UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA, Plaintiff, and TAYLOR HOME OF CHARLOTTE, INC. Intervenor-Plaintiff. v. CITY OF CHARLOTTE, NORTH CAROLINA, Defendant.	)	CIVIL ACTION NO. 3:94-CV-394-MU

UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTIONS TO DISMISS INTERVENOR'S SECOND AND FOURTH CLAIMS

STATEMENT OF THE CASE

The United States filed suit on November 23, 1994, against Defendant City of Charlotte, North Carolina ("Defendant"). The United States alleges that Defendant has violated the Fair Housing Act, 42 U.S.C. §§ 3601 et seq. (1988 & Supp. IV 1992). The United States' claims include one based on discrimination by Defendant against Intervenor-Plaintiff, Taylor Home of Charlotte Inc. ("Intervenor" or "Taylor") in the context of Taylor's application to construct a home for AIDS patients.

Taylor moved to intervene and Magistrate Judge McKnight issued an Order allowing intervention on December 28, 1994. Taylor's Complaint in Intervention includes four claims. Only the second and fourth claims are subjects of Defendant's current motions to dismiss. These claims allege violations of title II

of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 et seq. (Supp. IV 1992) and section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794 (1988 & Supp. IV 1992). Defendant seeks dismissal of these claims under Fed. R. Civ. P. 12(b)(1) for lack of standing and under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.[1]

The United States has significant responsibilities for implementing and enforcing title II of the ADA, including the promulgation of implementing regulations. 42 U.S.C. § 12134. The United States also has significant responsibility for enforcing section 504 of the Rehabilitation Act in connection with federally assisted programs and activities. The United States, therefore, has a strong interest in ensuring that the case law developed in this suit, regarding standing to sue and regarding the ADA's application to zoning decisions, is consistent with the United States' interpretation of the statutes and the Department of Justice's regulations.[2]

ARGUMENT

I. Taylor Has Standing under Title II of the ADA Based on Its Association with Persons with Disabilities

Defendant concedes that the allegations of Taylor's Complaint in Intervention must be taken as true for purposes of

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[1] Defendant challenges Taylor's title II claim, arguing that title II does not apply to zoning. Defendant does not argue that section 504 is inapplicable to zoning.

[2] The United States will not address Defendant's factual contention that Taylor's section 504 claim should be dismissed for lack of a sufficient "nexus" to Federal funding.

the present motions. Defendant's Memorandum in Support, p. 3. Taylor provides housing for persons with AIDS.[3] Taylor alleges that Defendant revoked Taylor's permit to build a group home in Charlotte because persons with AIDS would occupy the building. Taylor's Complaint in Intervention asserts that this action violates the ADA.

Defendant argues that title II of the ADA extends rights only to individuals with disabilities, and not to individuals or entities who are subjected to discrimination on the basis of their association with individuals with disabilities. Defendant argues that, because Taylor is not, itself, an individual with a disability, Taylor does not have standing to sue under title II. This argument ignores the statutory text and legislative history of title II, as well as the implementing regulations and technical assistance materials issued by the Department of Justice. Defendant's argument also ignores relevant case law supporting Taylor's standing.

Title II of the ADA prohibits discrimination on the basis of disability in general terms. 42 U.S.C. §12132. It then goes on to extend relief to "any person alleging discrimination on the basis of disability." 42 U.S.C. § 12133. Contrary to Defendant's contention, that "person" need not be an individual with a disability. That person may be an entity or anyone who is injured by a covered entity's discrimination. As Defendant

[3] Defendant does not dispute that AIDS is a disability within the meaning of the ADA.

notes, Congress knew how to limit enforcement to "individuals with disabilities" if it wanted to. Yet, in defining who could sue under title II, it provided for broad enforcement by any "person."

In fact, title II protects individuals and entities from discrimination on the basis of association with an individuals with disabilities. Titles I and III provide numerous specific provisions defining prohibited discrimination. 42 U.S.C. §§ 12112 and 12182. Rather than repeat those specific provisions in title II, Congress simply prohibited discrimination by public entities with one sentence in general terms. 42 U.S.C. § 12132. Congress then went on to require, in title II itself, that the Department of Justice's title II regulations be "consistent with this chapter," 42 U.S.C. § 12134(b), meaning consistent with the entire Act. See "References In Text" to 42 U.S.C. § 12201 ("Construction"). By doing so, Congress made clear that the discrimination prohibited by the general provisions of title II encompassed that which was prohibited in greater detail by titles I and III.

Included explicitly in title III's list of prohibited discrimination is discrimination against "an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association." 42 U.S.C. § 12182(b)(1)(E). See also 42 U.S.C. § 12112(b)(4) (Title I provision prohibiting discrimination on the basis of association). Thus, by incorporating the specific

prohibitions of title III into the general prohibition of title II, Congress made title II applicable to discrimination against individuals and entities on the basis of association.

In legislative history, Congress underscored title II's prohibition of discrimination on the basis of association. In emphasizing its intent that title II's prohibitions "be identical to those set out in the applicable provisions of titles I and III of this legislation. . . ," H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. 84 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 367, the House Committee on Education and Labor directed that "the construction of 'discrimination' set forth in section 302(b) [42 U.S.C. § 12182(b)] should be incorporated in the regulations implementing this title." Id. The House Committee on the Judiciary report explained that "[t]itle II should be read to incorporate provisions of titles I and III . . . such as Section 102(b)(4) [42 U.S.C. § 12112(b)(4), explicitly prohibiting discrimination on the basis of association]. . . ." H.R. Rep. No. 435 (III), 101st Cong., 2d Sess. 51 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 474.

Clearly, therefore, title II's protections must be read to be coextensive with title III's protections. See Kinney v. Yerusalim, 9 F.3d 1067, 1073 n. 6 (3d Cir. 1993), cert. denied, 114 S. Ct. 1545 (1994) (noting that this legislative history shows that Congress intended titles II and III to be read consistently). The legislative history's explicit reference to section 302(b), which includes the prohibition of discrimination

on the basis of association, makes clear Congress' intent to include entities associated with individuals with disabilities within the protection of title II, just as they are included in title III.

Consistent with the statute and its legislative history, the Department of Justice regulation implementing title II specifically provides: "A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association." 28 C.F.R. § 35.130(g) (1994). This regulation makes clear that protection under title II is not limited to individuals with disabilities, but extends to individuals and entities associated with them.

The Department of Justice's preamble to the title II regulation further emphasizes Congress' intent to protect entities associated with individuals with disabilities. In discussing § 35.130(g), the preamble provides:

> Paragraph (g), which prohibits discrimination on the basis of an individual's or entity's known relationship or association with an individual with a disability, is based on sections 102(b)(4) [42 U.S.C. § 12112(b)(4)] and 302(b)(1)(E) [42 U.S.C. § 12182(b)(1)(E)] of the ADA. . . .
>
> This protection is not limited to those who have a familial relationship with the individual who has a disability. Congress considered, and rejected, amendments that would have limited the scope of this provision to specific associations and relationships. . . .
>
> During the legislative process, the term "entity" was added to section 302(b)(1)(E) [42 U.S.C.

> § 12182(b)(1)(E)] to clarify that the scope of the provision is intended to encompass not only persons who have a known association with a person with a disability, but also entities that provide services to or are otherwise associated with such individuals. This provision was intended to ensure that entities such as health care providers, employees of social service agencies, and others who provide professional services to persons with disabilities are not subjected to discrimination because of their professional association with persons with disabilities.

28 C.F.R. pt. 35, App. A at 453.

Pursuant to statutory authority, 42 U.S.C. § 12206(c)(3), the Department of Justice has published its Title II Technical Assistance Manual ("TA Manual," attached as Exhibit A) to assist the public in understanding and complying with the statute and the regulation. The TA Manual provides:

> A State or local government may not discriminate against individuals or entities because of their known relationship or association with persons who have disabilities. This prohibition applies to cases where the public entity has knowledge of both the individual's disability and his or her relationship to another individual or entity. In addition to family relationships, the prohibition covers any type of association between the individual or entity that is discriminated against and the individual or individuals with disabilities, if the discrimination is actually based on disability. . . .
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> ILLUSTRATION 2: A local government could not refuse to allow a theater company to use a school auditorium on the grounds that the company has recently performed at an HIV hospice. . . .

TA Manual § II-3.9000 at 17 (November 1993).

The Department of Justice's interpretations of title II are entitled to controlling weight. The regulation was issued pursuant to statutory mandate. 42 U.S.C. § 12134(a). Accordingly, it is to be given "controlling weight unless [it is]

arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). See Tugg v. Towey, 864 F. Supp. 1201, 1205 n. 6, 1208 (S.D. Fla. 1994) (according Department of Justice's title II regulation controlling weight regarding coverage of discrimination on the basis of association). See also Noland v. Wheatley, 835 F. Supp. 476, 483 (N.D. Ind. 1993) (applying Chevron to give controlling weight to Department of Justice interpretation of title II); Petersen v. University of Wisconsin Bd. of Regents, 818 F. Supp. 1276, 1279 (W.D. Wis. 1993) (same). This regulation is far from "arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 844. In fact, it is required by the statute and its legislative history.

In addition, as the Department of Justice's interpretation of its own regulation, the analysis in the preamble to the regulation and the TA Manual is entitled to "'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381, 2386 (1994) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). See Tugg v. Towey, 864 F. Supp. at 1208 (relying on the preamble regarding coverage of association); Fiedler v. American Multi-Cinema, Inc. 871 F. Supp. 35, 36 n. 4 (D.D.C. 1994) (according controlling weight to Title III Technical Assistance Manual); Noland, 835 F. Supp. at 483

(relying on TA Manual's interpretation of title II); Petersen, 818 F. Supp. at 1280 (same).

Very few cases have addressed the issue of title II's protection of individuals and entities subjected to discrimination on the basis of their association with individuals with disabilities. In Tugg v. Towey, 864 F. Supp. 1201, deaf individuals and their family members sued for violations of title II of the ADA. The defendants in that case, like Defendant 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 did have standing to assert their own rights under the ADA.[4] See also Finley v. Giacobbe, 827 F. Supp. 215 (S.D.N.Y. 1993) (assuming, without discussion, that non-disabled individual fired from county hospital for admitting patients with AIDS has standing to assert claim under title II).

Defendant cites Kessler Inst. for Rehabilitation, Inc. v. Mayor and Council of Essex Fells, ___ F. Supp. ___, 1995 WL 42916 (D.N.J. 1995), for the proposition that title II provides rights

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[4] Because title II was intended to extend the protections of section 504 to non-federally funded entities, 42 U.S.C. § 12134, the cases discussed infra regarding section 504 also support applying title II to association claims. See also H.R. Rep. No., 485 (II), 101st Cong., 2d Sess. 84, reprinted in 1990 U.S.C.C.A.N. 303, 367.

only to individuals with disabilities and not to entities that serve individuals with disabilities. The court in that case failed to address the provisions of the statute discussed above, the clear language of the regulation, the legislative history, or the technical assistance materials produced by the Department of Justice. Based, as it apparently was, on a cursory and incomplete reading of the statute, that decision is contrary to the law and should not be relied upon as precedent for this Court. To do so would be to frustrate congressional intent and to overrule statutorily required regulations in contravention of established principles of judicial review.

II. Taylor Has Standing Under Section 504 of the Rehabilitation Act on the Basis of Association with Individuals with Disabilities

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1988 & Supp. IV 1992) broadly prohibits discrimination on the basis of disability. The Act goes on to provide that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." 29 U.S.C. § 794a (1988) (emphasis added). The "person aggrieved" need not be an individual with a disability.[5]

[5] Defendant concedes the breadth of coverage of very similar language in the Fair Housing Act. Defendant's Memorandum In Support, p. 7 (discussing the "expansive language in the Fair Housing Act, which provides a right of action to any 'aggrieved person.'").

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, 182 n. 12 (3d Cir. 1987), cert. denied, 484 U.S. 849 (1989), 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:

> Section 504's protection extends not just to handicapped individuals who are direct participants in federally-funded programs or activities but also to those who are intended ultimate beneficiaries of such programs or activities. Under § 504, discrimination on the basis of handicap is actionable upon a simple showing that discrimination has resulted in "a diminution of the benefits [a disabled individual] would otherwise receive from [a federally-funded] program." . . . In fact, 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. (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).

In Nodleman v. Aero Mexico, 528 F. Supp. 475 (C.D. Cal. 1981), the court considered whether an individual without a disability had standing to sue under section 504 when her traveling companions were denied services because they used wheelchairs. The court stated that "[t]he use of the phrase 'any person aggrieved' in section 505(a)(2) evinces a congressional intention to define standing to bring a private action under section 504 as broadly as is permitted by Article III of the Constitution." Id. at 485.[6] The court, therefore, found that the non-disabled individual could sue if "plaintiff alleges the

[6] Notably, such broad standing must extend at least as far as the Fair Housing Act, which, Defendant concedes, covers entities injured by discrimination on the basis of disability. Defendant's Memorandum In Support, p. 7.

loss of important associational benefits resulting from the exclusion of discriminatees." Id. at 486, citing Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210-11 (1972). In the particular case before that court, the plaintiff had failed to allege facts to clarify the basis of her standing. Therefore, the court dismissed her claim without prejudice.

Independent Housing Servs. v. Fillmore Ctr. Assocs., 840 F. Supp. 1328 (N.D. Cal. 1993), upheld an organization's standing to sue under section 504 because the organization provided services to individuals with disabilities and because its provision of those services was made more difficult by the defendant's discriminatory acts. Id. at 1336.

These cases indicate that Taylor has standing to redress its injuries under both section 504 of the Rehabilitation Act and title II of the ADA. Defendant cites several cases purporting to support its contention that only an individual with a disability may sue under the Rehabilitation Act. However, Defendant's cases do not support that contention. Six of the eight cases Defendant cites, including the one by the Fourth Circuit, simply addressed the question of whether the Rehabilitation Act provided a private right of action to individuals with disabilities. Each case confirmed that such a private right existed. None of these cases addressed whether a private right of action was available to anyone other than individuals with disabilities. These cases simply did not raise, let alone decide, the issue raised by the current motions.

In Nelson v. Tuscarora Intermediate Unit No. 11, 457 A.2d 1260 (Pa. 1983), cert. denied, 464 U.S. 866 (1983), the court found, in the context of public education, that the Rehabilitation Act was not a defense to an action by a school district to collect the cost of education for a child with a disability from a provider of residential services to the child. The court found that the defendant had no standing to assert the Rehabilitation Act as a defense, relying on 45 C.F.R. § 84.33(c)(1) (regulation by the Department of Health Education and Welfare), which provided that the Rehabilitation Act would not "relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person." The defendant fell within this provision because it had accepted contractual and legal obligations to educate the child. Section 504 does not provide such a regulatory limitation in the context of zoning. Nor is Taylor seeking to avoid an obligation to provide services. Therefore, Nelson is not helpful in the current case.

In addition, one case cited by Defendant, Andrew H. by Irene H. v. Ambach, 600 F. Supp. 1271, 1278-80 (N.D.N.Y. 1984) indicates that an organization will have standing if it alleges injury to itself or to its members. The court, on summary judgment, found that the particular organizations before it, however, had failed to sufficiently show such injury.

III. Title II of the ADA Applies to All Zoning Enforcement Activities Undertaken by Public Entities

In enacting the ADA, Congress sought to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Defendant seeks to limit that mandate by arguing that some activities of local governments, such as zoning, are not covered. In other words, Defendant contends, local governments are prohibited from discriminating in some of their activities but are free to discriminate in others. The Defendant does not articulate any reason for distinguishing zoning from other activities of public entities and the statute does not provide a basis for such a distinction.

A. The Text and Legislative History of Title II Demonstrate Congressional Intent to Cover Local Zoning Enforcement Schemes.

Title II provides broad protection against discrimination on the basis of disability in the provision of public services. Title II's antidiscrimination provision employs expansive language, intended to reach all actions taken by public entities. It states:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.

Id. at § 12132. There is no suggestion in the statute that zoning or any other type of public action is to be excluded from this broad mandate. Zoning activities and decisions are plainly among the "services, programs, or activities" conducted by public entities. Moreover, the last phrase of title II's prohibition is

even more expansive, stating simply that no individual with a disability may be "subjected to discrimination" by a public entity. Id. This language prohibits a public entity from discriminating on the basis of disability in any manner, whether through zoning or any other official activity.

To allow discrimination on the basis of disability in any area of government functioning denies persons with disabilities equal opportunity to benefit from those government functions, in direct contravention to the ADA's stated goals.[7]

Title II's legislative history leaves no doubt that Congress intended title II to cover every action taken in every forum in which a public entity may function. The House Report states: "The Committee has chosen not to list all the types of actions that are included within the term 'discrimination,' as was done in titles I and III, because this title essentially simply extends the antidiscrimination prohibition embodied in section 504 to all actions of state and local governments." H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. 84 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 367 (emphasis added). The House Report emphasizes the broad coverage of title II later, stating: "Title II of the bill makes all activities of State and local governments subject to the types of prohibitions against discrimination against qualified individuals with a disability

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[7] 42 U.S.C. § 12132. As a remedial statute, the ADA "must be broadly construed to effectuate its purposes." Kinney v. Yerusalim, 812 F. Supp. 547, 551 (E.D. Pa. 1993), aff'd, 9 F.3d 1067 (3d Cir. 1993), cert. denied, 114 S. Ct. 1545 (1994).

included in section 504 (nondiscrimination)." Id. at 151, reprinted in 1990 U.S.C.C.A.N. at 434 (emphasis added).

Representative Coelho, the ADA's principal sponsor in the House of Representatives, explained that the ADA was meant to prohibit discrimination in the enactment and enforcement of local ordinances. 134 Cong. Rec. 9606, E1310 (April 29, 1988) (attached) (Title II "will prohibit discriminatory activities of State and local governments resulting from ordinances, laws, regulations, or rules.").[8]

B. Department of Justice Interpretations Explicitly Show That Title II Applies to Local Zoning Enforcement Schemes.

Consistent with title II's broad language and its legislative history, the Department of Justice, in its title II implementing regulation and other title II analyses, has interpreted title II to reach all actions by public entities, including zoning enforcement actions.

The Department of Justice's regulation implementing title II repeats the statute's general nondiscrimination provision that "no qualified individual with a disability shall . . . be excluded from participation in or be denied the benefits of the

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[8] It is also evident from other language in the ADA that the Act was intended to reach, and, in some cases, preempt local ordinances. Section 103 states that: "Nothing in this [Act] shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to local food handling which is designed to protect public health from individuals who pose a significant risk to the health or safety of others. . . ." 42 U.S.C. § 12113(d)(3). See also H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 61 (1990), reprinted in 1990 U.S.C.C.A.N. 565, 570. This section would have been unnecessary if the ADA were not otherwise intended to affect local ordinances.

services, programs, or activities of a public entity, or be subjected to discrimination by any public entity." 28 C.F.R. § 35.130(a) (1994). The Department of Justice's preamble to the regulation explains that "title II applies to anything a public entity does . . . . All governmental activities of public entities are covered. . . ." 28 C.F.R. pt. 35, App. A at 441-42.

The regulation enumerates several categories of specific activities that constitute discrimination by public entities. 28 C.F.R. § 35.130. One of these specific provisions requires public entities to make reasonable modifications to their policies, practices, and procedures, where such modifications are necessary to avoid discrimination on the basis of disability. 28 C.F.R. § 35.130(b)(7).[9] Commensurate with the Act, this provision uses broad language to cover the widest possible range of actions by public entities. Zoning enforcement actions, including the enactment of ordinances, and any administrative processes, hearings, and decisions by zoning boards, fall squarely within the category of "policies, practices, or procedures" mentioned in the regulation.

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[9] As discussed supra at 5-6, the Department of Justice's regulation is entitled to controlling weight unless it is "arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). In addition, the Department of Justice's preamble and Title II Technical Assistance Manual interpreting its regulation are entitled to controlling weight unless they are "plainly erroneous or inconsistent with the regulation." Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381, 2386 (1994).

The Title II TA Manual specifically uses zoning in an illustration of a public entity's obligation to modify its policies, practices, and procedures. It explains:

> A municipal zoning ordinance requires a set-back of 12 feet from the curb in the central business district. In order to install a ramp to the front entrance of a pharmacy, the owner must encroach on the set-back by three feet. Granting a variance in the zoning requirement may be a reasonable modification of town policy.

TA Manual § II-3.6100 at 14. The TA Manual also makes clear that title II reaches local laws and ordinances generally. The title II regulation requires public entities to conduct a self-evaluation to assess, inter alia, all of their policies, practices, and procedures. 28 C.F.R. § 35.105(a). The TA Manual's explanation of the self-evaluation explicitly recognizes that "a public entity's policies and practices are reflected in its laws, ordinances, regulations, administrative manuals. . ." TA Manual § II-8.1000 at 44. Discriminatory "policies, practices, and procedures must be modified," regardless of their form. Id.

C. Judicial Interpretations Do Not Support Construing Title II as Inapplicable to Zoning.

Defendant cites several cases as indicating that title II is inapplicable to zoning. However, none of the cases cited by Defendant provide any analysis or rationale to support their decisions. This Court should decline to follow them.[10]

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[10] In Burnham v. City of Rohnert Park, 1992 WL 672965 (N.D. Cal. 1992) (unpublished opinion), Moyer v. Lower Oxford Township, 1993 WL 5489 (E.D. Pa. 1993) (unpublished opinion), and Kessler, 1995 WL 42916, the courts literally provided no

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In Oxford House, Inc. v. City of Albany, 155 F.R.D. 409, 410-11 (N.D.N.Y. 1994), the plaintiffs "completely failed to cite any authority" to support their position. In considering the plaintiffs' motion for reconsideration, the court acknowledged that its decision that title II did not apply to zoning was based simply on the lack of legal argument presented by the plaintiffs. The court further acknowledged that authorities submitted by the plaintiffs in support of their reconsideration motion might, if timely presented, have led to a different conclusion.

The conclusion reached by these courts is not only unsupported, but it is plainly contrary to the broad statutory language, legislative history, and implementing regulation of title II, none of which were considered by the courts.

D. Construing Title II to Cover Zoning Is Consistent with the Rehabilitation Act and Other Civil Rights Statutes.

Although very few cases have addressed this issue under title II, courts have found zoning to be covered under related civil rights laws, most notably section 504 of the Rehabilitation Act and the Fair Housing Act.

1. Interpretations of Section 504 of the Rehabilitation Act.

Title II was intended to incorporate all the protections of section 504 of the Rehabilitation Act and to extend those

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[10](...continued)
discussion of the basis for their conclusion that zoning did not constitute a program, service, or activity. In Canaan Ministries, Inc. v. Town of Cheektowaga, 1994 WL 584707 (W.D.N.Y. 1994) (unpublished opinion), the court did not undertake any analysis at all, but simply accepted the plaintiff's concession that the ADA would not apply.

protections to cover all activities of public entities. See H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. 151 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 434. Therefore, the fact that the Rehabilitation Act covers zoning indicates that title II should be similarly interpreted.

Notably, Defendant does not challenge the Rehabilitation Act's application to zoning. The Rehabilitation Act, in section 504, prohibits discrimination on the basis of disability in any "program or activity" of recipients of Federal financial assistance. 29 U.S.C. § 794 (1988 & Supp. IV 1992). The Civil Rights Restoration Act made clear that "[T]he term 'program or activity' and 'program' means all of the operations of [a recipient of federal funding]." 20 U.S.C. § 1687 (emphasis added). The phrase "all of the operations of" demonstrates that section 504 applies to every action taken by an entity receiving Federal financial assistance. Neither the Rehabilitation Act nor the Civil Rights Restoration Act, nor their legislative histories, contain any references indicating congressional desire to exempt zoning enforcement from their coverage. In fact, congressional debates during the enactment of the Civil Rights Restoration Act demonstrate that the broad language was understood to cover zoning activities.[11]

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[11] During consideration of the Civil Rights Restoration Act, Senator Hatch stated:

> The zoning function of local government will likely be covered by these laws in ways never before achieved. . . . [I]t will be difficult, if not impossible, for

(continued...)

The few courts to address the issue have concluded that section 504 reaches zoning enforcement activities. See, e.g., Sullivan v. City of Pittsburgh, 811 F.2d 171, 181-83 (3d Cir. 1987), cert. denied, 484 U.S. 849 (1989) (court held that city's denial of permit to rehabilitation center for recovering alcoholics violated section 504).[12] Cf. Stewart B. McKinney Found. v. Town Planning & Zoning Comm'n of Fairfield, 790 F. Supp. 1197 (D. Conn. 1992) (court declined to rule on section 504 claim, because plaintiff prevailed on Fair Housing claim).

2. Interpretations of the Fair Housing Act.

Our analysis of title II is also consistent with judicial interpretations of the Fair Housing Act, 42 U.S.C. §§ 3601 et seq. (1988 & Supp. IV 1992). Like title II, the Fair Housing Act bars discrimination by using broad, general language, in order to reach all aspects of the housing process in which discrimination can occur. Courts, stressing Congress' use of expansive language, have interpreted the Fair Housing Act's general statutory language to cover local zoning decisions, even though zoning was not specifically mentioned in that Act. See, e.g., Casa Marie, Inc. v. Superior Court, 988 F.2d 252, 257 n. 6 (1st Cir. 1993) (citing H.R. Rep. No. 711, 100th Cong., 2d Sess. 22

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[11](...continued)
localities and states to escape total coverage under the bill, including a locality's zoning function. . . .

134 Cong. Rec. 4259, S2422 (March 17, 1988) (attached).

[12] The district court opinion in Sullivan has a more extended discussion of the applicability of Section 504. See 620 F. Supp. 935, 946 (W.D. Pa. 1985).

(1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2183); South-Suburban Housing Ctr. v. Greater South Suburban Bd. of Realtors, 935 F.2d 868, 882 (7th Cir. 1991) (en banc), cert. denied, 502 U.S. 1074 (1992); Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1209-10 (7th Cir. 1984); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

When the Fair Housing Act was amended in 1988, among other things, to prohibit discrimination on the basis of disability, Congress expressly indicated that discriminatory zoning decisions were prohibited by the statute. H.R. Rep. No. 711, 100th Cong., 2d Sess. 24 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2185 ("Congress intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices"). The 1988 amendments included language similar to that in the title II regulation, prohibiting "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person [with a disability] equal opportunity to use and enjoy a dwelling . . . ." 42 U.S.C. § 3604(f)(3)(B). Courts have confirmed that that language authorizes challenges to zoning actions. See, e.g., City of Edmonds v. Washington State Building Code Council, 18 F.3d 802 (9th Cir. 1994), cert. denied, 115 S. Ct. 417 (1994); Casa Marie, 988 F.2d at 270 n. 22; Potomac Group Home Corp. v. Montgomery County, Md., 823 F. Supp. 1285 (D. Md.

1993). The similar language in title II should be read to provide similar coverage.

CONCLUSION

For the foregoing reasons, the United States urges the Court to deny Defendant's motion to dismiss Taylor's claims and to find that: (1) Taylor has standing under title II to challenge discrimination on the basis of its association with individuals with disabilities; (2) Taylor has standing under section 504 to challenge discrimination on the basis of its association with individuals with disabilities; and (3) Taylor's challenge to Defendant's zoning action states a claim under title II.

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CERTIFICATE OF SERVICE

I, the undersigned attorney for the United States of America, do hereby certify that on March 13, 1995, I personally caused to be served upon the persons listed below, by first class mail, true and correct copies of the foregoing United States' Memorandum In Opposition To Defendant's Motions to Dismiss Intervenor's Second and Fourth Claims.

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