UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ACCESS LIVING OF METROPOLITAN CHICAGO,	)	
and	)	
SHEILA AKHTAR, LARRY BIONDI, W. CAROL CLEIGH, MARY DELGADO, JAMES A. FERNEBORG, JENNIFER HART, SHARON LAMP, RENE DAVID LUNA, and J. FREDERICK STARK,	)	No. 00 C 0770
	)	Judge James F. Holderman
Plaintiffs,	)	Magistrate Judge Schenkier
v.	)	
CHICAGO TRANSIT AUTHORITY,	)	
Defendant.	)	

UNITED STATES' MEMORANDUM OF LAW AS AMICUS CURIAE

The United States of America, by its undersigned counsel, submits this Memorandum of Law as *Amicus Curiae*.

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INTRODUCTION

On February 8, 2000, Access Living of Metropolitan Chicago and nine individuals (collectively, "the Plaintiffs") filed the Complaint in this case. The Complaint alleges that the Chicago Transit Authority is in violation of title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 - 12165 ("ADA"), and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"). The Plaintiffs allege that there has been a "systemic failure [by the CTA] to provide basic and necessary public transportation services to plaintiffs and other persons with disabilities .... On a persistent and ongoing basis, defendant has discriminated against plaintiffs by denying them equal access to public buses and trains[.]" See Complaint ¶ 1.

On February 23, 2001, the Chicago Transit Authority ("CTA") filed a Motion for Summary Judgment.[1] In its Motion, CTA argues that it is entitled to summary judgment, in part, because the plaintiffs do not have standing, have not established a prima facie case of intentional discrimination, and have failed to establish that they are entitled to injunctive relief.

On April 9, 2001, the Court granted the United States leave to participate in this case as an amicus curiae. This amicus curiae brief advises the Court on several legal issues raised by CTA's Motion for Summary Judgment. First, this brief describes the circumstances under which individuals and groups should have standing to make claims under the ADA and Section 504. Second, this brief discusses when it is necessary that intentional discrimination be proven in a claim under title II of the ADA, and describes the types of evidence that would help establish intent to discriminate. Finally, this brief advises the Court on the propriety of an order of

[1] On March 1, 2001, CTA filed a Revised Motion for Summary Judgment. All references in this Memorandum of Law to CTA's Motion for Summary Judgment are references to the Revised Motion.

injunctive relief in a case arising under the ADA and Section 504. In this brief, the United States does not address the merits of the Plaintiffs' claims. Instead, this brief addresses the legal issues raised by CTA's Motion for Summary Judgment and provides the Court with guidance regarding how to apply the appropriate legal standards to the factual allegations raised by the Plaintiffs.

ARGUMENT

I. Legal standards applicable to the motion for summary judgment.

In order to prevail in its Motion for Summary Judgment, the CTA must meet a high standard of proof. Summary judgment is appropriate only when the evidence fails to demonstrate that there is a genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. Fed. Rule Civ. Pro. 56(c). The Plaintiffs in this case can establish that there is a genuine issue of material fact if they provide sufficient evidence that would allow a reasonable jury to find for them at trial. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). Summary judgment is improper if there is a "reasonably contestable issue of fact that is potentially outcome-determinative." EEOC v. Sears, Roebuck & Co, 233 F.3d 432, 436 (7th Cir. 2000). To determine whether such an issue of fact exists, the court must "review the record in the light most favorable to the nonmoving party and. . . draw all reasonable inferences in that party's favor." Larimer v. Dayton Hudson Corporation, 137 F.3d 497, 500 (7th Cir.1998). Only "if no reasonable jury could find for the party opposing the motion" may summary judgment be granted. Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 931 (7th Cir.1995).

II. Overview of Title II of the ADA and Section 504 of the Rehabilitation Act

Title II of the Americans with Disabilities Act ("ADA") provides:

> 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.[2]

The general nondiscrimination provision of Section 504 of the Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, 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.

Because the terms of title II of the ADA and Section 504 of the Rehabilitation Act are so similar, courts use similar standards in interpreting them. "Because title II of the ADA essentially extends the antidiscrimination prohibition embodied in section 504 to all actions of State and local governments, the standards adopted in this part are generally the same as those required under section 504 for federally assisted programs." 28 C.F.R. Part 35, App. A at 477. See also Helen L. v. DiDario, 46 F.3d 325, 330 n.7 (3rd Cir. 1995); Henrietta D. v. Guiliani, 119 F.Supp.2d 181, 206 (E.D.N.Y. 2001)("[b]ased upon the close relationship between the two acts, cases interpreting the Rehabilitation Act are considered persuasive authority for interpreting the ADA," quoting Tugg v. Towey, 864 F.Supp. 1201, 1205 n.4 (S.D. Fla. 1994)).

The ADA was enacted in 1990 to eliminate pervasive societal discrimination against

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[2] "Public entity" is defined, in relevant part, to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1); 28 C.F.R. § 35.104.

individuals with disabilities. 42 U.S.C. § 12101. In enacting the ADA, Congress found that individuals with disabilities had historically been subject to isolation and segregation, and had been discriminated against in "such critical areas as employment,. . . transportation, . . . recreation, . . . health services, . . . and access to public services." Id. at § 12101(a)(2), (3). The ADA was meant to effect a considerable change in the ways in which private businesses and State and local governments treat and serve individuals with disabilities. The ADA's coverage is accordingly broad -- prohibiting discrimination on the basis of disability in employment, State and local government programs, services, and activities, public and private transportation systems, telecommunications, public accommodations, and commercial facilities.

Title II is divided into two parts. Subtitle A, 42 U.S.C. §§ 12131-12134, generally prohibits disability-based discrimination by state and local government entities. Subtitle B, 42 U.S.C. §§ 12141-12165, sets forth specific requirements governing public transportation services provided to individuals with disabilities. The U.S. Department of Transportation ("DOT") is responsible for the implementation of Subtitle B, and has issued a regulation implementing that subtitle. See 49 C.F.R. §§ 37.1 et seq. The Department of Transportation also has significant administrative and enforcement responsibilities regarding the title II transportation provisions at issue in this action. See 49 C.F.R. § 37.11(a); 49 C.F.R. Part 27, subpt. F. If the Department of Transportation believes a violation has occurred, and voluntary compliance efforts are unsuccessful, it may refer the matter to the Department of Justice for judicial action. 42 U.S.C. § 12132; 29 U.S.C. § 794a; 42 U.S.C. § 2000d-1.

Pursuant to title II, as well as standards set forth in DOT regulations, 49 C.F.R. parts 27 and 37, public transportation entities are required to construct and alter facilities to be accessible

and to ensure that certain vehicles are accessible. See 42 U.S.C. §§ 12142 (vehicles), 12146 (new facilities), 12147 (alteration of existing facilities). See also 49 C.F.R. § 37.41 (construction of new facilities); 49 C.F.R. § 37.43(a)(1) (alteration of existing facilities); 49 C.F.R. §§ 37.71(a) and 37.79 (new vehicles); 49 C.F.R. §§ 37.73(a), (b) and 37.81(a), (b) (used vehicles). When providing transportation services, the entities are required to maintain in "operative condition" the accessible features of their facilities and vehicles, including lifts and other means of access to vehicles, and elevators. 49 C.F.R. §§ 37.161(a), (b). The DOT regulations set forth detailed requirements for the maintenance and operation of lifts, including establishing a system of "regular and frequent" maintenance checks, taking the vehicle out of service when the lift is found to be inoperative (within limits), and providing alternative transportation when the anticipated arrival time of the next accessible vehicle exceeds 30 minutes. 49 C.F.R. § 37.163.

DOT regulations specifically explain that this requirement does not prohibit "isolated or temporary interruptions in service or access due to maintenance or repairs." 49 C.F.R. § 37.161(c). DOT regulations explain that repairs must be made promptly. 49 C.F.R. pt. 37, App. D at 533. The preamble to the regulations further states that "repairing accessible features must be made a high priority," and that "[a]llowing obstructions or out of order accessibility equipment to persist beyond a reasonable period of time would violate this Part, as would mechanical failures due to improper or inadequate maintenance." Id. In discussing § 37.163, the preamble also provides that a failure by public entities to arrange prompt repair of inoperative elevators, lifts, or other accessibility-related equipment would "also violate this part." Id. The preamble requires that "an aggressive preventive maintenance program for lifts is essential." Id.

The Plaintiffs allege that Defendant, by failing to make its bus and train systems readily

accessible to and usable by people with disabilities, has discriminated against them based on their disabilities. Specific allegations involving Defendant's "systemic failure" to provide Plaintiffs with equal access to its buses include its repeated failure to address the following: malfunctioning or non-functioning mechanical lifts, bus drivers inadequately trained in the use of mechanical lifts, and failure by bus drivers to call out stops and to pick up riders with disabilities waiting at bus stops. Complaint ¶ 2. Plaintiffs further allege that Defendant's "systemic failure" to provide equal access to Plaintiffs on its trains includes repeated failures to: implement a system to ensure that mobility impaired riders who use a wheelchair can embark and disembark safely; adequately train station agents in the use of the "gap-filler;"ensure that station elevators are maintained in working order; and, ensure that train personnel call out train destinations and stops. Complaint ¶ 3.

III. Group and Individual Standing

A. General Standing Requirements

Defendants claim that Access Living does not have standing to sue in its own right or on behalf of its current and future clients. Defendants' Motion for Summary Judgment at 17. More particularly, Defendants claim that Access Living does not have standing to sue in its own right under title II of the ADA because it is not "a qualified individual with a disability," as that term is employed under the Act, and that it cannot sue on behalf of its current and future clients inasmuch as Access Living cannot base its claims upon the rights of third persons. Id.

Article III of the United States Constitution confines federal courts to adjudicating actual "cases" and "controversies." Allen v. Wright, 468 U.S. 737 (1984). Among the several doctrines "'serv[ing] to identify those disputes which are appropriately resolved through the

judicial process' ... is the doctrine of standing." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). In addressing the issue of standing, a court must determine whether a party has a sufficient personal stake in the outcome of an otherwise justiciable controversy to obtain relief through a judicial resolution of that controversy. Sierra Club v. Morton, 405 U.S. 727, 731 (1972). Standing questions must be resolved according to a two-part inquiry that considers not only Article III constitutional limitations but also prudential limitations. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979). A litigant must pass both constitutional and prudential muster to have standing to sue. Family & Children's Center, Inc. v. School City of Mishawaka, 13 F.3d 1052, 1058 (7th Cir. 1994), cert. denied, 513 U.S. 961 (1994).

1. Article III Standing

To establish standing under Article III, the litigants must establish an "irreducible constitutional minimum of standing." Lujan, 504 U.S. at 560 (1992); Plotkin v. Ryan, 239 F.3d 882, 884 fn. 5 (7th Cir. Feb. 6, 2001). This "irreducible constitutional minimum of standing" contains three elements: (1) plaintiffs suffered actual or threatened injury; (2) the condition complained of caused the injury or threatened injury, and (3) the requested relief redressed the alleged injury. Lujan, 540 U.S. at 560-61. These three basic requirements are referred to as injury-in-fact, causation/traceability, and redressability. Plotkin, 239 F.3d at 884. When examining whether plaintiffs suffered actual or threatened injury, the inquiry focuses on whether the injury-in-fact is (1) "concrete and particularized," and (2) actual or imminent, not 'conjectural' or 'hypothetical.'" Lujan 540 U.S. at 560.

An alleged violation of the ADA is an injury sufficient to give rise to an Article III case

or controversy. Aikins v. St. Helena Hosp., 843 F.Supp. 1329, 1334 (N.D.Cal.1994). This identified injury must be personal to the plaintiffs, and not theoretical or speculative. See Hoepfl v. Barlow, 906 F.Supp. 317, 322 (E.D. Va. 1995) ("[T]he right created and at issue here is the right to be free from discrimination in the enjoyment of public accommodations and services"); see also Doe v. National Board of Medical Examiners, 199 F.3d 146, 153 (3d Cir. 1999) (plaintiff's fear of discrimination due to identification of his disability was a concrete injury).

2. Prudential Limitations

In addition to Article III's "minimum of standing," the Supreme Court has recognized prudential limitations on the "class of persons who may invoke the courts' decisional and remedial powers." Warth v. Seldin, 422 U.S. 490, 499 (1975). For instance, a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Id.

Prudential limitations do not apply, however, when Congress, by legislation, has expanded standing to the full extent permitted by Article III, thereby overriding prudential standing limitations and authorizing all persons who satisfy the Constitution's standing requirements to bring a particular action in federal court. Warth, 422 U.S. at 501 ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) ("Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one who otherwise would be barred by prudential standing rules.").

B. Individual Standing To Sue Under The ADA And The Rehabilitation Act

Defendants argue that the individual Plaintiffs do not have standing because none of them

has suffered an injury in fact. Motion for Summary Judgment, at 21.

As explained supra, to establish standing under Article III, the individual Plaintiffs must establish the three prongs of the Lujan test by showing that (1) they suffered actual or threatened injury; (2) the condition complained of caused the injury or threatened injury, and (3) the requested relief redressed the alleged injury. Lujan, 504 U.S. at 560-61; Doe v. County of Montgomery, Illinois, 41 F.3d 1156, 1159 (7th Cir. 1994). When examining whether the individual Plaintiffs suffered actual or threatened injury, the inquiry should focus on whether the injury-in-fact is (1) "concrete and particularized," and (2) actual or imminent, not 'conjectural' or 'hypothetical.'" Lujan at 560.

When individual Plaintiffs are themselves the objects of the action, "there is ordinarily little question that the action or inaction [of the defendant] has caused [them] injury, and that a judgment preventing or requiring the action will redress it." Lujan, 504 U.S. at 560-61.

Therefore, the individual Plaintiffs in this case can survive summary judgment if they produce evidence which, when viewed in the light most favorable to them, suggests that they were denied opportunities to ride the CTA's bus and rail systems. More specifically, the Plaintiffs can survive summary judgment if they can establish that a reasonable jury could find for them with regard to facts such as those alleged in the Complaint: that they were repeatedly confronted by malfunctioning or non-functioning mechanical lifts; by bus drivers who did not know how to operate the lifts; by bus drivers who did not know to call out stops; by bus drivers who did not stop to pick up riders with disabilities; by train station agents who were inadequately trained in the use of the "gap-filler;" by inoperable elevators at train stations; and by train personnel who did not know to call out the stops. In other words, the Plaintiffs will

survive summary judgment if there is a genuine issue about whether CTA provided these individuals with accessible transportation.

C. A Public Interest Group's Representational Standing to Sue Under The ADA and the Rehabilitation Act

The Defendant argues that Access Living lacks representational standing to bring its claims under the ADA and the Rehabilitation Act, since the evidence identified by Access Living during discovery makes clear that Access Living cannot establish this allegation "without requiring the participation of individual association members." Defendants' Motion for Summary Judgment at 20. Defendants' arguments, however, find no support in the prevailing case law.

Generally, an injured party must assert her own legal rights and interests and cannot rest her claim to relief on the legal rights or interests of third parties. Warth v. Seldin, 422 U.S. 490, 499 (1975); Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 600 (7th Cir.1993); National Organization for Women, Inc., v. Scheidler, 897 F. Supp. 1047, 1067 (N.D. Ill. 1995). However, in certain circumstances, an association may have standing solely as the representative of the people who it serves. Warth v. Seldin, 422 U.S. at 511; Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d at 600. The landmark case for associational, or organizational, standing is Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977). The Hunt test is as follows:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt, 432 U.S. at 343. The Hunt test was reaffirmed in International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock, 477 U.S. 274 (1986), where the Court specifically noted that very often an organization will present an especially efficient vehicle for litigation from the perspective of both the litigants and the judicial system. Brock, 477 U.S. at 289. The Court continued, "[a] preexisting organization can often draw upon a preexisting reservoir of experience, research, and capital. These resources ... can often sharpen the presentation of issues appreciably – one of the primary concerns of the doctrine of standing." Retired Chicago Police Ass'n, 7 F.3d at 600 (citing Brock); see Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 187 (1951) (Jackson, J., concurring).

The first prong of the Hunt test is whether those whom Access Living represents would otherwise have standing to sue in their own right. This issue is addressed above, in the discussion of an individual's standing to sue.

The second prong of the Hunt test, whether the interests Access Living seeks to protect are germane to its purposes, has clearly been established by Access Living. Access Living is an organization that represents, and provides services to, people with disabilities. Its mission statement shows that its primary purpose is to protect individuals with disabilities:

> Access Living fosters the dignity, pride, and self-esteem of people with disabilities, and enhances the options available to them so that they may choose and maintain individualized and satisfying lifestyles ... Access Living recognizes the innate rights, abilities, needs and diversity of people with disabilities, works toward their integration into community life, and serves as an agent of social change.

Access Living Mission Stmnt., at http://www.state.il.us/dhr/housenet/disab/access/mission.html.

The third prong of the Hunt test is whether the claim asserted or the relief requested

requires the participation of individuals who the group serves in the lawsuit. In examining this prong, the Seventh Circuit has stated that it could "discern no indication in Warth, Hunt, or Brock that the Supreme Court intended to limit representational standing to cases in which it would not be necessary to take any evidence from individual members of an association." Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 601-02 (7th Cir. 1993). The Court then stated that the third prong of the Hunt test is "more plausibly read as dealing with situations in which it is necessary to establish 'individualized proof' ... for litigants not before the court in order to support the cause of action." Id. at 602, quoting Hunt, 432 U.S. at 344. The Court then noted that:

> [W]hile the third prong of the Hunt test requires that we conclude that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit," Hunt, 432 U.S. at 343, associational standing does depend "in substantial measure on the nature of the relief sought." Warth, 422 U.S. at 515. Declaratory, injunctive, or other prospective relief will usually inure to the benefit of the members actually injured and thus individualized proof of damages is often unnecessary. Id.

Retired Chicago Police Ass'n, at 602-603. The Court then stated that recovery would not require that every member of the plaintiff association give evidence. Id. at 603. Rather, as stated by the Court, the plaintiffs would need to establish, using circumstantial evidence, that the violation occurred, and that this evidence "might be supplied by the evidentiary submissions of some of the members." The court then concluded that each of the plaintiff's members' presence as a party would not be required. Id. at 603.

As in Retired Chicago Police Ass'n, Access Living does not need to have each of its clients participate in this action. Any declaratory, injunctive, or other prospective relief against

Defendant would inure to the benefit of all individuals with disabilities, including the clients of Access Living, when these individuals use the Defendant's transit services. Under Hunt and Retired Chicago Police Ass'n, the relief being sought by Access Living and the individual Plaintiffs requires only that Plaintiffs establish, using circumstantial evidence by some of the people who it serves, that the violation occurred. If the court finds that Access Living has established each prong of the Hunt test, then Access Living has representational standing under the ADA and the Rehabilitation Act to bring this action on behalf of its clients with disabilities.

D A Public Interest Group's Standing to Sue In Its Own Right Under The ADA and the Rehabilitation Act

1. Article III Standing

Defendant argues that summary judgment should be granted because Access Living did not allege specific facts that, if taken as being true, demonstrate that it has suffered a concrete and demonstrable injury as required under Lujan. Motion for Summary Judgment at 18.

An association or organization may gain standing by suing based on injuries to itself. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982). See, e.g., Oak Ridge Care Center v. Racine County, Wis., 896 F. Supp. 867, 871 (E.D. Wis. 1995) (elder care facility had Article III standing under ADA).

Access Living can survive summary judgment on this point if it produces evidence showing that it has been frustrated from achieving its purposes and goals because CTA is making it difficult for Access Living's employees, board members, and clients to participate in community life or reach Access Living's offices, and for Access Living's employees to attend

meetings in and around Chicago and to reach people with disabilities in the community. Such evidence would satisfy Lujan's requirement that Access Living has suffered an injury-in-fact traceable to CTA's conduct that a favorable decision by this Court would remedy.

2. Prudential Limits

Defendant argues that Access Living does not have standing under the ADA because it is not an "individual" as required for standing. Motion for Summary Judgment at 17. As explained supra, generally, a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975). However, as long as constitutional requirements are met, Congress may grant standing to organizations to seek relief on the basis of the legal rights and interests of others. Warth, 422 U.S. at 501.

Congress granted broad enforcement powers under title II of the ADA, which prohibits discrimination on the basis of disability in general terms, 42 U.S.C. § 12132, and extends relief to "any *person* alleging discrimination on the basis of disability." 42 U.S.C. § 12133 (emphasis added). Congress similarly granted broad enforcement powers under the Rehabilitation Act, which extends its remedies to "any person aggrieved" by the discrimination of a person on the basis of his or her disability. 29 U.S.C. § 794a(a)(2). See Innovative Health Systems, Inc., v. City of White Plains, 117 F.3d 37, 47 (2d Cir. 1997). That "person" need not be an individual with a disability, as Defendants maintain, but may be an entity or anyone who is injured by a covered entity's discrimination.

Of those courts to address the specific issue of title II's protection of individuals and entities subjected to discrimination on the basis of disability, most courts have determined that

an institution has standing to sue under title II. See Innovative Health Systems, 117 F.3d at 44-45; Oak Ridge Care Center v. Racine County, Wis., 896 F. Supp. 867, 872-73 (E.D.Wis. 1995); Tugg v. Towey, 864 F. Supp. 1201, 1205 (S.D. Fla. 1994); Concerned Parents to Save Dreher Park Center v. City of West Palm Beach, 846 F. Supp. 986, 990 (S.D. Fla. 1994). See also Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (fair housing organization had standing to sue in its own right under Fair Housing Act, a civil rights statute closely analogous to the ADA); Growth Horizons, Inc. v. Delaware County, Pa., 983 F.2d 1277, 1282 (3d Cir. 1993) (corporation that provided community living arrangements to mentally ill individuals had standing to sue under Fair Housing Act); Raver v. Capitol Area Transit, 887 F. Supp. 96, 98 (M.D. Pa. 1995) (nonprofit corporation that seeks to assure equal access to mass transportation facilities for persons with disabilities has standing to sue under ADA).

Most courts have similarly determined that individuals and entities who are injured by discrimination on the basis of disability have standing under Section 504 even though they are not, themselves, individuals with disabilities. In Sullivan v. City of Pittsburgh, 811 F.2d 171 (3d Cir. 1987), for example, a non-profit corporation that operated treatment centers for alcoholics sued under section 504 of the Rehabilitation Act for discrimination in zoning and funding decisions by the defendant city. The defendant argued that, because the corporation was not a qualified individual with a disability, the city's discrimination against the corporation was not actionable. The court disagreed, finding that:

> the clear intent of Congress in enacting § 504 was to make unlawful direct or indirect discrimination against any handicapped individual who would benefit from a federally-funded program or activity. . . . Therefore, if the City denied . . . funds to [the plaintiff corporation] because the funds would be used for handicapped

individuals, it violated § 504.

Id. at 182 n. 12 (citations omitted) (emphasis added).

In Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103 (9th Cir. 1987), an organization paid for a sign language interpreter for a deaf juror and was denied reimbursement by the county. The organization sued under section 504. The defendants challenged the organization's standing, claiming the organization was not a member of the class benefitted by the statute. The court disagreed, finding that organizations of or for people with disabilities have standing to sue under section 504 for injunctive relief and to recover expenses made necessary by a defendant's discrimination. Id. at 1115. See also Williams v. United States, 704 F.2d 1162, 1163 (9th Cir. 1983) (organization whose purposes include improving the quality of life of individuals with disabilities has standing to sue to require Federal agencies to perform their obligations under section 504); United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977) (associations of individuals with disabilities have standing); Nodleman v. Aero Mexico, 528 F. Supp. 475 (C.D. Cal. 1981); Independent Housing Servs. v. Fillmore Ctr. Assocs., 840 F. Supp. 1328 (N.D. Cal. 1993).

The only case cited by Defendants in support of their argument that Access Living lacks standing to sue under the ADA and the Rehabilitation Act is Kessler Inst. for Rehabilitation, Inc. v. Mayor and Council of Essex Fells, 876 F. Supp. 641 (D.N.J. 1995). Defendants' Motion for Summary Judgment at 18. However, this Court will find Kessler of little help because the court in that case did not address the provisions of the Americans with Disabilities Act, the clear language of the regulation interpreting title II, or the legislative history of the statute. Liberty Resources v. Southeastern Pennsylvania Transportation Authority, 2001 WL 15960, *5 at n16

(E.D.Pa. Jan. 5, 2001)("[t]he reasoning in Kessler is flawed" for several reasons).

Innovative Health Systems, Oak Ridge and Tugg, on the other hand, are well-reasoned and supported by the plain language, legislative history, and agency interpretation of the ADA.[3] In Innovative Health Sys., an outpatient drug and alcohol rehabilitation treatment center and a number of its clients sued the City of White Plains and various officials under the ADA and Rehabilitation Act after the treatment center's application for a building permit was denied. There, as here, defendants challenged plaintiffs' standing to sue under both statutes. The Second Circuit rejected defendants' arguments, noting: "That IHS is not granted legal rights under [the ADA or Rehabilitation Act], . . . 'hardly determines whether [it] may sue to enforce the . . . rights of others.'" Innovative Health Sys., 117 F.3d at 47 (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 103 n.9 (1979)). "Rather," the court continued, "we must look to whether the statutes 'grant[] persons in the plaintiff's position a right to judicial relief." Id. (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)). The Second Circuit concluded:

> Looking to the enforcement provisions of each statute, we agree with the district court that IHS has standing under both Title II of the ADA and the Rehabilitation Act. Title II's enforcement provisions extends relief to "any person alleging discrimination on the basis of disability." 42 U.S.C. § 12133 (1994). Similarly, the Rehabilitation Act extends its remedies to "any person aggrieved" by the discrimination of a person on the basis of his or her disability." 29 U.S.C. § 794a(a)(2). As the district court noted, the use of such broad language in the enforcement provisions of the statute "evinces a congressional intention to define standing to bring a private action under 504 [and Title II] as broadly as is permitted by Article III of the Constitution." See Innovative Health Sys., Inc., 931 F. Supp. at 237 (quoting Nodleman v. Aero Mexico, 528 F. Supp. 475, 485 (C.D. Cal. 1981)(citing Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209,

[3] In Concerned Parents to Save Dreher Park Center v. City of West Palm Beach, 846 F. Supp. 986, 990 (S.D. Fla. 1994), the court also recognized standing if one represents those subjected to discrimination based on a disability.

93 S. Ct. 364, 366-67, 34 L. Ed. 2d 415 (1972))).

Innovative Health Sys., 117 F.3d at 47.

Similarly, in Oak Ridge, the court found that Oak Ridge Care Center, an elder care facility that challenged defendant's denial of its application for a conditional use permit under the ADA and the Fair Housing Act, had Article III standing because, as a result of defendant's discriminatory action, it lost a sale of property and had to continue to make mortgage payments. Oak Ridge, 896 F. Supp. at 871. The court refused to follow Kessler because "[t]he Kessler court failed to consider the regulations implementing the ADA." Id. at 872. The court found that ADA standing for an institution was contemplated by the Appendix to 28 C.F.R. § 35.130(g), and the plain language of the regulations supported its finding. Id.

Finally, in Tugg, deaf individuals and their family members sued for violations of title II of the ADA. The defendants in that case, like the defendants here, argued that the non-disabled individuals did not have standing to sue in their own right because they were not individuals with disabilities. The court, relying on 28 C.F.R. § 35.130(g) and the preamble thereto, found that title II gave "broad protection to anyone associated with an individual with a disability." Id. at 1208. Consequently, the court found that the non-disabled individuals had standing to assert their own rights under the ADA. See also Comer v. Cisneros, 37 F.3d 775, 789 (2d Cir. 1994) (under Fair Housing Act court need only examine constitutional minima of injury); Epicenter of Steubenville, Inc. v. City of Steubenville, 924 F. Supp. 845, 849-50 (S.D. Ohio 1996) (corporation had standing to challenge under the Fair Housing Act City's zoning ordinance that prohibited it from obtaining permit to operate an adult care facility); Finley v. Giacobbe, 827 F. Supp. 215, 219-20 (S.D.N.Y. 1993).

The foregoing authorities firmly establish that a public interest group has standing to sue in its own right and on behalf of its current and future clients.

IV. The Need to Prove Intentional Discrimination Under the ADA and the Rehabilitation Act.

CTA contends that the plaintiffs have failed to establish a prima facie case of intentional discrimination, which it argues is required under title II of the ADA. Defendant's Motion for Summary Judgment at 22-53. However, proof of intentional discrimination is not necessary to establish a prima facie case; instead, it is necessary only to justify a court's award of compensatory damages. Moreover, to prove intentional discrimination the plaintiffs do not need to show a discriminatory animus on the part of CTA officials, but need to establish only a "deliberate indifference" to the complaints about accessibility problems.

To make out a prima facie case under title II, a plaintiff does not have to prove intentional discrimination. In Washington v. Indiana High School Athletic Assn., 181 F.3d 840, 846 (7th Cir. 1999), the Seventh Circuit held, "We cannot accept the suggestion that liability under Title II of the Discrimination Act must be premised on an intent to discriminate on the basis of disability." The Court of Appeals noted that several other circuit courts of appeal have also held that a plaintiff is not required to present proof of intentional discrimination to establish a prima facie case under title II or Section 504 of the Rehabilitation Act. Id. See McPherson v. Michigan High School Athletic Assn., 119 F.3d 453, 460 (6th Cir. 1997); Crowder v. Kitigawa, 81 F.3d 1480, 1483-84 (9th Cir. 1996); Norcross v. Sneed, 755 F.2d 113, 117 n. 4 (8th Cir. 1985); Pushkin v. Regents of the Univ. of Colorado, 658 F.2d 1372, 1385 (10th Cir. 1981); Prewitt v. United States Postal Service, 662 F.2d 292, 306 (5th Cir. 1981).

Evidence of intentional discrimination is only relevant in the context of a claim for compensatory damages. See Guardians Association v. Civil Service Commission of New York, 463 U.S. 582 (1983)(analyzing Title VI of the 1964 Civil Rights Act).[4] See also Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1153 (10th Cir. 1999)(since intentional discrimination is not an element of the plaintiff's prima facie case, the only question is whether the plaintiff had to prove intentional discrimination to receive an award of compensatory damages). Ferguson v. City of Phoenix, 157 F.3d 668 (9th Cir. 1998), cited in CTA's Motion for Summary Judgment, illustrates this point. The district court in that case found that there was no proof of intentional discrimination; while it granted injunctive relief, it did not award compensatory damages. Id. at 673. Similarly, in Midgett v. Tri-County Metropolitan Transportation District of Oregon, 74 F. Supp. 2d 1008, 1018 (D.Or. 1999), also cited in CTA's Motion, the district court first analyzed whether there was sufficient proof for an injunction, and then took up the issue of intentional discrimination to determine if compensatory damages were appropriate.

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[4] Title II of the ADA affords plaintiffs the "remedies, procedures, and rights"set forth in 29 U.S.C. § 794a (which governs the relief available under Section 504). 42 U.S.C. § 12133. In turn, 29 U.S.C. § 794(a)(2) gives Section 504 plaintiffs the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964," 42 U.S.C. § 2000d et seq. (Title VI). Therefore, the remedies available for violations of title II of the ADA are coextensive with those available under Title VI of the 1964 Civil Rights Act. See Parker v. Universidad de Puerto Rico, 225 F.3d 1, 4 (1st Cir. 2000) (Title II adopts the remedial scheme of Title VI); Dertz v. City of Chicago, 912 F.Supp. 319, 324 (N.D. Ill. 1995) (Title II adopts the remedies, rights, and procedures of Section 504, which, in turn, adopt the procedural and remedial scheme of Title VI). Because Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, et seq., borrows the remedial scheme of Title VI of the Civil Rights Act of 1964, see e.g. Cannon v. Univ. of Chicago, 441 U.S. 677, 694-699 (1979) (Congress intended that Title IX would be interpreted and applied as Title VI as been), decisions regarding damages interpreting one of the statutes often are used by courts to apply to all four. See Alexander v. Choate, 469 U.S. 287, 293 (1985) (because Title IX, Section 504, and Title VI contain parallel language, the same analytic framework should generally apply in cases under all three statutes).

It is premature at this stage for the court to rule on the appropriate remedies and therefore it is premature to analyze the evidence of intent. However, if intent is considered at this stage of the proceedings, the Supreme Court has laid out the legal standard for intentional discrimination in Gebser v. Lago Vista Ind. School Dist., 524 U.S. 274 (1998). The Court held that a plaintiff can establish intentional discrimination under Title IX through proof of "deliberate indifference." In Gebser, a high school student brought suit against a school district, claiming that she had been sexually harassed by a teacher. The Supreme Court ruled that the school district was not liable for damages under Title IX for actions about which it had no knowledge. The Court held that in cases that do not involve the official policy of a recipient entity, damages would be available only if "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on recipients' behalf has actual knowledge of the discrimination in the recipient's programs and fails adequately to respond." Id. at 290. The response, or lack thereof, must amount to "deliberate indifference." Id. That is, an official must make a decision not to remedy the violation that has been brought to his or her attention. Id.

In Chontos v. Rhea, 29 F.Supp. 2d 931 (N.D. Ind. 1998), a federal district court applied "deliberate indifference" in a Title IX case. It held that although a university took some corrective actions when it first received complaints of sexual harassment by a professor, including giving him a written warning and ordering him into counseling with a psychiatrist, a reasonable jury could find that it was still deliberately indifferent to the problem in part because it did not adequately follow up on the problem. Id. at 937. Moreover, although the university had in place a written policy on sexual harassment, a reasonable jury could find that what the university actually did when it received complaints was more important than the written policy.

Id. at 936-37.

The Fourth Circuit has held that a state licensing agency's failure to make a reasonable accommodation for a test-taker could constitute deliberate indifference. Pandazides v. Virginia Board of Education, 13 F.3d 823 (4th Cir. 1994) (intentional discrimination is not necessarily discriminatory animus, but may be simple disparate treatment). The Second Circuit reached the same conclusion in a similar case. Bartlett v. New York State Board of Law Examiners, 156 F.3d 321 (2d Cir. 1998), judgment vacated by 527 U.S. 1031 (1999). A district court in Maryland held that the failure to provide a sign language interpreter could constitute deliberate indifference, even where the omission was the result of thoughtlessness and indifference rather than animus. Proctor v. Prince George's Hospital Center, 32 F. Supp. 2d 820, 828-29 (D. Md. 1998).

The Ninth Circuit's analysis in Ferguson reinforces these points. The Ninth Circuit found that there was no deliberate indifference in that case for several reasons. First, the number of complaints received by the City of Phoenix's 9-1-1 center was quite low: "We find nothing to suggest that the City received alleged numerous and repeated complaints to which it did not respond. In fact, the evidence was to the contrary." Ferguson v. City of Phoenix, 157 F.3d at 675. Moreover, whenever the 9-1-1 center received a complaint, the complaints were investigated and "a follow-up was always done." Id.[5]

Applying these legal standards to this case, the plaintiffs can survive partial summary judgment if they produce evidence which, when viewed in the light most favorable to the

[5] Ferguson, Pandazides and Proctor were decided before Gebser, and Bartlett made no reference to Gebser. However, all four employed the "deliberate indifference" standard and therefore remain relevant.

Plaintiffs, suggests that CTA employees were aware that people with disabilities were experiencing problems with accessibility. Moreover, evidence such as the following will also be relevant: whether CTA employees undertook a meaningful investigation of the complaints; whether the people with disabilities who complained to CTA received a timely response; whether CTA took substantial steps to correct the problems raised in the complaints; whether CTA put in place procedures to ensure that the problems would not be repeated in the future; and whether CTA responded in a consistent way to the various complaints that it received.

CTA also argues that "the discriminatory intent must be that of the covered public entity, not its employees." Defendant's Motion for Summary Judgment at 23. However, as explained above, the question for this Court as it evaluates the evidence of intentional discrimination is whether "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures ... has actual knowledge of discrimination in the recipient's programs," and responds with "deliberate indifference." Gebser v. Lago Vista Ind. School Dist., 524 U.S. at 290. The relevant question in this case is not whether the people who took the allegedly unlawful actions, or made the allegedly unlawful oversights, were bus drivers or train engineers or employees in the administrative offices at CTA's headquarters. The legal test is whether these employees and officials had the authority to act on the problems that were reported to them.

The primary case CTA relies on, Smith v. Metropolitan School District Perry Township, 128 F.3d 1014 (7th Cir. 1997), was decided before the Supreme Court laid out the standard in Gebser. Moreover, the principle of that case is not at broad as CTA suggests. The Seventh Circuit has explained that Smith stands for the proposition that "the school district was not liable

for the sexual harassment by one of its teachers because there was no evidence that a school official knew of the alleged harassment and failed to respond." Mary M. v. North Lawrence Communication School Corp., 131 F.3d 1220, 1224 (7th Cir. 1997). In other words, Smith is in harmony with Gebser.

CTA concludes its argument on this point by asserting, "Accordingly, in order to establish a claim under the Rehabilitation Act or Title II for compensatory damages, the Plaintiffs must show that the CTA itself engaged in intentional discrimination." Motion for Summary Judgment at 24. This statement, of course, begs the question. This Court should determine that the Defendants are responsible if CTA employees who had some authority to correct the problems responded to complaints with "deliberate indifference."

V. The Availability of Injunctive Relief Under the ADA and the Rehabilitation Act.

CTA finally asserts that plaintiffs have not established that they are entitled to injunctive relief: "The Plaintiffs here have clearly failed to establish the type of strong record which would be required to support the imposition of injunctive relief against a government entity." Defendant's Motion for Summary Judgment at 58.

CTA attempts to convince this Court that an order for injunctive relief against a state or local government entity is extraordinary in a case under title II or Section 504. In fact, such orders are routine in cases where a plaintiff establishes liability. Title II, Section 504, and Title VI all provide the same "remedies, procedures, and rights." See 42 U.S.C. § 12133 (title II of the ADA), 29 U.S.C. § 794(a)(2)(Section 504) and 42 U.S.C. §§ 2000d et seq. (Title VI). When it is proven that a state or local government entity has violated of one of these federal civil rights

statutes, injunctive relief is regularly granted. See, e.g., Ferguson v. City of Phoenix, 157 F.3d 668 (9th Cir. 1998)(the district court granted the plaintiff injunctive relief because it found that the 9-1-1 system did not operate properly); Galloway v. District of Columbia Superior Court, 816 F. Supp. 12 (D.D.C. 1993)(court's policies with regard to jurors with vision impairments enjoined); Olmstead v. L.C., 1997 WL 148674 (N.D.Ga. 1997), aff'd 138 F.3d 893 (11th Cir. 1998), aff'd 527 U.S. 581 (1999)(order directing state to revise its community-based treatment policies).

CTA's argument on this point assumes that there is insufficient proof that it has violated the statute; in other words, the argument is premised on the Court finding that Access Living has not proved its case. This argument therefore depends on facts that may still be in dispute.

Moreover, CTA cites cases that are not helpful to the resolution of this issue. Teamsters Local Unions Nos. 75 and 200 v. Barry Trucking, Inc., 176 F.3d 1004 (7th Cir. 1999) deals with the standards that courts impose for requests for preliminary injunctions. Rizzo v. Goode, 423 U.S. 362 (1976), dealt with a case where a federal court, through the court's inherent powers, took direct control of a police department's internal processes. Here, there is specific statutory authorization for an order of injunctive relief. If Access Living can establish that CTA is in violation of the ADA and Section 504, this Court can order any injunctive relief that is consistent with those statutes and specifically targeted to resolve the accessibility problems identified as being in violation of the statutes.

CONCLUSION

For these reasons, the United States respectfully submits that the Court should rule in favor of the Plaintiffs on the issues addressed above.

Respectfully submitted,

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