IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MAINE

GEORGE CROCKER, Plaintiff, v. LEWISTON POLICE DEPARTMENT, et al., Defendants.	CASE NO. 00-13-P-C **UNITED STATES' MEMORANDUM AS AMICUS CURIAE IN OPPOSITION OF DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

I. INTRODUCTION

This case was filed by George Crocker, a deaf individual, against the Lewiston Police Department, Andre Gagne in his official capacity as District Court Bail Commissioner, and the Androscoggin County Sheriff's Department.[1] Plaintiff alleges that the defendants violated Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§12131-61 ("ADA"), Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, and the Maine Human Rights Act, 5 M.R.S.A. §4592,[2] by failing to provide sign language interpreters, telecommunications equipment, and other appropriate auxiliary aids necessary for effective communication.

[1] Crocker settled out of court with the Androscoggin County Sheriff's Department.

[2] Crocker also filed a claim with the Maine Human Rights Commission which issued findings of reasonable grounds of discrimination by the police department, sheriff's department, and bail commissioner. Compl. at ¶24.

Bail Commissioner Gagne filed a Motion for Summary Judgment challenging, inter alia, the constitutionality of the ADA's abrogation of States' Eleventh Amendment immunity. The Lewiston Police Department also filed a Motion for Summary Judgment arguing, inter alia, that "[a]s a matter of law, the arrest that took place in this case cannot be considered a public program or benefit within the meaning of these anti-discrimination statutes."

As amicus curiae, the United States urges the Court to deny the defendants' motions for summary judgment. Regarding Bail Commissioner Gagne's constitutionality argument, the United States Supreme Court granted certiorari in University of Alabama Board of Trustees v. Garrett, — U.S. —, 120 S.Ct. 1669, 146 L.Ed.2d 479 (2000), to address the validity of the abrogations of States' Eleventh Amendment immunity under both Title I and Title II of the Americans with Disabilities Act. Oral argument was heard on October 11, 2000, and the Supreme Court's decision will control the disposition of the constitutional question regarding the Americans with Disabilities Act. Therefore, we urge this Court hold in abeyance consideration of this issue until the Supreme Court issues its opinion in Garrett.

The Lewiston Police Department's argument that the plaintiff's arrest in this case cannot be considered a public program or benefit must fail because Title II of the ADA and Section 504 of the Rehabilitation Act cover all operations of a police department. As discussed below, the plain language of both statutes, Title II's legislative history, the Department of Justice's Title II implementing regulation, 28 C.F.R. Pt. 35 (1995), and the regulation's Preamble, 28 C.F.R. Pt. 35, App. A. (1995), clearly establish that all operations of a police department, including plaintiff's arrest in this case, are public programs covered by Title II of the ADA.

II. ARGUMENT

TITLE II AND SECTION 504 COVER ALL OPERATIONS OF A POLICE DEPARTMENT

A. The Statutory Language of Title II and Section 504 is Broadly Inclusive

Congress enacted the Americans With Disabilities Act (ADA) as a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b). An exercise of the "sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce," ibid., the ADA broadly covers, and prohibits discrimination in, both private and public activity, including employment (42 U.S.C. 12111-12117), commercial facilities (42 U.S.C. 12181-12189), public transportation (42 U.S.C. 12141-12150) and, as relevant here, the full range of activities conducted by public entities (42 U.S.C. 12131-12134). Federal agencies are given a leading role in implementing and enforcing the ADA, in light of Congress's declared purposes to "provide clear, strong, consistent, enforceable standards addressing discrimination" against people with disabilities and to "ensure that the Federal Government plays a central role in enforcing" those standards on their behalf. 42 U.S.C. 12101(b)(2)-(3).[3]

This case involves the anti-discrimination provisions of Part A of Title II of the ADA, 42 U.S.C. 12132, and Section 504 of the Rehabilitation Act. Section 12132 of the 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.

(Emphasis added). Similarly, Section 504 provides in pertinent part:

[3] The Department of Justice is the designated Federal agency responsible for investigating complaints regarding "All programs, services, and regulatory activities relating to law enforcement...." Title II Technical Assistance Manual at II-9.2000(6).

> [n]o 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.

29 U.S.C. 794(a) (emphasis added). Title II defines "public entity" to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(A)-(B). Title II was modeled closely on Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and extended Section 504's prohibition against disability-based discrimination in programs and activities (including state and local programs and activities) receiving federal financial assistance to all operations of state and local governments, whether or not they receive federal assistance.[4]

The broad reach of Section 504 is evidenced by the definition of "program or activity" which includes "all of the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance." 29 U.S.C. §794(b)(1)(A) (emphasis added). Therefore, Section 504 applies to arrests and actions related thereto as they constitute "operations of" the police department. See, e.g., Gorman v. Bartch, 152 F.3d 907, 913 (8th Cir. 1998) (applying Section 504 to an arrestee's transportation); Calloway v. Boro of Glassboro Dept. of Police, et al., 89 F.Supp.2d 543, 554 (D.N.J. 2000) (applying Rehabilitation Act to investigative questioning at police station); Hanson v. Sangamon County Sheriff's Dept., et al., 991 F.Supp. 1059, 1062-63

[4] See S. Rep. No. 116, 101st Cong., 1st Sess. 44 (1989) (Senate Report) ("The first purpose [of Title II] is to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973, to all programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto, regardless of whether or not such entities receive Federal financial assistance."); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 84, 151 (1990) (House Report) (same); id., Pt. 3, at 50 (same).

(C.D. Ill. 1998) (applying Rehabilitation Act to arrestee's opportunity to post bond and make a telephone call). Similarly, Title II has been interpreted to cover police arrest procedures. Gorman, 152 F.3d at 913 (applying Title II to an arrestee's transportation); Hainze v. Richards, 207 F.3d 795, 800 (5th Cir. 2000) (applying Title II to an officer's on-the-street responses to reported disturbances once the scene is secure and there is no threat to human life).

B. Legislative History Establishes that Congress Intended Title II Cover All Activities of State and Local Government

The legislative history of Title II confirms that both statutes prohibit discrimination against qualified individuals with disabilities with respect to everything a public entity does, including arrests. The House Education and Labor Committee Report specifies that "Title II . . . makes all activities of State and local governments subject to the types of prohibitions against discrimination against a qualified individual with a disability included in section 504." H.R. Rep. No. 101-485, 151 (1990) (emphasis added). In addition, during legislative debate, Congressman Levine asserted that the ADA specifically addressed mistreatment by the police. He stated:

> One area that should be specifically addressed by the ADA's regulations should be the issue of nondiscrimination by police. Regretfully, it is not rare for persons with disabilities to be mistreated by the police. . . . Many times, deaf persons who are arrested are put in handcuffs. But many deaf persons use their hands to communicate, either through sign language or by writing a note to a nondisabled person who does not know sign language. The deaf person thus treated is completely unable to communicate.
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> Although I have no doubt that police officers in these circumstances are acting in good faith, these mistakes are avoidable and should be considered illegal under the Americans With Disabilities Act. They constitute discrimination, as surely as forbidding entrance to a store or restaurant is discrimination.

136 Cong. Rec. H2599-01, H2633 (May 22, 1990) (statement of Rep. Levine).

C. Department of Justice's Title II and Section 504 Regulations Cover Police Activity

Regulations issued by the Department that is charged with the enforcement of the statute must be given " 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). See also Bragdon v. Abbott et al., 524 U.S. 624, 646 (1998) (as the agency directed by Congress to issue implementing regulations for the ADA, the Department of Justice's views are entitled to deference); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) ("'When Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency's decision controlling weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'"). The same deference is due the agency's Preamble or commentary accompanying a regulation because both are part of a department's official interpretation of legislation. Stinson v. United States, 508 U.S. 36, 45 (1993); Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

The Department of Justice has promulgated regulations for the implementation of Title II. 28 C.F.R. Pt. 35. Section 35.190(b)(6) designates the Department of Justice as the agency responsible for coordinating the compliance activities of public entities that administer "[a]ll programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions." The regulations state that the statute's coverage extends to "all services, programs, and activities provided or made available by public entities." 28 C.F.R. 35.102(a) (emphasis added). The preamble to the regulations indicates that this language was intended to apply to "[a]ll governmental activities of public entities," i.e., "anything a public entity does." 28 C.F.R. Pt. 35, App. A, at 466. And the

preamble's discussion of Section 35.130, which sets forth the general substantive prohibitions against discrimination, notes that a public entity may be required to provide assistance to individuals with disabilities "where the individual is an inmate of a custodial or correctional institution." 28 C.F.R. Pt. 35, App. A, at 478.

The Department's Title II Technical Assistance Manual, published in accordance with Section 12206 of the ADA, specifically lists "jails and prisons" as types of facilities that, if constructed or altered after the effective date of the ADA, must be designed and constructed so that they are readily accessible to and usable by individuals with disabilities. Title II Technical Assistance Manual at II-6.0000, II-6.3300(6).[5] In addition, the 1994 Supplement to the Technical Assistance Manual uses police department encounters as an example of when effective communication is critical:

> ILLUSTRATION 3: A municipal police department encounters many situations where effective communication with members of the public who are deaf or hard of hearing is critical. Such situations include interviewing suspects prior to arrest (when an officer is attempting to establish probable cause); interrogating arrestees; and interviewing victims or critical witnesses. In these situations, appropriate qualified interpreters must be provided when necessary to ensure effective communication.

Title II Technical Assistance Manual 1994 Supp. at II-7.1000 (b)(3).

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[5] The Department's regulations also provide that public entities building new facilities or altering existing ones may follow either the Uniform Federal Accessibility Standards (UFAS) or the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG), established by the Access Board. 28 C.F.R. 35.151(c); see 41 C.F.R. 101-19.6, App. A; 28 C.F.R. Pt. 36, App. A. The UFAS lists "jails, prisons, reformatories" and "[o]ther detention or correctional facilities" as institutions to which the accessibility standards apply. 41 C.F.R. 101-19.6, App. A, at 149. Recent amendments to the ADAAG include specific accessibility guidelines for detention and correctional facilities. 63 Fed. Reg. 2000, 2009-2013 (1998). The Access Board adopted those amendments as a final rule in 1998. 63 Fed. Reg. 2000. As adopted by the Access Board, they provide guidance to the Department of Justice in establishing accessibility standards under Title II. See ibid.; 42 U.S.C. 12134(c); 12204(a). The Department of Justice has proposed adoption of the amendments. 59 Fed. Reg. 31,808 (1994).

The Department of Justice's Section 504 implementing regulations also specify that the Rehabilitation Act applies to arrests. The word "program" is defined to "mean[] the operations of the agency or organizational unit of government receiving or substantially benefitting from the Federal assistance awarded, e.g., a police department or department of corrections." 28 C.F.R. 42.540(h) (emphasis added). The term "benefit" includes provisions of services such as "treatment, handling, decision, sentencing, confinement, or other prescription of conduct." Id. at 42.540(j).

D. Case Law Overwhelmingly Supports Broad Coverage of State and Local Police Activities, Including Arrests

In Pennsylvania Dept. of Corrections, et al. v. Yeskey. 524 U.S. 206 (1998), the Department of Corrections and several department officials argued that the ADA was inapplicable to inmates in state prisons. The U.S. Supreme Court unanimously disagreed, holding that "the plain text of Title II of the ADA unambiguously extends to state prison inmates...." Yeskey. 524 U.S. at 212. The Court stated:

> the statute's language unmistakeably includes State prisons and prisoners within its coverage.... [T]he ADA plainly covers state institutions without any exception that could cast the coverage of prisons into doubt . . . . [Even] assuming . . . 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.'

Id. at 209, 212 (citations omitted).

Relying on Yeskey, the Court of Appeals for the Eighth Circuit found that arrestee transportation is a program or service of a local police department under the ADA in Gorman v. Bartch, 152 F.3d 907, 913 (8th Cir. 1998). "The statutes must be interpreted broadly to include the ordinary operations of a public entity in order to carry out the purpose of prohibiting

discrimination." Gorman, 152 F.3d at 913 (emphasis added). See also Johnson v. City of Saline, et al., 151 F.3d 564, 569-70 (6th Cir. 1998) ("the phrase 'services, programs, or activities' encompasses virtually everything that a public entity does. . . . [T]he word "activities," on its face, suggests great breadth and offers little basis to exclude any actions of a public entity."); Innovative Health Systems, Inc. v. City of White Plains, et al., 117 F.3d 37, 44-45 (2nd Cir. 1997) (demonstrating the breadth of Title II and Section 504 by holding that zoning decisions are covered under both statutes even though "zoning does not constitute a 'service, program, or activity' . . . because making such decisions is a normal function of a governmental entity"); Crowder v. Kitagawa, 81 F.3d 1480 (9th Cir. 1996) (demonstrating the breadth of Title II coverage by holding that Hawaii's 120-day quarantine requirement for animals entering the State violates Title II by discriminating against visually-impaired individuals even though the quarantine requirement is not a "service," or "benefit"provided by the State); Calloway v. Boro of Glassboro Dept. of Police, et al., 89 F.Supp.2d 543, 554 (D.N.J. 2000) (applying ADA to investigative questioning at police station); Hanson v. Sangamon County Sheriff's Dept., et al., 991 F.Supp. 1059, 1062-63 (C.D. Ill. 1998) (applying ADA to arrestee's opportunity to post bond and make a telephone call); Lewis v. Truitt, et al., 960 F.Supp. 175, 178 (S.D. Ind. 1997) (applying ADA to the arrest of a deaf individual).

In fact, this Court has held that arrests are covered under the ADA. In Jackson v. Inhabitants of the Town of Sanford, et al., 1994 WL 589617, at *1 (D.Me. 1994), Jackson was mistakenly arrested for driving under the influence of intoxicating liquor and/or drugs when, in fact, his behavior reflected certain physical disabilities caused by a stroke. Jackson filed suit in this Court alleging, inter alia, that his arrest was an act of discrimination based on his disability and that the Town failed to properly train its police officers to prevent discriminatory treatment

of persons with disabilities. Id. at *6. The Town argued that the ADA was inapplicable. Id. This court disagreed stating, "Title II of the ADA clearly applies to acts of discrimination by a public entity against a disabled individual." Id. And in Barber v. Guay, et al., 910 F.Supp. 790, 709 (D.Me.1995), Barber was arrested for theft. The State never prosecuted Barber who filed suit in this Court claiming, inter alia, that he has a disability or is perceived by others as having a disability and was denied proper police protection and fair treatment due to his disability. Id. at 790, 796. This court rejected defendants' summary judgment motion by finding that Barber stated a valid cause of action under the ADA. Id. at 802. Importantly, Barber was not mistakenly arrested *because of* his disability, but rather, stated a valid cause of action based on *his treatment during the arrest*.

Defendant relies on Patrice v. Murphy, 43 F.Supp.2d 1156, 1157 (W.D. Wa. 1999), in asserting that an arrest is not a type of service, program, or activity from which a disabled person could be excluded or denied benefits.[6] We disagree. Not only did the District Court fail to

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[6] Defendant cites Hainze v. Richards, 207 F.3d 795, 800 (5th Cir. 2000) and Gohier v. Enright, 186 F.3d 1216 (10th Cir. 1999) as cases relying upon the holding in Patrice. However, both cases are inapplicable to the instant case. The Hainze court held only that "Title II does not apply to an officer's on-the-street responses to reported disturbances . . . prior to the officer's securing the scene and ensuring that there is no threat to human life. . . . Once the area [is] secure and there [is] no threat to human safety, the [police department] would have been under a duty to reasonably accommodate [the arrestee's] disability. . . ." Hainze, 207 F.3d at 801-02 (emphasis added). Because there is no allegation that there was a threat to human safety in Mr. Crocker's case, the holding in Hainze is inapplicable here. Similarly, Gohier is inapplicable to this case as the Court of Appeals for the Tenth Circuit explicitly stated that "a broad rule categorically excluding arrests from the scope of Title II . . . is not the law." Gohier, 186 F.3d at 1221.

In addition, the defendant's reliance on Rosen v. Montgomery County Md., 121 F.3d 154 (4th Cir. 1997), for the proposition that "a deaf arrestee could not sustain an ADA claim where he admitted to the elements of the criminal charge," Def.'s Mot. for Summ. J. at 11, is also misplaced because the Court did not so hold. To the extent the Court stated that an arrest is "a stretch of the [ADA's] statutory language and of the underlying legislative intent," Rosen, 121 F.3d at 157, the decision pre-dates the U.S. Supreme Court's decision in Pennsylvania Dept. of Corrections, et al. v. Yeskey. 524 U.S. 206 (1998).

consider the broad language of Title II, it failed to consider the Supreme Court's decision in Yeskey and relied primarily on pre-Yeskey decisions. See Patrice, 43 F.Supp.2d 1156, 1158 (citing, e.g., Armstrong v. Wilson, 124 F.3d 1019 (9th Cir. 1997); Crawford v. Indiana Dept. of Corrections, 115 F.3d 481 (7th Cir. 1997); Rosen v. Montgomery County Maryland, 121 F.3d 154 (4th Cir. 1997)).

CONCLUSION

For the foregoing reasons, the United States, as amicus curiae, asks that this Court find that Title II of the ADA and Section 504 apply to all of a police department's operations, including plaintiff's arrest in this case.

Respectfully submitted,

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