UNITED STATES DISTRICT COURT
NORTHEN DISTRICT OF NEW YORK

NAVELLA CONSTANCE AND VERNAL CONSTANCE,

Plaintiffs,

-against- 98-CV-1440 (FJS)(GJD)

STATE UNIVERSITY OF NEW YORK HEALTH SCIENCE CENTER,

Defendant.

UNITED STATES' REPLY IN SUPPORT OF ITS *AMICUS CURIAE* BRIEF

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PRELIMINARY STATEMENT

Pursuant to the Court's Order of March 29, 1999, the United States moved, on April 28, 1999, to intervene as of right in this action to address the constitutionality of Title II of the Americans with Disabilities Act ("ADA"), and Section 504 of the Rehabilitation Act ("Rehabilitation Act"), and moved simultaneously for leave to address as *amicus curiae* the proper construction of these Acts. On May 11, 1999, defendant New York filed its responsive papers. The United States submits the following reply.

ARGUMENT

I. THE ADA'S STATUTORY ABROGATION OF ELEVENTH AMENDMENT IMMUNITY WAS ENACTED PURSUANT TO THE FOURTEENTH AMENDMENT

In its Reply, pp. 2-3, defendant claims that the legislative record of the ADA remains unclear regarding the basis of Congress' authority in enacting the Eleventh Amendment abrogations in the Act.

Although Congress need not announce that it is legislating pursuant to its Section 5 authority, see Counsel v. Dow, 849 F.2d 731, 736-737 (2d Cir.), cert. denied, 488 U.S. 955 (1988), Congress declared that its intent in enacting the ADA was "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment . . ., in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). That declaration has been found adequate by other courts to uphold the constitutionality of the ADA. See Clark v. California, 123 F.3d 1267, 1270-1271 (9th Cir.), cert. denied, 118 S.Ct. 2340 (1998); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998); Seaborn v. Florida, 143

F.3d 1405 (11th Cir.), cert. denied, 119 S. Ct. 1038 (1999); Kimel v. Board of Regents, 139 F.3d 1426, 1433, 1442-1443 (11th Cir.), cert. granted on ADEA issue, cert. on ADA issue still pending, 119 S. Ct. 901, 902 (1999); Crawford v. Indiana Dept. of Corrections, 115 F.3d 481, 487 (7th Cir. 1997).

The Second Circuit reached a similar conclusion in a case involving the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq., which requires "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Board of Educ. v. Rowley, 458 U.S. 176, 201 (1982). In Counsel v. Dow, 849 F.2d 731, 737 (2d Cir.), cert. denied, 488 U.S. 955 (1988), the Court held that IDEA's predecessor was a valid exercise of Congress' Section 5 authority. As Representative Dellums explained during the enactment of the ADA, "we are empowered with a special responsibility by the 14th amendment to the Constitution to ensure that every citizen, not just those of particular ethnic groups, not just those who arguably are 'able-bodied,' not just those who own property -- but every citizen shall enjoy the equal protection of the laws." 136 Cong. Rec. 11,467 (1990); see also id. at 11,468 (remarks of Rep. Hoyer).

Notwithstanding defendant's claims to the contrary, in the legislative history to the ADA, Congress made express findings about the status of people with disabilities in our society and determined that they were subject to continuing "serious and pervasive" discrimination that "tended to isolate and segregate individuals with disabilities." 42 U.S.C. § 12101(a)(2). We need not repeat these

findings here in toto. Nor can we provide a complete summary of the 14 hearings held by Congress at the Capitol, the 63 field hearings, the lengthy floor debates, and the myriad of reports submitted to Congress by the Executive Branch in the three years prior to the enactment of the ADA, see Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 393-394 nn.1-4, 412 n.133 (1991) (collecting citations), as well as Congress' thirty years of experience with other statutes aimed at preventing discrimination against persons with disabilities, see Lowell P. Weicker, Jr., Historical Background of the Americans with Disabilities Act, 64 Temp. L. Rev. 387, 387-389 (1991) (discussing other laws enacted to redress discrimination against persons with disabilities). However, in the next few pages we will briefly sketch some of the major areas of discrimination Congress discovered and was attempting to redress.

First, the evidence before Congress demonstrated that persons with disabilities were sometimes excluded from public services for no reason other than distaste for or fear of their disabilities. See S. Rep. No. 116, 101st Cong., 1st Sess. 7-8 (1989) (citing instances of discrimination based on negative reactions to sight of disability) (Senate Report); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28-31 (1990) (same) (House Report). The legislative record contained documented instances of exclusion of persons with disabilities from hospitals, theaters, restaurants, bookstores, and auction houses simply because of prejudice. See Cook, supra, at 408-409 (collecting citations). Indeed, the United States Commission on Civil Rights,

after a thorough survey of the available data, documented that prejudice against persons with disabilities manifested itself in a variety of ways, including "reaction[s] of aversion," reliance on "false" stereotypes, and stigma associated with disabilities that lead to people with disabilities being "thought of as not quite human." U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 23-26 (1983); see also Senate Report, supra, at 21. The negative attitudes, in turn, produced fear and reluctance on the part of people with disabilities to participate in society. See Senate Report, supra, at 16; House Report, supra, at 35, 41-43; Cook, supra, at 411. Congress thus concluded that persons with disabilities were "faced with restrictions and limitations * * * resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. 12101(a)(7).

These decades of ignorance, fear, and misunderstanding created a tangled web of discrimination, resulting in and being reinforced by isolation and segregation. The evidence before Congress demonstrated that these attitudes were linked more generally to the segregation of people with disabilities. See Senate Report, supra, at 11; U.S. Commission on Civil Rights, supra, at 43-45. This segregation was in part the result of government policies in "critical areas [such] as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). For example, in enacting the IDEA, Congress had determined that millions

of children with disabilities were either receiving no education whatsoever, an inadequate education, or receiving their education in an unnecessarily segregated environment. See 20 U.S.C. 1400(c)(2)-(c)(4) (as amended, 1997); see also Rowley, 458 U.S. at 191-203 (surveying legislative findings); Cook, supra, at 413-414.

Similarly, there was evidence before Congress that, like most public accommodations, government buildings were not accessible to people with disabilities. See 135 Cong. Rec. 8,712 (1989) (remarks of Rep. Coelho); U.S. Commission on Civil Rights, supra, at 38-39; see also Americans with Disabilities Act of 1989: Hearings on H.R. 2273 before the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 334 (1989) (House Hearings). Of course, even when the buildings were accessible, persons with disabilities were often excluded because they could not reach the buildings. The evidence before Congress showed that, in fact, public streets and sidewalks were not accessible. See House Report, supra, at 84; House Hearings, supra, at 248, 271. And even when they could navigate the streets, people with disabilities were shut out of most public transportation. See H.R. Rep. No. 485, Pt. 1, 101st Cong., 2d Sess. 24 (1990).

Finally, even when people with disabilities had access to generally available goods and services, often they could not afford them due to poverty. Over twenty percent of people with disabilities of working age live in poverty, more than twice the rate of other Americans. See National Council on the Handicapped, On the Threshold of Independence 13-14 (1988). Congress found this condition was

linked to the extremely high unemployment rate among people with disabilities, which in turn was a result of discrimination in employment combined with inadequate education and transportation. See Senate Report, supra, at 47; House Report, supra, at 37, 88; Toward Independence, supra, at 32; U.S. Commission on Civil Rights, supra, at 80. Thus Congress concluded that even when not barred by "outright intentional exclusion," people with disabilities "continually encounter[ed] various forms of discrimination, including * * * the discriminatory effects of architectural, transportation, and communication barriers." 42 U.S.C. 12101(a)(5).

As Justice Marshall explained, "lengthy and continuing isolation of [persons with disabilities] perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them." Cleburne, 473 U.S. 432, 464 (1985). Congress could reasonably have found government discrimination to be a root cause of "people with disabilities, as a group, occupy[ing] an inferior status in our society, and [being] severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6).

II. IN ENACTING THE ADA, CONGRESS WAS REDRESSING CONSTITUTIONALLY COGNIZABLE INJURIES

Defendant also argues at p. 4 that the ADA is not "remedial" legislation, but "substantive" legislation requiring States to take "affirmative measures" to accommodate individuals' disabilities. Defendant suggests that a shift from "similar treatment to different treatment" of persons with disabilities by providing reasonable accommodations creates "new positive rights." Id. In essence,

defendant argues that the Equal Protection is limited to prohibiting unequal treatment of similarly situated persons.

In enacting the ADA, Congress was acting within the constitutional framework that has been laid out by the Supreme Court. The Equal Protection Clause prohibits invidious discrimination, that is "a classification whose relationship to [a legitimate] goal is so attenuated as to render the distinction arbitrary or irrational." Cleburne, 473 U.S. at 446.[1]

The Supreme Court has also recognized that the principle of equality is not an empty formalism divorced from the realities of day-to-day life, and thus the Equal Protection Clause is not limited to prohibiting unequal treatment of similarly situated persons. The Equal Protection Clause also guarantees "that people of different circumstances will not be treated as if they were the same." United States v. Horton, 601 F.2d 319, 324 (7th Cir.), cert. denied, 444 U.S. 937 (1979) (quoting Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law 520 (1978)). By definition, persons with disabilities have "a physical or mental impairment that substantially limits one or more * * * major life activities." 42 U.S.C. § 12102(2)(A). Thus, as to that life activity, "the handicapped typically are not similarly situated to the nonhandicapped." Alexander

[1]In Cleburne, the Supreme Court unanimously declared unconstitutional as invidious discrimination a decision by a city to deny a special use permit for the operation of a group home for people with mental retardation. The Court acknowledged that "irrational prejudice," id. at 450, "irrational fears," id. at 455 (Stevens, J.), and "impermissible assumptions or outmoded and perhaps invidious stereotypes," id. at 465 (Marshall, J.), existed against people with disabilities in society at large and sometimes inappropriately infected government decision making.

v. Choate, 469 U.S. 287, 298 (1985). The Constitution is not blind to this reality and instead, in certain circumstances, requires equal access rather than simply identical treatment. While it is true that the "'Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same,"' Plyler v. Doe, 457 U.S. 202, 216 (1982), it is also true that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." Jenness v. Fortson, 403 U.S. 431, 442 (1971).

Thus, there is a basis in constitutional law for recognition that discrimination exists not only by treating people with disabilities differently for no legitimate reason, but also by treating them identically when they have recognizable differences.[2] Similarly, it is also a denial of equality when access to facilities, benefits, and services is denied because the State refuses to acknowledge the "real and undeniable differences between [persons with disabilities] and others." Cleburne, 473 U.S. at 444.

III. DEFENDANT HAS WAIVED ITS ELEVENTH AMENDMENT IMMUNITY BY ACCEPTING FEDERAL FUNDS UNDER THE REHABILITATION ACT

Defendant argues that it did not have sufficient notice that it would be subject to Section 504 private lawsuits when it participated

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[2]As the Sixth Circuit has explained in a case involving gender classifications, "in order to measure equal opportunity, present relevant differences cannot be ignored. When males and females are not in fact similarly situated and when the law is blind to those differences, there may be as much a denial of equality as when a difference is created which does not exist." Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 657 (6th Cir. 1981); see also Lau v. Nichols, 483 F.2d 791, 806 (9th Cir. 1973) (Hufstedler, J., dissenting from the denial of reh'g en banc), rev'd, 414 U.S. 563 (1974).

in the federal program. Defendant, by accepting federal funds "with its 'eyes wide open,'" County of Monroe v. Florida 678 F.2d 1124, 1134 (2nd Cir. 1982), cert. denied, 459 U.S. 1104 (1983), quoting Edelman v. Jordan, 415 U.S. 651, 693 (1974) (Marshall, J., dissenting), consents to Section 504 liability.[3]

CONCLUSION

DEFENDANT'S RULE 12(C) MOTION SHOULD BE DENIED IN ITS ENTIRETY

Dated: May 19, 1999
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[3]Regarding claims for damages, defendant suggests that something more than "an unintentional failure" or "a negligent failure" to provide interpreting services is required for claims for monetary damages under the ADA and the Rehabilitation Act. Reply at p. 8. In the context of the Acts, intentional discrimination against individuals with disabilities does not require personal animosity or ill will. See Bartlett v. New York State Board of Law Examiners, 156 F.3d 321, 331 (2d Cir. 1998). In Naiman v. New York University, 1997 WL 249970 (S.D.N.Y.), the district court denied defendant's motion to dismiss plaintiff's Rehabilitation Act claim, stating that "[a]ssuming that intent is a prerequisite for monetary relief under the [Act], Naiman's allegation that he requested a qualified interpreter, which was not provided, coupled with the absence of any allegation that NYU attempted to provide Naiman with effective communication, sufficiently alleges intent." 1997 WL 249970 at *5.

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 1999, I sent by first-class mail copies of the United States' Reply in Support of its *Amicus Curiae* Brief to the following counsel of record:

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