disavowed that argument (Br. 30), and thus we do not press it in this appeal. See DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 731 (3d Cir.) ("'amicus may not frame the issues for appeal'"), cert. denied, 516 U.S. 916 (1995).

these actions, which they were aware would harm predominantly minority districts, at least in part because of "purposeful" discrimination. See Hunter v. Underwood, 471 U.S. 222, 231-232 (1985) (in order to show intentional racial discrimination, plaintiffs need not show that racial minorities were the only class intended to be burdened, or that race was the only reason for the decision); cf. Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061 (3d Cir. 1996) (en banc) (disbelief of defendant's proffered reasons combined with other evidence permits factfinder to conclude that there was intentional discrimination), cert. denied, 117 S. Ct. 2532 (1997). As the facts alleged in the complaint could permit a factfinder to conclude that defendants engaged in intentional discrimination, this case should be remanded to give plaintiffs the opportunity to prove these allegations.

### B. Plaintiffs Have Alleged That The Commonwealth Provides Funds For Education In A Manner That Has A Discriminatory Impact On Predominantly Minority Districts In Violation Of The Title VI Regulation

Plaintiffs allege that predominantly minority school districts receive "less Commonwealth treasury revenues per student than school districts with higher white enrollments and the same level of poverty" (J.A. 37-38 ¶¶ 53-54). On its face that states a claim that the Commonwealth is distributing its funds to school districts in a manner that has a discriminatory impact on the basis of race.

Intervenors asserted in the district court that predominantly minority school districts in fact receive more

state revenues per pupil than many predominantly white school districts, and the district court appears to have relied in part on that assertion in finding that the complaint failed to state a claim (App. 32). If that factual assertion could properly be considered at this stage, which is doubtful, and if it is true, it would nevertheless not be dispositive. Plaintiffs allege that the state formula contains a factor that increases aid to less wealthy districts (J.A. 36 ¶ 49), and it follows that a minority district, if poor, might well receive more funding per capita than a white district that happened to be wealthy. They allege, however, that after controlling for poverty -- a factor the Commonwealth clearly deems relevant to funding -- the formula distributes less state revenues per capita to predominantly minority school districts than to predominantly white districts (J.A. 37-39 ¶¶ 53-55).

This disparity may be the result of one or more factors in the formula, perhaps as yet unknown to the plaintiffs, with an unjustified discriminatory impact on the basis of race.[10/] This case should be remanded so that plaintiffs have the opportunity

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[10/] The fact that plaintiffs did not identify the factors in the formula that have a disparate impact is not dispositive at this stage of the proceedings. See Menkowitz v. Pottstown Memorial Med. Ctr., 154 F.3d 113, 124 (3d Cir. 1998) ("a plaintiff generally need not explicitly allege the existence of every element in a cause of action if fair notice of the transaction is given and the complaint sets forth the material points necessary to sustain recovery"); cf. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657-658 (1989) (noting that discovery will normally be necessary to permit plaintiffs to identify with specificity causes of disparate impact).

to discover the causes of this disparity in state funds between predominantly minority districts and others, controlling for poverty.

Even if predominantly minority districts benefit from a subsidy for poverty, they may be disadvantaged on the basis of race if other factors in the formula unjustifiedly diminish the benefits received by minority populations. In Connecticut v. Teal, 457 U.S. 440, 455-456 (1982), for example, the Supreme Court held that a Title VII disparate impact suit about promotions was not barred simply because defendants could show that minorities ultimately were promoted at a higher rate than whites. Instead, the Court held that plaintiffs could challenge any portion of the promotions process that disparately excluded minorities from consideration. The Teal holding has been applied in Title VI disparate impact cases. See Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1420 (11th Cir. 1993); Meek v. Martinez, 724 F. Supp. 888, 905-906 (S.D. Fla. 1987) (finding that various components of funding distribution formula violated Title VI regulations). Indeed, this Court applied Teal in a case analogous to this one in Wilmore v. City of Wilmington, 699 F.2d 667 (1983). In Wilmore, plaintiffs challenged a promotions process under Title VII that ranked people based on the combined weight of three separate factors. In response to the district court's suggestion that the disparate impact of one factor could not be challenged because it was balanced out by the results of another, this Court explained "[t]his reasoning penalizes

minorities for doing well on one part of the exam and overlooks how much better their overall test results would have been if they had not been so handicapped on that part of the exam." Id. at 675.

Moreover, plaintiffs allege that the Commonwealth has the duty to provide each child with an education (J.A. 24 ¶ 20), that it has delegated that duty to each school district (J.A. 24 ¶ 20), and that it has authorized and encouraged school districts to raise monies locally through property taxes for that purpose (J.A. 35 ¶ 47). Plaintiffs also allege that the state system for funding education, taken as a whole, has a disparate impact on predominantly minority school districts (J.A. 37, 39, 40, 42-43 ¶¶ 52, 56, 60, 65, 66). At least in some circumstances, these allegations may state a claim under the disparate impact regulation.

Any policy which may have a disparate impact may be justified: even if plaintiffs do make that showing, defendants have an opportunity to demonstrate "substantial legitimate justification[s]" for the disparities. Elston, 997 F.2d at 1407. Finally, if there is a significant racial disparity and no legitimate justification, defendants will have the opportunity to propose a remedial plan. Lawyer v. Department of Justice, 117 S. Ct. 2186, 2193 (1997). Defendants are not required by Title VI to use any particular method of funding public education. By accepting federal funds, however, they have agreed not to administer their program in a manner that results in unjustified

discriminatory effects.

## CONCLUSION

This Court should hold that plaintiffs may sue to enforce the discriminatory effects regulation and have stated a claim under the regulations.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the Federal Rule of Appellate Procedure 32(7)(B). It contains 6,990 words.

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CERTIFICATE OF SERVICE

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