IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

PATHWAYS PSYCHOSOCIAL SUPPORT CENTER, INC., et al.	:	
Plaintiffs,	:	
v.	:	**Civil Action No. DKC-99-1362**
TOWN OF LEONARDTOWN, et al.,	:	
Defendants.	:	

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MEMORANDUM OF LAW OF THE
UNITED STATES OF AMERICA AS AMICUS CURIAE

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

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I. INTRODUCTION

Plaintiffs bring this action seeking injunctive relief and monetary damages under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and under the equal protection and due process clauses of the United States Constitution based on Defendants' refusal to approve Pathways Psychosocial Support Center, Inc.'s ("Pathways") request for a grant to purchase a building in downtown Leonardtown and the subsequent denial of an occupancy permit to enable Pathways to operate a rehabilitation center for people with mental disabilities in downtown Leonardtown.

In the pending motion, Defendants claim, *inter alia*, that Pathways does not have standing to sue under the ADA because Pathways does not fall within the definition of a "qualified individual with a disability", and that it has failed to assert a viable claim under § 504 of the Rehabilitation Act because it has not alleged that there exists a nexus between the federal financial assistance that Defendants receive and the alleged discriminatory conduct. Defendants' arguments, however, are contrary to the plain language of these two important civil rights statutes. Moreover, Defendants' arguments run contrary to the statutes' legislative history, the Department of Justice regulations interpreting the statutes, and the prevailing case law. Accordingly, for the reasons set forth in greater detail below, the United States, as *amicus curiae*, respectfully submits that this Court should deny Defendants' Motion to Dismiss.

II. ARGUMENT

A. Legal Standard

In assessing a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the court must accept the factual allegations contained in the complaint as true. *Advanced Health-Care Services, Inc. v. Radford Community Hosp.*, 910 F.2d 139, 143 (4th Cir.

1990). Dismissal is appropriate pursuant to Rule 12(b)(6) only if "'it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proven in support of its claim.'" *Id*. at 143-144 (quoting *Johnson v. Mueller*, 415 F.2d 354, 355 (4th Cir. 1969). Thus, for purposes of Defendants' Motion to Dismiss, the Court must accept the factual allegations set forth in Plaintiffs' complaint.

In standing cases, the United States Supreme Court has made clear that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)(quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)).

B. Plaintiffs' ADA Claim

1. The ADA in General

The Americans With Disabilities Act states: "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. "Public entity" is defined, in relevant part, to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1); 28 C.F.R. § 35.104.

The ADA was enacted in 1990 to eliminate pervasive societal discrimination against individuals with disabilities. 42 U.S.C. § 12101. Congress found that individuals with disabilities, including persons with mental disabilities, had historically been subject to isolation

and segregation, and had been discriminated against in "such critical areas as . . . recreation, . . . health services, . . . and access to public services." *Id*. at § 12101(a)(2),(3); *Olmstead v. Zimring*, ___ U.S. at ___, 1999 WL 407380 at *14, 9 A.D. Cases 705 (June 22, 1999)(Kennedy, J.)(concurring in judgment)("persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility."). This discrimination had taken various forms: both outright intentional exclusion as well as failures to make changes in existing practices and facilities, such that persons with disabilities are relegated to "lesser services, programs, activities, benefits, . . . or other opportunities." *Id*. at § 12101(a)(5). Congress observed that persons with disabilities "are notably underprivileged and disadvantaged," and that they "are much poorer, have far less education, have less social and community life, participate much less often in social activities" than do persons without disabilities, and that these disadvantages are due to "discriminatory policies, based on unfounded, outmoded stereotypes and perceptions, and deeply imbedded prejudices." H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 447-48.

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). The ADA's coverage is accordingly broad -- prohibiting discrimination on the basis of disability in employment, State and local government programs, services, and activities, public and private transportation systems, telecommunications, public accommodations, and commercial facilities.

The ADA was meant to effect a considerable change in the ways in which private

businesses and State and local governments treat and serve individuals with disabilities. It established new federal civil rights, to be enforced federally. Congress noted that "there is a need to ensure that the Federal Government plays a central role in enforcing these standards on behalf of individuals with disabilities." S. Rep. No. 116, 101st Cong., 1st Sess. 20 (1989) (hereinafter "Senate Report"); *see also* H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. 47-48, *reprinted in* 1990 U.S.C.C.A.N. 303, 329-30. Congress stressed that federal intervention was critical, because "State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing."[1] Congress chose not to require the exhaustion of State or administrative remedies prior to the issuance of federal judicial relief under title II. *See, e.g., Noland v. Wheatley*, 835 F. Supp. 476, 482 (N.D. Ind. 1993); *Finley v. Giacobbe*, 827 F. Supp. 215, 219 (S.D.N.Y. 1993); *Petersen v. University of Wis. Bd. of Regents*, 818 F. Supp. 1276 (W.D. Wis. 1993).

2. Plaintiffs Have Standing to Sue Under the ADA

In their Motion to Dismiss, Defendants do not contest that zoning decisions are covered by the ADA. Indeed, it is by now well-established that zoning falls within the wide ambit of the ADA. *See, e.g., Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998)(title II of the ADA applies to all State activities); *Bay Area Addiction Research and*

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The Senate Report declared:

> [E]nough time has . . . been given to the States to legislate what is right. Too many States, for whatever reason, still perpetuate confusion. It is time for Federal action. . . . [E]xisting States laws do not adequately counter such acts of discrimination."

Senate Report at 18.

Treatment, Inc. v. City of Antioch, ___ F.3d ___, 9 A.D. Cases 722, 1999 WL 351126 (9th Cir. 1999)("We hold that Title II of the ADA and § 504 of the Rehabilitation Act apply to zoning ordinances . . . ."); *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997)("[B]oth the ADA and the Rehabilitation Act clearly encompass zoning decisions by the City because making such decisions is a normal function of a governmental entity."). Instead, Defendants claim that Pathways does not have standing to sue in its own right or on behalf of its current and future clients. *Defendants' Memo.* at 8. More particularly, Defendants claim that Pathways does not have standing to sue in its own right because it is not "a qualified individual with a disability," as that term is employed under the Act, and that it cannot sue on behalf of its current and future clients inasmuch as Pathways cannot base its claims upon the rights of third persons. *Id*. Defendants' arguments, however, find no support in the ADA, the regulation interpreting title II, its legislative history, or the prevailing case law.

a. <u>Article III and Prudential Limitations</u>

Article III of the United States Constitution requires that a party have standing in order to invoke the jurisdiction of the federal courts. In addressing the issue of standing, a court must determine whether a party has a sufficient personal stake in the outcome of an otherwise justiciable controversy to obtain relief through a judicial resolution of that controversy. *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). "Simply stated, the consideration of standing ensures the appropriateness of a particular party to pursue specific litigation." *Finlator v. Powers*, 902 F.2d 1158, 1160 (4th Cir. 1990). Standing questions must be resolved according to a two-part inquiry that considers (1) Article III constitutional limitations and (2) prudential limitations. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). A litigant must

pass both constitutional and prudential muster to have standing to sue. *Family & Children's Center, Inc. v. School City of Mishawaka*, 13 F.3d 1052, 1058 (7th Cir. 1994).

i. Article III Standing

To establish standing under Article III, a litigant must establish that (1) it suffered actual or threatened injury; (2) the condition complained of caused the injury or threatened injury, and (3) the requested relief redressed the alleged injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Finlator*, 902 F.2d at 1160.[2] "In the shorthand analysis of standing, these three basic requirements are referred to as injury-in-fact, causation and redressability, and they are central to any discussion of standing." *Finlator*, 902 F.2d at 1160. Pathways satisfies all three elements.

Pathways alleges that it has sustained "substantial and significant damages" as a result of being denied access to two properties in downtown Leonardtown to operate a rehabilitation center for people with mental disabilities. *Complaint* at ¶ 42. Thus, Pathways has been "injured in fact." Moreover, the Defendants' denial of a grant to enable Pathways to purchase a building in downtown Leonardtown and the subsequent denial of an occupancy permit to enable Pathways to operate a rehabilitation center for people with mental disabilities caused the injuries sustained by Pathways. Finally, the injunctive relief and monetary damages sought by Pathways will redress its sustained injuries.

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The Supreme Court has made clear that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)(quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

Pathways has suffered an injury in fact fairly traceable to Defendants' conduct that a favorable decision by this Court would remedy. *Lujan*, 504 U.S. at 560. Clearly, then, Pathways' complaint satisfies Article III's constitutional standing requirements, and Defendants' assertion that Pathways has not met the Constitutional requirements of Article III standing is simply wrong. *See, e.g., Oak Ridge Care Center v. Racine County, Wis.*, 896 F. Supp. 867, 871 (E.D. Wis. 1995)(elder care facility had Article III standing under ADA).

ii. Prudential Limitations

When addressing standing, a court must also consider whether prudential limitations bar standing. Prudential limitations do not apply, however, when Congress, by legislation, has expanded standing to the full extent permitted by Article III, thereby overriding prudential standing limitations and authorizing all persons who satisfy the Constitution's standing requirements to bring a particular action in federal court. "The standing question . . . is made less troublesome when Congress has identified the litigant as someone entitled to pursue statutorily-created rights to the fullest extent permitted by article III. In these circumstances, our standing inquiry is narrowed to constitutional limitations alone, because Congress has displaced the need to independently invoke prudential rules of self-restraint." *Motor Coach Ind., Inc. v. Dole*, 725 F.2d 958, 963 (4th Cri. 1984)(citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)).

Congress clearly intended that litigants such as Pathways be accorded standing to sue under the ADA based not only on its own legal rights but also the legal rights and interests of its current and future clients. The language of the ADA, the Department of Justice's regulation interpreting title II and Technical Assistance Manual, the statute's legislative history, and the

prevailing case law make this abundantly clear.

1. The Language of the Act Itself Supports Pathways' Standing to Sue Under the ADA

Congress granted broad enforcement powers under title II of the ADA, which prohibits discrimination on the basis of disability in general terms, 42 U.S.C. § 12132, and extends relief to "any *person* alleging discrimination on the basis of disability." 42 U.S.C. § 12133 (emphasis added). That "person" need not be an individual with a disability, as Defendants maintain, but may be an entity or anyone who is injured by a covered entity's discrimination, as evidenced by the express protection from discrimination that Congress conferred on individuals and entities on the basis of association with individuals with disabilities.

Titles I and III make clear that the ADA applies to discrimination against individuals and entities on the basis of association. *See* 42 U.S.C. § 12182(b)(1)(E) (explicitly in title III's list of prohibited discrimination is that 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"); *see also* 42 U.S.C. § 12112(b)(4) (title I provision prohibiting discrimination on the basis of association). While titles I and III provide numerous specific provisions defining prohibited discrimination, 42 U.S.C. §§ 12112 & 12182, Congress simply prohibited discrimination by public entities in general terms in title II, rather than repeating the specific provisions of titles I and III. 42 U.S.C. § 12132. Moreover, Congress explicitly required in title II 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"). Thus, the general non-discrimination provisions of title II encompass the more specific types of discrimination, including discrimination on the basis of association, that are set forth in titles I and III. Contrary to Defendants' argument, therefore, title II of the ADA does confer standing on Pathways to sue on behalf of itself and as a result of its association with individuals with disabilities.

2. The Department of Justice's Interpretation of Title II of the ADA Also Supports Pathways' Standing to Sue

The Department of Justice regulation implementing title II also confirms that title II prohibits discrimination against entities associated with individuals with disabilities.[3] The regulation 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). The Department of Justice's preamble to the title II regulation further emphasizes the 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) and 302(b)(1)(E) (42 U.S.C. § 12182(b)(1)(E)) of the ADA. . . .

3/ Congress directed the Attorney General to issue regulations implementing provisions of title II. 42 U.S.C. § 12134(a) provides: "[T]he Attorney General shall promulgate regulations in an accessible format that implement this part." Section 12134(b) further provides that the Attorney General "shall be consistent with this chapter and with the coordination regulations . . . applicable to recipients of Federal financial assistance under [§ 504 of the Rehabilitation Act]." 42 U.S.C. § 12134(a) & (b); *See also Olmstead*, ___ U.S. ___, 1999 WL 407380 at * 5, 9 A.D. Cases 705 (June 22, 1999).

> 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) 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.

The Department of Justice's interpretation of title II is 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." *Olmstead v. Zimring*, ___ U.S. ___, 1999 WL 407380 at * 9, 9 A.D. Cases 705 (June 22, 1999);[4] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). *See also Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 103 n.9 (1979); *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); *Civic Ass'n of the Deaf of the City of New York, Inc. v. Guiliani*, 915 F. Supp. 622, 635 (S.D.N.Y. 1996) (giving title II regulations controlling weight); *Noland v. Wheatley*, 835 F.

[4/] The *Olmstead* Court reiterated that "[b]ecause the Department is the agency directed by Congress to issue regulations implementing Title II, its views warrant respect." *Olmstead*, ___ U.S. at ____, 1999 WL 407380 at * 9, 9 A.D. Cases 705 (citations omitted). The Court also observed that "'the well-reasoned views of the agencies implementing a statute "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."'" *Id.* at ____ (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (quoting in turn *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)).

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). Clearly, this regulation is far from "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

Furthermore, 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") to assist the public in understanding and complying with the statute and the regulations. 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. . . .

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

The foregoing authorities make abundantly clear that Pathways has standing to sue on behalf of itself and the clients it serves. *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).

3. The ADA's Legislative History Adds Even Further Support For Pathways' Standing to Sue

The ADA's legislative history underscores Congress' intent that title II include the 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 "title II should be read to incorporate provisions of titles I and III . . . such as Section 102(b)(4) of the ADA [42 U.S.C. § 12112(b)(4)]." H.R. Rep. No. 435 (III), 101st Cong., 2d Sess. 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 474. Therefore, title II's protections must be read to be consistent with title III's protections. *See Kinney v. Yerusalim*, 9 F.3d 1067, 1073 n.6 (3d Cir. 1993) (noting that this legislative history shows that Congress intended titles II and III to be read consistently), *cert. denied*, 511 U.S. 1033 (1994).

4. Prevailing Case Law Supports Pathways' Standing to Sue

Of those courts to address the specific issue of title II's protection of individuals and entities subjected to discrimination on the basis of their association with individuals with disabilities, most courts have determined that an institution has standing to sue under title II. *See Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997); *Buckhannon Board & Care Home v. West Virginia Dept. of Health*, 19 F. Supp.2d 567 (N.D. W.Va. 1998); *Oak Ridge Care Center v. Racine County, Wis.*, 896 F. Supp. 867, 872-73

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

The only case cited by Defendants in support of their argument that Pathways lacks standing to sue under the ADA is *Kessler Inst. for Rehabilitation, Inc. v. Mayor and Council of Essex Fells*, 876 F. Supp. 641 (D.N.J. 1995). *Defendants' Memo*. at 8-9. In *Kessler*, however, the court failed to address the provisions of the statute discussed above, the clear language of the regulation interpreting title II, the legislative history, or the Department of Justice's technical assistance manual. 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 by this Court. To do so would frustrate congressional intent and overrule statutorily-required regulations in contravention of established principles of judicial review.[5]

[5/] Defendants make no effort whatsoever to discuss that line of cases that has rejected *Kessler*. Instead, Defendants merely cite two cases, *Innovative Health Systems* and *Buckhannon*, in a footnote and state, summarily, that "this authority is not persuasive and Defendants respectfully argue that its reasoning has no applicability to this case." *Defendants' Memo*. at 9. n.2. Such a cursory argument should carry little if any weight.

Innovative Health Systems, , Buckhannon, Oak Ridge and *Tugg*, on the other hand, are well-reasoned and supported by the plain language, legislative history, and agency interpretation of the ADA.[6] In *Innovative Health Sys.*, Plaintiff Innovative Health Systems, an outpatient drug and alcohol rehabilitation treatment center and a number of its clients sued the City of White Plains, its mayor, the city zoning board of appeals and its chair, and the city planning board and its chair under the ADA and Rehabilitation Act after the treatment center's application for a building permit was denied. There, as here, defendants challenged plaintiffs' standing to sue under both statutes. The Second Circuit rejected defendants' arguments, noting: "That IHS is not granted legal rights under [the ADA or Rehabilitation Act], . . . 'hardly determines whether [it] may sue to enforce the . . . rights of others.'" *Innovative Health Sys.*, 117 F.3d at 47 (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 103 n.9 (1979)). "Rather," the court continued, "we must look to whether the statutes 'grant[] persons in the plaintiff's position a right to judicial relief." *Id*. (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The Second Circuit concluded:

> Looking to the enforcement provisions of each statute, we agree with the district court that IHS has standing under both Title II of the ADA and the Rehabilitation Act. Title II's enforcement provisions extends relief to "any person alleging discrimination on the basis of disability." 42 U.S.C. Section 12133 (1994). Similarly, the Rehabilitation Act extends its remedies to "any person aggrieved" by the discrimination of a person on the basis of his or her disability." 29 U.S.C. Section 974a(a)(2). As the district court noted, the use of such broad language in the enforcement provisions of the statute "evinces a congressional intention to define standing to bring a private action under 504 [and Title II] as broadly as is permitted by Article III of the Constitution." *See Innovative Health*

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

> *Sys., Inc*., 931 F. Supp. at 237 (quoting *Nodleman v. Aero Mexico*, 528 F. Supp. 475, 485 (C.D. Cal. 1981)(citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 93 S. Ct. 364, 366-67, 34 L. Ed. 2d 415 (1972))).

Innovative Health Sys., 117 F.3d at 47. *Innovative Health Sys*. provides analytically rigorous support for Pathways right to sue under the ADA on its own behalf and on behalf of its clients.

In *Buckhannon*, plaintiff Buckhannon Board and Care Home, Inc. ("BBCH") operated a residential board and care home ("RBCH"). BBCH applied to the West Virginia Office of Health Facility Licensure and Certification ("OHFLC") for a renewal of its licensure with respect to three homes it operated. The OHFLC conducted an inspection of BBCH's facilities and concluded that each home housed residents who were incapable of "self-preservation." Under West Virginia law, RBCH residents are required to possess the ability to remove themselves, physically, from "situations involving imminent danger," an ability referred to as "self-preservation." *Buckhannon*, 19 F. Supp.2d at 570. The State Fire Marshal also inspected the homes and issued a written report in which it reached the same conclusion as the OHFLC. Consequently, the OHFLC ordered Buckhannon to cease operations and transfer its residents, denying them a waiver to continue operations. BBCH subsequently sued under the ADA and Fair Housing Act on behalf of itself and certain residents as next friends. *Id*.

In denying defendants' motion to dismiss on standing grounds, the *Buckhannon* court held:

> The residents' non-ambulatory status prevents them from remaining at a RBCH; the current fire regulations are the cause of this injury; and the requested relief, a waiver, would redress this injury because it would allow them to remain at their RBCH. Thus, the first requirement for associational standing has been met. The purpose of a RBCH is to house people who can no longer care for themselves; hence, the Association seeks protection of its interest in extending care to such people regardless of their ambulatory statute and in doing so satisfies the second

> criteria for associational standing. Finally, the participation of the individual residents is not required because neither the ADA nor the FHAA claims require individualized proof. For the foregoing reasons, this Court finds that the Association has standing to sue the defendants.

Buckhannon, 19 F. Supp.2d at 576.

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

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

prohibited it from obtaining permit to operate an adult care facility); *Finley v. Giacobbe*, 827 F. Supp. 215, 219-20 (S.D.N.Y. 1993).

The foregoing authorities firmly establish that Pathways has standing to sue in its own right and on behalf of its current and future clients. Defendants' sole reliance on *Kessler*, a case resoundingly criticized for its lack of analytical rigor, cannot overcome the reasoned case law upon which Plaintiffs' complaint rests.

C. Plaintiff's Rehabilitation Claim

Unlike their arguments with respect to the ADA, Defendants do not maintain that Plaintiffs lack standing to sue under the Rehabilitation Act. Rather, Defendants maintain that Pathways has failed to *plead* a sufficient nexus between the federal funds that Leonardtown receives and the acts giving rise to Defendants' alleged discriminatory and unlawful conduct. *See Defendants' Memo*. at 10. Like their ADA argument, Defendants' argument with respect to Plaintiffs' Rehabilitation Act claim lacks merit.

1. The Rehabilitation Act in General

The Rehabilitation Act provides: "No otherwise qualified individual with a disability . . . 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. . . ." Like the ADA, § 504 of the Rehabilitation Act uses expansive language and was intended to cover every action, including zoning enforcement actions, taken by public entities or subdivisions that receive or are extended federal financial assistance. *See*, e.*g., Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997)("[B]oth the ADA and the Rehabilitation Act clearly encompass zoning decisions

by the City because making such decisions is a normal function of a governmental entity"); *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 181-83 (3d Cir.), *cert. denied*, 484 U.S. 849 (1987) (city's denial of permit to rehabilitation center for recovering alcoholics violated § 504).

The Rehabilitation Act was enacted to discourage the segregation of persons with disabilities, and to expand their opportunities. 29 U.S.C. § 701 (1988). To that end, the statute established federal grant programs to benefit persons with disabilities, and, in § 504, it prohibits discrimination on the basis of disability in any "program or activity" of recipients of federal financial assistance. *Id.* at § 794.

Congress clarified the definition of "program or activity" in 1988 in the Civil Rights Restoration Act[7] to overturn an unduly narrow interpretation of that phrase by the Supreme Court. 20 U.S.C. § 1687 (1988); S. Rep. No. 64, 100th Cong., 2d Sess. 1-2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3, 3-4 (overturning *Grove City College v. Bell*, 465 U.S. 555 (1984)).[8] The

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[7] Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28, 28 (1987) (codified as 20 U.S.C. § 1687 note) ("legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and *broad, institution-wide* application of those laws.") (emphasis added).

[8] Congress' intent in passing the Civil Rights Restoration Act was clear. As the Senate Report states: "S.557 was introduced . . . to overturn the Supreme Court's 1984 decision in *Grove City College v. Bell*, . . . and to restore the effectiveness and vitality of the four major civil rights statutes [Title IX, Title VI, Section 504, and the Age Discrimination Act of 1975] that prohibit discrimination in federally assisted programs." S. Rep. No. 64 at 2, reprinted in 1988 U.S.C.C.A.N. at 3-4. The Civil Rights Restoration Act includes virtually identical amendments to broadly define "program or activity" (for coverage purposes) for the four cross-cutting civil rights statutes, including the Rehabilitation Act. The Senate Report provides extensive detail about the history of these statutes, including Congress' original intent that they be broadly interpreted and enforced; the consequences of *Grove City College*, *i.e.*, the narrow interpretations by courts and agencies that relieved entities of liability for apparent acts of discrimination because of the new, constricted interpretation of program or activity; and detailed explanations of the Civil Rights Restoration Act language. *Id.* at 5-20.

clarified definition provides that:

> [T]he term 'program or activity' and 'program' means *all of the operations of*–
>
> > (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
> >
> > (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

20 U.S.C. § 1687 (1988) (emphasis added).

By using the phrase "all of the operations of," the definition demonstrates that § 504 applies to every action taken by an entity receiving federal financial assistance. Neither the Rehabilitation Act nor the Civil Rights Restoration Act, or their legislative histories, contain any references indicating congressional desire to exempt zoning enforcement from their coverage. The Civil Rights Restoration Act stresses "institution-wide" coverage, and congressional debates during the enactment of the Civil Rights Restoration Act demonstrate that the broad language was understood to cover zoning activities.[9] *See, e.g.*, *Innovative Health Sys., Inc.*, 117 F.3d at 44-45); *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 181-83 (3d Cir. 1987), *cert. denied*, 484 U.S. 849 (1989) (city's denial of permit to rehabilitation center for recovering alcoholics violated

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[9/] 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 localities and states to escape total coverage under the bill, including a locality's zoning function. . . . Thus, for example, zoning requirements falling with a disproportionate impact on a particular minority group can be struck down, even if they were not adopted for a discriminatory purpose. 134 Cong. Rec. 4259 (1988).

§ 504).[10]

Moreover, most courts that have interpreted the financial coverage language of the Civil Rights Restoration Act have held that generally, the entire department or office within a state or local government constitutes a "program or activity" for purposes of the Rehabilitation Act. For example, in *Huber v. Howard County, Maryland*, 849 F. Supp. 407, 415 (D. Md. 1994)(Kaufman, J.), *aff'd*, 56 F.3d 61 (4th Cir. 1995), *cert. denied*, 516 U.S. 916 (1995), this Court found that a county fire department received federal financial assistance within the meaning of § 504 upon evidence that a subunit within the fire department received federal funds and the salary of one employee was partially paid with federal funds. The court stated:

> While the receipt of federal financial assistance by one department or agency of a county does not render the entire county subject to the provisions of § 504, and while such assistance to one department does not subject another department to the requirements of § 504, if one part of a department receives federal financial assistance, the whole department is considered to receive federal assistance as to be subject to § 504.

Id. (citing *Schroeder v. City of Chicago*, 927 F.2d 957, 962 (7th Cir. 1991) and *Tanberg v. Weld County Sheriff*, 787 F. Supp. 970, 974 (D. Colo. 1992)).

In *Schroeder*, the court specifically observed that "[i]f the office of a mayor receives federal financial assistance and distributes it to local departments or agencies, all of the operations of the mayor's office are covered along with the departments or agencies which actually get the aid." *Schroeder*, 927 F.2d at 962 (quoting S. Rep. No. 64, 100th Cong., 2d

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[10/] The district court opinion in *Sullivan* contains an extended discussion of the applicability of § 504. *See* 620 F. Supp. 935, 946 (W.D. Pa. 1985).

Sess. 16 (1987), reprinted in 1988 U.S.C.C.A.N. 18.[11] *See also Bentley v. Cleveland County Board of County Commissioners*, 41 F.3d 600, 603 (10th Cir. 1994)(county's indirect receipt of federal funds from the Oklahoma Department of Transportation rendered it amenable to suit under § 504); *Henning v. Village of Mayfield Village*, 610 F. Supp. 17, 19 (N.D. Ohio 1985)(dispatcher stated cause of action under § 504 against Village even though federal funds were not specifically earmarked for hiring dispatchers: "Because the city receives funds to be used as it determines and does so for so many different purposes it cannot be found that the programs or activities receiving funds should be limited to a small specific use such as to provide employment for dispatchers.").

2. Plaintiffs Have Stated a Claim Under § 504 of the Rehabilitation Act

Plaintiffs allege in their complaint that "defendants are the recipients of federal financial assistance." *Complaint* at ¶ 46. Not one of the Defendants, including Leonardtown's mayor, contests this assertion in the pending Motion to Dismiss. Nor, in fact, do Defendants argue -- let alone establish -- that there does *not* exist a nexus between the federal financial assistance

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[11/] As *Huber* and *Schroeder* make clear, federal financial assistance may be received directly or indirectly in order give rise to a claim under the Rehabilitation Act. For example, colleges indirectly receive federal financial assistance when they accept students who pay, in part, with federal financial aid directly distributed to the students. *See Bob Jones University v. Johnson*, 396 F. Supp. 597, 603 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975). In *Bob Jones University*, the university was deemed to have received federal financial assistance for participating in a program wherein veterans received monies directly from the Veterans Administration to support approved educational pursuits, although the veterans were not required to use the specific federal monies to pay the schools for tuition and expenses. *Id.* at 602-03 & n.22. Even if the financial aid to the veterans did not reach the university, the court considered this financial assistance to the school since this released the school's funds for other purposes. *Id*. at 602. Thus, an entity may be deemed to have "received federal financial assistance" even if the entity did not show a "financial gain, in the sense of a net increment in its assets." *Id*. at 602-03. Aid such as this, and noncapital grants, are equally federal financial assistance. *Id*.

they receive and the alleged discriminatory conduct. Instead, Defendants merely assert that "Pathways has *failed to allege* that the Defendants' alleged conduct is in any way related to a program or activity of Leonardtown or St. Mary's County that receives federal financial assistance." *Defendants' Memo*. at 10 (emphasis added).[12] Plaintiffs do assert, however, without contradiction, that *each* of the Defendants receives federal financial assistance. Thus, the nexus is directly asserted, and at this stage in the litigation, Plaintiffs' assertion -- unchallenged as it is by Defendants -- must be accepted as true. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)("At the pleading stage, general factual allegations . . . may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'")(quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)); *Advanced Health-Care Services, Inc. v. Radford Community Hosp.*, 910 F.2d 139, 143 (4th Cir. 1990); *Byers v. Rockford Mass Transit Dist.*, 635 F. Supp. 1387, 1390 (N.D. Ill. 1986)(plaintiff's complaint survives dismissal "as long as some federal funding is alleged."). This is particularly evident in light of this Court's decision in *Huber*, the Seventh Circuit's decision in *Schroeder*, and the district court's opinion in *Byers*. *Huber*, 849 F. Supp. at 415; *Schroeder*, 927 F.2d at 962; *Byers*, 635 F. Supp. at 1390. *See also* S. Rep. No. 64, 100th Cong., 2d Sess. 16 (1987), reprinted in 1988 U.S.C.C.A.N. 18.[13]

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[12]/ Presumably, Defendants would have stated in their motion that no nexus exists if that in fact were the case.

[13]/ To the extent Defendants would have this Court hold that federal financial assistance must be used directly for zoning board activities for those activities to be covered by § 504, the Court should decline the invitation to do so. The authorities cited above firmly establish that the zoning board's activities are covered so long as the city department that includes zoning activities receives or distributes federal funds. *See* 29 U.S.C. § 794(b)(1); *Innovative Health*

Defendants rely solely on one case, *Winfred v. City of Chicago*, 957 F. Supp. 1014 (N.D. Ill. 1997), in support on their contention that Plaintiffs have failed to assert a viable § 504 claim. Defendants' reliance on *Winfred*, however, is clearly misplaced. In *Winfred*, plaintiff, a former city sanitation worker, filed suit against the City of Chicago under § 504 alleging that the city refused to reinstate him because of his disability. In his complaint, Winfred alleged that "the City is a recipient of federal financial assistance and therefore, its programs and activities, including the employment practices of the Department of Streets and Sanitation, are subject to . . . § 504." *Id.* at 1024. In dismissing plaintiff's claim, the court refused to infer that because the entire City of Chicago received federal funds, the Department of Streets and Sanitation also received direct federal assistance. *Id.*

In the present case, Plaintiffs have not merely alleged that the Town of Leonardtown receives financial assistance; instead, Plaintiffs have alleged that *each* of the Defendants -- the Mayor of Leonardtown, the Town Manager, the Commissioners of the Town of Leonardtown, and the members of the Town of Leonardtown Planning and Zoning Commission -- receive financial assistance. It is the *Town of Leonardtown*, through the individual defendants and their respective governmental bodies, that are alleged to have discriminated against Plaintiffs. Thus, unlike in *Winfred*, Plaintiffs' complaint alleges that Defendants' discriminatory conduct is directly related to a program or activity (zoning) of Defendants, all of whom, the complaint alleges, receive federal financial assistance. *See Innovative Health Sys.*, 117 F.3d at 48-49 (permitting Rehabilitation claim against city, zoning board, and planning board based on city's

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Sys., 117 F.3d at 44-45; *Schroeder*, 927 F.2d at 962.

receipt of federal funds); *Byers*, 635 F. Supp. at 1390. Having alleged that each of the Defendants receives federal financial assistance, Plaintiffs have properly asserted a viable claim under § 504 of the Rehabilitation Act.[14]

III. CONCLUSION

For the foregoing reasons, the United States of America, as *amicus curiae*, submits that the Court should deny Defendants' Motion to Dismiss.

Respectfully submitted,

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[14] At a minimum, Plaintiffs should be permitted to further explore this issue in discovery.

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of June, 1999, copies of the United States of America's Memorandum of Law as *Amicus Curiae* were mailed, first class postage prepaid, to:

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