Chapter 5

Governmental Services and Programs

A. Introduction and Overview

Title II of the Americans with Disabilities Act (ADA) defines public services as programs of state or local governments and their departments, agencies, and other instrumentalities. 42 U.S.C. §12131(1). Programs operated or funded by the federal government are not subject to this section of the ADA. They are, however, subject to Sections 501 and 504 of the Rehabilitation Act. 29 U.S.C. §§791, 794.

Publicly operated programs include a wide range of activities. Unlike Title III, relating to private providers of accommodations for the public and which defines twelve specific categories of programs, Title II is more general. It applies to programs such as public transportation, social services and health care, public schools and universities, criminal and civil justice programs, voting, and public recreational areas. As was noted in previous chapters, there may be overlapping authority for certain activities, subjecting them to more than one title of the ADA, more than one federal law, and additional state and local requirements. For example, a "fun run" open to the public and sponsored by a private corporation that refused to allow individuals in wheelchairs to participate might implicate both Title III of the ADA and Title II if the city arranged for routing and other use of city facilities and protection.

Title II also subjects those programs covered under this portion of the ADA to nondiscrimination in employment. This issue is not covered in this chapter, but is treated in Chapter 3. Federal government employment is also covered in Chapter 3.

This chapter also references state and local governmental activities that are not services in the common sense of that term. Activities such as licensing, oversight, and other regulation fall within this category. In addition, state and local laws that are discriminatory in fact or in practice are also briefly discussed. Legal requirements related to family rights, such as child custody, are an example.

[1] Chapter Goals

This chapter will provide the following:

- A review of the key principles of the applicable statutes
- An application of these principles in the context of programs operated by or highly regulated by governmental authorities
- An understanding of the relationship of the major statutory provisions that affect state and local governmental programs and their relations to those operated by private entities as public accommodations
- An understanding of the statutory coverage for programs operated by state and local governmental authority and coverage of programs operated by federal agencies
- An understanding of the concepts of discrimination and reasonable accommodations including modifications of policies, practices, and procedures
- An understanding of architectural barrier issues and requirements that relate to existing facilities, new facilities, and renovations and alterations

- Application of federal statutes to licensing, including both business licensing and professional licensing
- Application of federal statutes to mass transit
- Application of federal, state, and local requirements to issues of driving and parking and on demand services such as taxi services
- Application of federal, state, and local governmental requirements to the criminal justice system, including jury participation and criminal process
- Application of federal, state, and local governmental requirements related to voting
- A general awareness of enforcement requirements

[2] Key Concepts and Definitions

The following are some key concepts for reference in learning about individuals with disabilities in the context of government services and programs.

Americans with Disabilities Act

Enacted in 1990, the ADA provides specific requirements for public services that are provided by state and local governments.

Architectural barriers

This primarily refers to design features that indirectly affect the ability of individuals with mobility and sensory impairments to access the physical facilities and structures.

Alterations

Generally refers to a physical change that affects the usability of a facility. Where such changes are made after the effective date of a particular statute (ADA, Rehabilitation Act), the facility must meet specific design standards with respect to those areas that are altered. Repainting and similar kinds of cosmetic changes do not generally trigger requirements under the ADA or Rehabilitation Act.

Covered facilities and programs

All aspects of programs receiving federal financial assistance are subject to Section 504 of the Rehabilitation Act, not just those receiving the assistance. For example, the athletics programs of a university receiving a federal grant in its arts and sciences department will also be covered. Both public entities and private entities may receive federal financial assistance.

Design standards

Detailed sets of regulations provide specifications for a range of issues affecting physical design for both mobility and sensory impairments. These are standards that relate to new construction or that should be followed when there are certain types of alterations or renovations. The standards cover aspects such as slopes, elevators, parking, seating on assembly areas, restrooms, and paths of travel. They also cover signage. Each program or service is unique, and it is impossible to provide with specificity every detail of what would make a program or service as a whole accessible.

Existing facilities

Federal statutes have differing requirements regarding retrofitting physical facilities that were built before the applicable date of the relevant statute. Generally, under Title III of the ADA, public accommodations must remove barriers to the extent it is readily achievable to do so. For private providers of public accommodations receiving federal financial assistance, barriers in existing facilities should be removed so that the program is accessible when viewed in its entirety.

Licensing

Governmental agencies (primarily at the state level) engage in numerous licensing programs that could be covered under Title II of the ADA. These include licensing of businesses (such as liquor licenses, lottery operations, and building permits) and professional licensing (primarily for the legal profession and health care professions).

Mass transit

This refers generally to a broad array of transportation services including bus systems, subway systems, and light rail systems. While most mass transit programs are operated by private non-profit organizations (and are thus subject to Title III of the ADA), they are highly regulated by state and local governmental authorities, which may mean that Title II of the ADA also applies.

New construction

Depending on the applicable date of the applicable statute (the ADA or Section 504), a specific set of detailed design standards apply to new construction by entities providing accommodations to the public.

Public accommodations

Within Title III of the ADA, this refers to *private* entities that provide accommodations open to the public. Title II (for state and local governmentally provided programs) and Section 504 of the Rehabilitation Act (for all entities receiving federal financial assistance), often, but not always, provide for similar requirements for physical facilities and nondiscrimination as Title III. The remedies under the different statutes are not the same.

Public services

Public services generally refers to programs provided by a governmental entity. Within the ADA, this only refers to state and local governmental entities. Services funded or provided by the federal government are covered under the Rehabilitation Act and other statutes. There are a number of private services that are public accommodations under Title III of the ADA that are heavily regulated or funded by governmental authorities. These include transportation and utility systems as well as many educational programs and health care programs. Licensing of many private operations is provided by governmental programs. The interplay of these statutes for programs affected by several statutes has been the topic of judicial attention.

Reasonable accommodations

Unlike most civil rights statutes, the ADA and the Rehabilitation Act require more than nondiscrimination. They also require reasonable accommodation. Some of the requirements are spelled out in regulatory and statutory language (although generally not as all inclusive listings). Reasonable accommodations include both auxiliary aids and services (such as interpreters) and modification of policies, practices, and procedures (such as allowing assistance animals in places where they are ordinarily prohibited).

This requirement is not intended to require unduly burdensome (administratively or financially) accommodations. Nor is it intended to require that fundamental alterations to a program be made. Case law highlights that the burden is generally on the program to demonstrate that a requested accommodation is not reasonable. It also demonstrates that federal statutes contemplate individualized determinations and an interactive process in determining what accommodations would be reasonable.

Individuals seeking accommodations are not entitled to their preferred or a best accommodation. The accommodation should be reasonable and effective. What is unclear at present is whether the accommodation must be “necessary” for it to be required.

Section 504 of the Rehabilitation Act

Many ADA Title III programs that are private by provided accommodations for the public receive federal financial assistance. Many programs subject primarily to Section 504 of the Rehabilitation Act and Title II (such as public universities) may have within them Title III entities, such as bookstores, or they may lease or use or facilitate private programs. The determination of which requirements apply and how they relate can be complex and challenging.

self-evaluation

Title II of the ADA requires that state and local governmental programs conduct a self-evaluation of the barriers in their programs and prepare a transition plan for addressing barriers.

B. Nondiscrimination

[1] Federal Government Programs

Sections 501, 503, and 504 of the Rehabilitation Act prohibit federal agencies, federal contractors, and recipients of federal financial assistance from discriminating on the basis of disability. Chapter 3 (Employment) discusses the nondiscrimination in employment mandates under those statutory provisions.

The model regulations under Section 504 have separate sections applying to the major types of recipients of federal financial assistance. The three major categories of recipients for which model regulations were developed are preschool, elementary and secondary education; postsecondary education; and health, welfare and social services. 34 C.F.R. part 104. The application of nondiscrimination requirements of the Rehabilitation Act to these settings is addressed in Chapters 6, 7, and 9, and to a lesser extent in Chapter 8. Application to settings such as the judicial system and mass transit is discussed later in this chapter.

[2] State and Local Government Programs

For state and local government programs receiving federal financial assistance, Section 504 of the Rehabilitation Act applies. The more significant statute, however, is the Americans with Disabilities Act (ADA), because it reaches virtually every state and local public service regardless of whether the program receives federal financial assistance.

Hypothetical Problem 5.1

Springfield is a city with a population of 750,000. The city's economic base includes two colleges, several museums, some manufacturing of household goods and appliances, a health care center with several hospitals, including a veterans' rehabilitation hospital, and a technology park. It is located on a lake, and there is also substantial regional tourism connected with waterfront activities.

During times when there was full employment and a strong economy, the city government planned improvements in several recreational areas, including biking trails, new boat docks on the city-owned lakefront area, and four new swimming pools to be built in underserved areas. In addition, the budget includes retrofitting all ten existing pools to be accessible for individuals with mobility impairments (at a cost of $1 million over five years). One of the existing pools is located near the veterans' hospital. The four new pools would all be accessible. The boat dock improvements, the bike trail additions, new pool construction, and retrofitting had a phase-in schedule of five years. The total budget for the five year period was $5 million. The bike trail additions were begun in the first year (with an expenditure of $250,000), and the contracts for the new pools ($2 million) and the renovations ($1 million) were put out for bid during that first year. Before the contracts had been finalized, there was a significant economic downturn in the area, due to some unpredicted events,

including a major tornado and loss of substantial manufacturing. The regional economy was also affected, and the downturn adversely affected tourism.

The city board of supervisors, which makes decisions on the city budget, has revisited the budget and decided to go forward with the boat dock improvements as an investment in revitalization (cost of $1 million over the next three years). The city has decided to shift some of the $5 million budgeted for recreational improvements to city building repair costs resulting from the tornado, but to go forward with the bike trail and boat dock expenditures. The board has decided at the present not to go forward with the new swimming pool construction or the accessibility retrofitting and to use the $3 million budgeted for that for storm cleanup. The city is considering closing down all existing swimming pools for the summer because of the costs of maintenance and staffing.

Tina is a veteran who was injured in Afghanistan and who is being rehabilitated in the veterans' hospital. She plans to remain in the community to continue rehabilitation and had been looking forward to using an accessible swimming pool. Only one of the city's existing pools is accessible, and that one is in a remote suburb that would require transportation time of over an hour each way.

In addition, Tina uses the paratransit system that is currently funded through a combination of a city subsidy, federal grant funding, and passenger fares. The metro system (Springfield Transit Authority for Riders (STAR)), which provides both scheduled bus service and paratransit service is a nonprofit private agency, but it is regulated by the city board of supervisors and must have all changes in service and rates approved by the city. Because of the economic downturn, STAR has requested to eliminate all bus service (including paratransit service) to suburban areas of the city. There is very low ridership in these areas. This would mean that Tina could not use paratransit service to reach the one existing accessible swimming pool and a worksite where she is seeking employment.

Tina has become a member of an injured veterans' advocacy group, and was advised by the director of the group that an examination of the city's ADA/504 self-evaluation plan did not address recreational facilities at all, and only addressed city office buildings. She is considering whether to seek redress regarding the swimming pool planning and the changes in the paratransit service. She is also considering whether to ask the advocacy group to seek redress in court.

What are the considerations that the advocacy group should give to the substantive, procedural, and strategic issues? What remedies are available? Are there other avenues of redress other than litigation that might be more effective?

One of the first cases to address the nondiscrimination aspects of Title II of the ADA, which prohibits discrimination by public services, is the following.

Concerned Parents to Save Dreher Park Center v. City of West Palm Beach

846 F. Supp. 986 (S.D. Fla. 1994)

RYSKAMP, DISTRICT JUDGE:

I. *Background*

[The case was brought by an association of parents and volunteers concerned about the city's actions and individuals with disabilities and their parents or guardians who had previously used these programs.]

In 1986 the City conducted a needs assessment to determine the need for leisure services for persons with physical and/or mental disabilities of West Palm Beach. The City determined that West Palm Beach had a significant disabled population in need of such services. As a result, and since that time, the City has made available a variety of recreational and social programs and activities for individuals with disabilities and their families at the Dreher Park Center.

As of the 1992–1993 fiscal year, the City was offering at its Dreher Park Center such programs as

Jammin' in the Sun Day Camp (summer day camp services for a variety of children with varying disabilities), Awesome Adventurer Club (club-type program for children with varying disabilities), T.G.I.F. (monthly social program for mentally handicapped adults to develop leisure skills), Good Times Club (monthly social program for visually-impaired and blind adults), Sib Shop (designed as an outlet for children with siblings with disabilities), a lip reading instruction program, the Out and About Club (a quarterly activity program for visually-impaired teens), Leisure Alternatives (leisure activities for mentally handicapped adults), little league baseball for disabled youth, swimming for physically disabled persons, and other regular and occasional programs or activities. During fiscal year 1992–1993 approximately 300 disabled persons participated in the Dreher Park Center programs.

The 1992–1993 budget for the entire Department of Leisure Services was $6,573,550. Of this amount, the Special Populations section was allotted $384,560 for their budget. Of the $384,560, the Dreher Park Center's share of the budget was $170,694.

In the fall of 1993, as a result of budget constraints the City made various cuts to the 1993–1994 budget, including those for programs in the Department of Leisure Services. The entire budget of the Department of Leisure Services was reduced from $6,573,550 in Fiscal Year 1992–1993 to $5,919,731 in Fiscal Year 1993–1994. The budget for the Special Population Section was reduced from $384,560 to $82,827. The remaining $82,827 is apparently specifically designated for the salary and benefits for one staff member (a Special Population Supervisor) and for utilities and maintenance of the Howard Park Senior Citizens Center building and liability insurance. Three other positions in the Special Populations section (those for personnel at the Dreher Park Center) were eliminated, as was maintenance for the Dreher Park Center facility. The effective result was that all previously existing programs for the persons with disabilities were completely eliminated.

Plaintiffs instituted this action for injunctive relief in the Court of Fifteenth Judicial Circuit alleging violation of the Americans with Disabilities Act, 42 U.S.C. §12101, et seq. (the "ADA") and Article I, Section 2 of the Florida Constitution.

II. *Preliminary Injunction*

A. *Substantial Likelihood of Prevailing on the Merits*

The ADA became effective on July 26, 1992, and there is relatively little case law interpreting the reach of the statute. Neither party has directed the Court to any case that applies Title II (relating to public services) of the ADA to city-sponsored recreational programs, nor has this Court been able to locate any cases directly applicable. However, the statute and regulations promulgated thereunder are clear enough to decide this particular case of first impression.

Title II of the ADA provides that "... no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132. Thus, to show a violation of Title II, a plaintiff must show: (1) that he is, or he represents, the interests of a "qualified individual with a disability"; (2) that such individual was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities or was otherwise discriminated against; and (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.

First, there is no dispute that Plaintiffs or those whose interests Plaintiffs represent are "qualified individuals with disabilities." The definition of the term is: an individual with a disability who, with or without reasonable modifications to rules, policies, or practices ... meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. 28 C.F.R. §35.104. There is no dispute as to the fact that Plaintiffs are individuals with disabilities. However, although Defendant has not raised it, the Court considered the issue of whether Plaintiffs were qualified individuals with disabilities. It could be argued that in many

recreational/athletic activities a threshold level of physical and mental abilities constitute "essential eligibility requirements" that disabled persons may not meet. As a paradigmatic scenario, it may be the case that there are wheelchair-bound children who cannot meet the "essential requirements" for a soccer team because they cannot run or cannot kick a ball. However, such an analysis would be persuasive only if the full and entire extent of the City's recreational program was one soccer team. An "essential eligibility requirement" of a soccer team may be the ability to run and kick, but the only "essential eligibility requirement" of the City's recreational program (which is the sum of a variety of individual recreational, social, and educational activities and programs) is the request for the benefits of such a program. Therefore, the only "essential eligibility requirement" that Plaintiffs must meet is to request the benefits of a recreational program.

Further, even if certain physical or mental abilities were considered to be essential eligibility requirements, the same "non-qualifying" disabled individuals may be able to meet such requirements when "reasonable modifications" to the program are made. Thus, if the City's recreational program is not merely one athletic or other activity but rather an entire network of individual activities and services, a creation of a wheelchair soccer team or something of comparable recreational value may be a "reasonable modification" of the City's recreational program. The physical ability requirements for wheelchair soccer, obviously, are different than for non-disabled soccer and may be met by the same disabled persons disqualified for "regular" soccer.[1]

Second, the elimination of the Dreher Park Center programs has the effect of denying persons with disabilities the benefits of the City's recreational programs. The City emphasizes that none of the City's recreational programs are closed to individuals with disabilities, and in this round-about way the City seems to be arguing that because no discriminatory animus exists, there is no Title II violation. Certainly intentional discrimination is banned by Title II. But further, actions that have the effect of discriminating against individuals with disabilities likewise violate the ADA. The most directly applicable part of the regulations under Title II provides:

> A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; (ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities.... 28 C.F.R. §35.130(b)(3).

Thus, although the City is not required to offer to the public (disabled or non-disabled) any type of recreational or leisure programs in the first place, when it does provide and administer such programs, it must use methods or criteria that do not have the purpose or effect of impairing its objectives with respect to individuals with disabilities.

The complete elimination of the Dreher Park Center programs clearly has the effect of impairing the Leisure Services Department's self-professed "Mission Statement" to "[provide] comprehensive and quality recreation services/entertainment" with respect to Plaintiffs and other disabled persons. There are no equivalent programs provided by the County of Palm Beach or any other neighboring municipal or private entities (which are also facing shrinking budgets) that can fill the void left by the elimination of these programs. While it is true that there is no evidence of deliberate exclusion of disabled persons from the general recreational programs offered by the City, it is clear that many of the general programs are unable to offer the benefits of recreation to individuals with disabilities because of the nature of the recreational activities and the physical and other limitations of persons with disabilities. Although the ADA contemplates that public entities will provide "integrated settings" for services and programs, the requirement is for "the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. §35.130(d). Therefore, the ADA contemplates that different or separate benefits or services be provided if they are "necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as

those provided to others." 28 C.F.R. §35.130(b)(1)(iv). It appears from the evidence that City had offered the Dreher Park Center programs precisely because they were needed to give equal benefits of recreation to persons with disabilities. When these programs were eliminated, Plaintiffs were denied the benefits of the City's leisure services in contravention of Title II.

Lastly, there is strong evidence that the denial of the benefits of recreation was by reason of Plaintiffs' disabilities. The City argues that there is no discriminatory intent against the disabled population, but rather that fiscal concerns dictated the elimination of the Dreher Park Center programs. However, at oral argument the City was unable to account for the extreme disparity between the extent of the budget cuts for the disabled population and the non-disabled, nor has any evidence of any other legitimate reason been presented. This is a significant failure of proof because while Title II does not require any particular level of services for persons with disabilities in an absolute sense, it does require that any benefits provided to non-disabled persons must be equally made available for disabled persons. Therefore, had the City cut their entire budget for the Department of Leisure Services, effectively eliminating recreational programs for disabled and non-disabled alike, the ADA would not be implicated because both groups would be equally affected. However, if the City chooses to provide leisure services to non-disabled persons, the ADA requires that the City provide equal opportunity for persons with disabilities to receive comparable benefits.

The Court accordingly holds that Plaintiffs have shown a substantial likelihood of prevailing on the merits of the ADA claim because there is persuasive evidence for and a lack of any evidence against the finding that the complete elimination of the Dreher Park Center programs denies the Plaintiffs of an equal access to recreational services provided by the City on account of Plaintiffs' disabilities.

B. *Irreparable Injury*

[Omitted]

C. *Greater Injury to Plaintiffs than Potential Harm to Defendant*

The Court also finds that irreparable harm suffered by Plaintiffs outweighs the potential harm to the City. The City argues that the public purpose of fiscal integrity and maintaining a balanced budget outweighs the injury to Plaintiffs. First, the expenditure of funds cannot be considered a harm if the law requires it. Further, some $170,000 in the context of a $6.5 million budget does not create any real issues of "fiscal integrity" nor present a threat to an otherwise balanced budget.

D. *Public Interest*

Although there is a substantial public interest in balancing the City's budget, as discussed above this interest is not disserved to any significant extent by the continued funding of the Dreher Park Center programs. Further, beyond the interests of the 300 plus disabled individuals that participate in the programs offered by the City, the public also has an interest in meeting the recreational needs of people with disabilities, as well as in upholding the principle of equal rights for individuals with disabilities. The equality of all persons is the underlying principle of the ADA, and one which the public has a strong interest in promoting.

Problems

1. The court implies that special recreational programming is probably not required in the first place. Is that a correct interpretation of the ADA?

2. Might this decision result in a deterrent to Title II agencies to offer specialized programming initially? What about the court's statement that the special programs were offered in order to give equal benefits to people with disabilities?

C. Modification of Rules, Policies, and Practices

Title II regulations under the ADA define a qualified individual with a disability as one who can meet the eligibility requirements of the program "with or without reasonable modifications to rules, policies, or practices." 28 C.F.R. §35.130(b)(7).

The *Dreher Park* decision in the previous section provides some insight as to some of the accommodations that were provided by a city operated recreational program. The court does not address whether any or all of these accommodations would be required in the first place, but rather focuses on the complete elimination of the programs as part of a budget cut.

There are a number of government programs where modifications or accommodations could be at issue. Several of these areas are discussed separately in later sections of this chapter. These are treated separately because they are areas in which the stakes are high and/or litigation has begun to address the issues in a number of cases. These include licenses to do business, professional licensing, mass transit, driving and parking, access to justice, and voting. Budget cuts have also affected programs of health care and independent living, which are discussed in the chapters on housing and health care.

The following case excerpt is a unique set of facts that raises interesting issues requiring the court to balance public safety concerns with nondiscrimination policies. It provides a useful insight into the test to be applied and the deference to be given to regulatory and legislative bodies that have considered modifications.

Crowder v. Kitagawa

81 F.3d 1480 (9th Cir. 1996)

DAVID R. THOMPSON, CIRCUIT JUDGE

[Author's Summary: The plaintiffs were a class of individuals with visual impairments who use guide dogs. Hawaii's quarantine law is designed to prevent rabies. It requires a 120-day quarantine for dogs, cats and other animals that adversely affects individuals who use assistance animals. While there is a process for the individual with a disability entering Hawaii to have some access to a guide dog during that time, the limitations effectively denies meaningful use of the service of the dog for the 120 days. Plaintiffs sought reasonable modifications such as vaccinations, a program that had already been debated by veterinarians, scientists and academicians during a legislative debate that resulted in no change to the policy.]

Discussion

The plaintiffs allege Hawaii's quarantine system violates section 12132 of the ADA, which provides that "no qualified individual with a disability shall by reason of such disability be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity."

The linchpin of the district court's summary judgment on the ADA claim, and the state's argument, is that "[t]he quarantine requirement is a public health measure, and not a 'service' or benefit furnished by the state to eligible participants." Because, according to the district court, the quarantine requirement is not a service or benefit provided by the state, the quarantine does not deny the plaintiffs any benefits, and as a result they have no claim under the ADA.

The flaw in this analysis is the assumption that no violation of the ADA occurs unless a service or benefit of the state is provided in a manner that discriminates against disabled individuals. This simply is not so.

Section 12132 of the ADA precludes (1) exclusion from/denial of benefits of public services, as well as (2) discrimination by a public entity. Due to the insertion of "or" between exclusion from/denial of benefits on the one hand and discrimination by a public entity on the other, we conclude Congress intended to prohibit two different phenomena. Congress intended to prohibit outright discrimination, as well as those forms of discrimination which deny disabled persons public

services disproportionately due to their disability.

In section 12101(a)(5), Congress declared its intent to address "outright intentional exclusion" as well as "the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, [and] failure to make modifications to existing facilities and practices." It is thus clear that Congress intended the ADA to cover at least some so-called disparate impact cases of discrimination, for the barriers to full participation listed above are almost all facially neutral but may work to effectuate discrimination against disabled persons.

Few would argue that architectural barriers to disabled persons such as stairs, or communication barriers such as the preference for the spoken word, are intentionally discriminatory. Yet, stairs can deny the wheelchair-bound access to services provided on the second floor of a government building; and communicating only by the spoken word can deny deaf persons the ability to find out that it is the second floor where they must go to obtain the services they seek.

These and other types of barriers to participation by the disabled in public life do not provide any benefits themselves. Neither stairs nor the spoken word is a "service, program, or activit[y]" of a public entity, yet each can effectively deny disabled persons the benefits of state services, programs or activities.

A further indication of Congress' intent to cover both intentional discrimination and discrimination as a result of facially neutral laws is the explicit mandate in the ADA that federal regulations adopted to enforce the statute be consistent with the Rehabilitation Act. Section 12133 of the ADA provides that "[t]he remedies, procedures, and rights set forth in [the Rehabilitation Act] shall be the remedies, procedures, and rights" applicable to section 12132 discrimination claims.

The Supreme Court interpreted the Rehabilitation Act in *Alexander v. Choate*, 469 U.S. 287 (1985). In *Choate*, the Court concluded that Congress intended to protect disabled persons from discrimination arising out of both discriminatory animus and "thoughtlessness," "indifference," or "benign neglect." The Court held, however, that judicial review over each and every instance of disparate impact discrimination would be overly burdensome. Rather than attempt to classify a type of discrimination as either "deliberate" or "disparate impact," the Court determined it more useful to assess whether disabled persons were denied "meaningful access" to state-provided services.

Although Hawaii's quarantine requirement applies equally to all persons entering the state with a dog, its enforcement burdens visually-impaired persons in a manner different and greater than it burdens others. Because of the unique dependence upon guide dogs among many of the visually-impaired, Hawaii's quarantine effectively denies these persons—the plaintiffs in this case—meaningful access to state services, programs, and activities while such services, programs, and activities remain open and easily accessible by others. The quarantine, therefore, discriminates against the plaintiffs by reason of their disability.[3]

During the four days of each week of the quarantine period when guide dogs must remain in the quarantine station this denial is especially acute. On the other three days when the dogs are allowed out of the quarantine station grounds, the negative impact of the regulation is only slightly alleviated, because during these days the regulations require that the guide dogs avoid all physical contact with other humans or animals. This effectively precludes visually-impaired persons from using a variety of public services, such as public transportation, public parks, government buildings and facilities, and tourist attractions, where humans or animals are inevitably present.

It is no response to assert that the visually-impaired, like anyone else, can leave their dogs in quarantine and enjoy the public services they desire. As the Department of Justice has noted in related regulations, "the general intent of Congress" was "to ensure that individuals with disabilities are not separated from their service animals," such as guide dogs.

We conclude that Hawaii's quarantine requirement is a policy, practice or procedure which

discriminates against visually-impaired individuals by denying them meaningful access to state services, programs and activities by reason of their disability in violation of the ADA.

When a state's policies, practices or procedures discriminate against the disabled in violation of the ADA, Department of Justice regulations require reasonable modifications in such policies, practices or procedures "when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."

There is a genuine dispute of material fact as to whether the plaintiffs' proposed modifications to Hawaii's quarantine amount to "reasonable modifications" which should be implemented, or "fundamental alter[ations]," which the state may reject. The district court refused to consider this question because [t]he legislature has already thoroughly considered [the plaintiffs'] proposed alternatives and has rejected them. As noted earlier, it is the province of the legislature, and not this court, to assess the efficacy of public health measures against the risks they are designed to reduce, particularly when the questions are debatable and experts disagree as to the best solution to the problem.

The district court concluded it could not assess the reasonableness of the plaintiffs' proposed modifications in light of the legislature's own consideration of the issue. Yet in virtually all controversies involving the ADA and state policies that discriminate against disabled persons, courts will be faced with legislative (or executive agency) deliberation over relevant statutes, rules and regulations.

The court's obligation under the ADA and accompanying regulations is to ensure that the decision reached by the state authority is appropriate under the law and in light of proposed alternatives. Otherwise, any state could adopt requirements imposing unreasonable obstacles to the disabled, and when haled into court could evade the antidiscrimination mandate of the ADA merely by explaining that the state authority considered possible modifications and rejected them.

We are mindful of the general principle that courts will not second-guess the public health and safety decisions of state legislatures acting within their traditional police powers.

Whether the plaintiffs' proposed alternatives to Hawaii's quarantine for guide dogs constitute reasonable modifications or fundamental alterations cannot be determined as a matter of law on the record before us. Once again turning to the Rehabilitation Act, we have held that the determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry. Moreover, inquiry into reasonable modification would necessitate findings of fact regarding the nature of the rabies disease, the extent of the risk posed by the disease, and the probability that the infected animals would spread it.[4]

Conclusion

We reverse the district court's grant of summary judgment in favor of Hawaii. We remand this case to the district court for determination of the factual dispute whether the plaintiffs' proposed modifications to Hawaii's quarantine are reasonable under the ADA.

Notes

Following this decision, the parties settled the case (the Justice Department had intervened), agreeing that the state of Hawaii would establish regulations permitting guide dogs, with proper documentation (including certification of training from a recognized guide dog school) and testing, to enter the state without the usual waiting period of four months. *Crowder v. Nakatani*, CA No. 93-00213DAE (Jan. 15, 1998).

As noted in the previous chapter, there has been a substantial increase in the presence of service

animals in public places. While the 2010 federal regulations for Titles II and III have addressed this increase to some extent, a number of issues about state and local governmental regulations exist that might prohibit certain breeds of dogs. If individuals with service dogs wanted to travel to foreign countries, there might be questions about foreign country quarantine laws and how those might be addressed. The individual traveling in such a setting might not have much recourse, but the student traveling as part of a study abroad program might seek assistance from the higher education program in seeking waiver in some settings. Although an institution of higher education might not be able to force a waiver, there may at least be responsibilities to assist the student in working through these rules.

Problems

1. Does a state law requiring motorcyclists to wear helmets discriminate against individuals with hearing impairments because they cannot hear as well with a helmet? *Buhl v. Hannigan*, 16 Cal. App. 4th 1612, 20 Cal. Rptr. 2d 740 (1993).

2. Electronic bingo devices, with touch sensitive video screens allowing individuals to play several bingo cards at a time, are illegal in some states. A person with limited manual dexterity might need such a device to play bingo. Would a state law prohibiting their use violate the ADA? See *Video Bingo Device OK'd for Disabled*, HOUSTON CHRONICLE, Dec. 21, 1994, at A26.

3. Does a statute that prohibits issuing marriage licenses to people with HIV violate the ADA? *T.E.P. v. Leavitt*, 840 F. Supp. 110 (D. Utah 1993). See also LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §9.01 (2012 and cumulative supplement).

D. Architectural Barriers

[1] Application of the Architectural Barriers Act, the Rehabilitation Act, and the Americans with Disabilities Act

Programs operated by state and local governmental agencies are potentially subject to several sets of requirements with respect to barrier-free access. In addition to state and local building code and requirements, which are beyond the scope of this book to address, most state and local governmental programs are subject to the architectural barrier requirements found under Title II of the Americans with Disabilities Act. In addition, those programs receiving federal financial assistance would be subject to Section 504 of the Rehabilitation Act. Buildings and facilities constructed or altered by or on behalf of the federal government are subject to the Architectural Barriers Act, 42 U.S.C. §4151; 36 C.F.R. Part 1191. This would apply to buildings such as post offices, military bases, and federal housing projects.

Like the requirements related to public accommodations, discussed in Chapter 4 (Public Accommodations), the mandates related to physical access in state and local programs depend on whether the facility is already in existence at the time of the applicable date or whether the construction is new or whether there is renovation after the applicable date.

Under Section 504 of the Rehabilitation Act, programs are not required to make facilities accessible to the same degree that would be required for new construction. Barriers were to have been removed so that the program would be readily accessible when viewed in its entirety. 34 C.F.R. §104.22(a). This is the standard that would still apply for federal programs.

Title II of the ADA applies essentially the same mandate as Section 504 with respect to existing facilities. State and local governmental programs are required to make existing programs accessible when viewed in their entirety. 28 C.F.R. §35.150. Private entities considered to be public accommodations, however, must remove barriers to the extent it is readily achievable to do so. 28

C.F.R. §36.305. This issue is addressed in Chapter 4.

For construction subject to the Architectural Barriers Act, Minimum Guidelines and Requirements for Accessible Design, 36 C.F.R. Part 1191 app. C, apply. These standards apply to the General Services Administration, the Department of Housing and Urban Development, the Department of Defense, and the United States Postal Service. New construction by programs subject to Section 504 of the Rehabilitation Act must comply with the Uniform Federal Accessibility Standards, 34 C.F.R. §104.23(c). Programs subject to Title II of the ADA must meet the standards of either the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG), 28 C.F.R. part 36, app. A, 36 C.F.R. Part 1191 app. B. New construction was to be accessible by January 26, 1992, for programs subject to Title II. For programs subject to Title III, the applicable deadline for new construction is January 26, 1993.

Which design standards are required for new construction and renovations depends on which statute applies and when the new construction occurred because of the varying dates that the requirements have gone into effect. As a result of the confusion in applying these various standards, particularly when there is overlapping legislative application, some of the standards have been consolidated. The revised and consolidated standards for new construction under the Rehabilitation Act, the Americans with Disabilities Act, and the Architectural Barriers Act were published in 2004. For commentary and analysis, see 69 Fed. Reg. 44085 (July 23, 2004).

As of March 15, 2011, Department of Justice regulations clarify new requirements relating to design of certain types of facilities. See 75 Fed. Reg. 56,164–236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236–358 (September 15, 2010) (Title III). These new regulations replace earlier regulations promulgated under both Title II and Title III. The Final Rules amend 28 C.F.R. Parts 35 and 36. The current regulations address access requirements for design of residential housing provided by state and local governmental entities, and new construction and alterations of detention and correction facilities. The regulations also provide design standards for new construction and alterations for access in recreation areas (including amusement rides, boating facilities, exercise machines and equipment, fishing piers and platforms, golf facilities, miniature golf, play areas, swimming pools) and in public facilities (including detention and correctional facilities, judicial facilities, and residential dwelling areas). Many of these types of programs are operated by or licensed or leased by state and local governmental programs.

Later in this chapter the issue of immunity from damage actions is discussed in the context of two Supreme Court decisions that addressed the issue in the context of architectural barriers. In *Tennessee v. Lane* (reproduced later in this chapter), two claimants with mobility impairments claimed that they were adversely affected in accessing the judicial system because county courthouses lacked elevators and had other barriers. The case of *United States v. Georgia*, 546 U.S. 151 (2006), involved architectural barriers in the prison setting. Again, the Court focused on the issue of immunity, and left to other courts the analysis of what was required to remove barriers. The plaintiff, who is paraplegic, challenged prison conditions in Georgia. Included in his assertions was a claim that "he was confined for 23-to-24 hours per day in a 12-by-3 foot cell in which he could not turn his wheelchair around. He alleged that the lack of accessible facilities rendered him unable to use the toilet and shower without assistance...." The Court did not reach the substantive issue of what would be required in either case, because the decisions focused on issues of Eleventh Amendment immunity.

[2] Self-Evaluation and Transition Plans

Under the ADA, state and local governmental programs have additional mandates with respect to accessibility. These programs are required to conduct a self-evaluation, to the extent it had not already been completed pursuant to Section 504 of the Rehabilitation Act. 28 C.F.R. §35.105. The ADA self-evaluation was to have been completed by January 26, 1993. Programs subject to Section 504 were to

have conducted a self-evaluation by 1978. Considering the amount of time between these dates—fifteen years—a considerable update probably would be required in most cases. In addition to the self-evaluation requirements of the ADA, programs were to develop transition plans for removing barriers, which were to be implemented by January 26, 1995. The following case is one of the first, and still one of the few, cases to address this issue under the ADA.

The following case excerpt is unusual in that very few of these types of cases have been brought by individual litigants. It is a useful opinion because it is one of the few decisions that discusses in detail the statutory and regulatory requirements for self-evaluations and transition plans.

Tyler v. City of Manhattan

849 F. Supp. 1429 (D. Kan. 1994)

SAFFELS, SENIOR DISTRICT JUDGE:

Plaintiff Lewis "Toby" Tyler ("Tyler") seeks declaratory, injunctive, and monetary relief against the City of Manhattan ("City") under the Americans with Disabilities Act. Count I of his complaint claims that the City has violated the ADA by failing to complete an acceptable self-evaluation as required by 28 C.F.R. §35.105 and by failing to adopt an acceptable transition plan as required by 28 C.F.R. §35.150(d). Count II alleges that the City has subjected plaintiff to discrimination by failing to carry out its obligations to permit him to participate equally in its services, activities, and programs, in particular its recreational programs, city council meetings, and advisory board activities.

Plaintiff is partially paralyzed as a result of a gunshot wound to the head, and he is confined to a wheelchair. The City does not dispute that he is a "qualified individual with a disability" as defined by Title II of the ADA.

The City is a political subdivision of the state of Kansas. There is no dispute that the defendant is a "public entity" for purposes of Title II of the ADA. The City employs more than 50 persons.

The City appointed a committee ("ADA Committee") to facilitate compliance with the ADA and to identify priorities. The ADA Committee's membership included City employees and persons with disabilities. The ADA Committee met monthly. Plaintiff attended and participated in virtually all its meetings, except during a three to four-week period when he was recovering from a broken hip and arm. Plaintiff contends that the City did not maintain a list of interested parties consulted by the ADA Committee. Although the City concedes that no such formal list was compiled, it contends that the Committee's records include references to all interested parties, so that such a list could be produced.

Plaintiff regularly attends meetings of the City Commission, held at City Hall. On one occasion in November 1992, plaintiff was unable to attend a City Commission meeting held on the second floor of City Hall, because the elevator was not working. City Commission members were aware that the elevator was not functioning and nevertheless went ahead with the meeting. However, some of the agenda items were deferred to the Commission's next meeting, which the plaintiff attended. City Commission meetings include a time for public comments, when any individual is allowed three minutes to address the Commission. City Commission meetings are televised on the City's cable access channel.

The City timely prepared a self-evaluation for the purpose of complying with ADA's implementing regulations. In preparing the ADA self-evaluation, the City and its ADA Committee reviewed and relied upon the 1984 self-evaluation prepared by the City for the purpose of complying with Section 504 of the Rehabilitation Act of 1973. Plaintiff was not prevented from talking with City personnel regarding the self-evaluation, and in fact submitted comments both verbally and in writing.

Plaintiff asserts that the self-evaluation was inadequate in scope because it did not address all programs, activities, policies, and procedures; and because it did not include streets, sidewalks, parking spaces, and buildings leased by the City. In response, the City contends that all city programs,

activities, policies, and practices were evaluated; that the self-evaluation included sidewalks and parking areas adjoining each of the facilities evaluated; and that the ADA does not require evaluation of buildings leased by the City. The City's ADA self-evaluation is available for public review.

The ADA Committee prioritized each of the evaluated facilities with regard to the need for modifications. Within the time permitted by the ADA and its implementing regulations, the City made a list of some planned structural modifications to existing City buildings and facilities that were deemed necessary in order to comply with the ADA. This list was prepared for the purpose of complying with the regulatory requirement that the City prepare a "transition plan."

Plaintiff contends that the City has not adequately complied with the transition plan requirement. Plaintiff contends that the transition plan completed by the City is not broad enough in scope nor complete enough in detail. Further, plaintiff contends that a list of completed facility modifications does not exist, and that no place has been designated for public inspection of such a list. The ADA transition plan itself, however, is available for public review.

Plaintiff contends that his visual impairments prevent him from reading notices in the normal written format, and that the City did not offer public notices in any alternative media as required by the ADA. The City does not produce all its documents in alternative media, but will do so upon request. Some city documents, such as City Commission agendas, are available on audiotape at the city library. The plaintiff has not submitted any requests to the City for notices or other documents in alternative formats.

The City administers a licensing program for purveyors of cereal malt beverages, including liquor stores.

Discussion

The City first argues that its self-evaluation and its transition plan meet the minimum requirements of the regulations implementing the ADA.

The ADA itself does not require local governments to initiate self-evaluations or to adopt transition plans. The ADA, however, does direct the Attorney General to promulgate regulations to implement Part A of Title II of the ADA, which generally prohibits discrimination by public entities against qualified individuals with disabilities. See 42 U.S.C. §12134(a).

The regulations promulgated by the Department of Justice to implement Part A of Title II generally require each public entity to conduct a "self-evaluation" as follows:

> §35.105 Self-evaluation.
>
> (a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.
>
> (b) A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.
>
> (c) A public entity that employs 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:
>
> (1) A list of the interested persons consulted;
>
> (2) A description of areas examined and any problems identified;
>
> (3) A description of any modifications made.
>
> (d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section

shall apply only to those policies and practices that were not included in the previous self-evaluation.

Among other things, the implementing regulations also prohibit a public entity from excluding a qualified individual with a disability from participation in its services, programs, or activities or denying such an individual the benefits of its services, programs, or activities, because the entity's facilities are inaccessible. See 28 C.F.R. §35.149. The transition plan requirement addresses the accessibility of existing facilities, as opposed to new construction. Under 28 C.F.R. §35.150(a)(1), a public entity need not necessarily make each of its existing facilities accessible. However, the entity's services, programs, and activities must be operated so as to be readily accessible to and usable by individuals with disabilities. 28 C.F.R. §35.150(a). This mandate may be met by a variety of means, which may not necessarily include structural changes in existing facilities. 28 C.F.R. §35.150(b)(1).[5] If a public entity elects to make such structural changes in existing facilities in order to achieve compliance, however, and if it employs 50 or more persons, it must develop a "transition plan" setting forth the steps necessary to complete such changes. 28 C.F.R. §35.150(d).

The regulation sets forth the requirements for the transition plan as follows:

(d) Transition Plan.

(1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.

(2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

(3) The plan shall, at a minimum—

(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

(4) If a public entity has already complied with the transition plan requirement of a Federal agency regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this paragraph (d) shall apply only to those policies and practices that were not included in the previous transition plan. If the public entity undertakes structural changes in existing facilities, such changes must be made "as expeditiously as possible," but no later than January 26, 1995.

28 C.F.R. §35.150(c).

In Count I of his complaint, the plaintiff essentially challenges the adequacy of the City's efforts to comply with the regulation requiring a self-evaluation, and the regulation requiring the City to prepare a transition plan in the event that it elects to make structural changes in existing facilities in order to meet the accessibility mandate of the ADA. Whether or not the City's self-evaluation and transition

plan comply with the regulations are essentially questions of law, although the determination of those legal issues depends upon certain underlying facts.

The court has carefully reviewed the City's self-evaluation documents submitted as an exhibit to its motion for summary judgment. The self-evaluation prepared for the purpose of complying with the ADA and its implementing regulations consists of the following:

1. A one-page document listing the programs and services originally evaluated in 1984 as part of the transition plan required by §504 of the Rehabilitation Act of 1973. The document also states that programs, activities, or services that could be made accessible to the handicapped by non-structural means were deemed to be accessible.
2. A one-page document captioned "ADA Services and Programs Policy," which essentially states the City's policy prohibiting discrimination on the basis of disability, and provides that the policy applies to all City-funded services, programs, and activities. The policy document designates the Department of Human Resources as being responsible for compliance with the ADA.
3. An undated one-page list of city buildings and facilities identified for purposes of the self-evaluation, indicating whether the facility is used by the general public, for programs, or as an employee work center.
4. An undated one-page list of buildings surveyed for purposes of evaluating their physical accessibility. The buildings listed duplicate those in Item 3.
5. Several multi-page self-evaluation checklists prepared in 1984 by recipients of federal housing funds and federal revenue sharing funds.

Plaintiff essentially claims in Count I that the City's self-evaluation does not comply with 28 C.F.R. §35.105. In its motion for summary judgment, the defendant argues that its self-evaluation appropriately relied upon and adopted the self-evaluation it conducted in 1984 for purposes of complying with §504 of the Rehabilitation Act of 1973. The City argues that the regulation does not require public entities that have completed Section 504 self-evaluations to complete duplicative evaluations of facilities for purposes of the ADA. Essentially, the City argues that it has met the "minimum" requirements of Title II in performing the required self-evaluation.

From the present record, the court is unable to conclude as a matter of law that the City's self-evaluation complies with 28 C.F.R. §35.105. The City is correct that the regulation does not require duplication of the self-evaluation conducted by the City for purposes of complying with §504 of the Rehabilitation Act. On the other hand, the regulation does not permit a public entity to rely solely on its §504 evaluation to meet the ADA's requirement for a self-evaluation. Indeed, §35.105(d) explicitly provides that the self-evaluation requirement applies only to those policies and practices that were not included in the previous self-evaluation. The language of the regulation clearly recognizes that the scope of the ADA self-evaluation is broader than that required by §504. Yet, the City's ADA self-evaluation appears to be nothing more than the previous self-evaluation conducted in 1984 for purposes of complying with §504, with the addition of two new pages which essentially do nothing more than assert that the City will comply with the ADA.

Indeed, the great bulk of the documents included within the City's exhibit labelled "self-evaluation plan" are in fact exact duplicates of documents prepared in 1984. The regulation upon which the City relies, however, explicitly provides that the ADA self-evaluation requirement applies only to policies and practices not included in the previous self-evaluation. Only the first two pages of the exhibit appear to have been newly generated for purposes of meeting the ADA self-evaluation requirement. The court would be hard pressed to conclude that these two pages alone reflect a good faith intent on the part of the City to carry out the type of self-evaluation envisioned by the ADA regulations. One of the two pages is a statement of the City's policy against discriminating on the basis of disability.

While the court finds this policy completely consistent with the ADA, a statement of anti-discrimination policy is not the same as an evaluation of the extent to which current services, policies, and practices do not or may not meet the requirements of Title II and its implementing regulations.

The City's reply brief states that its ADA policy allows for a "day-to-day evaluation of programs and activities and the flexibility to modify or move programs that are or may become inaccessible under individual circumstances." However, the Title II implementing regulations clearly call for the City to conduct a comprehensive self-evaluation within one year of the effective date of the regulations. Further, to the extent the City elects to comply with the ADA's accessibility mandate by making structural modifications to existing facilities, the regulations require the City to adopt a specific transition plan by July 26, 1992, showing specifically how the City plans to achieve such compliance. In short, the regulations promulgated by the Department of Justice to enforce Title II do not permit the City to exercise a "day-to-day evaluation;" nor do they afford the City the "flexibility" to make modifications of programs that "are or may become inaccessible" on a case-by-case basis. Rather, the regulations impose an affirmative duty on the City to ensure its services, programs, and activities are accessible to those with disabilities. The City is required by the regulations to conduct a self-evaluation to identify compliance deficiencies, and proceed to correct those deficiencies whether or not a particular qualified individual with disabilities is presently excluded from access by such deficiencies.

The City's 1984 self-evaluation appears to have comprehensively reviewed the accessibility of city buildings and facilities as of 1984, and at least some programs and activities that were recipients of federal funds in 1984. However, it is a disputed issue of fact whether the ADA self-evaluation addressed all of the City's current services, policies, and practices, and the effects thereof, to determine the degree of their compliance with the ADA. This is the explicit requirement of 28 C.F.R. §35.105(a).

... Paragraph (d) provides that the self-evaluation required by this section shall apply only to programs not subject to section 504 or those policies and practices, such as those involving communications access, that have not already been included in a self-evaluation required under an existing regulation implementing section 504. Because most self-evaluations were done from five to twelve years ago, however, the Department expects that a great many public entities will be reexamining all of their policies and programs. Programs and functions may have changed, and actions that were supposed to have been taken to comply with section 504 may not have been fully implemented or may no longer be effective. In addition, there have been statutory amendments to section 504 which have changed the coverage of section 504, particularly the Civil Rights Restoration Act of 1987, which broadened the definition of a covered "program or activity."

Because the City's ADA self-evaluation appears to rely almost exclusively on the self-evaluation conducted in 1984 for purposes of compliance with §504, the court cannot conclude that the City is entitled to judgment as a matter of law on plaintiff's claim that the self-evaluation falls short of compliance with 28 C.F.R. §35.105.

Count I of the complaint also challenges the adequacy of the transition plan adopted by the City for the purpose of complying with 28 C.F.R. §35.150(d), with regard to the accessibility of existing facilities. The court has carefully reviewed the City's transition plan, which has been submitted as an exhibit to the City's motion for summary judgment. The plan includes a preprinted one-page form for each of several city buildings and facilities, such as City Hall and the public library, which includes a listing of the structural changes to the facility deemed necessary in order to achieve accessibility. An additional preprinted form in the plan designates a need for "[c]urb ramps as required throughout the community with priority given to those sidewalks serving public facilities and public accommodations." On each form, the City has indicated that the proposed modifications have been "[i]ncluded in CDBG [Community Development Block] Grant for possible funding after August

1992." The only other item included in the transition plan is a city map showing the locations of each facility designated for improvements.

The City contends in its motion for summary judgment that the transition plan meets the minimum requirements of 28 C.F.R. §35.150(d). The court disagrees. The plan does not include a schedule for providing curb ramps in accordance with the priorities forth in §35.150(d)(2), but merely echoes the language of the regulation that "priority" will be given to curb ramps on walkways serving public facilities and accommodations. Nor does the plan comply with the minimum requirements explicitly set forth in §35.150(d)(3). The plan does not identify existing physical barriers but simply indicates generally the parts of the listed facilities that need to be modified or added. The plan does not describe "in detail" the methods to be used to make the facilities accessible. Nor does it specify a schedule for taking the necessary steps to make the facilities accessible.[6] Finally, the transition plan itself does not designate the official responsible for implementation of the transition plan. Consequently, the court must deny the City's motion for summary judgment on the plaintiff's claim that the transition plan fails to comply with the requirements of the ADA regulations, in particular 28 C.F.R. §35.150(d).

Notes

1. *The High Cost of Litigation:* In a subsequent decision in the *Tyler* case, the court awarded attorneys' fees because "the plaintiff has prevailed on the merits as evidenced by the remedial action taken by the defendant." *Tyler v. City of Manhattan*, 866 F. Supp. 500, 501 (D. Kan. 1994). The court recognized that the claimed fees and costs amounting to nearly $62,000 were substantial. "Because the litigation has led to the development of a new field of law, both parties have expended sizable amounts of time, energy, and resources." *Id.* at 502.

2. *Standing to challenge failure to do self evaluations and develop transition plans.* While there are few cases on this issue, at least three federal circuit courts have determined that the ADA does not provide for private enforcement of self-evaluation and transition plan requirements. See, e.g., *Iverson v. City of Boston*, 452 F.3d 94 (1st Cir. 2006); *Ability Center of Greater Toledo v. City of Sandusky,* 385 F.3d 901 (6th Cir. 2004); *Lonberg v. City of Riverside*, 571 F.3d 846 (9th Cir. 2009). Might the attorney's fees decision in *Tyler* have changed the strategy of litigants in the cases where a court held that there is no individual standing to challenge transition plan and self-evaluation issues? The *Tyler* court did not address the issue of standing. If individuals cannot challenge this inaction, then what is the incentive for engaging in these processes? Is there sufficient benefit to identifying barriers that might become the basis for subsequent penalties? Does the self-evaluation and transition plan requirement under Section 504 of the Rehabilitation Act (where a failure might result in loss of federal financial assistance) provide a sufficient incentive as a policy matter?

E. Licensing Practices

The Americans with Disabilities Act prohibits discrimination on the basis of disability by state and local governmental entities. As the following opinions illustrate, this raises interesting questions about whether a governmental agency acting in a regulatory capacity, rather than in the direct provision of services, is subject to Title II of the ADA.

Hypothetical Problem 5.2

Springfield is being proactive in addressing economic downturn challenges and has built a new sports arena (SPARENA) that can be used as a venue for concerts, conventions, and other large audience events. To pay for the costs of building and maintaining the arena, the city will lease space within the arena's common areas to vendors of food,.pngts, sportswear, and alcohol. Some of these leases will be long term (three to five years, with renewable options) to vendors such as major

national fast food chains. Some will be short term licenses (for the duration of the event) to vendors associated with a particular event. Other long term leases will be granted to corporations for viewing spaces with 20 to 50 seats and social space with a bar for food and beverage service and other amenities. For the ten year leases, the tenant is given flexibility about how to arrange the space. The shorter term arrangements provide that the city is to specify the design, and also allows the city to license the space to other parties when there is not a major scheduled sports event or concert in the facility. There is also a closed room press box. All private boxes and the press box are accessible to enter, but within the ten year corporate boxes, some have been fitted out in a way that is not accessible in some areas for wheelchair users. Some of the private boxes are fully accessible and are in close proximity to the parking lot.

The number of accessible seats in areas other than the private boxes meet the numerical expectation for an arena of this size, but they are all located in one area. The accessible area is also the most distance from the entrance to the public parking lots, requiring a wheelchair user to travel long distances to reach. These are also often not desirable seats when certain concerts and other events are held at the arena. There is one small more desirable accessible area, but these seats are almost always sold at the most expensive price range.

Tina (from Hypothetical Problem 5.1) purchased a ticket along with a friend to attend a concert at SPARENA. Because of her financial situation, she could only afford the $25 ticket in the area far from parking. The close area accessible seating tickets were $150. When she attended, she discovered the challenge of parking. She also discovered that to purchase food from vendors was very hard because of the high counters making it difficult for them to see her. One of the sportswear shops has clothing racks so close together that she could not enter the store. In discussing this with friends, she also became aware that the TV sets in the common areas that broadcast what is happening in the venue did not have closed captioning, although within the arena, there was closed captioning on the display boards. Through an open records request, she has learned that the city contracted with a developer/contractor to build the arena, and the developer/contractor entered into contracts with architects and engineers for various aspects of the construction. She has also found correspondence that one of the architects had advised the contractor that the plans the contractor requested for accessible seating seemed problematic under federal requirements, but that the developer had told the architect to build it that way anyway.

A private college and a public university in Springfield have both entered into several year contracts to hold sports events and graduation events at SPARENA. Tina is enrolled at the public university and plans to attend sports events and her graduation at SPARENA and would like to be sure these events are accessible.

The attorney that she consults about her options is considering possible liability and remedies against the city, the contractor/developer, the architect, the engineer, the event sponsors, and the vendors. What are the various substantive, procedural, and strategic considerations? What remedies would be available? Are there avenues other than litigation that might be more effective in achieving the goal?

[1] Licenses to Do Business

Tyler v. City of Manhattan

849 F. Supp. 1429 (D. Kan. 1994)

[The first part of this decision is reported in the preceding section.]

The City next argues that plaintiff cannot prevail on Count III of his complaint, as a matter of law. Count III alleges that the City has entered into licensing and contractual arrangements with local businesses in violation of 28 C.F.R. §35.130(b)(1). Specifically, the plaintiff argues that the City

knowingly issues liquor licenses and building permits for facilities that are not accessible to persons with disabilities. As a result, plaintiff alleges that he has been denied access to services, activities, and programs offered either by the City or by facilities licensed by the City, in particular eating and drinking establishments and liquor stores. Further, plaintiff contends that the City fails to evaluate its licensees for compliance with the ADA, and has failed to require ADA compliance as a condition for licensure.

In seeking summary judgment on Count III, the City correctly argues that the regulations implementing Title II of the ADA do not cover the programs and activities of entities that are licensed or certified by a public entity. See 28 C.F.R. §35.130(b)(6). Although City programs operated under contractual or licensing arrangements may not discriminate against qualified individuals with disabilities, see 28 C.F.R. §35.130(b)(1), "[t]he programs or activities of licensees or certified entities are not themselves programs or activities of the public entity merely by virtue of the license or certificate."[7] Therefore, except to the extent that plaintiff asserts in Count III that he has been denied access to services, aids, and programs provided by the City under licensing or contractual arrangements, the defendant is entitled to judgment as a matter of law on Count III.

In response to the City's motion for summary judgment, the plaintiff contends that the City provides a service to the nondisabled public by physically inspecting licensed facilities. If those facilities are not accessible to persons with disabilities, he argues, the City's inspection service and the accompanying safety benefits are not available equally to persons with disabilities. While that may be true, individuals with disabilities are not denied access to such licensed facilities, or to the claimed benefits flowing from the City's inspection of them, by virtue of any act of the City in the manner it conducts those activities. Rather, they are excluded from the benefits of the City's inspection and licensing services solely because the licensed structure itself happens to be inaccessible. Title II of the ADA and its implementing regulations prohibit discrimination against qualified individuals only by public entities. It simply does not go so far as to require public entities to impose on private establishments, as a condition of licensure, a requirement that they make their facilities physically accessible to persons with disabilities.

The plaintiff has not asserted any facts in his response showing that a genuine issue of material fact exists with regard to Count III of his complaint. He relies solely on the argument that the City licenses inaccessible restaurants, vendors of cereal malt beverages, and liquor stores. As previously discussed, such facilities are not "services, programs, or activities of a public entity" under the ADA and hence are not covered by Title II or by the implementing regulations. The City is therefore entitled to summary judgment on Count III.

Problems

1. In Texas, it is a policy that the businesses licensed to sell lottery tickets must meet ADA accessibility requirements. This is a more proactive way to ensure accessibility than after-the-fact challenges against a state or local governmental agency, such as in the *Tyler* case. The program was begun in January 1994. See also *Paxton v. State of West Virginia Dep't of Tax & Revenue*, 5 N.D.L.R. ¶473 (W. Va. 1994), in which the lottery commission was directed to require lottery vendors to be accessible.

2. Would it violate Title II for a governmental agency to issue building permits to parties where the proposed construction is in violation of ADA building guidelines? *Schnall v. Levin*, C.A. No. CA-93-5707 (E.D. Pa. filed Oct. 28, 1993).

[2] Professional Licensing

[a] Licensing Exam Accommodations

Courts have given substantial attention to the governmental participation in professional licensing, particularly for the legal and medical professions. There are two primary areas in which disability discrimination arises—accommodations to the professional licensing exams and character and fitness questions.

There have been a number of cases addressing accommodations on professional licensing exams, including a Supreme Court case remanded for further proceedings. These cases have addressed both whether the individual met the definition of disabled within the statute, and whether the accommodations being requested were reasonable in light of concerns about security of the exam and whether there was a fundamental alteration to the program by providing certain accommodations.

In *Bartlett v. New York State Board of Law Examiners*, 119 S. Ct. 2388 (1999) (vacating judgment and remanding), the Court was to have addressed whether Marilyn Barlett's learning disability was a "disability" within the ADA. The Supreme Court had simultaneously decided the *Sutton* trilogy, discussed in early chapters of the text, in which mitigating measures were to be considered in deciding that issue. On remand, the lower court determination was that she met the definition. The ADA Amendments Act of 2008 broadened the definition, as discussed earlier in the text. As a result, it is probably less likely that status as a person with a disability will be the focus of professional licensing board denial of requested accommodations, although it is probable that documentation issues will still arise. These will include whether the documentation has been prepared by someone with appropriate expertise and whether it is appropriately recent.

Decisions today are more likely to focus on the accommodations themselves. Judicial decisions have addressed accommodation issues involving additional time on a particular day of the exam, taking an exam over multiple dates, using Braille and large print, use of readers and transcribers. For case references, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §5:7 (2012 and cumulative supplement).

The 2008 Amendments included language applicable to institutions of higher education that are applicable to the professional licensing setting. This language provides that

> Nothing in this Act alters the provision specifying that reasonable modifications in policies, practices, or procedures shall be required unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.

42 U.S.C. §12201(f).

Notes

Professional Licensing Exam Accommodations: There have been a number of cases in which courts have addressed accommodations on the bar exam. In *D'Amico v. New York State Bd. Of Law Exmrs.*, 813 F. Supp. 217 (W.D.N.Y. 1993), the plaintiff had a severe visual disability. The New York State Board of Law Examiners was willing to offer her unlimited time on two exam days, but was unwilling to allow her to take the bar exam over four days. The accommodation suggested by the Board was found to exacerbate her condition, deferring to the treating physician because the Board had provided no medical opinion to support its conclusion. The court, while recognizing legitimate concerns about maintaining the integrity of the exam process, also recognized the plaintiff's willingness to comply with reasonable security requirements. The court found that

> the Board's opinion as to what is "reasonable" for a particular applicant can be given very little weight when the Board has no knowledge of the disability or disease, no expertise in its treatment, and no ability to make determinations about the physical capabilities of one afflicted with the disability or disease.

The denial of the accommodation was found to violate the ADA.

In *Florida Bd. of Bar Exmrs. re S.G.*, 707 So. 2d 323 (Fla. 1998), the court held that it was not a reasonable accommodation to have the score of separate sections of the bar taken at separate sittings calculated as though they were taken at the same administration. This can be contrasted with *In re Rubenstein*, 637 A.2d 1131 (Del. 1994), in which a different result was reached. In an unusual decision, the Delaware Supreme Court ordered the state board of bar admissions to issue a certificate to practice to an applicant with a learning disability who had not passed the bar exam. The court held that she had been unfairly denied extra time to complete the exam in violation of Title II of the ADA. While this may initially seem to be an extraordinary remedy, inappropriate because professional competence should be demonstrated before licensure, additional facts explain the decision. The applicant had previously passed the multistate and the professional conduct portion of the exam, but not at the same time the essay section was passed. On her fourth attempt to pass all portions simultaneously, she passed the essay portion of the exam, but fell just short of the multistate section. The examiners had denied her accommodations recommended by an appropriate professional. The court found that there was sufficient evidence of competence to justify the equitable remedy of admission to the bar, rather than requiring that she be given the exam again with appropriate accommodations.

The Ninth Circuit decision in *Enyart v. National Conference of Bar Examiners,* 630 F.3d 1153 (9th Cir. 2011), allowed a preliminary injunction in a case where a bar applicant was denied computer accommodations that she had used during law school and for the California bar exam. The court noted that the technology that allowed for an enlarged screen should be considered as to whether it would "best ensure" that the test reflects the aptitude or achievement of the applicant instead of the impairment. The court noted that advances in technology should be taken into account. See also *Jones v. National Conference of Bar Examiners,* 801 F. Supp. 2d 270 (D. Vt. 2011); *Bonnette v. District of Columbia Court of Appeals,* 796 F. Supp. 2d 164 (D.D.C. 2011) (both issuing injunctions requiring bar examiners to use screen access software).

In 2014, the Law School Admissions Council settled a case regarding the practice of "flagging" LSAT tests taken under nonstandard conditions. http://www.nationallawjournal.com/id=1202656088420/8.7M-Settlement-Ends-'Flagging'-of-Disabled-LSAT-Takers#.

In *Binno v. The American Bar Association*, No. 12-2263, 2016 U.S. App. LEXIS 10887 (6th Cir. June 16, 2016), the Sixth Circuit Court of Appeals addressed a unique theory by a law school admission applicant who was blind and who claimed that the accommodations on the LSAT were not sufficient because one type of question required spatial understanding that is very difficult for individuals with visual impairments. The case was unusual because it was brought against the American Bar Association challenging its law school accreditation requirements that in essence required law schools to admit only applicants who had taken the LSAT. The court in dismissing the case against the ABA questioned whether the appropriate defendant should have been the Law School Admission Council ("LSAC"). The LSAC has changed its accommodations for these kinds of questions, so there may be a statute of limitations issue for the plaintiff to challenge this the LSAC policy at this point.

See also Laura Rothstein, *Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed and What Are the New Issues?* 22 AMERICAN U. J. OF GENDER, SOCIAL POL'Y & THE LAW 519 (2014).

Department of Justice regulations, effective March 15, 2011, address the documentation requirements for obtaining accommodations on examinations. 75 Fed. Reg. 56,164–236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236–358 (September 15, 2010) (Title III). If documentation is required, it should be reasonable and limited to the need for the modification, accommodation, or auxiliary aid or services requested. 28 C.F.R. §36.309.

Problems

1. *Fundamental Aspects of the Program*: Parties are not required to make fundamental alterations to the program or to lower standards in order to comply with the ADA. Parties may also demonstrate that a requested accommodation would be unduly burdensome either administratively or financially as the basis for showing that the accommodation is not reasonable. How would courts be likely to respond to concerns raised about exam security if an applicant requested to take an exam over several days? If a blind applicant requested to take the bar exam in his or her home city rather than at the designated locations elsewhere, would that be a reasonable accommodation? Would there be any situations where speed would be an appropriate measured skill for the practice of the law? What about a policy limiting the number of times an individual could take a professional licensing exam? There have been a number of other challenges involving accommodations on the bar exam with a variety of results. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §5:7 (2012 and cumulative supplement).

2. *Prep Courses for Professional Licensing*: It is clear that the ADA applies not only to professional exams, but to courses offered to prepare individuals for these exams. Such programs probably would be subject to Title III of the ADA rather than Title II. Should such courses be required to provide sign language interpreters and Brailled study aids if they already are providing transcripts of the lectures? See *United States v. Harcourt Brace Legal & Prof. Publications, Inc.*, No. CA 94-C-3295 (N.D. Ill., settled May 27, 1994); *United States v. Becker* C.P.A. Review, No. CV-92-2879 (D.D.C. settled May 16, 1994).

3. An individual with a visual impairment who uses a seeing eye dog wants to bring the dog to the three day bar exam and has requested assistance in taking the dog to be walked to relieve itself at intervals during the exam because the individual is not familiar with the venue for the exam. The individual also wants to stop the clock whenever he takes a break with the dog. The exam is given in four hour blocks of time. What if the individual requests that a friend be available to walk the dog as needed? What considerations are relevant in that situation?

[b] Character and Fitness Inquiries

In the professional licensing process, professional education programs and the individuals themselves, often must provide information about the qualifications and character and fitness for the profession. This information includes academic performance information, details about accommodations received during the educational process, and information about the character and fitness of the individual. Character and fitness questions can relate to truthfulness and trustworthiness. A common practice is to ask about mental health or substance abuse history. Early litigation challenged these questions in both the medical and legal professions as being discriminatory under the Americans with Disabilities Act. In addition to the claim of discrimination, there is substantial concern that these inquiries actually deter students from seeking treatment. There is also concern about ensuring the confidentiality of the treatment records provided to the state licensing boards as part of this process.

In one of the earliest decisions, the court in *Medical Society of New Jersey v. Jacobs*, 1993 U.S. Dist. LEXIS 14294; 2 Am. Disabilities Cas. (BNA) 1318 (D.N.J. 1993), struck down broad questions, not limited in time, about substance abuse and mental health treatment, as imposing extra burdens on qualified individuals with disabilities when those burdens are not necessary. The court noted that the licensing board could "formulate a set of effective questions that screen out applicants based only on their behavior and capabilities. For example, the Board is not foreclosed by Title II from screening out applicants based on their employment histories; based on whether applicants can perform certain tasks or deal with certain emotionally or physically demanding situations; or based on whether applicants have been unreliable, neglected work, or failed to live up to responsibilities.... [T]he Board may discriminate against individuals based on their current illegal use of drugs."

The court provided the following additional guidance.

> The parties do not dispute that all of the challenged questions inquire into the existence of "disabilities," as that term is employed in the ADA. Thus each of the challenged questions inquire into disabilities, because each question asks for information regarding physical or mental impairments, or alcohol or drug abuse.
>
> It is also unquestionable that many qualified individuals with disabilities will be singled out through their affirmative answers to the challenged questions. Title II defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modification to rules, policies, or practices ... meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."
>
> Furthermore, these additional burdens are unnecessary. The Court is confident that the Board can formulate a set of effective questions that screen out applicants based only on their behavior and capabilities. For example, the Board is not foreclosed by Title II from screening out applicants based on their employment histories; based on whether applicants can perform certain tasks or deal with certain emotionally or physically demanding situations; or based on whether applicants have been unreliable, neglected work, or failed to live up to responsibilities. In these areas, the applicants' references remain a valuable source of information. Also noteworthy is that the Board may discriminate against individuals based on their current illegal use of drugs.
>
> The Court further notes that there remain to the Board other sources of information, besides license applications, to determine the fitness of applicants and physicians. For instance, information about malpractice payments, along with information about sanctions taken by boards of medical examiners and health care entities, is available to the Board through the Health Care Quality Improvement Act of 1986, 42 U.S.C. §11101 et seq. Furthermore, New Jersey doctors are required to report to the Board "information which reasonably indicates that another practitioner has demonstrated an impairment, gross incompetence or unprofessional conduct which would present an imminent danger to an individual patient or to the public health, safety or welfare." And, of course, the Board will always have available that most important source of information of all, patient complaints.
>
> The essential problem with the present questions is that they substitute an impermissible inquiry into the status of disabled applicants for the proper, indeed necessary, inquiry into the applicants' behavior. In the context of other anti-discrimination statutes, it has been held to be fundamental that an individual's status cannot be used to make generalizations about that individual's behavior.
>
> The Court stresses, however, that it is not actually the questions themselves that are discriminatory under the Title II regulations. Theoretically, the Board could ask questions concerning the status of applicants, yet neither have the time nor the manpower to act upon the answers. Rather, it is the extra investigations of qualified applicants who answer "yes" to one of the challenged questions that constitutes invidious discrimination under the Title II regulations.

Note

The High Cost of Litigation: Following the *Jacobs* decision on the substantive issues, a settlement was reached. As part of the settlement, the court ordered the New Jersey Board of Medical Examiners to pay $233,293 for attorneys' fees incurred following attempts to resolve the matter at an early stage, which would have avoided excessive costs. *Medical Soc'y of New Jersey v. Jacobs*, 1994 U.S. Dist. LEXIS 15261, 62 U.S.L.W. 2238 (D.N.J. Sept. 26, 1994).

A number of challenges have been brought similar to the claim in the *Jacobs* case. The most notable decision reaching a different result than the *Jacobs* decision is the following case. The question at issue is more narrow than the question in the New Jersey case and the questions used by many state licensing agencies.

Applicants v. The Texas State Board of Law Examiners

C.A. No. A-93-CA-740 (Oct. 11, 1994)

SPARKS, JUDGE:

Pursuant to Texas Government Code Section 82.022(b), the Texas Supreme Court adopted the Texas Rules of Court that "govern the administration of the [Board's] functions relating to the licensing of lawyers." The Texas Government Code further requires each person intending to apply for admission to the Texas Bar to file with the Board a declaration of intention to study law and, before taking the bar examination, an application for examination.

The Board is charged with assessing each applicant's moral character and fitness to practice law based on its investigation of the character and fitness of applicants. The Board, in fulfilling its statutory duties, must recommend denial of a license if the Board finds "a clear and rational connection between the applicant's present mental or emotional condition and the likelihood that the applicant will not discharge properly the applicant's responsibilities to a client, a court, or the legal profession if the applicant is licensed to practice law."

The Board's investigation is limited to areas "clearly related to the applicant's moral character and present fitness to practice law." The rules promulgated by the Texas Supreme Court that govern admission to the Texas Bar define fitness as "the assessment of mental and emotional health as it affects the competence of a prospective lawyer." The fitness requirement is designed to exclude from the practice of law in Texas those persons having a mental or emotional condition that "would present the person from carrying out duties to clients, courts, or the profession." The fitness requirement is limited to present fitness; "prior mental or emotional illness or conditions are relevant only so far as they indicate the existence of a present lack of fitness."

Persons intending to seek admission to the Texas Bar usually file their declarations during the first year of law school. The rules require each applicant filing a declaration to provide extensive information about his or her background, including a history of mental illness. The Rules also provide that the Board may require the applicant to execute a consent form authorizing the release of records to the Board.

The questions formulated by the Board to seek information about an applicant's mental health history have been substantially revised since 1992 in efforts to comply with the [Americans with Disabilities Act.] [Author's Note: Language of various versions is omitted.] The current version of question 11 asks:

> 11. a) Within the last ten years, have you been diagnosed with or have you been treated [for] bipolar disorder, schizophrenia, paranoia, or other psychotic disorder?
>
> b) Have you, since attaining the age of eighteen or within the last ten years, whichever period is shorter, been admitted to a hospital or other facility for the treatment of bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?
>
> If you answered "YES" to any part of this question, please provide details on a *Supplemental Form*, including date(s) of diagnosis or treatment, a description of the course of treatment, and a description of your present condition. Include the name, current mailing address, and telephone number of each person who treated you, as well as each facility where you received treatment, and the reason for the treatment.

Dr. Richard Coons, one of the experts who testified on the Board's behalf and who is educated as a lawyer, medical doctor, and psychiatrist, was a consultant to the Board in the Board's formulation of the current version of question 11.

An affirmative answer to any part of question 11 triggers a requirement that the applicant provide a detailed description of the diagnosis or treatment and identify and provide the address of each

individual that has treated the applicant. The current declaration also includes a general authorization and release for records that each applicant must sign. The current authorization limits the release of mental health records to only those pertaining to diagnosis of the conditions specified in question 11.

As part of the investigation process, each applicant must identify employers or clients and provide character references. The Board then sends forms to the identified references requesting information about the applicant. The current form sent to individuals listed in the declaration by the applicant as character references, employers, or former clients includes a question regarding the reference's knowledge about whether the applicant has been diagnosed or treated in the past ten years for bipolar disorder, schizophrenia, paranoia, or any psychotic disorder.

In addition to the declaration, each person ... must file an application ... [including] a verified affidavit that requires, among other statements, an assertion that the applicant is not mentally ill.... [E]ach applicant [must] sign a verified affidavit ... that the applicant has not been diagnosed, treated, or hospitalized since the filing of the declaration for bipolar disorder, schizophrenia, or any psychotic disorder.

Bipolar disorder, schizophrenia, paranoia, and psychotic disorders are serious mental illnesses that may affect a person's ability to practice law. People suffering from these illnesses may suffer debilitating symptoms that inhibit their ability to function normally. The fact that a person may have experienced an episode of one of these mental illnesses in the past but is not currently experiencing symptoms does not mean that the person will not experience another episode in the future or that the person is currently fit to practice law. Indeed, a person suffering from one of these illnesses may have extended periods between episodes, possibly as much as ten years for bipolar disorder or schizophrenia. Although a past diagnosis of the mental illness will not necessarily predict the applicant's future behavior, the mental health history is important to provide the Board with information regarding the applicant's insight into his or her illness and degree of cooperation in controlling it through counseling and medication. In summary, inquiry into past diagnosis and treatment of the severe mental illnesses is necessary to provide the Board with the best information available with which to assess the functional capacity of the individual.

[Factual information about the plaintiffs omitted.]

The prohibition against discrimination [under Title II of the ADA] extends to "qualified individual[s] with a disability." A person is a "qualified individual with a disability" in the context of licensing or certification if the person can meet the essential eligibility requirements for receiving a license or certification. The regulations prohibit the imposition of eligibility criteria that "screen out or tend to screen out" a disabled individual from "fully and equally enjoying any service, program, or activity, *unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered*." 28 C.F.R. §28.130(b) (emphasis added). When, as in this case, questions of public safety are involved, the determination of whether an applicant meets "essential eligibility requirements" involves consideration of whether the individual with a disability poses a direct threat to the health and safety of others. However, a determination that a person poses such a threat may not be based on generalizations or stereotypes about the effects of a particular disability but must be based on

> an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

The plaintiffs argue that all the mental health questions the Board has used, including the present narrow inquiry, inquire into an individual's status as mentally ill rather than focusing on behaviors that would affect the individual's ability to practice law. They contend that such inquiry is not necessary, the standard required by the ADA to justify the application of criteria that "screen out or tend to

screen out," because the same information can be ascertained through other sources and means.

The plaintiffs suggest that applicants to the Board have already been extensively screened by virtue of successfully completing college and achieving admission to law school. Further, any aberrant behavior that might bear on their present mental fitness would be apparent from a criminal, educational, or employment history. The plaintiffs presented evidence that, in fact, the current question was imperfect in that some who suffer from the specified mental illnesses may be missed by the current question because they have not sought diagnosis or treatment. The plaintiffs suggest reliance on other facets of the investigatory process applied to all applicants or a series of questions aimed at behavior would comply with the ADA and would be just as effective as the process the Board currently employs. Alternatively, the plaintiffs suggest asking applicants to voluntarily disclose if they suffer from any mental illness that could affect their ability to perform the functions essential to being a lawyer.

The defendant's expert testified that a direct mental health inquiry ... is necessary in the licensing process to get a full understanding of the functional capacity of the applicant's mental fitness. The defendant's expert further testified that the inquiry should go back a minimum of five years and optimally ten years because of the chronic nature of the severe mental illnesses specified in the current question 11, which often have an onset during adolescence. Although relying on past behavior in other areas may reveal behavior relevant to mental fitness, the evidence reflected that in the majority of cases already reviewed by the Board, this was not the case.

The inquiries courts in other states have held prohibited by the ADA were virtually identical to the previous broad-based forms of question 11 used by the Board that intruded into an applicant's mental health history without focusing on only those mental illnesses that pose a potential threat to the applicant's present fitness to practice law. The Court concurs that such a broad-based inquiry violates the ADA.

As stated above, the ADA does not preclude a licensing body from any inquiry and investigation related to mental illness, instead allowing for such inquiry and investigation when they are necessary to protect the integrity of the service provided and the public. [R]eliance on "behavior" occurring in other facets of an individual's life as triggers to indicate a mental illness affecting present fitness may be present is a much more inexact and potentially unreliable method of ascertaining mental fitness.

The Board has a duty not to just the applicants, but also to the Bar and the citizens of Texas to make every effort to ensure that those individuals licensed to practice in Texas have the good moral character and present fitness to practice law and will not present a potential danger to the individuals they will represent. The Board has a limited opportunity to accomplish this task—the time of the filing of the declaration and application.

In each of these [varied] proceedings, the lawyer must be prepared to offer competent legal advice and representation despite the stress of understanding the responsibility the lawyer has assumed while balancing other clients' interests and time demands.

[T]he Court finds, by a preponderance of the evidence that the Board's use of the current question 11, a narrowly focused question, and the subsequent investigation based on an affirmative response to the question are necessary to ensure the integrity of the Board's licensing procedure, as well as to provide a practical means of striking an appropriate balance between important societal goals.

Problems

1. Are *Jacobs* and *Applicants* distinguishable?

2. The argument for inquiring into the mental health status of prospective job applicants as a protection of clients can be made by employers, such as law firms. Would such questions by firms be likely to withstand an ADA challenge? If not, then how could the Texas decision be justified? Are

Title I and Title II simply to be read differently? What if answering in the affirmative to any of the mental health history cases resulted in not being able to obtain malpractice insurance? Would a Title I analysis then be more appropriate?

3. There are legitimate concerns about safety of clients and the public and competency to practice law or medicine. What types of questions could state licensing agencies ask to more directly determine character and fitness to practice law or medicine without risking violation of the ADA or without asking about mental health history? The Medical Society of New Jersey has changed its questions to ask about current medical conditions that impair the ability to practice and other questions about *current* conditions that are limiting.

4. What is the likelihood that questions about current illegal use of controlled substances would withstand ADA scrutiny in the professional licensing context? Questions about a history of drug addiction? A history of alcohol addiction? Current alcohol addiction?

5. Would the kinds of questions permitted depend on the profession involved? Would there be a different analysis with respect to teacher certificates, pharmacy licensing, nursing license, or other professions compared with law and medicine?

Note

1. *Mental Health Questions:* The issue of mental health history questions in the professional licensing context has been evaluated in several states. The majority have either removed the questions voluntarily or the courts have determined that the questions violate the ADA. *See* LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §5.08 (2012 and cumulative supplement). For an excellent discussion of the issues raised in professional licensing mental health questions, see Stanley Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILLANOVA L. REV. 635 (1997). There is evidence that asking such questions is a deterrent to getting treatment for individuals in professional programs who fear that they will not be admitted to the profession if they answer affirmatively to questions about treatment and diagnosis. See also Laura Rothstein (with Mark Rothstein), *Impaired Physicians and the ADA*, Viewpoint, June 9, 2015 JAMA, 2015;313(22); 2219–2220, http://jama.jamanetwork.com/article.aspx?articleid=2319174; Laura Rothstein, *Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed and What Are the New Issues?* 22 AMERICAN U. J. OF GENDER, SOCIAL POL'Y & THE LAW 519 (2014); Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531 (2008).

In one of the few recent cases to challenge the legality of mental health history questions for professional licensing, the court struck down one of the inquiries as going too far, but upheld the other three. See *ACLU-Indiana-Indiana University School of Law v. Indiana State Board of Law Examiners*, 2011 WL 4387470 (D. Ind. 2011). See also Louisiana Attorney Licensure System, Jocelyn Samuels, Louisiana Attorney Licensure System, U.S. Department of Justice, http://www.ada.gov/louisiana-bar-lof.docx (last visited May 29, 2014). Lexis Cite: 2014 Nat'l Disability L. Rep. ¶138 (LRP) LEXIS 27 (2014) (DOJ Findings Letter that Louisiana mental health history questions for bar admission violate Title II of the ADA) http://www.ada.gov/louisiana-bar-lof.docx.

2. *Myths and Stereotypes:* The following is an edited excerpt from Laura Rothstein, *Millennials and Disability Law: Revisiting* Southeastern Community College v. Davis, 34 J. COLL. & UNIV. L. 169, 182–184 (2007) (citations to footnotes are omitted).

> The April 2007 shootings at Virginia Tech University raised extensive concern and reaction across the country. Everyone wanted to know how to keep dangerous and "crazy" people off campus. One frequent reaction was that the students should be required to disclose mental health status and that this should be reported to a wide variety of university and law enforcement offices

to ensure the safety of these students. This is not only inappropriate in most cases under current legal doctrine, but such a practice would have a deterrent effect on students who might want treatment. In addition it might violate the treating professional's confidentiality obligation of a therapist.

It should be emphatically noted that most individuals with mental illness are not violent or dangerous and do not present a direct threat. Some, however, are disruptive and may seem threatening in some instances because of their behavior. This behavior may or may not be a result of the mental illness. For that reason, it is critical to focus on behavior and conduct and not diagnosis or history of treatment.

Some would suggest that asking about mental health problems during the admissions process might reduce problems on campus. While the courts have upheld narrow questions about mental health status and substance abuse in the context of professional licensing certification, they are unlikely to do so in the context of higher education admission. The public protection issues that arise in professional licensing are not the same as those in higher education. The appropriate and permissible questions in higher education are those relating to behavior and conduct, not to diagnosis and status. While institutions need not admit or continue enrollment of students who present a direct threat to self, others, or property, they should not treat adversely those who are diagnosed with a mental illness or a substance abuse problem, unless that individual's condition has raised direct threat concerns in the past or there is a justifiable basis for the likelihood of concerns in the future. It is also important that the institution keep this information confidential.

Misconduct and misbehavior need not be excused even if caused by a mental impairment or a substance abuse problem.... A difficult situation is presented to a university where a student exhibits self destructive behaviors, including threats of suicide, eating disorders, engaging in substance or alcohol abuse, and engaging in antisocial behaviors. While there may not be a threat to others, there can be a disruption or interference with the educational process in the classroom or in a campus living situation. Roommates, other students, instructors, and even patients in health care settings may be challenged by such conduct. For example, a roommate who feels the need to keep a constant eye on a student who is suicidal will be disrupted in the educational process. The focus should be on documenting the destructive behavior, and determining the best course of action based on that. One of the challenges is to identify what code of conduct or disciplinary code is being violated by such behaviors and to ensure that university policies are in place that address that.

The issue of threat to self is an unsettled question in the context of professional licensing. While it is permissible to consider threat to self in the context of employment, Department of Education guidance indicates that it may not be permissible in an education context. The Department of Justice has oversight of Title II, including state agencies involved with professional licensing. This is a program that is the conduit between education and employment. What makes the most sense for how threat to self should be treated?

3. In response to concerns about overly broad mental health history questions, the court in *Clark v. Virginia Board of Bar Examiners*, 880 F. Supp. 430 (E.D. Va. 1995), addressed a case involving an applicant for admission to the Virginia bar. The applicant alleged that the question on the license application violated the ADA. It asked whether the applicant had within the past five years been treated or counseled for mental, emotional or nervous disorders. An affirmative response required the applicant to provide additional information about the dates of treatment, the treating physician or institution, a description of the diagnosis and treatment and prognosis.

The court held that the question was too broad and should be rewritten to achieve the objective of protecting the public. The broadly worded question was found to discriminate by imposing additional eligibility criteria. The court found that the Board had not obtained evidence that mental health counseling or treatment is effective in guarding against direct threat. The court recognized the deterrent effect of asking a question about mental health counseling, and recognized that past

behavior would probably be the best predictor of present and future mental fitness. The decision provides in a footnote a useful listing of approaches that all states had taken to asking mental health questions. The listing was updated in an article by Theresa Esquerra, *Mental Illness Disclosure Requirements on State Bar Moral Character and Fitness Applications: A Qualitative Survey*, at www.activeminds.org/storage/activeminds/documents/theresa_esquerra_part_a.pdf.

F. Mass Transit

Mass transit refers to a broad array of transportation services. This includes service offered to the public by both public and private entities on either a demand responsive or fixed route basis. Because of the cost, this is one of the most controversial areas of public policy relating to individuals with disabilities. For example, making subway systems accessible in older cities can be extraordinarily costly. There has been some debate about whether individuals with disabilities would use mass transit even if the systems were made accessible.

A Third Circuit opinion from 1989, *Americans Disabled for Accessible Public Transportation (ADAPT) v. Burnley*, 867 F.2d 1471 (3d Cir. 1989), was withdrawn and the judgment vacated, so it has no value as precedent. The opinion, however, provides a useful history of the attempt to regulate accessible mass transit under the myriad of federal statutes. These included the Urban Mass Transportation Act, the Federal Aid Highway Act, the Architectural Barriers Act of 1968, the Surface Transportation Assistance Act, and Section 504 of the Rehabilitation Act. The guidance and regulations from the various federal agencies involved (Department of Transportation, the Department of Health, Education and Welfare (now Health and Human Services)) created confusion as to whether all public transportation vehicles were to be retrofitted to be accessible or only whether new vehicles must be accessible. There was additional confusion as to whether there was a "safe harbor" limiting the amount of spending for special services. Requirements relating to paratransit systems were also unclear.

In 1990, with the passage of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 et seq., Congress specified nondiscrimination and access policy related to demand responsive systems, designated public transportation (not including public school transportation) provided to the general public on a regular and continuing basis, fixed route system transportation, paratransit systems, intercity and commuter rail systems, and rail transportation. 42 U.S.C. §§12141–12165; 49 C.F.R. pts 27, 37 and 38. The Section-by-Section Analysis clarifying the regulations is found at 56 Fed. Reg. 45584–45621 (Sept. 6, 1991). The regulations apply to both public and private entities providing mass transit, and implement Titles II and III of the ADA, as well as Section 504 of the Rehabilitation Act, the Urban Mass Transportation Act, and the Federal Aid Highway Act.

Paratransit services present a complex set of issues. These issues include whether it is required, the level of service that should be provided, and what eligibility requirements must be met. Basically, public transit programs providing a fixed-route transportation system must provide a complementary paratransit system. In recognition that it might be unduly burdensome to provide such service, there is a waiver provision. Eligibility requirements are also addressed in the statute and regulations. 42 U.S.C. §12143(a); 49 C.F.R. §§37.121 to 37.156.

The ADA includes reference to how over-the-road bus systems (such as Greyhound) are affected, as well as specifying some requirements relating to taxicabs. The ADA, primarily through its regulations, mandates access for both the vehicles and the fixed facilities as well as providing for nondiscrimination and accommodation to policies and practices of mass transit providers.

In recognition of the high cost in some cases of implementing some of the requirements, there is a phase-in schedule for compliance. For example, mass transit providers need not immediately make all vehicles accessible. They must, however, purchase only accessible vehicles in the future, and there

must be some assurance that the overall program is accessible. This may mean the provision of a paratransit system. New stations must be accessible immediately, but not all existing stations require immediate barrier removal. By July of 1993, however, those stations identified as key stations must be accessible. There are provision for extensions of some deadlines in the case of undue hardship. Challenges by individuals with disabilities to the new requirements have not yet reached the courts in any great number.

The difficulty of making over-the-road buses (buses with elevated passenger decks located over the baggage compartment) accessible was recognized. The issue was referred for further study. 42 U.S.C. §12185.

In *Wray v. National R.R. Passenger Corp.*, 10 F. Supp. 2d 1036 (E.D. Wisc. 1998), passengers with disabilities sued Amtrak for violations of the ADA. The plaintiffs were passengers who were taking a trip from Milwaukee to Memphis. The plaintiffs, who were elderly and suffered from a variety of medical conditions sat in the car reserved by Amtrak for persons with disabilities, although they had not previously made reservations to do so. When the conductor realized that the plaintiffs were sitting in the disability-accessible seats without reservations, he firmly requested that they move or he would call the police. The plaintiffs moved to the upper level. However, the restroom was on the lower level, and one of the plaintiffs, who took medication causing her to urinate frequently, was on several occasions unable to get down the steep steps before urinating. The question the court analyzed in this case was "does the ADA grant plaintiffs a right to sit in the disabled seating section, notwithstanding that they did not have reservations and that there were more disabled passengers than there were available seats?" The court found that the ADA does not grant such a right. Amtrak has disability-accessible seats, and their reservation system is a reasonable response to excess demand. Therefore, the plaintiffs had no right to stay in the disability-access seats, and the defendants did not violate the ADA by requiring them to move.

An interesting case addressed issues of access to subway lines. In *Disabled in Action of Pennsylvania v. Southeastern Pennsylvania Transportation Authority,* 635 F.3d 87 (3d Cir. 2011), a summary judgment for the plaintiff was affirmed in a claim by an advocacy group that Title II of the ADA required accessibility to a subway station where a stairway and escalator were altered after the enactment of Title II. The case recognized that different circuits have different views of what constitutes an alteration under Title II of the ADA. An indication of the types of situations that can give rise to issues involving transportation is found in the case of *Johnson v. Napa Valley Wine Train*, 52 Nat'l Disability Law Rep. ¶135 (N.D. Cal. 2016), where passengers with mobility impairments who had requested assistance and were reassured that it would be available brought suit when they found the assistance inadequate. The court allowed the case to proceed. The Program had indicated in its response that the specific modifications were not adequately requested.

Problem

1. The ADA regulations relating to mass transit vehicles include a number of design specifications relating to elements such as grab bars and other safety features. Would a failure to comply with such an ADA requirement be the basis for establishing a breach of duty in a common-law tort action? See *Greater Houston Transp. Co. v. Zrubeck*, 850 S.W.2d 579 (Ct. App. Tex. 1993).

2. Hypothetical Problem 5.1 includes issues regarding elimination of some paratransit service by the City of Springfield. What is the likely outcome of a legal challenge to this decision? What parties might be subject to challenge? The City, the STAR program? What about Eleventh Amendment immunity? Would that affect the remedies that Tina or other plaintiffs could recover?

Note

The Right to Travel: Before the passage of any of the major statutes relating to accessible

transportation, advocates attempted to raise constitutional arguments to force governmental authorities to make buses accessible. The claim was that the failure to make public transportation accessible was a denial of the Equal Protection Clause of the Fourteenth Amendment to the Constitution. The response to such claims was that public transportation is not a fundamental right. Applying the rational basis test to such claims thus resulted in a finding that there was no denial of equal protection. See *Snowden v. Birmingham-Jefferson County Transit Auth.*, 407 F. Supp. 394 (N.D. Ala. 1975), *aff'd*, 551 F.2d 862 (5th Cir. 1977). One of the earliest discussions of this issue, is found in Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501 (1973). A pre-ADA discussion of public transportation policy is found in ROBERT A. KATZMANN, INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED (1986).

G. Driving and Parking

For the individual with a disability who does not want to use mass transit or some public transportation system, but would rather drive, there are three major obstacles. These are obtaining a driver's license, access to a vehicle, and access to parking and highways. Disability discrimination law addresses these issues in varying ways.

[1] The Driver's License

Obtaining a driver's license is an essential requirement to being able to drive legally. Most licensing requirements fall under state law, although federal licensing requirements relate to operators of vehicles in interstate commerce, such as truck drivers, and operators of railroad vehicles, etc. These laws vary substantially in who may not be licensed, when a license may be revoked, and whose license may be restricted. They also vary as to how impairments are evaluated and how an individual may challenge an adverse decision. The condition probably most affected by such restrictions is epilepsy. In many states, individuals with epilepsy have great difficulty in obtaining driver's licenses. It remains to be seen whether the ADA will have any impact on this issue.

Problems

1. Marvin is a medical student who has epilepsy, but he has been seizure-free for ten years. One evening he forgot to take his medication, and had a seizure on the freeway causing a minor accident. After the police report was filed, indicating the facts surrounding Marvin's epileptic seizure, he was notified that his license was being revoked pursuant to a state law revoking driver's licenses for medical reasons (including drug or alcohol addiction). What action should Marvin take? Is Marvin tactically helped or hurt by the fact that he is a medical student? See *Labenski v. Goldberg*, 41 Cnn. App. 866, 678 A.2d 496 (Conn. App. Ct. 1994).

2. If a state acted negligently in renewing an unrestricted driver's license to an individual known to be prone to epileptic seizures, and another individual was killed as a result of an auto accident resulting from a seizure by the licensee, would the state be liable for negligence? See *Johnson v. Department of Pub. Safety & Corrections*, 636 So. 2d 644 (La. Ct. App. 1993).

Notes

1. *Interstate Truck and Common Carrier Drivers:* The federal government is involved in the licensing of drivers in interstate trucking and interstate common carriers, such as bus drivers. The Interstate Commerce Commission (ICC) regulates drivers subject to its jurisdiction. In one of the major cases on this issue, a truck driver requested the Department of Transportation to waive its rule disqualifying drivers with a history of epilepsy. In deciding that the denial of the waiver did not

violate Section 504 of the Rehabilitation Act, the court noted that there was not an absolute "anti-epilepsy" rule. The court found that a Task Force, which had been appointed to study medical qualifications of drivers, had recommended against permitting individuals with epilepsy to drive unless they had had no seizures and had not taken anticonvulsant drugs for ten years. The plaintiff had been seizure-free for six years, but he took anticonvulsant drugs.

In holding that the Department of Transportation was not required to make an individualized inquiry as to plaintiff's fitness, the court deferred to the Task Force's recommendation. It concluded that the Task Force's rule was a reasonable one based on sound statistics and that it was sufficiently individualized in its application. See *Ward v. Skinner*, 943 F.2d 157 (1st Cir. 1991). Is there a justification for having a more stringent rule with respect to licensing individuals with epilepsy for interstate trucking and common carrier driving than for a regular automobile driver's license? The Supreme Court's decision in *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), involved termination of employment in a commercial truck driver position because the individual did not meet Department of Transportation vision requirements. The plaintiff alleged that the requirements could be waived, and that denial of waiver violated the ADA. In deciding that the employer was not required to waive the requirement the Court noted the following:

> Is it reasonable ... to read the ADA as requiring an employer ... to shoulder the general statutory burden to justify a job qualification that would tend to exclude the disabled, whenever the employer chooses to abide by the otherwise clearly applicable, unamended substantive regulatory standards despite the Government's willingness to waive it experimentally and without any finding of its being inappropriate? If the answer were yes, an employer would in fact have an obligation of which we can think of no comparable example in our law. The employer would be required in effect to justify de novo an existing and otherwise applicable safety regulation issued by the Government itself. The employer would be required on a case-by-case basis to reinvent the Government's own wheel when the Government had merely begun an experiment to provide data to consider changing the underlying specifications.... It is simply not credible that Congress enacted the ADA (before there was any waiver program) with the understanding that employers choosing to respect the Government's sole substantive visual acuity regulation in the face of an experimental waiver might be burdened with an obligation to defend the regulation's application according to its own terms.

As noted in previous chapters, the ADA Amendments Act of 2008 returns the definition of a person with a disability to a broad reading. While generally the amendments prohibit considering ameliorative effects of mitigating measures in determining disability, they allow for considering the ameliorative effect of mitigating measures of "ordinary eyeglasses or contact lenses in determining whether there is a substantial limitation." 42 U.S.C. §12102(4)(E)(iii). The amendments prohibit covered entities, however, from using qualification standards or selection criteria that are based on uncorrected vision unless these are job-related and consistent with business necessity. 42 U.S.C. §12113(c). In sum, the 2008 amendments do not really change the *Albertsons* decision with respect to whether the individual was otherwise qualified.

2. *Recipients of Federal Financial Assistance:* Programs, such as public schools, city metro bus systems, etc., also are subject to federal regulation with respect to driver's licensing. 49 C.F.R. part 391. In *Strathie v. Pennsylvania Dep't of Transp.*, 716 F.2d 227 (3d Cir. 1983), the court vacated a lower court decision which had upheld the denial of a school bus driver's license to an individual with a hearing impairment. The case was remanded for a determination as to whether the plaintiff was otherwise qualified.

Should standards for school bus drivers be more stringent than for interstate truck drivers? See also *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), in which the court held that city employees who were insulin dependent driving on public roads were not disabled under Section 504 and were not otherwise qualified.

3. *Associational Discrimination*. Many states provide for special driver permits for minors who drive under the supervision of a parent or legal guardian. In *Barber v. Colorado*, 31 Nat'l Disability Law Rep. ¶147 (D. Colo. 2005), the court dismissed a Title II claim based on associational disability. A mother's visual impairment prevented her from having a license that would have allowed her daughter to participate in the permit program. The court held that associational discrimination claims were not allowed under Title II of the ADA, only Title I. This seems to be a narrow reading of the statute, which was probably intended to extend associational discrimination to all aspects of the ADA.

[2] The Automobile

A 1982 article entitled *Dealing with Handicapped Consumers* asks what obligations apply in selling goods to individuals with disabilities. These questions are still timely. Is there any potential consumer law liability in selling a car to someone "who cannot possibly drive it because of bad eyesight, or a bad heart, or a history of epileptic seizures"? Or tort liability by the car dealer after such a sale where someone else is injured by the consumer with a disability driving a car? Is a dealer obligated to allow someone using a wheelchair to transfer in and out of an automobile although injury to the car's upholstery might result? The article notes that "case law precedents are few and widely scattered throughout the 50 states." It will be interesting to monitor whether the passage of the ADA has any impact on additional litigation raising these complex issues of the relationship between obligations not to discriminate on the basis of disability and consumer protection and tort law requirements. See *Dealing with Handicapped Consumers: Added Risks and Obligations*, 18 TRIAL 64 (December 1982). As driverless cars become more of a reality, some of these issues may no longer be relevant.

Notes

1. *Market Forces:* In recognition that consumers with disabilities represent a significant market to target, General Motors at one time offered Saturn buyers $1,000 as reimbursement to cover costs incurred in installing adaptive equipment to their vehicles. *Saturn Offers Reimbursement to Disabled Buyers*, L.A. TIMES, March 3, 1994, at D2.

2. *Rental Cars:* In a settlement with the Department of Justice, Avis agreed to make rental cars with hand controls available and to train its mechanics to install the equipment, so that the adaptations can be made available on short notice. Other settlement terms included allowing an individual with a disability, but without a driver's license, to be financially responsible on the rental agreement when the car was to be driven by an individual accompanying the person with a disability. Accommodations for individuals who do not have credit cards were also part of the settlement. *Avis Inc., Garden City, New York*, Enforcing the ADA: A Status Report Update (U.S. Dept. of Justice, Civil Rights Division, Public Access Section, Washington, D.C.), July–Sept. 1994, at 5.

[3] Parking and Highways

Access to federal highway facilities is subject to requirements of the Federal Aid Highway Act. 23 U.S.C. §142. The ADA applies to state and local streets and roads. Parking areas also will be subject to ADA requirements for the most part. The applicable requirements will depend on whether the parking area is part of a public program (Title II) or a private program (Title III). In addition, in many states there are additional requirements relating to provision of spaces for vehicles appropriately designated.

[4] Taxicab Service

Taxicab service is technically subject to Title III of the ADA, but because it is heavily regulated, the requirements relating to such service are discussed in this chapter. Providers of taxicab service are

not required to purchase or lease accessible automobiles. If a provider purchases vehicles other than automobiles, such vehicles must be accessible unless the provider can demonstrate equivalency in service (including scheduling, response time, fares, area and time of service). 27 C.F.R. §§37.29, 37.105.

As services such as Uber and Lyft evolve, new issues arise. One is whether they are actually subject to nondiscrimination laws. The other is, if they are covered by the statutes, what is required of them with respect to accessibility. See, e.g., *National Federation of the Blind v. Uber Technologies, Inc*., 103 F. Supp. 3d 1073 (N.D. Cal. 2015) (a case in which it was alleged that some drivers refused to transport assistance animals; granting associational standing of organization representing blind persons; leaving open the question of whether provider of taxi services was a public accommodation under Title III). In addition to animal issues, there remain questions of how the systems have to ensure the vehicles can transport wheelchairs and what assistance the driver must provide to an individual with a mobility impairment.

H. Access to Justice

[1] Participation on Juries

Individuals with visual or hearing impairments face difficulties as parties to judicial proceedings and as jurors. The categorical exclusion of individuals with sensory impairments from jury lists has been successfully challenged by a number of claimants applying the ADA and Section 504 of the Rehabilitation Act. The following case is an example of such a challenge.

Galloway v. Superior Court

816 F. Supp. 12 (D.D.C. 1993)

JOYCE HENS GREEN, DISTRICT JUDGE:

[P]laintiff Donald Galloway ("plaintiff" or "Galloway") initiated this action, alleging that defendants' policy and practice of refusing to permit persons who are blind to serve on juries of the Superior Court of the District of Columbia ("Superior Court") violates the Rehabilitation Act of 1973 ("Rehabilitation Act"). Plaintiff subsequently filed a second amended complaint, which added a cause of action alleging a violation of Title II of the Americans with Disabilities Act ("ADA").

Background

Plaintiff Galloway is a United States citizen, who lives in and is registered to vote in the District of Columbia. He is also blind and has been blind since the age of sixteen. Presently, he is employed as a Special Assistant and Manager by the District of Columbia Department of Housing and Community Development. Prior to attaining his current position, Galloway received both a Bachelors of Arts degree in sociology and a Masters of Arts in social work. After completing his education, he held a variety of research and supervisory positions in both the private and public sectors. For instance, early in his career, Galloway worked for the University of California, assisting the establishment of a prepaid health care program and health care centers. Later, Galloway served for three years as the Director of the Peace Corps for Jamaica, and then became assistant to the Deputy Director of the Peace Corps. In his current position with the District of Columbia government, as well as in his past positions, Galloway has had "to evaluate facts and people and to weigh evidence and make judgments based on this information."

Like many registered voters in the District of Columbia, Galloway received a notice from the Superior Court indicating that he had been selected for jury duty. Accordingly, accompanied by his guide dog, he duly reported to Superior Court at 8:00 a.m. on the specified date, March 1, 1991.

Although he attempted to register for the jury pool, Galloway was informed by Superior Court personnel that he was barred from serving as a juror because he is blind—the official policy of the Superior Court excludes all blind persons from jury service.

Discussion

After careful consideration of the statutes invoked and the pleadings submitted, it is clear that defendants have violated the Rehabilitation Act, the ADA, and the Civil Rights Act of 1871 by implementing a policy that categorically excludes blind individuals from jury service. [The Court did not directly address the availability of compensatory damages.]

A. *The Rehabilitation Act*

It is readily apparent that the Superior Court jury system falls within the purview of Section 504 of the Rehabilitation Act. First, the Act defines "program" as "all of the operations of ... a department, agency, special purpose district, or other instrumentality of a State or of a local government." 29 U.S.C. §794(b)(1)(A). In addition, the Superior Court receives "Federal financial assistance" in the form of grants from the United States Department of Justice. Nor is there any question that a blind person is a "handicapped individual" within the meaning of the Act.

Accordingly, the sole remaining issue is whether Galloway or any blind person is "otherwise qualified" to sit on a jury. Defendant bases its policy of excluding blind persons from jury service on the assertion that no blind person is ever "qualified" to serve as a juror because he or she is not able to assess adequately the veracity or credibility of witnesses or to view physical evidence and thus cannot participate in the fair administration of justice. Defendants' position is not only profoundly troubling, but clearly violates the Rehabilitation Act.

Without doubt, there exists "the tendency on the part of officialdom to overgeneralize about the handicapped." *Shirey v. Devine*, 670 F.2d 1188, 1204, n. 45 (D.C. Cir. 1985). The policy at issue here is an excellent example of this penchant for overgeneralization. It is furthermore the reason why a court "must look behind the qualifications [invoked by defendants]. To do otherwise reduces the term 'otherwise qualified' and any arbitrary set of requirements to a tautology." Thus, two questions exist: What are the essential attributes of performing jury duty, and can Galloway or other blind persons meet these requirements?

Defendants' policy is based on the assumption that visual observation is an essential function or attribute of a juror's duties. In reaching this conclusion, however, defendants failed to examine any studies or review any literature on the ability of blind individuals to serve on juries or the ability of these individuals to assess credibility.[13] Even now, defendants only conclusorily contend that plaintiff "is not capable of performing all of the essential aspects of jury service." However, plaintiff has offered uncontradicted testimony that blind individuals, like sighted jurors, weigh the content of the testimony given and examine speech patterns, intonation, and syntax in assessing credibility. Thus, "[t]he nervous tic or darting glance, the uneasy shifting or revealing gesture is almost always accompanied by auditory correlates[, including inter alia,] clearing the throat, pausing to swallow, voice quavering or inaudibility due to stress or looking downward," Kaiser, *Juries, Blindness and the Juror Function*, 60 Chicago Kent Law Review 191, 200 (1984), and permits a blind juror to make credibility assessments just as the juror's sighted counterparts do.

... In many ... jurisdictions, visual impairment is not a per se disqualification, but may result in the exclusion of a blind individual from the jury pool if the case involves a significant amount of physical evidence or if the right to a fair trial is otherwise threatened by that juror's service.

Similarly, in the United States, there are several active judges who are blind. Indeed, it is highly persuasive that Judge David Norman, a blind person, served as a judge on the Superior Court of the District of Columbia and presided over numerous trials where he was the sole trier of fact and had to assess the credibility of the witnesses before him and evaluate the documentation and physical

evidence. Defendants have never claimed that "those trials were invalid because [Judge Norman] was blind." It is thus illogical to suggest that all blind persons are unqualified to sit on a jury when a blind judge in the same Superior Court successfully fulfilled those very duties a blind juror would have to discharge. No distinction can be drawn between a blind judge's ability to make factual findings and the abilities of a blind juror.[14]

In addition, the Superior Court admits persons who are deaf to jury panels and has never suggested that simply because they cannot hear, they cannot serve. In fact, the Superior Court accommodates those individuals by providing sign language interpreters. Yet, a deaf juror cannot hear a witness' words and cannot make credibility determinations based on inflection and intonation of voice, but still is able to make the requisite credibility determinations. Defendants obviously recognize deaf individuals' qualifications to serve on a Superior Court jury since no policy excluding deaf jurors exists. Applying the same logic to a blind individual demonstrates that although a blind juror cannot rely on sight, the individual can certainly hear the witness testify, hear the quaver in a voice, listen to the witness clear his or her throat, or analyze the pause between question and answer, then add these sensory impressions to the words spoken and assess the witness' credibility. Defendants' policy toward deaf jurors evidences a lack of prejudice towards those with hearing impairments and demonstrates their ability to look behind archaic stereotypes thrust upon disabled persons; it is thus difficult to fathom why the policy differs toward blind jurors.

Moreover, even if the individual does not initially appear to be "otherwise qualified," it must still be determined whether reasonable accommodation would make the individual otherwise qualified. In the instant case, no accommodation was offered to Galloway or to any other blind person. According to Galloway he was turned away after being expressly informed that blind jurors could not be accommodated. Plaintiff has established that, in many instances, accommodation could indeed result in an "otherwise qualified" individual. As noted above, sign language interpreters are provided to deaf individuals serving on Superior Court juries. A similar service could be employed for blind jurors.[15] With this type of "reasonable accommodation," a blind juror such as plaintiff should be able to serve satisfactorily in most cases.

In addition to the evidence presented showing that visual observation is not necessarily an essential function of a juror, Galloway introduced substantial evidence to support his individual qualifications to serve competently on a jury. Plaintiff's educational and employment history underscores the fact that he can, and does, make credibility determinations daily. Galloway has served in a number of executive positions in the private sector, the federal government, and the state government and is presently responsibly employed by the District of Columbia, one of the defendants herein. In these capacities, Galloway has been called upon to evaluate facts, weigh evidence, and make judgments. He assesses credibility by listening carefully to the content and consistency of a person's speech and pays particular attention to auditory clues: the rhythm of a person's breathing and the sounds of a person moving, for example.

Yet, just as no per se rule of exclusion should be employed against blind persons who wish to serve as jurors, no per se rule of inclusion should apply either. Plaintiff has never argued that he should be permitted to participate in every trial. Rather, he has consistently conceded that there may be cases in which it would be inappropriate for a blind person to serve as a juror—cases in which there is a substantial amount of documentary evidence, for example—and that the decision as to whether he should be empaneled in any particular case should be left to the Judge, the attorneys, and the voir dire process. In many cases, a blind juror can certainly provide competent jury service.[16]

[Authors' Note: The court also addressed claims under the ADA and §1983. The court determined that the ADA requires that an individualized inquiry should be made and that a practice of categorical exclusion of all blind persons from the jury pool violates the ADA. A cognizable claim was also stated under §1983 for the same reasons.]

Note

The previous case addressed discrimination against a blind individual in jury selection. In *DeLong v. Brumbaugh*, 703 F. Supp. 399 (W.D. Pa. 1989), the court addressed this issue in the context of an individual who was deaf and a similar automatic exclusion policy. At one point in the decision which declared this policy invalid, the court addressed several concerns including the following:

> The concern ... that the presence of an interpreter would violate the sanctity of the jury system and the secrecy of the jury's deliberations was misplaced. The record is clear that qualified interpreters are bound by oath to interpret accurately and perform only the assigned functions during the deliberative process.

Problems

1. The previous materials address the discriminatory impact of excluding individuals who are blind or deaf from jury pools. If a trial took substantially longer to conduct because of the time necessary for accommodations discussed in the decisions, is it fair to require parties to such litigation to bear the additional costs of their attorneys' hourly rates for trial? Would this be a factor in the case-by-case analysis of jury qualification in a particular case? Could the system of developing lists of names from which jury pools are drawn be challenged as having a discriminatory impact? For example, if jury pools are drawn from lists of individuals with drivers' licenses, this would tend to preclude those with mobility and visual impairments. Would it matter if a state had another form of personal identification card for those not seeking drivers' licenses but needing an official photo ID, and these lists were included in the jury pool list?

2. To what extent are attorneys who are deaf entitled to have interpreters paid for during court proceedings? See *Mosier v. Commonwealth of Kentucky*, 37 Nat'l Disability L. Rep. ¶244 (E.D. Ky. 2008).

Even if reasonable accommodations, such as interpreters, are provided to parties to lawsuits, the lack of availability of legal services to individuals with disabilities is a major obstacle. The availability of attorneys' fees under the ADA, the Rehabilitation Act, the Individuals with Disabilities Education Act, and the Fair Housing Act, has provided some incentive for private attorneys to provide representation of individuals in claims involving disability discrimination. These statutes do not, however, provide attorneys' fees for representing clients with disabilities in legal actions unrelated to disability discrimination.

Title III of the ADA prohibits private attorneys from discriminating on the basis of disability in representing clients and requires that private attorneys make reasonable accommodations. This means that private attorneys might be required to provide interpreters or remove architectural barriers, if it is not an undue burden to do so.

Another barrier to judicial access is inaccessible design of courthouses and other facilities such as prisons. In a later section on enforcement, two Supreme Court decisions arise in the context of access barriers. The Court focused on the issue of Eleventh Amendment immunity in both cases, and did not decide the substantive issues regarding architectural barriers. In reviewing those cases, consider what the lower courts are likely to do on remand.

[2] Criminal Justice System

Hypothetical Problem 5.3

In 2000, Charles was sentenced to state prison for twenty five years for robbery with a deadly weapon, a crime in which the victim had been seriously injured from Charles shooting a gun. After

the fifth year of prison, Charles was injured in a prison fight and is now a paraplegic. He is also obese and has developed diabetes, which is beginning to cause vision impairments. After his injury, Charles has found it difficult to access the prison law library to work on his pro se petitions for parole. He has requested, but been denied a single cell to accommodate his wheelchair. He has claimed that insulin treatment has been delayed on many occasions, and that he should be allowed to administer his insulin with a syringe on his own schedule. There is a work program picking up trash on the highway, to allow prisoners credit towards their sentence, but prisoners with mobility impairments are not eligible. Charles would like to have a trained seeing eye dog while in prison. What are Charles' likely rights and remedies under the ADA?

While some might argue that individuals who are jailed or imprisoned give up some of their rights, the courts have interpreted disability discrimination laws to apply in these settings. The first case addressing this issue clarifies the intent of Congress in this respect.

Pennsylvania Department of Corrections v. Yeskey

524 U.S. 206 (1998)

SCALIA, J., delivered the opinion for a unanimous Court.

The question before us is whether Title II of the Americans with Disabilities Act of 1990 (ADA), which prohibits a "public entity" from discriminating against a "qualified individual with a disability" on account of that individual's disability, see [42 U.S.C.] §12132, covers inmates in state prisons. Respondent Ronald Yeskey was such an inmate, sentenced in May 1994 to serve 18 to 36 months in a Pennsylvania correctional facility. The sentencing court recommended that he be placed in Pennsylvania's Motivational Boot Camp for first-time offenders, the successful completion of which would have led to his release on parole in just six months. Because of his medical history of hypertension, however, he was refused admission. He filed this suit against petitioners, the Commonwealth of Pennsylvania's Department of Corrections and several department officials, alleging that his exclusion from the Boot Camp violated the ADA.

Petitioners argue that state prisoners are not covered by the ADA for the same reason we held in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), that state judges were not covered by the Age Discrimination in Employment Act of 1967 (ADEA)/Gregory relied on the canon of construction that absent an "unmistakably clear" expression of intent to "alter the usual constitutional balance between the States and the Federal Government," we will interpret a statute to preserve rather than destroy the States' "substantial sovereign powers." It may well be that exercising ultimate control over the management of state prisons, like establishing the qualifications of state government officials, is a traditional and essential State function subject to the plain-statement rule of *Gregory*. "One of the primary functions of government," we have said, "is the preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task." "It is difficult to imagine an activity in which a State has a stronger interest."

Assuming, without deciding, that the plain-statement rule does govern application of the ADA to the administration of state prisons, we think the requirement of the rule is amply met: the statute's language unmistakably includes State prisons and prisoners within its coverage. The situation here is not comparable to that in *Gregory*. There, although the ADEA plainly covered state employees, it contained an exception for "'appointee[s] on the policymaking level'" which made it impossible for us to "conclude that the statute plainly cover[ed] appointed state judges." Here, the ADA plainly covers state institutions without any exception that could cast the coverage of prisons into doubt. Title II of the ADA provides that:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services,

> programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. §12132.

State prisons fall squarely within the statutory definition of "public entity," which includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government." §12131(1)(B).

Petitioners contend that the phrase "benefits of the services, programs, or activities of a public entity," §12132, creates an ambiguity, because state prisons do not provide prisoners with "benefits" of "programs, services, or activities" as those terms are ordinarily understood. We disagree. Modern prisons provide inmates with many recreational "activities," medical "services," and educational and vocational "programs," all of which at least theoretically "benefit" the prisoners (and any of which disabled prisoners could be "excluded from participation in"). See *Block v. Rutherford*, 468 U.S. 576, 580 (1984) (referring to "contact visitation program"); *Hudson v. Palmer*, 468 U.S. 517, 552, (1984) (discussing "rehabilitative programs and services"); *Olim v. Wakinekona*, 461 U.S. 238, 246 (1983) (referring to "appropriate correctional programs for all offenders"). Indeed, the statute establishing the Motivational Boot Camp at issue in this very case refers to it as a "program." The text of the ADA provides no basis for distinguishing these programs, services, and activities from those provided by public entities that are not prisons.

We also disagree with petitioners' contention that the term "qualified individual with a disability" is ambiguous insofar as concerns its application to state prisoners. The statute defines the term to include anyone with a disability

> who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. §12131(2).

Petitioners argue that the words "eligibility" and "participation" imply voluntariness on the part of an applicant who seeks a benefit from the State, and thus do not connote prisoners who are being held against their will. This is wrong on two counts: First, because the words do not connote voluntariness. See, e.g., Webster's New International Dictionary 831 (2d ed. 1949) ("eligible": "Fitted or qualified to be chosen or elected; legally or morally suitable; as, an eligible candidate"); *id*., at 1782 ("participate": "To have a share in common with others; to partake; share, as in a debate"). While "eligible" individuals "participate" voluntarily in many programs, services, and activities, there are others for which they are "eligible" in which "participation" is mandatory. A drug addict convicted of drug possession, for example, might, as part of his sentence, be required to "participate" in a drug treatment program for which only addicts are "eligible." And secondly, even if the words did connote voluntariness, it would still not be true that all prison "services," "programs," and "activities" are excluded from the Act because participation in them is not voluntary. The prison law library, for example, is a service (and the use of it an activity), which prisoners are free to take or leave. In the very case at hand, the governing law makes it clear that participation in the Boot Camp program is voluntary.

Finally, petitioners point out that the statute's statement of findings and purpose, 42 U.S.C. §12101, does not mention prisons and prisoners. That is perhaps questionable, since the provision's reference to discrimination "in such critical areas as ... institutionalization," §12101(a)(3), can be thought to include penal institutions. But assuming it to be true, and assuming further that it proves, as petitioners contend, that Congress did not "envisio[n] that the ADA would be applied to state prisoners," in the context of an unambiguous statutory text that is irrelevant. As we have said before, the fact that a statute can be "'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"

Our conclusion that the text of the ADA is not ambiguous causes us also to reject petitioners' appeal to the doctrine of constitutional doubt, which requires that we interpret statutes to avoid "grave and doubtful constitutional questions." That doctrine enters in only "where a statute is susceptible of two constructions." And for the same reason we disregard petitioners' invocation of the statute's title, "Public Services." "[T]he title of a statute ... cannot limit the plain meaning of the text. For interpretive purposes, [it is] of use only when [it] shed[s] light on some ambiguous word or phrase."

Because the plain text of Title II of the ADA unambiguously extends to state prison inmates, the judgment of the Court of Appeals is affirmed.

Individuals with disabilities face a variety of special problems in obtaining access to the judicial system. For individuals with mobility impairments, inaccessible courthouses and other facilities, such as offices of attorneys and facilities for incarceration, can present significant obstacles to participation. Title II of the ADA requires that state and local governmental judicial facilities be accessible when viewed in their entirety. State and local programs that receive federal financial assistance are subject to Section 504 of the Rehabilitation Act, which requires substantially the same degree of access. Federal facilities are subject to Sections 501 and 504 of the Rehabilitation Act.

Department of Justice ADA regulations effective March 15, 2011, include several provisions affecting the criminal justice system. These include provisions relating to the new construction and alteration of detention and correctional facilities and inclusion of accessible design, 28 C.F.R. §35.151(k), integrated housing as appropriate, and visitation rights. 28 C.F.R. §35.152. 75 Fed. Reg. 56,164–236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236–358 (September 15, 2010) (Title III).

Problems

1. Should an individual who is morbidly obese, and whose obesity makes living in an un-airconditioned environment extremely uncomfortable, be provided any reasonable accommodations if the individual has been incarcerated in an un-airconditioned facility?

2. A news story from Wichita, Kansas, reports that a judge had ordered a 500 pound man to a halfway house. The man, who had been convicted of forging checks, had previously been ordered to pay $11,000 in restitution and to diet at a halfway house as a condition of probation. After losing 50 pounds, he left the halfway house. The judge ordered him to return to the halfway house to lose weight because he gained weight after leaving, and the judge believed that the weight affected his ability to get a job, resulting in little repayment of the restitution. Is the ADA implicated in any way in this decision? See *The Scales of Justice: Man Must Diet or Be Jailed*, HOUSTON CHRONICLE, Jan. 12, 1995, at A6.

Notes

1. *Competency of Individuals with Disabilities in the Criminal Justice System:* There is increasing awareness that some individuals with intellectual disabilities may become incarcerated in error. This may be a result of a number of reasons, such as the lack of understanding of plea bargain procedures. This is perhaps particularly true in cases involving individuals with moderate intellectual disabilities, who can "pass" for not having a disability. See Joseph P. Shapiro, *Innocent, But Behind Bars*, U.S. NEWS & WORLD REPORT 36 (September 19, 1994).

2. *Training for Law Enforcement Officers:* The ADA regulations do not provide specifically for training of law enforcement officers, but the analysis of the regulations under Title II note that "it would be appropriate for public entities to evaluate training efforts because, in many cases, lack of training leads to discriminatory practices, even when the policies in place are nondiscriminatory." 46

Fed. Reg. 35702 (July 26, 1991). See also *Jackson v. Inhabitants of Sanford*, No. 94-12-P-H, 1994 U.S. Dist. LEXIS 15367, 63 U.S.L.W. 2351, 3 A.D. Cas. 1366 (D. Me. Sept. 23, 1994), in which the court held that unjustified arrests of individuals with disabilities wrongly thought to be under drug or alcohol influence are subject to Title II sanction. The case involved a man who had suffered a stroke which affected his speech and who was wrongfully arrested for drunk driving. This decision emphasizes the importance of adequate law enforcement training.

A number of recent cases have looked at the issue of training and liability for failure to train. See, e.g., *Thao v. City of St. Paul*, 481 F.3d 565 (8th Cir. 2007) (no Title II liability when police officer fatally shot individual with paranoid schizophrenia who had barricaded himself in the house and lunged at officer while holding weapons; more training would not have caused different police response); *Sanders v. City of Minneapolis, Minnesota*, 474 F.3d 523 (8th Cir. 2007) (no ADA violation in claim that police were not trained to deal with individuals with mental illness); *Buben v. City of Lone Tree*, 2010 U.S. Dist. LEXIS 104853, 2010 WL 3894185 (D. Colo. 2010) (possible Title II violation when law enforcement officers arrested individual with disability who was misperceived to be engaging in illegal conduct; mental disability may have caused behavior; officers deployed electroshock weapon; allowing Title II reasonable accommodation claim to proceed to determine whether city had policy on handling individuals with mental impairments during arrest); *C.C. v. State of Tennessee*, 2010 U.S. Dist. LEXIS 100327, 2010 WL 3782232 (M.D. Tenn. 2010) (allowing claim to go forward brought by individual with multiple mental impairments who was injured while in a cell in a residential facility; claim involved failure to appropriately train employees who attacked him); *Scozzari v. City of Clare*, 723 F. Supp. 2d 974 (E.D. Mich. 2010) (summary judgment for city in wrongful arrest Title II ADA claim; resident with schizophrenia shot after altercation; officers' perception of criminal behavior and not based on perception that disability made conduct appear to be unlawful; rejecting failure to train theory); *Shultz v. Carlisle Police Dept.*, 706 F. Supp. 2d 613 (M.D. Pa. 2010) (no Title II violation in claim of failure to train in situation where police officers had allegedly used excessive force after restaurant patron with seizure was tasered when he refused to board gurney after EMS team arrived; no demonstration of discrimination); *Fitch v. Kentucky State Police*, 2010 U.S. Dist. LEXIS 120013, 2010 WL 4670440 (E.D. Ky. 2010) (claim that law enforcement was not provided with proper training when commercial driver was arrested for drunk driving, but claimed diabetes was basis for arrest; blood test after arrest showed plaintiff had not consumed alcohol); *Abdi v. Karnes*, 556 F. Supp. 2d 804 (S.D. Ohio 2008) (504/ADA violations related to law enforcement encounters with individuals with serious mental illness; training should be provided where such encounters are highly likely); *Furtado v. Yun Chung Law*, 51 So. 3d 1269 (Fla. Dist. Ct. App. 4th Dist. 2011) (ADA claim against Sheriff for wrongful death in case by man whose wife with a mental disability was shot and killed during involuntary commitment action; discussion of training to deal with individuals with mental health problems). The highly publicized police shootings involving race issues have also highlighted the importance of police training with respect to certain populations.

Other recent cases have raised the challenges that have occurred involving individuals with mental illness and physical disabilities in the criminal justice system. See, e.g., *Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 43 Nat'l Disability L. Rep. ¶46 (S.D. Tex. 2011) (Title II can apply to arrests; denying summary judgment to city when parents alleged failure to provide reasonable accommodation during arrest; crisis intervention team not sent to home where son with schizoaffective disorder was acting out; altercation resulted in shooting and death of arrestee). In *City and County of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765 (2015), the Supreme Court dismissed as improvidently granted the writ of certiorari of the Title II issue. In this case, two police officers shot and seriously wounded a woman with severe mental disabilities. The plaintiff sued for damages under Title II of the ADA. There was evident confusion about what San Francisco was arguing at the Supreme Court. The Court noted that the City and County argued in their certiorari petition that Title

II did not apply to arrests by police, but by the time the City and County filed their briefs before the Supreme Court, they had changed their argument and accepted that Title II applied to the arrest. Instead, they argued that the plaintiff was not a qualified individual under Title II because she posed a direct threat to others. Noting that in *Pennsylvania v. Department of Corrections*, 524 U.S. 206 (1998), the Court held that Title II covers inmates in state prisons, the Supreme Court in *Sheehan* declared that it had never decided whether Title II imposes on public entities vicarious liability for monetary damages for purposeful or deliberately indifferent conduct of its employees. It noted that this is an important question, but because the parties agreed that Title II imposes vicarious liability for monetary damages, it would be improvident to decide the Title II issue. From this case, it appears that the Court is eager to visit the question of monetary damages under Title II based on vicarious liability of a public entity's employees' bad acts. See Ann C. McGinley, City and County of San Francisco, California, et al., v. Sheehan: *Title II of the ADA and Reasonable Accommodations in Police Arrests of Citizens with Disabilities*, http://hamilton-griffin.com/guest-blog-ann-mcginley-city-and-county-of-san-francisco-california-et-al-v-sheehan-title-ii-of-the-ada-and-reasonable-accommodations-in-police-arrests-of-citizens-with-disabilities/.

3. *911 Access:* A settlement agreement between the City of Los Angeles and the Department of Justice involved 911 emergency service access for individuals who are deaf or who have speech impairments. The basis of the suit was that Title II of the ADA was violated when the city did not respond to a 911 call by an individual who was deaf. BNA ADA Manual, Vol. 3, No. 8, p. 47 (August 1994).

4. *Prisoners with HIV*. Individuals in the criminal justice system who are HIV positive have raised some unique issues. Exclusion of HIV-positive prison inmates from working in food service jobs in prison was at issue in a case arising in California. The court upheld the policy, noting that prison riots have resulted from food service, and inmates receiving food from HIV-positive servers would perceive a threat, even thought it might be irrational to do so. *See Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994).

5. In 2014, in *Hall v. Florida*, 572 U.S. ___, 134 S. Ct. 1986 (2014), the Supreme Court held unconstitutional a Florida law that defined intellectual disability. Under that statute, an intellectual disability required an IQ test score of 70 or less. The case involved a defendant with an IQ slightly higher than 70 who faced the death penalty. Under Florida law, all further exploration of intellectual disability was foreclosed. The Court held that the law created an "unacceptable risk that persons with intellectual disability will be executed." A 2015 Supreme Court decision again addressed this issue. In *Brumfield v. Cain,* 576 U.S. ___, 135 S. Ct. 2269 (2015), the Court ruled in a case involving a death penalty inmate that the state court record had "ample evidence creating reasonable doubt as to whether Brumfield's disability manifested itself before adulthood." Thus he should have been allowed to have this issue considered in his case.

I. Voting

In 1984, the Voting Accessibility for the Elderly and Handicapped Act (VAEH), 42 U.S.C. §1973ee, went into effect. This statute allows either private action or Attorney General suit and provides for accessibility in polling places for federal elections. This does not directly affect state and local elections, except to the extent that many of these elections occur concurrently with federal elections. Title II of the ADA, however, applies to state and local governmental elections. In addition to being subject to the ADA and the VAEH, parties conducting federal elections are also programs subject to both Section 501 and Section 504 of the Rehabilitation Act. For more detailed information on voting for individuals with disabilities, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §9:8 (2012 and cumulative supplement).

The following decision is one of the few court cases to address disability discrimination in the context of voting. It highlights to complexity of identifying the party responsible for implementing various legal requirements with respect to voting in order to bring about change.

Lightbourn v. County of El Paso, Texas

118 F.3d 421 (5th Cir. 1997)

EMILIO M. GARZA, CIRCUIT JUDGE:

I

The plaintiffs are five blind residents of El Paso, Texas, one mobility-impaired El Paso resident, and a private nonprofit group that aids disabled persons. They sued El Paso County ("El Paso") and the local Republican and Democratic parties under §504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act ("ADA"). Subsequently, El Paso impleaded the Secretary, and the plaintiffs also added him as a defendant.

The plaintiffs alleged that the defendants discriminated against them by failing to ensure that persons with visual and mobility impairments have access to "polling sites and voting procedures." Specifically, the blind plaintiffs asserted that the voting equipment available at their polling places only permitted them to vote with the assistance of an election worker or other person, and the defendants had not taken steps to ensure that they could vote with complete secrecy.[17] Thus, they contended, the defendants violated §504 and the ADA. In addition, the wheelchair-bound plaintiff maintained that she had trouble locating a parking space next to and using the restroom facilities at her polling place. She asserted that the defendants breached their obligation to ensure that polling places are accessible to handicapped voters and hence violated §504 and the ADA.

[Procedural history omitted.]

II

A

[Class action issue discussion omitted.]

B

The Secretary next argues that the plaintiffs cannot state a claim against him under §504 of the Rehabilitation Act of 1973 because he does not receive financial assistance from the federal government....

We have held that to state a §504 claim a plaintiff must allege that the specific program or activity with which he or she was involved receives or directly benefits from federal financial assistance. Certainly, a plaintiff may not predicate a §504 claim against a state actor on the mere fact that the state itself obtains federal money. Here, the plaintiffs have not even argued that the Secretary receives federal financial assistance—let alone presented any evidence on this point. Therefore, the plaintiffs have failed to state a claim under §504 against the Secretary.

C

Last, the Secretary argues that the district court erred in holding that he violated the ADA by breaching a duty to ensure that local election authorities comply with the ADA....

Based on scattered provisions of the Texas Election Code, the district court found that the Secretary had a duty to warrant that local election authorities followed the ADA. Relying on Texas Election Code §§31.003 and 31.005....

Title II of the ADA provides that "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or

activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132. Thus, to establish a violation of Title II, the plaintiffs here must demonstrate: (1) that they are qualified individuals within the meaning of the Act; (2) that they are being excluded from participation in, or being denied benefits of, services, programs, or activities for which the Secretary is responsible, or are otherwise being discriminated against by the Secretary; and (3) that such exclusion, denial of benefits, or discrimination is by reason of their disability. The Secretary does not dispute that the plaintiffs are qualified individuals within the meaning of the ADA or that he is a public entity for purposes of the statute. The Secretary, however, asserts that he has not denied the plaintiffs the benefit of a program for which he is responsible.

In *Bush v. Viterna*, 795 F.2d 1203 (5th Cir.1986), a class of prisoners sued the Texas Commission on Jail Standards under 42 U.S.C. §1983, based upon county jail conditions that allegedly violated the Constitution. The plaintiffs claimed, under a theory of "supervisory liability," that the Commission's failure to discharge its state law-imposed duties caused the constitutional violations. The plaintiffs argued that if the Commission had followed its state law obligations to promulgate regulatory standards and enforce those standards, local officials would have ensured that conditions and activities in county jails did not violate the Constitution.

We analyzed the Commission's state law duties, and found that the Commission's purpose was to remedy inadequacies in county jail conditions. We also concluded that the Commission was required to promulgate standards, but was merely authorized to enforce those standards by order or by filing suit against noncomplying counties. We observed that when a federal right is deprived through state action, the court must turn to state law to determine which state actor is legally responsible for the violation. "States have virtually complete freedom to decide who will be responsible for such tasks, and therewith to determine who will be held liable for civil rights violations that occur in the course of carrying them out." We found that the Commission "simply does not appear to have any state-imposed legal duty to correct jail violations or noncompliance that it becomes aware of." Thus, we found that the prisoners did not state a claim against the Commission under §1983.

The plaintiffs' claim in *Bush* is analogous to the plaintiffs' claim here that the Secretary has a duty to ensure compliance with the ADA with regard to Texas elections. Following *Bush*, we look to Texas law to determine whether responsibility for the violations the plaintiffs allege can properly be attributed to the Secretary.

Review of the provisions of the Texas Election Code that refer to the Secretary's role in elections reveals that most give discretion to the Secretary to take some action. In the absence of such a duty, the Secretary cannot be held responsible for a failure to exercise his discretion.

The Texas Election Code does contain some provisions requiring the Secretary to take action with respect to elections. Specifically, §31.003 states that the Secretary

> shall obtain and maintain uniformity in the application, operation, and interpretation of [the Texas Election Code] and of the election laws outside this code. In performing this duty, the secretary shall prepare detailed and comprehensive written directives and instructions relating to and based on [the Texas Election Code] and the election laws outside this code. The secretary shall distribute these materials to the appropriate state and local authorities having duties in the administration of these laws.

Moreover, §31.004 provides that the Secretary

> (a) ... shall assist and advise all election authorities with regard to the application, operation, and interpretation of this code and of the election laws outside this code.
>
> (b) The secretary shall maintain an informational service for answering inquiries of election authorities relating to the administration of the election laws or the performance of their duties.

Whether these sections impose a duty on the Secretary to ensure compliance with the ADA

throughout Texas turns on whether the phrase "election laws outside this code" includes the ADA.

[T]he ADA does not include even a single provision specifically governing elections. On the contrary, the statute never refers to elections. Indeed, the statute only mentions voting once, and that is in the "findings and purpose" section. This section, 42 U.S.C. §12101(a)(3), notes that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services...." The mere mention of the word "voting" here does not transform the ADA into an "election law." Such a tangential allusion is insufficient to impose on the Secretary the rather extraordinary duty of ensuring that local election officials interpret and apply the ADA uniformly.

Second, as a general civil rights statute, the ADA involves every area of law. If the ADA is construed as an "election law," then it presumably could also be called an employment law, housing law, transportation law, and so on. However, we do not think that the common, ordinary meaning of "election laws" includes a law that can be characterized in so many different ways. Rather, "election laws" only covers laws that specifically relate to elections, such as the Voting Rights Act of 1965, 42 U.S.C. §§1972–1973, or the Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. §1973ee-1.

Third, if the Secretary is responsible for guaranteeing that local election officials comply with the ADA, then presumably he would also have a duty to warrant that these officials follow every other general civil rights statute that could touch on elections. These statutes would include, among others, the Civil Rights Act of 1870; the Civil Rights Act of 1871; the Ku Klux Klan Act of 1871; the Civil Rights Act of 1964; the Education Amendments of 1972; the Age Discrimination Act; the Indian Civil Rights Act of 1968; and various amending statutes such as the Civil Rights Restoration Act of 1987. In addition, the Secretary would need to ensure that local election officials follow other generally applicable laws which could pertain to elections, such as statutes dealing with littering, zoning, fire safety, and so on. We do not believe that the Texas legislature intended §31.003 to require the Secretary to provide "detailed and comprehensive written directives and instructions relating to and based on" these statutes, at least to the extent that they do not specifically pertain to elections.

In sum, we conclude that the phrase "election laws outside this code" only encompasses laws that specifically govern elections, not generally applicable laws that might cover some aspect of elections. Thus, neither §31.003 nor §31.004 imposes a duty on the Secretary to ensure statewide compliance with the ADA by the political subdivisions that administer elections in Texas.

Two other provisions in the Texas Election Code place responsibility on the Secretary for approval of voting systems and equipment used in Texas elections. Section 122.031 states that "[b]efore a voting system or voting system equipment may be used in an election, the system and a unit of the equipment must be approved by the secretary of state...." Section 122.038 provides that the Secretary "shall approve the system or equipment" after reviewing reports on the system or equipment prepared by designated examiners and determining that it "satisfies the applicable requirements for approval."

The plaintiffs maintain that the Secretary has violated the ADA because he has not approved equipment accessible to blind voters. The plaintiffs construe [Texas law] as obliging the Secretary to take affirmative steps to solicit and approve equipment that ensures a completely secret ballot for blind voters. The plaintiffs do not, however, specify where ... they find this expansive duty, particularly in the absence of any evidence that the Secretary has refused approval of voting equipment that satisfies the plaintiffs' desires. The plaintiffs' assertion that a voting machine for blind voters exists does not prove that the Secretary violated the ADA because the plaintiffs do not allege—let alone prove—that they presented any voting machine to the Secretary or that he failed to approve such a machine. Perhaps the plaintiffs could state a claim under the ADA if they demonstrated that the Secretary wrongly refused to approve such equipment after it was presented to him for approval.

However, the record does not reveal that the Secretary has considered any voting equipment that "satisfies the applicable requirements" and then failed to permit it. As a result, the plaintiffs have not demonstrated the Secretary's responsibility for the alleged ADA violations.

With regard to mobility-impaired voters, we note that §43.034 of the Texas Election Code places responsibility for accessibility of polling places to the elderly and physically handicapped on the "commissioners court[s]" and the "governing body of each political subdivision that holds elections." The district court stated that §43.034 imposes a statutory duty on local political subdivisions, but that the statute is unclear about how it is enforced. Without explanation, the district court concluded that it "is of the opinion that the final enforcer of this section is the Secretary of State." Thus, the district court found that the Secretary violated the ADA because some buildings used as polling places are not accessible to mobility-impaired voters.

We disagree with the district court's conclusion. Section 43.034 directs local election officials, not the Secretary, to ensure accessibility of polling places to elderly and physically handicapped voters. However, since §43.034 is clearly an "election law," we note that §31.003 commands the Secretary to obtain and maintain uniformity in the application, operation, and interpretation of §43.034. This means that the Secretary has a duty to maintain uniformity in the operation of a statute that requires local election officials to ensure the accessibility of polling places.

In this regard, the plaintiffs assert that local election officials implement §43.034 differently and that the Secretary has not issued "detailed and comprehensive written directives and instructions" suggesting that the officials administer that section in a particular way. To allege an ADA violation, though, the plaintiffs must also maintain, among other things, that they are being denied the benefit of a service for which the Secretary is responsible. Here, the service the Secretary has to perform is obtaining the uniform operation of §43.034. While the plaintiffs may receive a benefit from the accessibility mandate of §43.034, they do not receive any benefit from the uniformity of this mandate. For instance, assume that local election officials interpret the accessibility mandate differently. Some officials believe that §43.034 requires them to provide special scooters to ferry handicapped voters from the parking lot to the polling place; others disagree. The Secretary could carry out his duty under §31.003 either by informing local election officials that §43.034 does not compel the provision of special scooters or by directing local officials to offer such scooters. In other words, the Secretary can ensure uniformity by acting either to increase or decrease accessibility on the margin; uniformity in and of itself confers no benefit on the disabled. Thus, we determine that while the Secretary has a state-imposed legal duty to ensure the uniformity of the application, operation, and interpretation §43.034, this uniformity—without more—cannot be a "benefit" to the plaintiffs for purposes of the ADA and the alleged denial of uniformity cannot be an example of discrimination under the ADA. Accordingly, the Secretary cannot be held liable for violation of the ADA because some polling places are inaccessible to mobility-impaired voters.

Finally, §35.105 of the ADA implementing regulations requires a public entity to "[e]valuate its current services, policies, and practices, and the effects thereof ... [and] proceed to make the necessary modifications." 28 C.F.R. §35.105(a). The plaintiffs argue that the Secretary violated the ADA by failing to perform this "self-evaluation." The plaintiffs maintain that "[t]he Secretary's abject failure ... most notably by failing to prepare a self-evaluation plan, played a pivotal role in ensuring that, as of the trial in this case, no efforts had been made in Texas to adapt or invent voting systems that would provide secrecy of the ballot for voters who are blind...." The plaintiffs describe §35.105 as creating a "duty" on the part of the Secretary "to take the initiative and explore, through all means reasonably available, solutions to the discrimination faced by voters who are blind."

Central to the plaintiffs' argument here is the premise that §35.105 requires the Secretary to evaluate the practices of every electoral subdivision in Texas. We find such an interpretation of the regulation unreasonable. To the contrary, we read §35.105 as merely requiring the Secretary to

evaluate his department, an evaluation the Secretary performed. In fact, even the plaintiffs' counsel admitted before the district court that the Secretary performed an internal self-evaluation.

In sum, the Secretary has no duty under either Texas law or the ADA to take steps to ensure that local election officials comply with the ADA. While the Secretary has a duty to approve certain voting equipment, the plaintiffs have failed to allege facts suggesting a breach of that duty. In addition, while the Secretary has a duty to maintain uniformity in the administration of §43.034 and arguably breached that duty, he could not have denied any benefit to the plaintiffs. Therefore, we determine that the plaintiffs have failed to state a claim under the ADA against the Secretary.

Problem

How likely is it that the reasoning in *Lightbourn* will be adopted by other courts? What are the consequences of this decision?

In *National Coalition for Students with Disabilities Educ. and Legal Defense v. Allen*, 152 F.3d 283 (4th Cir. 1998), action was brought under the National Voter Registration Act (NVRA), 42 U.S.C. §1973gg-5(a)(2)(B), to require state officials to designate public university offices providing services to students with disabilities as voter registration agencies. The NVRA requires states to designate all offices providing State-funded programs that primarily provide services to persons with disabilities as voter registration agencies. The court found that offices providing services to students with disabilities at public colleges were offices for the purposes of the NVRA, and such university offices must provide voter registration services.

In *National Federation of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016), the court addressed Maryland's absentee voting program and found that it violated Title II and Section 504. The court held that an online ballot marking tool is a reasonable modification that does not fundamentally alter the state's absentee voting program.

J. Enforcement

In addition to the enforcement procedures and remedies discussed in the previous sections, the following is an overview of the enforcement mechanisms relating to governmentally provided services that discriminate unlawfully on the basis of disability.

[1] Americans with Disabilities Act

Unlike Title III of the ADA, which is more restrictive in terms of remedies, Title II of the ADA permits the recovery of damages. Title II incorporates the remedies, procedures, and rights of Section 504 of the Rehabilitation Act. 29 U.S.C. §794; 42 U.S.C. §12133. The ADA regulations provide for procedures for filing complaints with administrative agencies. 35 C.F.R. §§35.170–.178. Several federal agencies are designated to coordinate compliance activities with respect to Title II. 35 C.F.R. §35.190. The ADA is specific in its statutory language that states are not immune under the eleventh amendment to the Constitution from actions under the ADA. 42 U.S.C. §12202.

[2] Section 504 of the Rehabilitation Act

Violations of Section 504 of the Rehabilitation Act can be remedied either by complaint to the agency granting the federal funding or by private complaint in court. The majority of courts recognize a private right of action without exhaustion of administrative remedies. The model regulations under Section 504 specify the administrative review procedure. 28 C.F.R. pt. 41. For a discussion of cases and other information related to enforcement under Section 504, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §1.13 (2012 and cumulative supplement).

The remedies available under Section 504, and under the ADA as it incorporates Section 504 remedies and procedures, include termination of federal financial assistance, injunctive relief, and attorneys' fees. The statute is not specific as to the availability of damages under Section 504, although the majority of courts have recognized damages as a remedy. *See* LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §1.14 (4th ed. 2012 and cumulative supplements).

Section 504 was amended in 1986 to clarify that states are not immune from damage actions under Section 504 of the Rehabilitation Act. This is consistent with the ADA. 29 U.S.C. §701.

[3] The Architectural Barriers Act

The Architectural Barriers Act is enforced by the Architectural Transportation Barriers Compliance Board (ATBCB). 29 U.S.C. §792. This agency was created in 1973. It is probable that the primary avenue of redress is through the agency review process, and although judicial review of agency activity is permitted, it is not clear whether one may initially seek redress in the courts. *See* LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §1.17 (4th ed. 2012 and cumulative supplements).

Problem

As a tactical matter, when is it best to seek redress through administrative complaint procedures and when is it best to go directly to court? Should one do both?

[4] Immunity Issues

In *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), reprinted in Section 3[G][2], *supra*, the Court addressed the issue of immunity in the context of ADA employment claims under Title I against state employers. The Court held that states are immune from money damages in private suits under Title I. The Court left undecided whether the same immunity from money damages suits applies in Title II cases, whether remedies of reasonable accommodation can be ordered against states, and whether there is also state immunity in Section 504 cases. Also undecided was the issue of immunity in Title II cases involving issues other than employment.

The Supreme Court expanded its views on Eleventh Amendment immunity in ADA cases in two decisions involving the justice system. In the case of *Tennessee v. Lane*, 541 U.S. 509 (2004), the Supreme Court addressed the issue of Eleventh Amendment immunity in Title II cases against state agencies in the context of access to the justice system. Justice Stevens, writing for the majority in a 5–4 opinion, held that "the Eleventh Amendment permits suits for money damages under Title II." The following is a portion of the opinion in that case.

Tennessee v. Lane

541 U.S. 509 (2004)

JUSTICE STEVENS, delivered the opinion of the Court

In August 1998, respondents George Lane and Beverly Jones filed this action against the State of Tennessee and a number of Tennessee counties, alleging past and ongoing violations of Title II. Respondents, both of whom are paraplegics who use wheelchairs for mobility, claimed that they were denied access to, and the services of, the state court system by reason of their disabilities. Lane alleged that he was compelled to appear to answer a set of criminal charges on the second floor of a county courthouse that had no elevator. At his first appearance, Lane crawled up two flights of stairs to get to the courtroom. When Lane returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers to the courtroom; he consequently was arrested and jailed for failure to appear. Jones, a certified court reporter, alleged that she has not been able to gain access to a number

of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process. Respondents sought damages and equitable relief.

The State moved to dismiss the suit on the ground that it was barred by the Eleventh Amendment.

The ADA was passed by large majorities in both Houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities. In the years immediately preceding the ADA's enactment, Congress held 13 hearings and created a special task force that gathered evidence from every State in the Union.

Invoking "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce," the ADA is designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."

It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights....

This pattern of disability discrimination persisted despite several federal and state legislative efforts to address it.

With respect to the particular services at issue in this case, Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities. A report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities, even taking into account the possibility that the services and programs might be restructured or relocated to other parts of the buildings.

Given the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services, the dissent's contention that the record is insufficient to justify Congress' exercises of its prophylactic power is puzzling, to say the least.

The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment....

Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts. The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination. Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this "difficult and intractable proble[m]" warranted "added prophylactic measures in response."

The remedy Congress chose is nevertheless a limited one. Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility. But Title II does not require States to employ any and all means to make judicial services accessible to persons with disabilities, and it does not require States to compromise their essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service. As Title II's implementing regulations make clear, the reasonable modification requirement can be satisfied in a number of ways. In the case of facilities built or altered after 1992, the regulations require compliance with specific architectural accessibility standards. But in the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigned aides to assist persons with

disabilities in accessing services. Only if these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes. And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service.

This duty to accommodate is perfectly consistent with the well-established due process principle that, "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard" in its courts. Our cases have recognized a number of affirmative obligations that flow from this principle: the duty to waive filing fees in certain family-law and criminal cases, the duty to provide transcripts to criminal defendants seeking review of their convictions, and the duty to provide counsel to certain criminal defendants. Each of these cases makes clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. Judged against this backdrop, Title II's affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." It is rather, a reasonable prophylactic measure, reasonably targeted to a legitimate end.

For these reasons, we conclude that Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutions a valid exercise of Congress' Section 5 authority to enforce the guarantees of the Fourteenth Amendment.

Only a year later, the Court, in a unanimous decision, expanded on this issue in the context of access within a state prison system. In *United States v. Georgia*, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006), Justice Scalia, writing for the Court, determined that in appropriate contexts disabled inmates in state prisons could recover money damages under Title II of the ADA. The claimant, who was paraplegic, alleged lack of accessible facilities within his cell and that he had been denied assistance or access to use the toilet and shower and that he was denied access to physical therapy and medical treatment, and virtually all prison programs, because of his disability. The Court stated as follows:

> [I]nsofar as Title II creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.
>
> From the many allegations ... it is not clear precisely what conduct [Goodman] intended to allege in support of his Title II claims.... Once Goodman's complaint is amended, the lower courts will be best situated to determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

Problems

What do these decisions mean for the plaintiffs in these cases? Are they likely to recover damages? If the court had offered George Lane the reasonable accommodation of relocating the proceedings, would that be likely to be sufficient? What if they offered to have court employees carry him up the stairs? Are Goodman's claims regarding access in his cell more likely not to be immune from damage claims than a claim from his demand for a steam table for his housing unit? Is there a possibility that courts might conflate the issues of immunity and reasonable accommodation?

What is likely to happen with employment situations such as Beverly Jones' case? Is that really an employment case or is it an access to justice case? Has the Court left this issue unresolved?

What does the *Tennessee v. Lane* decision mean for old courthouses? What if they are historic?

What issues of security and undue burden are the operators of jails and prisons likely to raise with respect to physical access issues and barrier removal?

Would damages be available in the following kinds of cases (assuming that the conduct was found to violate the ADA), following the Court's reasoning? Charging for parking placards; denial of parental rights; public swimming pool discrimination; police handling of cases involving DUI; prison setting situations; access in state operated museums and sports and entertainment facilities.

Why is it important to be awarded damages and not just injunctive or declaratory relief?

K. Summary

Governmental agencies at all levels operate, facilitate, regulate, and support a range of programs. This oversight often involves private entities that are given funding or are regulated in some way. This chapter addresses disability discrimination issues by both governmental entities and private entities that are highly regulated and/or funded by governmental entities. Some of the private entities (air transportation and telecommunications) that involve governmental agencies were addressed in the previous chapter. Chapter 5 includes mass transit issues, because they are subject to even more governmental regulation than air travel.

Like the programs addressed in Chapter 4 on Public Accommodations, this chapter reviews both the nondiscrimination and reasonable accommodation expectations of most federal statutes. It adds to the discussion of architectural barrier issues by incorporating the additional requirements for governmentally funded or operated programs of engaging in a self evaluation of barriers and a transition plan to remove barriers to facilities in existence before the applicable date of the statute.

Licensing practices involve both licenses to engage in business enterprises (such as lottery systems or selling liquor) and professional licensing. Within professional licensing, the two major issues are accommodations to the licensing exam and character and fitness inquiries that might have direct or indirect impact on individuals with disabilities. Of particular attention are questions relating to mental health and substance use and abuse. This latter issue is currently receiving enforcement and judicial attention, and clear guidance for all state agencies has not yet been resolved.

While not major issues being addressed by courts, there are a number of interesting and developing issues involving governmental services. These include obligations to provide equitable funding to ensure access for individuals with disabilities for public programs (such as parks and recreation programs) and quarantine laws and other regulatory prohibitions affecting the presence of assistance and support animals.

The ability to travel on a daily basis is a key aspect of full participation in society for everyone. Most individuals need to get to work, to attend social functions, to attend conferences and meetings, and to participate in leisure activities. For those with disabilities (particularly mobility impairments, but also some sensory impairments), this access (primarily because of the design of physical facilities and vehicles) has been challenging.

Before the enactment of the ADA, mass transit discrimination requirements were unclear and in a state of disarray. Several mandates overlapped and agency oversight was not well-coordinated. Federal agencies and statutes provided unclear guidance to local operators of mass transit bus and subway systems. Before the ADA it was unclear whether all existing vehicles must be retrofitted, whether a certain portion of a budget must be spent, and what must be provided as special paratransit service. The ADA did a great deal to clarify the requirements (including vehicle design, station and boarding facilities, and communication issues).

Automobile transportation remains a major means of traveling for all Americans. For that reason, it is critical that policies clarify how to ensure nondiscrimination and reasonable accommodation for

drivers' licensing (primarily a state program), parking (which can implicate oversight from all levels depending on the location of the parking), and taxicab service (which is changing because of programs such as Uber and Lyft).

The justice system (both civil and criminal) is primarily a governmentally operated program. Issues affecting individuals with disabilities include their treatment as parties, incarceration (including architectural barriers issues and access to interpreters and health care services), individuals with HIV in the criminal justice system, the application of the death penalty to individuals with intellectual disabilities, and jurors with disabilities.

The courts have focused on a number of these topics. The major Supreme Court decisions on the issues focus on issues within the criminal justice system, which is not surprising given the significance of the right to liberty. State and local government programs of criminal justice are subject to the Rehabilitation Act, as the Court held in the *Pennsylvania Department of Corrections v. Yeskey* (1998). In *Tennessee v. Lane* (2004), the Supreme Court addressed access to courts under Title II of the ADA in a case involving architectural barriers. A year later, in *United States v. Georgia* (2006), the Court held that Title II of the ADA abrogates state immunity for suits by prisoners with disabilities. That holding is significant in light of the numerous lower court cases that have addressed an array of such issues (interpreters, segregation, health care access, etc.). The Court has considered issues of application of the death penalty to individuals with mental impairments. In 2014, in *Hall v. Florida*, the Supreme Court held unconstitutional a Florida law that defined intellectual disability. A 2015 Supreme Court decision in *Brumfield v. Cain* remanded for additional consideration a question about the state court record about a disability in a death penalty case.

Access to voting is now protected by federal statutes at least for federal elections. There is awareness of the importance of ensuring access to voting while protecting the confidentiality of the vote itself, and technology is improving to make that happen.

The areas of education, higher education, some aspects of housing (deinstitutionalization and community living), and health care also involve a number of governmental relationships. Because these topics are addressed in separate chapters, they are not covered in this chapter.

While there have been no Supreme Court cases on the other topics raised in this chapter, there have been numerous lower court decisions. Issues receiving the greatest attention include professional licensing (both exam accommodations and character and fitness issues). To a lesser extent, there are a number of cases raising issues about parking. These include whether there can be a charge for accessible parking permits.

It will be interesting to see how courts continue to evolve how governmental involvement (through regulation or funding) have indirect implications for other entities. It is unlikely that there will be any significant federal statutory changes in the near future, but depending on how issues evolve in the judicial system, there may be additional regulatory or general agency guidance.

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1. The Court recognizes that such an analysis opens a Pandora's Box of questions as to what are “reasonable modifications” to the City's recreational program. If for some reason a child is unable to play wheelchair soccer, must the City create another “soccer-like” team for those children? Such a question, a thorny one to answer is not at issue before the Court and will not be decided here, but the Court does note a couple of important guideposts. First, the ADA does not require that persons with disabilities be given “adequate recreational programs” or, for that matter, any recreational programs. However, the ADA does require that persons with disabilities be given equal access to whatever benefits the City offers to persons without disabilities. Further, although the City is permitted to provide recreational benefits that are better than those provided to non-disabled persons, the City is not required to do so. Secondly, the City is not required to make any modifications that would “fundamentally alter the nature of the service, program or activity,” or that would be futile in eliminating a “direct threat to the health or safety of others.”

3. In his dissent, Judge O'Scannlain argues that if the quarantine discriminates or denies state services “by

reason of blindness, then all people who are blind could" assert this ADA claim. Judge O'Scannlain explains that "the quarantine does nothing by reason of blindness; it affects the plaintiffs only because of their use of guide dogs." We respectfully disagree. Many barriers to full participation of the disabled work their discriminatory effects due to the auxiliary aids upon which the disabled rely, and not due solely to the disabling impairment. For example, stairs do not affect victims of multiple sclerosis solely by reason of their disease; some victims of multiple sclerosis, particularly in its early stages, may still be able to walk. The architectural barrier of stairs works its discriminatory effect because other victims of the disease rely on wheelchairs to move around. In this instance, it is not the disease which renders the disabled incapable of accessing services, it is the reliance on a particular type of auxiliary aid which does so.

4. This analysis is particularly important when, as here, there is evidence that the risk of rabies being imported by guide dogs is low, vaccine-based alternatives may be equally or more effective in preventing the importation of rabies, and the quarantine has not once in over 75 years detected a single case of rabies among imported dogs.

5. For example, a public entity may comply with the accessibility requirement by relocating services to accessible buildings, by constructing new facilities, or by delivering services by assigning aides to program beneficiaries. The regulations expressly provide that an entity need not make structural changes in existing facilities "where other methods are effective in achieving compliance with this section." 28 C.F.R. §35.150(b)(1).

6. 28 C.F.R. §35.150(d)(3)(iii) specifically provides that if the period of the transition plan exceeds one year, the plan must identify which steps will be taken during each year of the multi-year transition period. The City's transition plan makes no attempt to do so, although the City argues that it has three years, until January 26, 1995, to implement the modifications listed in the transition plan.

7. For example, a concessionaire operating in a city park under a contractual arrangement with the city might be considered a city service. However, a licensed food service establishment operating on private property would not be considered a city service, activity, or program just because the city granted it a license to conduct its food service business. In this case, the City has not contracted with any establishment licensed to sell or serve liquor for the purpose of providing any kind of government service or benefit to those who frequent such establishments.

13. Defendants assert that the Court can draw conclusions regarding jury service without recourse to scientific studies or post-verdict polls. Defendants buttress this proposition by noting that the Court analyzes essential juror functions every time it conducts voir dire. The Court agrees and sees no reason why blind jurors cannot serve competently. That is to say, blind jurors can perform the essential juror functions in most instances. This conclusion is based in part on the fact that juries in this United States District Court for the District of Columbia routinely permit blind jurors to serve if they elect to do so, and if, after voir dire, the Court concludes that the juror is qualified for that particular trial. As illustration, there are trials that involve no documentary or physical evidence or the evidence is such that it can be readily described with a "word picture."

14. The well-proven capabilities of blind lawyers, although not precisely parallel to those of every blind juror, are nonetheless persuasive. Blind lawyers have tried both civil and criminal cases before this Court and in doing so, they have utilized the same skills that a blind juror would need—they evaluate the credibility of witnesses and the content of physical and documentary evidence.

15. An organization called "Metropolitan Washington Ear, Inc." employs "audio describers"—individuals, trained to describe physical movements, dress, and physical settings for the blind. This or a similar service could be utilized in the Superior Court or the attorneys could be reminded to take special care in questioning witnesses to ensure accurate and complete descriptions of exhibits or diagrams. Moreover, if necessary, documentary evidence could be read to a blind juror by a sighted person and physical evidence could be described. In fact, the Library of Congress utilizes a device called a Kurzweil Reading Machine, which translates printed material into audio. Nevertheless, these suggestions are just that, suggestions—because no accommodation was offered to Galloway, the Court takes no position on the reasonableness of any particular accommodation other than to note that solutions are as limitless as a willing imagination can conceive.

16. Whether a blind juror can serve competently can be addressed on a case-by-case basis. During voir dire, jurors routinely inform the court of physical ailments or disabilities, temporary or otherwise, which could impede their ability to serve during that trial. In these instances, the judge determines, on an individual basis

after inquiry, whether that juror can serve on that particular case. This routine process occurs every day in every court. Members of the venire often advance a variety of reasons which may impact upon their ability to serve, including: requiring both smoking and non-smoking areas, needing to take medication at regular hours, taking medication which induces drowsiness, requiring frequent and regular recesses, having dietary requirements which cannot be satisfied by food available in the court cafeteria, and the inability to sit beyond certain hours due to child care, transportation and carpool constraints. These needs and constraints are addressed in the regular course of choosing a jury and may in some instances result in a determination that a juror cannot be accepted because either the flow of trial would be irreparably injured or a fair trial might not result. It is no different if there is a blind person in the venire. That person can be individually questioned to ascertain his or her abilities vis-a-vis that particular trial.

17. Texas Election Code §64.031 provides that a "voter is eligible to receive assistance in marking the ballot ... if the voter cannot prepare the ballot because of a physical disability that renders the voter unable to write or see...."