

LEGAL BRIEFINGS



Top Ten ADA Issues Under Titles II and III

1. Suing the State Under Title II — Is the State Immune?

a. Background

The 14th Amendment to the U.S. Constitution permits Congress to pass laws to address discriminatory actions by states. However, the 11th Amendment has been interpreted to provide states with immunity from private lawsuits for money damages in federal court unless the federal legislation remedies or prevents a problem of unconstitutional state action, and the legislation is deemed proportional and a reasonable response to the problem it is intended to remedy or prevent.

In recent years, the Supreme Court has interpreted the states' immunity under the 11th Amendment quite broadly, including holding that states are immune from ADA employment discrimination suits seeking money damages, *Garrett v. University of Alabama*, 531 U.S. 356 (2000).

This analysis was developed by Equip for Equality for Cherry Engineering Support Services, Inc. (CESSI). It is developed for use by the national network of ADA and IT Technical Assistance Centers and is solely advisory in nature. Equip for Equality and CESSI believe the analysis to be current as of the effective date of the document, but make no representation that the discussion remains good law thereafter. The analysis is not intended to be a legal determination of rights or responsibilities in general or in any specific case. Funding for this information brief is provided in part by NIDRR under contract #ED-02-CO-0008 to CESSI. However, the content and analysis in the document do not necessarily represent the opinion of NIDRR or the U.S. Department of Education and you should not assume endorsement by the Federal government.

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b. Supreme Court Reviews Constitutionality of Title II of the ADA

Three years after the Supreme Court ruled in *Garrett* that States are immune from employment discrimination suits for money damages in federal court under Title I of the ADA, the Supreme Court agreed to hear *State of Tennessee v. Lane*, 541 U.S. 509 (2004) to decide whether Congress acted properly when it made states subject to suits in federal court under Title II of the ADA.

Facts of Tennessee v. Lane

The plaintiffs in the case, two Tennessee residents with paraplegia, were denied access to judicial proceedings because those proceedings were held in courtrooms on the second floors of buildings lacking elevators. One of the plaintiffs, Beverly Jones, sought access to the courtroom to perform her work as a court reporter. The other plaintiff, George Lane, was unable to attend a criminal proceeding being held in an inaccessible second-floor courtroom; the state arrested him for failure to appear when he refused to crawl or be carried up the steps. Lane and Jones filed suit under Title II of the ADA to challenge the state's failure to hold proceedings in accessible courthouses.

Legal Arguments

In response to the ADA suit, the State of Tennessee argued that the Supreme Court's ruling that states cannot be sued for money damages in ADA employment discrimination cases should be extended to suits for money damages against the state under Title II as well. The plaintiffs

argued that there is a stronger history of discrimination by states under Title II and therefore, states should not be immune from suits for money damages.

Supreme Court's Ruling

In a 5-4 decision, the Supreme Court held that states are subject to lawsuits filed in federal court for money damages under the ADA in cases involving access to the courts. The question before the Supreme Court was whether Congress acted properly when it enacted the ADA and made states liable for discrimination against people with disabilities in the provision of government services. The Supreme Court has decided that the ADA does apply to the states when people with disabilities seek to enforce their rights to gain access to the courts.

In its decision, the Supreme Court ruled that when the ADA was passed, Congress identified an extensive history of discrimination by states in the provision of its programs and services for people with disabilities. The Court went on to hold that the remedies set forth by Congress in the ADA were appropriate to address the objective of enforcing access to the courts for people with disabilities. While the Court limited its holding to cases involving access to courts, its



expansive analysis documents the history of state-sponsored discrimination against people with disabilities in many different areas (such as voting, education, institutionalization, marriage and family rights, prisoners' rights, access to courts, zoning restrictions, and other areas) and contains broad statements about the careful tailoring of Title II's requirements generally. These aspects of the decision may prove helpful in defending the constitutionality of other applications of Title II in future cases.

b. Recent Lower Court Interpretations of *Tennessee v. Lane*

The following cases have been decided applying the Supreme Court's decision in *Lane*.

i. Prisons:

- *U.S. v. Georgia*, 546 U.S. 541 (2006), the United States Supreme Court said that an inmate can bring a Title II case against the State for money damages when the conduct by the State violates the Due Process Clause of the 14th Amendment. While the full Court agreed that damages were available against States for disability discrimination that also violates the Constitution, there is a split among the Justices as to whether damages are available for ADA violations that are not constitutional violations. The Court remanded the case to the lower court to identify which conduct by the State would violate the ADA but not the Constitution.

- *Hallett v. New York State Dept. of Correctional Services*, 2006 WL 903200 (S.D.N.Y. 2006), plaintiff, a former prison inmate, sought damages due to his denial of participation in prison programs, violating Title II of the ADA. The plaintiff used a wheelchair and prison officials told him he could not participate in certain prison programs because "they don't take wheelchairs." The defendants requested summary judgment, partly because of sovereign immunity. However, the district court allowed the plaintiff's claim to proceed. The court found that the actions of the defendants may have involved discriminatory animus, which meant the defendants may have violated the Fourteenth Amendment and therefore were not entitled to sovereign immunity.

- *Degrafnreid v. Ricks*, 417 F.Supp.2d 403 (S.D. N.Y. 2006), prison officials destroyed and failed to replace a prisoner's hearing aids, the court found that prison officials may have violated his Constitutional rights and allowed him to pursue his ADA claim requesting monetary damages against state officials.

ii. Education:

- *Association for Disabled Americans v. Florida International University*, 405 F.3d 954 (11th Cir. 2005), plaintiffs filed suit against University for failing to provide qualified sign language interpreters, failing to provide necessary auxiliary aids, such as effective note takers, as well as failing to provide physical access to students with disabilities. The 11th Circuit ruled that

the Supreme Court's reasoning in *Lane* should be extended to public education.

- ***Press v. State Univ. N.Y.*, 2005 WL 2360050 (E.D.N.Y. Sept. 27, 2005)**, a student with dyslexia and dysgraphia requested use of a calculator in class. Despite the evidence of a pattern of discrimination in education, the court declined to extend *Lane* to apply to education.
- ***Constantine v. Rectors & Visitors of George Mason University*, 411 F.3d 474 (4th Cir. 2005)**, plaintiff had migraine headaches and the university refused to allow her extra time to complete an exam. The 4th Circuit agreed that *Lane* should be extended to higher education and rejected the state's immunity claim.
- ***Costello v. University of North Carolina at Greensboro*, 2005 WL 1528788 (M.D.N.C. June 29, 2005)**, plaintiff was a college student with obsessive compulsive disorder who alleged that the university golf coach and others discriminated against him. Court held claim did not involve a fundamental right and upheld defendant's sovereign immunity claim. Plaintiff's Rehabilitation Act claim was allowed to proceed.
- ***Pace v. Bogalusa City School Board*, 403 F.3d 272 (5th Cir. 2005)**, the court held that the state of Louisiana knowingly waived 11th Amendment immunity to Section 504 by accepting federal funds. The court reasoned that because Congress made waiver of 11th Amendment immunity a clear condition

of accepting federal funds, a state cannot then argue it did not knowingly waive its immunity. The test is whether Congress made a clear statement, not the state's subjective beliefs. The case involved a student with cerebral palsy suing the state for lack of accessible facilities at the school.

- ***Doe v. Bd. of Trustees of the University of Illinois*, 429 F.Supp.2d 930 (N.D. Ill. 2006)**, a former M.D./Ph.D student argued that the University of Illinois failed to reasonably accommodate his requested accommodations. The district court dismissed his ADA claim, finding that the reasoning in *Lane* did not extend to education because education is not a fundamental Constitutional right. Although the court found that Illinois waived sovereign immunity for ADA violations, the waiver only applied to employees and Doe's claims related only to his status as a student. However, the court allowed Doe's ADA claims against the individual defendants in their official capacities, under the reasoning of *Ex Parte Young*.
- ***Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006)**, plaintiff, a college student diagnosed with a mental illness, alleged that the University of Puerto Rico failed to reasonably accommodate him and discriminated against him. The defendant's appealed the district court's denial of their motion for summary judgment to the First Circuit, but the First Circuit affirmed the district court's decision. Extending the reasoning in *Lane*, the First Circuit found that sovereign immunity is

not a defense to claims regarding access to public education.

iii. Disability Services:

- ***Buchanan v. Maine*, 417 F.Supp.2d 24 (D. Me. 2006)**, plaintiff was the representative of a mental health services client who was fatally shot by police. The court held that Title II of the ADA does not abrogate states' sovereign immunity as applied to public mental health services because provision of such services does not implicate a fundamental right.
- ***Bill M. v. Nebraska Dept. of Health and Human Services Finance and Support*, 408 F.3d 1096 (8th Cir. 2005), vacated, *U.S. v. Nebraska Dept. of Health and Human Services Finance and Support*, ___ U.S. ___, 126 S. Ct. 1826 (2006)**, plaintiffs, developmentally disabled adults, sued because they were denied "home and community-based Medicaid-funded services." The Eighth Circuit limited *Lane* to the right of access to the courts. However, the Supreme Court vacated the Eighth Circuit's opinion and remanded for further consideration in light of the Court's opinion in *U.S. v. Georgia*.

iv. Employment:

- ***Blumberg v. Nassau Health Care Corp.*, 378 F. Supp. 2d 122 (E.D.N.Y. July 8, 2005)**, plaintiff, a pediatric endocrinologist, was diagnosed with breast cancer, and was terminated when she returned to work. The court held that Title II of the ADA was broad enough to encompass

plaintiff's claim because "her termination was willful and motivated by disability-discriminatory animus."

- ***Cisneros v. Colorado*, 2005 WL 1719755 (D. Colo. July 22, 2005)**, plaintiff, a state employee with a back injury, brought a claim for disability employment discrimination under Title I and Title II of the ADA. The court dismissed plaintiff's case on the basis that his claims fell within the Supreme Court's decision in *Garrett*, which held that states were immune from Title I suits for damages in federal court.
- ***Maizner v. Hawaii Department of Education*, 2005 WL 3475692 (D. Hawaii 2005)**, the court allowed a special education teacher to pursue her claims for prospective relief, holding that the 11th Amendment protects states from retrospective relief but not prospective relief, such as reinstatement. The teacher alleged failure to accommodate her rheumatoid arthritis and termination because of her disability.
- ***Guttman v. Khalsa*, 446 F.3d 1027 (10th Cir. 2006)**, a doctor who was diagnosed with depression and post traumatic stress disorder sued New Mexico, alleging the State violated Title II after it revoked his medical license. The district court granted the State summary judgment, but the Tenth Circuit vacated the opinion and remanded for further consideration. The Tenth Circuit ordered the district court to reconsider whether the plaintiff stated a claim under Title II against the State and then determine whether or not the Title II claim is barred by sovereign immu-

nity based on the Supreme Court's reasoning in *U.S. v. Georgia*.

2. Community Integration Litigation

a. Background

When Congress passed Title II of the ADA it found that isolation and segregation was a pervasive form of discrimination and that discrimination against people with disabilities included people in institutional settings. The U.S. Department of Justice was designated by Congress to enforce Title II of the ADA and to issue regulations for Title II. DOJ Regulations stated that state and local governments must provide their services to people with disabilities in the most integrated setting appropriate to the needs of qualified individuals with disabilities and that state and local governments to make reasonable modifications in the services it provides unless those modifications would result in a fundamental alteration.

b. Supreme Court Reviews Community Integration Under Title II of the ADA

In 1999, the U.S. Supreme Court agreed to hear its first case addressing community integration under Title II of the ADA. The case was *Olmstead v. L.C.*, 527 U.S. 581 (1999) and involved two women with mental retardation and mental illness who were patients at a state-operated hospital in Georgia. Although state treatment profes-

sionals for both women had deemed them appropriate for community-based placements, both remained institutionalized. They filed suit under Title II of the ADA alleging that the state had violated the ADA's integration mandate. The Supreme Court found that the unwarranted institutionalization of people with disabilities is a form of discrimination that is actionable under the ADA. The Court ruled that the ADA requires States to serve people with disabilities in community settings, rather than in segregated institutions, when three factors are present:

- Treatment professionals determine community placement is appropriate;
- The person does not oppose community placement; and
- The placement can be reasonably accommodated taking into account the resources available to the State and the needs of others who are receiving State-supported services.

The Court ruled that a State can meet its obligations under *Olmstead* if it has a **comprehensive, effectively working plan** for evaluating and placing people with disabilities in less restrictive settings, and a **waiting list that moves at a reasonable pace** and that is not controlled by the State's endeavors to keep its institutions fully populated.

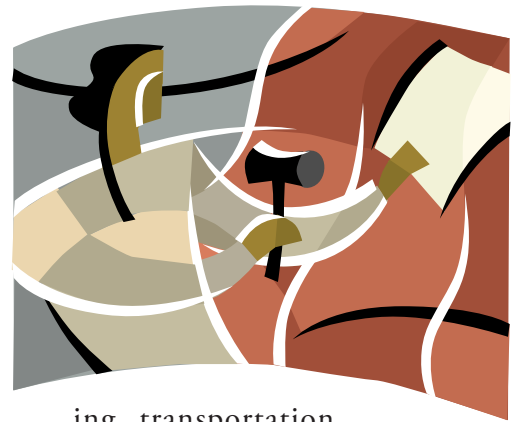
c. Recent Interpretations:

i. Fundamental Alteration

The Supreme Court held that states must make reasonable modifications in the services it provides unless those modifications would result in a fundamental alteration.

Many cases have turned on whether the plaintiffs' requested relief would be a fundamental alteration.

- ***Frederick L. v. Dept. of Pub. Welfare of Pa.*, 422 F.3d 151 (3rd Cir. 2005)**, is a class action on behalf of residents of a state psychiatric hospital. Plaintiffs challenged the State's compliance with the court mandate to "develop a plan for future de-institutionalization of qualified disabled persons that commits it to action in a manner for which it can be held accountable by the courts." Plaintiffs argued that the State failed to provide "concrete, measurable benchmarks and a reasonable timeline for them to ascertain when, if ever, they will be discharged to appropriate community services." In contrast, the State argued that all it had to do was "demonstrate 'a commitment to take all reasonable steps to continue [its past] progress'" in order to satisfy the fundamental alteration defense. The court interpreted *Olmstead* "to mean that a comprehensive working plan is a necessary component of a successful 'fundamental alteration' defense." In this case, the State's efforts were insufficient to demonstrate "a reasonably specific and measurable commitment to de-institutionalization for which DPW may be held accountable." The court then provided specifics, stating that at a bare minimum, a comprehensive, effectively working plan should: "specify the time-frame or target date for patient discharge, the approximate number of patients to be discharged each time period, the eligibility for discharge, and a general description of the collaboration required between the local authorities and the hous-



ing, transportation, care, and education agencies to effectuate integration into the community."

- ***Pennsylvania Protection & Advocacy, Inc. v. Pennsylvania Dept. of Public Welfare*, 402 F. 3d 374 (3d Cir. 2005)**, is a class action brought on behalf of residents in a nursing facility serving people with psychiatric and developmental disabilities. The Third Circuit stated that budgetary constraints alone do not satisfy the fundamental alteration defense. The court also found that defendants did not meet the fundamental alteration test because they failed to demonstrate a "commitment to action" to come into compliance with the ADA. The court held that demonstrating such a commitment is a prerequisite to establishing a fundamental alteration defense, and only when this is demonstrated do budgetary issues even become a factor.
- ***Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005)**, is a case in which plaintiffs argued that paying lower wages and benefits to community-based service providers than employees in state institutions was resulting in some individuals with developmental disabilities being unneces-

sarily institutionalized. The court held that California already had an acceptable de-institutionalization plan in place, and that disrupting it would be a “fundamental alteration of the State’s current policies and practices in contravention of the Supreme Court’s instructions in *Olmstead*.” The court concluded, based on the record, that “California’s commitment to the de-institutionalization of those developmental center residents for whom community integration is desirable, achievable and unopposed, is genuine, comprehensive and reasonable,” and that disrupting this plan would impermissibly restrict the leeway given to states in their operation of developmentally disabled services.

- *Arc of Washington v. Braddock*, 427 F.3d 615 (9th Cir. 2005) is a case in which the plaintiffs sued Washington state officials for failing to provide sufficient community services under its Home and Community Based Services Medicaid waiver program. The 9th Circuit held that Washington demonstrated that it has a “comprehensive effectively working plan” as contemplated by *Olmstead*, and therefore were not in violation of the ADA. Specifically, the court found: Washington’s HCBS program (1) is sizeable, with a cap that has increased substantially over the past two decades; (2) is full; (3) is available to all Medicaid-eligible disabled persons as slots become available, based only on their mental-health needs and position on the waiting list; (4) has already significantly reduced the size of the state’s institutionalized population; and (5) has experienced budget

growth in line with, or exceeding, other state agencies. Under such circumstances, forcing the state to apply for an increase in its Medicaid waiver program cap constitutes a fundamental alteration, and is not required by the ADA.

- *Lovely H. v. Eggleston*, 235 F.R.D. 248 (S.D.N.Y. 2006), involves welfare recipients with disabilities who sought injunctive relief under the ADA and Rehabilitation Act due to a proposed change in the administration of public benefits by New York City. Instead of providing benefits through its 29 neighborhood offices, the City proposed to provide these services only through three central offices. Following the reasoning in *Olmstead*, the court granted injunctive relief because it found that the City’s proposal clearly violated the mandate that persons with disabilities are given the opportunity to participate in mainstream service delivery mechanisms.

ii. Risk of Institutionalization

Although the *Olmstead* case involved plaintiffs in institutions, courts have held that *Olmstead* includes people who are at risk of institutionalization.

- In *Nelson v. Milwaukee County*, 2006 WL 290510 (E.D. Wis. 2006), plaintiffs, who are persons over the age of sixty and with disabilities, brought a class action under the ADA and Rehabilitation Act against the Wisconsin Department of Health and Family Services and its Secretary. The plaintiffs alleged that the inadequate funding of service providers

by the defendants in its community based services program would force the plaintiffs into more restrictive settings to receive services. The defendants sought to dismiss the claim, but the court allowed the plaintiffs claim to go forward, under the reasoning of *Olmstead*. The court found that the inadequate compensation of community services would result in unjustified segregation, violating the ADA and the Rehabilitation Act.

- In *Ligas v. Maram*, 2006 WL 64474 (N.D. Ill. Mar. 7, 2006), court granted plaintiffs' class certification motion finding that class included people with developmental disabilities who are currently institutionalized as well as those who are at risk of being institutionalized.

3. Reasonable Modifications in Title II Transportation Cases

Title II of the ADA is divided into two sections. Part A of Title II covers state and local governmental entities and Part B of Title II covers transportation. While Part A specifically states that state and local governments have an obligation to provide reasonable modifications, there is no explicit language regarding reasonable modifications in Part B. As a result, an emerging ADA issue is whether people with disabilities are entitled to a reasonable modification when bringing transportation discrimination cases.

In *Disabled in Action of Pennsylvania v. National Passenger R.R.*, 2005 WL 1459338 (E.D. Pa. June 17, 2005), plaintiffs are members of a group comprised of wheelchair users who travel on Amtrak together, typically to political events. For years, Amtrak, with appropriate notice, would create the necessary accessible space by removing fixed seats from train cars. In 2003, however, Amtrak stated that it would no longer remove the seats unless a \$200 per ticket fee is paid, in addition to the normal train fare. Plaintiffs filed suit under Title II of the ADA. The court held that since Part B of Title II states specifically how many spaces for passengers using wheelchair must be available on each train, no additional requirement can be imposed. The court found that public transportation entities are exempt to the reasonable modification requirements of Part A of Title II with respect to matters specifically governed by Part B, including the number of accessible seats.

In *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669 (5th Cir. 2004), parents of disabled adult passenger brought suit alleging that public paratransit service's failure to modify its paratransit services to require alley pick-up for passenger violated Americans with Disabilities Act. The 5th Circuit held that the Title II of the ADA does not require a paratransit provider to make reasonable modifications to its services. (Interestingly, the Department of Transportation recently issued Guidance stating that transit agencies must provide paratransit services in a way that goes beyond "curb to curb service" if necessary to actually get the passenger from point of origin to destination. This would seem to indicate that the Department of Transportation believes that transit providers are required to provide reasonable modifications of their policies and procedures.)

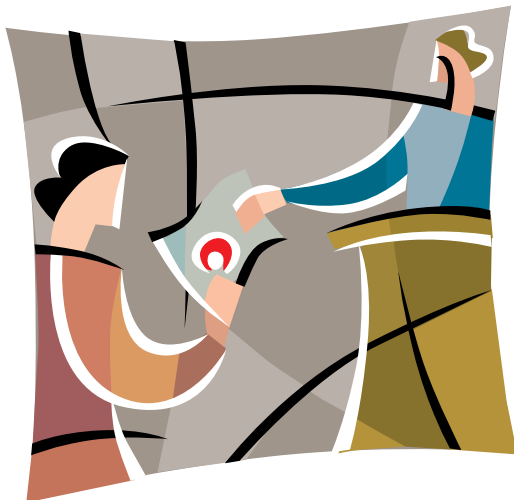
4. Parking Placard Surcharge

a. Background

Under the ADA's regulations, "a public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility that are required to provide that individual or group with the nondiscriminatory treatment required by the Act."

b. Court Rules that Parking Placard Surcharge Violates Title II of the ADA

In *Klingler v. Missouri Department of Revenue*, 433 F.3d 1078 (8th Cir. 2006), individuals with disabilities sued the State of Missouri alleging that it violated Title II of the ADA by charging a fee for removable disability parking placards. The court agreed with the plaintiffs and held that Missouri was in violation of the ADA. The court rejected that



Missouri met the ADA's requirements by providing its disability license plates at no cost since the license plate could only be obtained by owners of vehicles that were operated at least 50% of the time by the physically disabled person or used primarily to transport physically disabled members of the owner's household. Therefore, a removable placard was necessary for an individual who did not own a vehicle or did not ride in a vehicle that met these requirements. Note: Because the 8th Circuit previously held that money damages against the state are only available in court access cases (see *Bill M.* case above) the plaintiffs were only entitled to injunctive relief in this case, i.e. the removal of the surcharge. However, the court recently revisited its decision to deny plaintiffs monetary damages in light of a recent Supreme Court decision, which held that whether plaintiffs are entitled to recover money damages from the State depends on a claim-by-claim analysis (See *Goodman v. Georgia*, discussed above). Upon review, the court upheld its decision to deny plaintiffs money damages, finding that the State's conduct, although in violation of the ADA, was not unconstitutional. *Klingler*, 455 F.3d 888 (8th Cir. 2006)

In *Keef v. Nebraska Dept. of Motor Vehicles*, 2006 WL 1651042 (N.W.2d 2006), individuals with disabilities sued the State of Nebraska for both injunctive relief and money damages, alleging the State violated Title II of the ADA by charging a \$3 fee for removable disability parking placards. The Nebraska Supreme Court did not address the plaintiffs' claim for an injunction because the State had stopped charging the fee for the placards prior to the court's consideration of the issue. As for money damages, the court held that plaintiffs were not entitled to recovery of the placard fee. The court determined

that the fee did not deny individuals of a fundamental right, nor was there evidence that Congress was specifically concerned about fees for placards when it enacted the ADA. Therefore, the court held that the State was immune from suit for recovery of the parking placard fee.

5. Association Discrimination Under Title II

a. Background

Under the ADA, people who are discriminated because of their association with a person with a disability can state a cause of action. Typically, the association discrimination cases have arisen in the context of employment under Title I. However, two recent cases explore the application of association discrimination in the context of Title II.

b. Is an Association Discrimination Claim Viable Under Title II?

In *Barber v. Colorado*, 2005 WL 2657885 (D. Colo. 2005), the court dismissed claims against the state by two daughters of an individual with a visual disability, holding that Title II of the ADA does not support associational claims of discrimination. The court reasoned that unlike Title I, Title II does not expressly authorize claims based on associational discrimination. However, the court subsequently clarified its decision after plaintiffs amended their complaint, ruling that a plaintiff may assert a claim for associa-

tional discrimination under Title II as long as the plaintiff is directly injured as a result of discrimination against another person with a disability. See *Barber*, 2006 WL 213970 (D. Colo. January 4, 2006).

c. Can Third Party Recover Under Association Discrimination Claim for Denial of Access for Person with Disability?

In *Popovich v. Cuyahoga County Court of Common Pleas*, 150 Fed. Appx. 424 (6th Cir. 2005), the court affirmed the dismissal of a claim alleging violations of Title II and Section 504, holding that the individual lacked standing to bring an associational discrimination claim because she was not the individual denied access. The court ruled that it is the claimant who must have suffered the denial of access because of her relationship with the individual with a disability, and cannot bring a claim based on denial of access of the person with whom she associates.

In *Autism Society of Michigan (ASM) v. Fuller*, 2006 WL 1519966 (W.D. Mich. 2006), ASM brought suit under Title II, alleging that its organization had suffered an injury because it had to expend resources to address the public school's discrimination against a student with autism. The court dismissed ASM's complaint, holding that in order for organizations to have a claim under Title II, they must allege that they were themselves discriminated against or singled out in a discriminatory way due to their association with individuals with disabilities. Because ASM had not suffered an "ADA injury," its claim of associational discrimination failed.

6. Accommodations for Post-Secondary Students

a. Background

Many students with learning disabilities need accommodations when taking tests. However, courts have generally been hostile to claims made by students who have succeeded in the past despite having a learning disability that may or may not have been diagnosed. Because of the general hostility by courts to these kinds of claims, plaintiffs should try to identify a major life activity other than learning in which they are substantially limited.

b. Case Examples

In *Wong v. University of California*, 410 F.3d 1052 (9th Cir. 2005), the court ruled that a medical student with a learning impairment was not disabled because he had a record of prior academic achievements accomplished without accommodation. The student had failed his clerkship after being denied the accommodation of an additional reading period, but had a history of academic success.

In *Brown v. University of Cincinnati*, 2005 WL 1324885 (S.D. Ohio 2005), the court ruled that a student is not substantially limited in his ability to learn since he successfully completed high school and college without accommodations. Test results indicating below to low average neuropsychological function did not establish substantial limitation in the major

life activity of learning, especially given his past academic success.

In *Dixon v. University of Cincinnati*, 2005 WL 2709628 (S.D. Ohio 2005), a graduate student with bipolar disorder, dyslexia, and ADD was rightfully denied testing accommodation because she failed to establish her conditions were disabilities as defined by the Rehabilitation Act. The student's history of success worked against her claim of substantial limitation of her ability to learn.

In *Krolik v. Nat'l Bd. Of Medical Examiners*, 2006 WL 1794759 (D. Ariz. 2006), the court ruled that a recent medical school graduate was not entitled to a time extension or use of pen and paper for his board exams because he failed to show how his alleged ADHD substantially limited a major life activity. Although the graduate claimed that his learning and reading abilities were substantially limited, the court held that his history of academic success was "directly inconsistent with a claim that a student is substantially limited in learning." Further, the graduate's claim that his disability affected his ability to pass the test, which in turn affected his ability to work, failed because he had a long successful history of working.

7. Title II Liability for Failing to Make Sidewalks Accessible

There has been relatively little litigation against municipalities for failing to make its sidewalks accessible, but some recent decisions demonstrate that municipalities

will be held accountable if they do not meet their obligations under the ADA.

In *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002), a group of individuals with disabilities filed an action against the City for violation of Title II and Section 504 due to the city’s failure to provide curb cuts and make its sidewalks accessible. The district court dismissed the portion of plaintiffs’ complaint that dealt with sidewalk obstructions, such as benches, signposts and wires, in the path of access of the city’s sidewalks on the grounds that the ADA or Section 504 did not cover sidewalks. Although the language in the ADA calls for curb cuts in public sidewalks, it does not specifically address the issue of sidewalk accessibility. However, the 9th Circuit reversed and concluded that since the regulations do specifically address curb ramps, they could only do so if sidewalks were covered as well. The court found this interpretation consistent with the purpose of curb cuts and that sidewalks are a “program, service or activity” of the City covered by Title II of the ADA. The City petitioned for the Supreme Court to review the decision, but the Supreme Court denied the petition and let the Ninth Circuit’s decision stand.

In *Ability Center of Greater Toledo v. City of Sandusky*, 385 F. 3d 901 (6th Cir. 2004), the Sixth Circuit Court of Appeals upheld a lower court ruling that found that the City of Sandusky violated Title II of the ADA and its related regulations for failing to ensure accessibility when it renovated the City’s sidewalks. However, the Sixth Circuit found in favor of the City with respect to the plaintiff’s claim that the City was required to develop a transition plan for ADA compliance when structural changes are undertaken. The court found

that this provision of the ADA is not enforceable via a private cause of action.

In *Iverson v. City of Boston*, 452 F.3d 94 (1st Cir. 2006), an individual with paraplegia sued the City of Boston, alleging that the city violated Title II’s self-evaluation and transition plan regulations by failing to evaluate and improve the condition of its streets and sidewalks to make them more accessible. The court held that the self-evaluation and transition plan regulations impose obligations on public entities that go beyond those imposed by Title II of the ADA itself. Consequently, those regulations may not be enforced through the private right of action available under Title II. Moreover, the court noted that even if the plaintiff were entitled to a private right of action, neither the self-evaluation and transition plan regulations nor Title II itself imposes a duty on a public entity to make structural changes to existing facilities.

8. Standing to Sue Under Title III

a. Background on Standing

Article III of the Constitution of the United States restricts the federal courts to the adjudication of “cases” and “controversies.” Therefore, to proceed with a federal court case, a plaintiff must have “standing” or a sufficient personal stake in a dispute to ensure the existence of a live case or controversy, which renders judicial resolution appropriate.

To establish Article III standing, a plaintiff must show that:

1. She has suffered an “injury in fact” that is
 - (a) concrete and particularized and
 - (b) actual or imminent, not conjectural or hypothetical;
2. The injury is fairly traceable to the challenged action of the defendant; and
3. It is likely, as opposed to merely speculative, that the injury will be redressed by the relief requested.

b. Cases in Which Plaintiff Found to Lack Standing

In *Marcovecchio v. Commerce Bancorp, Inc.*, 2005 WL 159596 (D.N.J. 2005), a court ruled that a bank customer alleging access violations lacked standing to bring claims against any bank location other than his local branch. The court held that an ADA claimant can only sue if there is an actual or imminent threat of future disability discrimination, and thus cannot bring claims against branches he has never been to and has no plans to visit.

In *Access 4 All v. Oak Spring, Inc.*, 2005 WL 1212663 (M.D. Fla. 2005), the court held that an individual who lived five hours away from a Howard Johnson Inn in Ocala lacked standing to bring a Title III claim because he failed to show a likelihood of future harm from the alleged violations. The individual had gone to Ocala to visit an aunt and an amusement park, but his aunt had passed away and he expressed no interest

in returning to the park, so the threat of future injury was speculative at best.

In *Access 4 All, Inc. v. Wintergreen Commercial Partnership, Ltd.*, 2005 WL 2989307 (N.D. Tex. 2005), the court dismissed Title III claims of a Florida resident and a Florida organization for lack of standing because they failed to show a threat of future injury from alleged access violations at a Texas Holiday Inn. The court held that although the resident had visited the hotel once, a plaintiff that lives in another state and has no future plans to visit the defendant’s business lacks standing. A reservation made after the complaint was filed could not be considered for standing purposes.

In *Chambers v. Melmed*, 141 Fed. Appx. 718 (10th Cir. 2005), the court held that an individual who alleged she was denied artificial insemination treatments due to her blindness could not maintain her claim for injunctive relief under Title III because she could not show likelihood of suffering similar harm in the future. The plaintiff had moved away from the clinic and the doctor had ceased all artificial insemination services.

In *Molski v. Mandarin Touch Restaurant*, 385 F.Supp.2d 1042 (C.D. Cal. 2005), the court ruled that a restaurant patron with paraplegia lacked standing to sue a California restaurant for failure to comply with accessibility provisions of Title III. The court determined that the patron had not established likelihood of future injury because the restaurant was 116 miles from the patron’s home and he had visited the restaurant only once and had no concrete plans to return. Also, the fact that the patron had previously filed hundreds of lawsuits against small businesses throughout California for

ADA violations caused the court to doubt the sincerity of his intent to return to the restaurant. The patron appealed the court's decision, and the case is currently pending in the 9th Circuit.

In *Access for America, Inc. v. Associated Out-Door Clubs*, 2006 WL 1746890 (11th Cir. 2006), the 11th Circuit upheld a district court's finding that the claimants lacked standing to bring a claim against a track facility for having architectural barriers. The court noted that the claimant could not demonstrate that there was any reasonable chance that he would revisit the track, and he failed to prove a threat of future injury.

In *Wilson v. Costco Wholesale Corp.*, 426 F.Supp.2d 1115 (S.D. Cal. 2006), the court held that a store customer who complained of architectural barriers in Costco's store lacked standing under Title III because the customer failed to set forth evidence that he intended to return to the store. The court considered such factors as the vast distance between the customer's residence and the facility, the lack of past patronage at the store, the litigation history of the customer, and the customer's failure to reply to the store's letter requesting specific information about the barriers he encountered at the store.

c. Cases in Which Plaintiff Found to Have Standing

In *Gillespie v. Dimensions Health Corp.*, 369 F.Supp.2d 636 (D. Md. 2005), the court allowed former patients with hearing impairments to proceed with their Title III claim for failure to provide a live

sign language interpreter upon request, as the patients' risk of future harm granted them standing to seek injunctive relief. The patients could show likelihood of suffering similar injury if they live in close proximity to the hospital and the hospital engages in an ongoing pattern of behavior in violation of the ADA.

In *Kratzer v. Gamma Management Group, Inc.*, 2005 WL 2644996 (E.D. Pa. 2005), a group of individuals with mobility impairments successfully alleged a Title III claim against Ramada Inn, as they had standing under the ADA's futility provision despite not attempting to schedule conferences at the hotel. The individuals were able to show actual knowledge of barriers preventing equal access, and that they would use the facility if not for the barriers.



In *Tandy v. City of Wichita*, 380 F.3d 1277 (10th Cir. 2004), court found that some bus passengers with disabilities had standing to seek prospective relief in action against city transit system for inaccessible fixed-route bus system when there was specific pleading of the intent to use the bus system in the future and there was sufficient allegations of specific accessibility problems in the past that was traceable to the transit system's al-

leged failure to comply with the ADA's transportation provisions.

In *Wilson v. Pier 1 Imports, Inc.*, 413 F.Supp.2d 1130 (E.D. Cal. 2006), the court held that a customer who encountered architectural barriers at a Pier 1 Imports store had standing to bring suit under the ADA, even as to architectural barriers that the customer had not encountered himself and of which he was not aware until his expert visited the store. The court held that plaintiffs are not required to actually encounter a barrier in order to sue for its removal under the ADA. The future threat of encountering physical barriers at the store, whether or not initially encountered, sufficed to establish the customer's standing.

In *Access 4 All, Inc. v. 539 Absecon Blvd., L.L.C.*, 2006 WL 1804578 (D. N.J. 2006), the court granted a hotel patron leave to amend his complaint, stating that if the patron included evidence that he intended to return to the New Jersey hotel, he could establish standing to sue the hotel for failure to provide accessibility under Title III. The court disagreed with the hotel that the claimant's distance from the hotel made it unlikely that he would return if it became accessible. Instead, the

court held that due to the nature of hotels, distance is not a good measure of intent to return. In his affidavit, the patron stated that he returned to New Jersey several times a year and had family in that area. Also, the hotel is located very close to the airport, so it would be an ideal hotel for the claimant to stay when he returned to New Jersey.

9. Evacuation of People with Disabilities

Although most Title III litigation has focused on barriers for people with disabilities to enter places of public accommodation, a recent state court decision indicates that people with disabilities may also have an ADA cause of action if there are barriers to their safe evacuation out of a business.

In *Savage v. City Place Ltd. Partnership*, 2004 WL 3045404 (Md. Cir. Ct. Dec. 20, 2004), plaintiff, who uses a wheelchair, was shopping at Marshalls when the store and the mall it was located in were evacuated. Store personnel forced her to exit into an area of the mall that was below ground level and, as a result, she was unable to evacuate because the elevators were shut down and all the exits had stairs. A state court found that Title III of the ADA does apply to the issue of evacuation, and public accommodations must consider the needs of its customers with disabilities when developing emergency evacuation plans. The judge rejected the store's argument that after placing the plaintiff outside the store's entrance, it was the mall's legal responsibility to address her evacuation needs.



Following the court's ruling, the parties entered into a comprehensive settlement agreement in which Marshalls agreed to redevelop the evacuation procedures at its more than 700 stores located in 42 states and Puerto Rico.

Highlights of the settlement include:

- Certification of emergency exits for people with disabilities;
- Certification of store services in the event of an emergency;
- Written emergency policies and procedures;
- Training on emergency policies and procedures;
- ADA consultants hired for development and implementation of the new policies and procedures; and
- Designation of responsible corporate employee to oversee and coordinate implementation of the terms of the settlement.

10. ADA's Application to Websites

The ADA does not explicitly discuss whether it applies to websites, and thus far, there have been few cases. Over the years courts have reached different conclusions as to whether websites are covered under the ADA. (See *Martin v. Metropolitan Atlanta Rapid Transit Authority*, 225 F. Supp. 2d 1362 (N.D. Ga. 2002), holding that transit

authority's website is covered by Title II of the ADA and *Access Now v. Southwest Airlines*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002), *aff'd on other grounds*, 385 F.3d 1324 (11th Cir. 2004), holding that airline's website was not covered by Title III of the ADA because the website does not exist in any particular geographical location.)

A recent case has once again raised this issue and may result in more litigation as to website accessibility. In *National Federation of the Blind v. Target Corporation*, 2006 WL 2578282 (N.D. Cal. Sept. 6, 2006), an advocacy group for blind people claimed Target violated the ADA because its website was inaccessible. In denying Target's Motion to Dismiss, the judge concluded that to the extent that plaintiffs alleged that the inaccessibility of target.com impeded the full and equal enjoyment of goods and services offered in Target stores, the plaintiffs stated a claim. The court also found that Target treats target.com as an extension of its stores and as part of Target's overall integrated merchandising efforts.