IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

JEFFREY GORMAN,	)	
	)	
Plaintiff,	)	No. 95-0475-CV-W-8
	)	
and	)	
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Intervenor,	)	
	)	
	)	
v.	)	
	)	
	)	
STEVEN BISHOP, et al,	)	
	)	
Defendants.	)	
	)	

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JEFFREY GORMAN, Plaintiff, and THE UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. STEVEN BISHOP, et al, Defendants.	)	No. 95-0475-CV-W-8

MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

I. BACKGROUND

Plaintiff Jeffrey Gorman is an individual with a disability who uses a wheelchair. He filed this lawsuit against the Chief of Police of the Kansas City, Missouri Police Department ("KCMOPD"), several members of the KCMOPD's Board of Commissioners, and Neal Becker, an officer with the KCMOPD, alleging violations of title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12115-12164, and section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794.

Specifically, Mr. Gorman alleges that on May 31, 1992, defendant Becker detained him, removed him from his wheelchair, and transported him to police headquarters in a vehicle that was not suitable for individuals with his disability. As a result of

this conduct, the plaintiff claims he sustained injuries and his wheelchair was damaged during transport. See Complaint at ¶¶ 14, 19, and 20. Mr. Gorman also claims that defendant Bishop, as Chief of Police of the KCMOPD, and the remaining defendants, did not fulfill their obligation to implement the requirements of the ADA and section 504 within the KCMOPD. According to plaintiff, these defendants failed to provide vehicles suitable for transporting individuals who use wheelchairs, id. at ¶ 15; failed to make reasonable modifications in department policies, practices, and procedures necessary to avoid discriminating against plaintiff on the basis of his disability, id. at ¶ 16; and failed to provide adequate training to police officers in the proper handling of arrestees, like the plaintiff, who have spinal cord injuries. Id. at ¶ 17.

On June 7, 1995, defendants served upon the plaintiff and the United States copies of their Partial Motion to Dismiss and their Suggestions in Support of Partial Motion to Dismiss, in which they argued that the plaintiff's claims based upon title II of the ADA should be dismissed because that statute is unconstitutionally vague. On July 14, 1995, the United States filed a motion for leave to intervene in this case, pursuant to 28 U.S.C. § 2403(a), to defend the constitutionality of title II. This Court granted that motion and certified the issue of title II's constitutionality to the Attorney General in an order entered on October 10, 1995.

On that same date, this Court issued a second order, which states that after a cursory review of the law, it appears to the Court that "the ADA is not applicable to vehicles used to transport individuals arrested by local law enforcement officials." The order further states, however, that the Court desires that the plaintiffs, including the United States as intervenor, submit briefs "setting forth the reasons why the ADA applies to the facts of this case." Because it has intervened in this case solely with respect to the issue of title II's constitutionality, the government is submitting this brief as amicus curiae.

ARGUMENT

I. TITLE II COVERS ALL OF A PUBLIC ENTITY'S POLICIES, PRACTICES, AND PROCEDURES RELATED TO ARRESTS.

Title II of the ADA prohibits discrimination against "qualified individuals with disabilities" with respect to all of a public entity's "services, programs, and activities" or "by any such entity." This succinct yet broad application is sufficient in itself to encompass arrests; consistent with the statute's broad language both the legislative history of title II and the Preamble to the Department's title II implementing regulation, specifically address arrests as one of the activities of public entities covered by title II. Both make clear that title II is intended to require police departments to make reasonable modifications to their policies, practices, and procedures, and to provide training to officers that will avoid discriminatory arrests of individuals with disabilities. As demonstrated below,

title II's language, its legislative history, and interpretations of title II found in the Department of Justice's implementing regulation and Preamble leave no doubt that the plaintiff in the instant case has stated a proper claim under the ADA.

A. Title II Prohibits Discrimination against Qualified Individuals With Disabilities with Respect to Everything a Public Entity Does.

Title II does not prohibit discrimination with respect to any specific act by a public entity, but instead provides a general prohibition of discrimination broad enough to cover all actions of public entities, including arrests. Section 202 of the statute reads as follows:

> [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.[1] Title II's legislative history underscores what is evident on the statute's face -- that title II is intended to apply to "all actions of state and local governments." H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 84 (1990) (hereafter "House Report Part II"), reprinted in, 1990 U.S.C.C.A.N. 303, 367. See also id. at 151, reprinted in, 1990 U.S.C.C.A.N. at 434.

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[1] The remaining provisions of subtitle A of title II include definitions of statutory terms, 42 U.S.C. § 12131; a section on enforcement, 42 U.S.C. § 12132; procedures requiring the issuance of regulations to implement subtitle A, 42 U.S.C. § 12134; and the effective date.

The title II regulation promulgated by the Department of Justice, 28 C.F.R. Pt. 35 (1995), and the regulation's Preamble, 28 C.F.R. Pt. 35, App. A (1995), which constitutes the Department's official interpretation of the regulation, are consistent with the statute and legislative history.[2] Section 35.130(a) of the regulation repeats verbatim the language of section 202, see 28 C.F.R. § 35.130(a), and section 35.102(a) says that subtitle A of title II applies to "all services, programs, and activities provided or made available by public entities." 28 C.F.R. § 35.102(a).[3] The Preamble commentary on this section states simply that "title II applies to anything a public entity does." 28 C.F.R. Pt. 35, App. A, at 449.

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[2] The Department of Justice issued its title II regulation pursuant to statutory directive. See 42 U.S.C. § 12134(a). Accordingly, the regulation is to be given "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Noland v. Wheatley, 835 F. Supp. 476, 483 (N.D. Ind. 1993) (applying Chevron to give controlling weight to Department of Justice interpretations of title II of the ADA); see, e.g., Kinney v. Yerusalim, 9 F.3d 1067 (3d Cir. 1993) (relying on Justice Department interpretations of title II); Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276, 1279 (W.D. Wis. 1993) (same). The Preamble constitutes the Department's official interpretation of the regulation, and it is therefore also given "'controlling weight, unless it is plainly erroneous or inconsistent with the regulation.'" Stinson v. United States, 113 S. Ct. 1913, 1919 (1993) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)); see United States v. Larionoff, 431 U.S. 864, 872-73 (1977); Udall v. Tallman, 380 U.S. 1, 16-17 (1965); cf. Noland, 835 F. Supp. at 483 (relying on Technical Assistance Manual's interpretation of title II); Petersen, 818 F. Supp. at 1278 (same).

[3] Certain transportation services, programs, and activities of public entities are covered by subtitle B of title II. See 28 C.F.R. § 35.102(a) and (b) and discussion note 12, infra.

Section 202's general mandate of nondiscrimination is patterned after,[4] but has broader application than the prohibition of discrimination in section 504 of the Rehabilitation Act of 1973, which applies to all of the operations of federally-assisted and federally-conducted programs and activities.[5] 29 U.S.C. § 794(b)(1)(A). The House Education and Labor Committee Report notes that

> [t]he Committee has chosen not to list all the types of actions that are included within the term "discrimination" . . . because [title II] essentially simply extends the antidiscrimination prohibition embodied in section 504 to all actions of state and local governments.

House Report Part II at 84 (1990), reprinted in 1990 U.S.C.C.A.N. at 367. Plaintiffs alleging a violation of title II need to show

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[4] See 42 U.S.C. § 12134(b).

[5] Section 204(b) requires the Department of Justice to promulgate regulations implementing title II that are consistent with the regulations found at 28 C.F.R. Pt. 39, which apply to recipients of federal financial assistance, and the regulations found at 28 C.F.R. Pt. 41, which apply to all federally-conducted programs. 42 U.S.C. § 12134(b).

Title II's language closely tracks section 504's. The latter statute states, in pertinent part:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a).

only that they were "subjected to discrimination by" a public entity, 42 U.S.C. § 12132; section 202 does not include section 504's requirement that they identify a funded program or activity.

B. Title II's Legislative History and the Title II Regulation and Preamble Identify Arrests as One of the Activities or Actions of Public Entities That Must be Conducted in a Nondiscriminatory Manner.

The ADA's legislative history and the title II regulation and Preamble confirm that arrests are subject to title II. During House debates on the ADA, Representative Mel Levine said that

> [r]egretfully, it is not rare for persons with disabilities to be mistreated by police. Sometimes this is due to persistent myths and stereotypes about disabled people. Sometimes it is actually due to mistaken conclusions drawn by the police officer witnessing a disabled person's behavior.

He then cited examples of mistreatment of persons with disabilities by law enforcement officials and concluded that, even when conducted in good faith, "[t]hey constitute discrimination, as surely as forbidding entrance to a store or restaurant is discrimination." 136 Cong. Rec. H2599-01, H2633-01 (May 22, 1990).

Representative Steny Hoyer, one of the ADA's principal sponsors and its floor manager in the House of Representatives, added that title II covers training of public employees to ensure that discrimination does not occur. The example he cites to underscore this need involves a discriminatory arrest:

> [P]ersons who have epilepsy are sometimes inappropriately arrested because police officers have not received proper training to recognize seizures and to respond to them. In my [sic] situations, appropriate training of officials will avert discrimination.

136 Cong. Rec. E1913-01, E1916-01 (June 13, 1990). This same example appears in the House Judiciary Committee Report, which states that training of public employees, including police officers, may often be necessary in order to comply with title II's nondiscrimination mandate. See H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 51 (1990), reprinted in, 1990 U.S.C.C.A.N. 445, 473. See also United States' Suggestions in Opposition to Defendants' Partial Motion to Dismiss, Gorman v. Bishop, No.95-0475-CV-W-8 (W.D. Mo., July 14, 1995) (hereafter "U.S. Brief") at 6-7.

Representative Levine considered the issue of police officer training to avoid discriminatory arrests to be so important that he suggested that it be mentioned in the Department of Justice's title II implementing regulation. See 136 Cong. Rec. at H2599-01, H2633-01. As is made clear in the Preamble discussion of section 35.130(b) of the title II regulation,[6] the Department declined to include such a specific provision, in part because "[t]he general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of

[6] Section 35.130(b) enumerates several specific acts and omissions that constitute discrimination by public entities. See 28 C.F.R. § 35.130(b).

individuals with disabilities." See 28 C.F.R. Pt. 35, App. A, at 458. See also U.S. Brief at 7 & n.5. In fact, the Department had already made clear in the preamble commentary on its regulation implementing section 504 in its federally-assisted programs, that arrest procedures were covered by section 504 under the heading "Physical and Other Accessibility to Programs." See 45 Fed. Reg. 37,620 (1980) (describing procedures for administering Miranda warnings to persons who are deaf or who have hearing impairments).

Thus, even if this Court's suggestion in its October 10, 1995, order is correct and the ADA does not cover vehicles used to transport persons arrested by local law enforcement officials, it does not follow that the plaintiff's ADA claim must fall. Plaintiff has also alleged, more generally, a failure by defendants to make reasonable modifications to the KCMOPD's policies, practices, and procedures. Complaint at ¶ 16. Section 35.130(b)(7) of the regulation requires such modifications, with certain limitations, when they are necessary to avoid discrimination against persons with disabilities. 28 C.F.R. § 35.130(b)(7). See also note 11, infra.[7] It is possible that

[7] The plaintiff can also go forward with his allegations that his injuries were caused not solely as the result of being transported in a vehicle that was unsuitable for persons with his type of disability, but also as the result of failures by the KCMOPD to train police officers. Complaint at ¶ 17. One district court has already acknowledged that a failure to provide police officer training where necessary to avoid discriminatory arrests constitutes a violation of title II. See Jackson v. Inhabitants of the City of Sanford, 1994 WL 589617 (D. Me.) at * 6. In Jackson, the plaintiff sued the Town of Sanford and the police officer who arrested him under 42 U.S.C. § 1983, the ADA,

there were certain types of modifications to policies, practices, and procedures that the defendants could have made which would have required neither purchasing accessible transport vehicles for arrestees with disabilities, nor making modifications to existing vehicles. For example, another type of vehicle already in the department's possession and requiring no physical modifications at all, such as a patrol car, might have been used to transport the plaintiff without injury.[8]

II. IN ORDER TO ENSURE NONDISCRIMINATION, POLICE DEPARTMENTS MAY BE REQUIRED TO PROVIDE ACCESSIBLE VEHICLES TO TRANSPORT ARRESTEES WITH DISABILITIES OR TO MODIFY EXISTING VEHICLES.

Title II requires that public entities ensure qualified individuals with disabilities equal access to services, programs, and activities, and otherwise avoid subjecting such individuals to discrimination. Section 202 prohibits discrimination against any "qualified individual with a disability," see 42 U.S.C. § 12132,[9] which section 201(2) in turn defines as

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and state. Jackson was arrested following a traffic accident in which he was involved, because a police officer at the accident scene assumed Jackson's behavior was the result of alcohol or drug use. In fact, Jackson's behavior was the result of physical disabilities caused by a stroke and medication he was taking to control high blood pressure. Id. at * 1-2. Defendants' motion for summary judgment was granted as to all claims except Jackson's claim against the town under the ADA. The court held that Jackson was a "qualified individual with a disability," and that the town was required to make reasonable modifications to policies, practices and to provide police officer training, when necessary to avoid discriminatory arrests. Id. at * 6.

[8] The government expresses no opinion as to whether this particular modification to policies, practices, and procedures would in fact have been adequate to meet the defendants' title II obligations.

[9] See also Part I.A., supra.

> an individual 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 or 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) (emphasis added).[10] Thus, public entities must take appropriate measures, including removing transportation barriers in some circumstances, in order to carry out their services, programs, and activities in a manner that does not discriminate against individuals with disabilities.

The Department of Justice regulation lists a number of methods by which public entities may provide access to their services, programs, and activities, which include providing "accessible rolling stock or other conveyances." 28 C.F.R. § 35.150(b)(1). Following the brief list of specific methods for offering services, programs, and activities, section 35.150(b)(1) contains a "catch-all" phrase that allows a public entity to employ "any other methods that result in making its services, programs, and activities readily accessible to and usable by individuals with disabilities." Id. (emphasis added). See also U.S. Brief at 8. Either the specific method of providing "accessible rolling stock or conveyance," or section 35.150(b)(1)'s "catch-all" provision may be the basis for

[10] The title II regulation contains exactly the same definition of a "qualified individual with a disability" as section 201(2) of the ADA, including the reference to the "removal of . . . transportation barriers." See also 28 C.F.R.

requiring a police department to provide vehicles accessible to arrestees with disabilities.

This does not mean that all police departments are required to purchase fully accessible vehicles if there are other means of ensuring nondiscrimination in the activities in which those vehicles are used. In some cases, existing vehicles may already be sufficient to ensure safe transport, or may require very simple modifications. In other situations, it may be prohibitively expensive or too difficult to purchase new accessible vehicles or retrofit existing ones.[11] Nor has the government determined whether, in this particular case, the KCMOPD was required either to have acquired accessible vehicles or modified its existing ones in order to have avoided discriminating against the plaintiff. It is simply the government's position that subtitle A of title II covers the transportation of arrestees, and it may require that the vehicles used for that purpose be made accessible under some circumstances.[12]

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§ 35.104 (definition of "qualified individual with a disability").

[11] The ADA does not require a public entity to take any action to provide "program access" (as that term is defined in 28 C.F.R. § 35.150(a)) that it can demonstrate would either "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.150(a)(3). The concept of "fundamental alteration" also limits the obligation to make "reasonable modifications" to policies, practices, and procedures under section 35.130(b)(7) as well, though the concept of "undue burden" does not. 28 C.F.R. § 35.130(b)(7).

[12] Title II requires the Attorney General to promulgate regulations implementing subtitle A that include "standards

CONCLUSION

For all of the foregoing reasons, the United States, as amicus curiae, asks that this Court find that title II of the ADA applies to all of a police department's policies, practices, and procedures related to arrests, including the means by which arrestees with disabilities are transported.

Respectfully submitted,

STEPHEN L. HILL, JR. DEVAL L. PATRICK

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applicable to facilities and vehicles covered by this subtitle, other than facilities, stations, rail passenger cars, and vehicles covered by subtitle B." 42 U.S.C. § 12134(c). The inclusion of a separate subtitle B in title II, specifically addressing public transportation services, does not suggest that vehicles used for other services are exempt from subtitle A. The Secretary of Transportation has responsibility for issuing regulations implementing subtitle B of the ADA, 42 U.S.C. §§ 12141-12164, which addresses certain types of transportation barriers -- those related to transportation services (i.e., mass transit) that provide the general public with "general or special services (including charter service) on a regular and continuing basis." 42 U.S.C. § 12141(2). See 42 U.S.C. §§ 12143(b), 12149(a), and 12164. These regulations may be found at 49 C.F.R. Pts. 27, 37, and 38. The regulations that the Attorney General is required to issue pursuant to 42 U.S.C. § 12134 may not affect any matter within the scope of authority of the Secretary of Transportation. See 42 U.S.C. § 12134(a). See also 28 C.F.R. § 35.102(b) ("To the extent public transportation services, programs, and activities of public entities are covered by subtitle B of title II . . . they are not subject to the ftlinerequirements of this part."). If Congress had intended that title II should apply only to vehicles specifically covered by subtitle B, then the first reference to "vehicles" section 204(c) would be meaningless. Whenever possible, a statute must be construed in a manner that gives effect to every word. See, e.g., United States v. Nordic Village, Int., 503 U.S. 30, 35 (1992); Hoffman v. Connecticut Department of Income Maintenance, 492 U.S. 96, 103 (1989); United States v. Menasche, 348 U.S. 528, 538-539, (1955); Montclair v. Ramsdell, 107 U.S. 147, 152 (1883); United States v. Talley, 16 F.3d 972, 975 (8th Cir. 1994); Oberstar v. Federal Deposit Insurance Corporation, 987 F.2d 494, 501 (8th Cir. 1993); Beef Nebraska, Inc. v. United States, 807 F.2d 712, 717 (8th Cir. 1986).

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