IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 05-cv-00807-REB-CBS

JULIANNA BARBER, by and through her next friend, MARCIA BARBER, et al.,

Plaintiffs,

v.

STATE OF COLORADO, DEPARTMENT OF REVENUE, et al.,

Defendants.

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs, by and through their attorneys, hereby submit their Memorandum in Opposition to Defendants' Motion to Dismiss.

Plaintiffs bring this case to challenge Defendants' refusal to permit Marcia Barber -- who is legally blind and as a result does not have a driver's license -- from designating another responsible, licensed, adult driver to accompany her daughter, Julianna, while she practiced driving between the ages of 15 and 16. Defendants' conduct discriminated against Plaintiff Marcia Barber, injured Plaintiff Julianna Barber, and will injure Plaintiff Madeline Barber, all in violation of title II of the Americans with Disabilities Act ("Title II"), 42 U.S.C. § 12131 et seq., and section 504 of the Rehabilitation Act of 1973 ("RA"). 29 U.S.C. § 794.

FACTS

The Colorado General Assembly has declared that "[p]roviding additional behind-the-wheel training with a parent, guardian, or other responsible adult before

obtaining a minor driver's license is the beginning of the young driver's accumulation of experience." C.R.S. § 42-2-105.5. To ensure that teenage drivers get "behind-the-wheel" experience, the legislature provided that individuals 15 to 16 years old may obtain a "minor's instruction permit," which permits them to drive under the supervision of a licensed parent, stepparent, or guardian. Id. § 42-2-106(1)(b)(2004). The statute was amended after the filing of the Amended Complaint to permit a "grandparent with power of attorney" to accompany the minor driver as well. Id. § 42-2-106(1)(b)(2005).

Marcia Barber has retinitis pigmentosa and as a result is substantially limited in the major life activity of seeing. (Amended Complaint ("AC") ¶ 6.) Because of her disability, Ms. Barber does not have a driver's license. (Id. ¶ 31.) Ms. Barber has full custody of her daughters, Julianna and Madeline. (Id. ¶¶ 4, 5, 29, 30.)

Julianna Barber turned 15 on September 8, 2004, obtained a minor's instruction permit on October 13, and completed a driver education course on October 23. (Id. ¶¶ 26, 27.) As of that time, Julianna could only drive accompanied by a licensed parent, stepparent or guardian. Because Marcia Barber is legally blind and thus is not a licensed driver, she requested that she be permitted to designate another licensed, adult driver -- in this case, Marcia's father (Julianna's grandfather) -- to accompany Julianna while she practiced driving. (AC ¶ 35.)

Ms. Barber repeatedly requested this modification, which Defendants repeatedly rejected. (Id. ¶¶ 35-43.) At one point, when Ms. Barber spoke with Colorado Attorney General John Suthers, he told her that he did not view the problem as an ADA issue, and suggested that Ms. Barber assign guardianship of her daughter to someone who

could drive with her. (Id. ¶ 39.) Thus Ms. Barber faced a stark choice. She could give up guardianship of her daughter, which would be a drastic loss of parental rights, and an onerous and expensive legal undertaking, See C.R.S. § 15-14-201 (detailing the procedural steps involved in appointing a guardian). Because she chose not to do this, and because the state refused the reasonable modification she requested, she was excluded from directing Julianna's driving education between the ages of 15 and 16, and Julianna missed out on a year of driving practice. Unless Defendants change their policy, Marcia and Madeline Barber will face the same discrimination in 16 months, when Madeline Barber turns 15. (Id. ¶¶ 5, 44.)

The Barbers are members of the Colorado Cross Disability Coalition ("CCDC") and the American Council of the Blind of Colorado ("ACBC"; collectively, "Organizational Plaintiffs"). (AC ¶¶ 45, 52.) CCDC's purpose is to work for systemic change that promotes independence, self-reliance, and full inclusion for people with disabilities in the entire community. (Id. ¶ 46.) ACBC's purpose is to promote the independence, equality and opportunities for blind and visually impaired individuals in the state of Colorado. (Id. ¶ 53.) The elimination of discrimination, such as that of Defendants, and the integration of persons with disabilities into the community are thus at the core of the Organizational Plaintiffs' purpose. (Id. ¶¶ 50, 56.)

ARGUMENT

I. Standard of Review

Defendants have moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. "A court may dismiss a complaint only if it is clear that no

relief could be granted under any set of facts that could be proved consistent with the allegations." Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 507 (2002).

II. Title II and the Rehabilitation Act.

Plaintiffs largely agree with Defendants' recitation of the basic governing law. To show discrimination under Title II, Plaintiffs must allege, with respect to Marcia Barber: "(1) that [she] is a qualified individual with a disability; (2) that [she] was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination was by reason of [her] disability." Gohier v. Enright, 186 F.3d 1216, 1219 (10th Cir. 1999). (See Mem. Br. in Support of Defs.' Mot. to Dismiss ("MTD") at 7.) Plaintiffs also agree with Defendants that the standards for interpreting Title II and the RA are the same. (See id. at 5-6 & n.3.)

Discrimination under Title II and the RA may take the form not only of disparate treatment, but also of disparate impact and a failure to make reasonable modifications. See Tyler v. City of Manhattan, 118 F.3d 1400, 1407 (10th Cir. 1997); see also infra at nn. 1 & 2 (citing applicable regulations). The obligation to make reasonable modifications extends to state statutes. See, e.g., Crowder v. Kitigawa, 81 F.3d 1480, 1485 (9th Cir. 1996) (holding that state had reasonable modification obligation with respect to state statute requiring quarantine of dogs).

Defendants erroneously contend that each person or entity bringing a claim under Title II or the RA must prove the three Gohier elements as to himself, herself or itself. As explained in greater detail below, Plaintiffs must make this showing as to

Marcia Barber, and must show, with respect to her daughters Julianna and Madeline, that they have suffered or will suffer a cognizable injury caused by Defendants' discrimination against their mother. See infra Section V. The Organizational Plaintiffs may bring claims based on representational standing if their members have standing, the interests at stake are germane to the organizations' purposes, and the participation of individual members is not required. See infra Section IV.D.

III. Plaintiffs were Denied Access To Services Or Programs Because of Disability.

Defendants incorrectly argue that Plaintiffs were not denied access to services and programs because of disability for two reasons: (1) the statute is facially neutral; and (2) any distinctions in the statute have a rational basis. (MTD at 8-9.)

A. Defendants' Conduct Violates Title II and the Rehabilitation Act Despite the Fact That the Statute at Issue Is Facially Neutral.

Defendants argue that "[t]here is no discrimination based on disability" because "[t]he statute of which Plaintiffs complain is facially neutral." (MTD at 8.) This is not the correct standard under Title II or the RA, because it ignores two of the three ways of proving discrimination under those statutes: disparate impact; and failure to make reasonable modifications.

As noted above, the Tenth Circuit has recognized that Title II addresses both disparate impact and the failure to make reasonable modifications. Tyler, 118 F.3d at 1407; see also Chaffin v. Kansas State Fair Board, 348 F.3d 850, 859-60 (10th Cir. 2003) (Title II and the RA were intended "to remedy a broad, comprehensive concept of discrimination against individuals with disabilities, including disparate impact

discrimination."). Accordingly, both Title II and the RA prohibit "criteria or methods of administration . . . that have the effect of subjecting qualified individuals with disabilities to discrimination. . ."[1] and require that covered entities make reasonable modifications in policies, practices and procedures where necessary to prevent disability discrimination.[2] Thus the fact that the statute at issue here may be facially neutral is irrelevant if either (1) it has the effect of subjecting people with disabilities to discrimination; or (2) Defendants refused to make a reasonable modification. Plaintiffs have adequately pleaded both theories.

1. Plaintiffs Have Pleaded Failure to Provide Reasonable Modification.

Under a "reasonable modification" theory, Plaintiffs must plead that a modification was requested and that the requested modification was reasonable. See Colorado Cross Disability Coalition v. Hermanson Family Ltd. Pship, 264 F.3d 999, 1004 (10th Cir. 2001). The Amended Complaint alleges both. Id. ¶¶ 1, 35, 37-42.

2. Plaintiffs have Pleaded Discriminatory Administration.

Title II and the RA also both prohibit criteria and/or methods of administration that "have the effect of subjecting qualified individuals with disabilities to discrimination

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[1] 28 C.F.R. § 35.130(b)(3)(i) & (ii) (ADA regulations); 49 C.F.R. 27.7 (b)(4)(i) & (ii) (Dep't of Transportation RA regulations). See also 28 C.F.R. § 35.130(b)(8)(public entity may not impose eligibility criteria that screen out or tend to screen out individuals with disabilities unless such criteria are necessary).

[2] See 28 C.F.R. § 35.130(b)(7) (ADA regulations); Chaffin, 348 F.3d at 857 (Analyzing the RA and holding, "As the Supreme Court has explained, 'to assure meaningful access, reasonable accommodations in the [public entity's] program or benefit may have to be made.'" (quoting Alexander v. Choate, 469 U.S. 287, 301 (1985)).

on the basis of disability" or that have the "effect of defeating or substantially impairing accomplishment of the objectives of the . . . program with respect to individuals with disabilities."[3] The Department of Justice explains that this provision "prohibits . . . nonessential policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate." Preamble to Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. pt. 35, app A at 541 (2004). Plaintiffs have properly pleaded this claim by alleging that the statute requires a license to accompany a minor driver, and that, "because of her visual disability, Marcia Barber does not have a driver's license." (AC ¶ 1, 24, 31.) This denied Marcia Barber an effective opportunity to participate in the minor driving instruction program by directing her daughter's driving education. For the same reason, it had the effect of defeating the objectives of the program with respect to her. Colorado has deemed it important not only that minor drivers practice driving, but that parents control that process. Those objectives were completely defeated with respect to Marcia Barber in her attempts to control Julianna's driving education.

Defendant will have the burden of proving that its policy of requiring a licensed parent, stepparent or guardian -- with no provision for a disabled parent to designate an alternative without giving up rights -- is necessary. See, e.g., Siddiqi v. Regents of the Univ. of Cal., No. C 99-0790 SI, 2000 WL 33190435, at *7 (N.D. Cal. Sep. 6, 2000) (analyzing section 35.130(b)(3) with section 35.130(b)(8) which prohibits criteria that screen out people with disabilities unless those criteria can be shown to be necessary).

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[3] 28 C.F.R. § 35.130(b)(3)(i) & (ii). See also supra note 1.

Thus, Plaintiffs are not required to plead that the policy is unnecessary.[4]

Defendant argues that any teenager who does not have a licensed parent, stepparent or guardian would be affected by the statute. (MTD at 8-9.) While it is true that some nondisabled parents may not have driver's licenses, and therefore be negatively impacted by the challenged policy, all individuals with Ms. Barber's disability -- and persons with many other disabilities -- are prohibited by law from obtaining drivers' licenses, so all such individuals will be denied an effective opportunity to participate because of their disabilities. See Crowder, 81 F.3d at 1484 (holding that Hawai'i's animal quarantine law discriminated against blind people; though it applied equally to all persons arriving in Hawai'i with dogs, it had a disparate impact on blind people using guide dogs). Thus the statute has the effect of discriminating against -- and defeating the objectives of the program with respect to -- people with disabilities.

B. The Fact That The Distinctions Made by The Statute May have a Rational Basis is Irrelevant to Plaintiffs' Title II and RA Claims.

Defendants argue that "distinctions are valid as long as there is a rational basis for the distinction." (MTD at 9.) This is incorrect as a matter of law under Title II and the RA. Neither statute excuses discriminatory distinctions that have a rational basis, and Defendants point to no statutory or regulatory language that suggests that they do. As the Tenth Circuit has made clear in the context of the Fair Housing Act, 42 U.S.C. § 3601 et seq., the use of the Equal Protection Clause's rational basis test is not appropriate when the case "involves a federal statute and not the Fourteenth

[4] Should the Court disagree and hold that Plaintiffs were required to plead that the policy was unnecessary, Plaintiffs respectfully request leave to amend their complaint to do so.

Amendment." Bangerter v. Orem City Corp., 46 F.3d 1491, 1503 (10th Cir. 1995). The passage on which Defendants rely in arguing to the contrary was in fact explaining the standard under the Equal Protection Clause, not Title II or the RA. See Thompson v. Colorado, 278 F.3d 1020, 1030-31 (10th Cir. 2001). It is thus not relevant to the present case. The plain language of Title II and the RA make Defendants' conduct illegal regardless of any rational basis.

C. Defendants' Cases are Not to the Contrary.

Defendants quote from a series of cases stating that the purpose of Title II is to prevent disability discrimination rather than some other type of discrimination. If this is part of Defendants' argument concerning association discrimination, it is addressed in Section V below. If it is part of their attempt to limit coverage to facially discriminatory statutes, it was addressed in Section III.A above.

These cases are not, in any event, apposite. In two of the cases, the decision turned on the fact that the person alleging discrimination was not disabled. Buckley v. Consl. Edison Co. of N.Y., Inc., 155 F.3d 150, 156 (2nd Cir. 1998); Welsh v. City of Tulsa, Okl., 977 F.2d 1415, 1419 (10th Cir. 1992). In the present case, Plaintiffs have properly alleged that Marcia Barber is disabled, that Defendants discriminated against her, and that other Plaintiffs were injured by that discrimination.

In two other cases cited by Defendants, the court held that the duty to make reasonable accommodations only extended to accommodating disability, not other factors, for example, poverty or age. Weinreich v. Los Angeles County Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997) (no duty to accommodate poverty); Sandison

v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026, 1036-37 (6th Cir. 1995) (no duty to accommodate age). In the present case, the only reason Marcia Barber does not have a driver's license is that she is legally blind (AC ¶¶ 1, 31), so the requested modification is causally related to her disability. See McGary v. City of Portland, 386 F.3d 1259, 1267-68 (9th Cir. 2004) (distinguishing Weinreich and holding that where request for modification was result of disability, refusal to grant request was discrimination "by reason of" disability); Washington v. Indiana High Sch. Athletic Ass'n, Inc., 181 F.3d 840, 849 (7th Cir. 1999) (rejecting Sandison and holding that it was sufficient to establish causal relationship between disability and exclusion, that is, "but for" disability, plaintiff would not have been excluded). In addition, unlike the plaintiffs in Weinreich, 64 F.3d at 1037, and Sandison, 114 F.3d at 797, Plaintiffs here also plead a disparate impact theory. Finally, the quote from Selenke v. Medical Imaging of Colorado, 248 F.3d 1249, 1259 (10th Cir. 2001) related to discriminatory discharge, separate from the court's discussion addressing failure to accommodate.

IV. Plaintiffs Have Stated a Valid Claim under Title II and Rehabilitation Act.

A. Marcia Barber is a Qualified Individual with a Disability, Was Excluded from Defendants' Programs on the Basis of Disability and Has Suffered a Cognizable Injury.

1. Marcia Barber is a Qualified Individual with A Disability.

Defendants argue that Marcia Barber is not qualified to participate in the program at issue here because she does not have a driver's license, which is required by the statute if she is to accompany her daughter while she drives with a minor instruction permit. (See MTD at 10.) This ignores the statutory definition of "qualified individual

with a disability": "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, . . . meets the essential eligibility requirements for" the program at issue. 42 U.S.C. § 12131(2) (emphasis added).

The program at issue in this case is Colorado's minor driver's licensing program. When Julianna received her minor's instruction permit, this program required the participation of both the minor driver and a parent, stepparent, or guardian with a driver's license, thus making not only the minor but her parent, stepparent or guardian a part of the program. See C.R.S. § 42-2-106(1)(b) (2004). Defendants acknowledge "the General Assembly's intent in ensuring that a parent maintains some control over the driving instruction for his or her child." (MTD at 25 n.8.) Plaintiffs have properly pleaded that Marcia Barber, as the parent of a 15-year-old, met the essential eligibility requirements for participation in this program with the reasonable modification that she be permitted to designate another licensed driver to assist in supervising Julianna's driving instruction. She is thus a "qualified individual with a disability."

Defendants argue that Ms. Barber is not "qualified" because she does not have a license. This is circular. It is precisely this qualification that Plaintiffs challenge here: the requirement that a licensed parent be present with the minor driver, while denying the reasonable modification of permitting Ms. Barber -- who is unlicensed because of her visual disability -- to designate another licensed driver to assist in supervising Julianna's driving education. See Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430, 441 (E.D. Va. 1995) (noting, in addressing mental health question on bar application, that "[w]hile Defendant argues that [the plaintiff] is not an 'otherwise qualified individual'

because she failed to answer [the mental health question], this argument begs the question of whether [the question] must be answered at all."). As the Supreme Court has explained, in analyzing disability discrimination under the RA, "[t]he benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the . . . program or benefit may have to be made." Alexander v. Choate, 469 U.S. 287, 301 (1985). Defining the benefit at issue here to require precisely the issue being challenged effectively denies meaningful access to otherwise qualified individuals, that is, parents with disabilities who wish to control their teenagers' driving instruction without giving up parental rights. Thus, "qualified" cannot be defined to require a parent to have a driver's license where a reasonable modification would make it unnecessary.

2. Marcia Barber Was Denied Access to Defendants' Program on the Basis of Disability.

Defendants incorrectly assert that Marcia Barber "has not been, and does not allege that she was denied access to a service or program because of her disability." (See MTD at 10.) To the contrary, Plaintiffs have properly alleged that Defendants denied Marcia Barber access to and participation in Colorado's minor driving licensing program. The issuing of licenses by the state is a service, program or activity under Title II. Hason v. Medical Bd. of Calif., 279 F.3d 1167, 1172-73 (9th Cir. 2002). It is clear from the face and purpose of the statute and from Defendants' own brief[5] that parental participation is an essential facet of that program. Thus although it is Julianna

[5] See MTD at 25 n. 8.

who was denied an opportunity to practice driving, Ms. Barber was denied the opportunity to control her daughter's driving education by ensuring that she received that practice time and by being permitted to designate the person to accompany her, without giving up parental rights.

3. Marcia Barber Has Suffered A Cognizable Injury.

Defendants argue that Marcia Barber was not injured. (MTD at 10.) To the contrary, Ms. Barber was injured when she was denied the opportunity to control her daughter's driving education without giving up guardianship. The Supreme Court has held that "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." Troxel v. Granville, 530 U.S. 57, 65 (2000). These rights include the right of parents "to direct the upbringing and education of children under their control." Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-535 (1925). Excluding Ms. Barber from control over her daughter's driving education or forcing her to assign guardianship of her daughter is a deprivation of this fundamental liberty. It is an injury distinct to Ms. Barber, completely separate from the injury Julianna suffered through the deprivation of practice driving time.

This injury distinguishes this case from Simenson v. Hoffman, No. 95 C 1401, 1995 WL 631804 (N.D.Ill. Oct. 24, 1995), on which Defendants rely. In Simenson, a child was denied medical treatment based on his disability. Both the child and his parents sued. The court held that the parents did not state a claim for associational discrimination because they suffered no separate injury when the defendant refused to treat their son. Id. at *6. Ms. Barber, unlike the Simensons, suffered an injury to her

own interest: the liberty interest in the education and control of her daughter.

B. Julianna Barber Has Properly Alleged A Claim Despite the Fact that She is Not Disabled.

Defendants argue that Julianna Barber has not stated a claim because she is not a "qualified individual with a disability." (MTD at 11.) As demonstrated in Section V below, a plaintiff does not need to be a person with a disability -- or even a person -- to bring a claim under Title II or the RA if he, she or it was injured by discrimination against a person with a disability under one of those statutes. Julianna has properly alleged a claim under these statutes because she was injured when she was denied practice driving time between the ages of 15 and 16, and because that injury was caused by Defendants' discrimination against her mother: their refusal to make the requested reasonable modification of permitting her mother to designate an alternative licensed driver to accompany when Julianna practiced driving.

C. Madeline Barber's Claim is Ripe for Decision.

Madeline Barber stated a claim under Title II and the RA because she will be injured by Defendants' discrimination against her mother. See infra Section V.

Madeline is currently 13 years old and will be eligible for her minor instruction permit on January 14, 2007, the day she turns 15. Defendants argue that she is not yet qualified for the program at issue here. (See MTD at 11-12.) This argument is thus one of ripeness. Madeline's claim satisfies the Tenth Circuit's two-factor test for ripeness: the issue is fit for resolution; and there would be hardship to the Barbers in withholding judicial consideration. See New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499 (10th Cir. 1995).

A case is fit for resolution if it does not involve "'uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Id. at 1499. Madeline's claim does not depend on any uncertain or contingent events: she will turn 15 on January 14, 2007; she will then apply for a minor instruction permit; and the statute will prohibit her mother from designating anyone other than her grandfather to drive with her, and will require her mother to give up certain rights, through a power of attorney, even to do that. The fact that this case turns strictly upon a legal issue -- are the Defendants required to make the requested reasonable modification? -- supports its fitness for resolution. See New Mexicans, 64 F.3d at 1499.

There would be substantial hardship to Madeline and Marcia Barber were judicial consideration of Madeline's claim withheld. The question now before this Court is only relevant for one year of any teenager's life: from age 15 to 16. During that year, she may only drive when one of the individuals listed in section 42-2-106(1)(b) is present in the car; after the age of 16, she may drive with any licensed driver over the age of 21. C.R.S. § 42-2-106(1)(a). In order for Madeline to profit from the entire year of driving practice, the issues here must be resolved before she turns 15. If she were forced to wait until she turns 15 -- 16 months from now -- to file suit, she would spend valuable driving practice time in litigation. Madeline has thus satisfied the second factor as well.

The Tenth Circuit has held that a challenge to mental health questions on the application for admission to the state bar was ripe even though the plaintiff had not yet taken, much less passed, the bar exam: "were we to delay review until the Students pass the bar exam and challenge the questions before the Board and Colorado

Supreme Court, we would in effect require the Students 'to jump through a series of hoops, the last of which [they are] certain to find obstructed by a brick wall.'" Roe #2 v. Ogden, 253 F.3d 1225, 1231 (10th Cir. 2001). Similarly, were this Court to delay review of Madeline's claim, it would require her to jump though hoops, hit a brick wall, and use much of her practice driving time in court. Other courts have held claims to be ripe where an age-related trigger is much farther in the future than 16 months. See, e.g., Riva v. Mass., 61 F.3d 1003, 1009-1011 (1st Cir. 1995) (holding the that claim addressing a benefit cut that would not take effect for seven years was ripe); Breck v. Michigan, 47 F. Supp. 2d 880, 881, 884 (E.D. Mich. 1999) (holding that claim addressing age limit on judges running for reelection was ripe where one plaintiff would not stand for reelection for three years), aff'd 203 F.3d 392 (6th Cir. 2000).

D. The Organizational Plaintiffs Have Standing.

An organization may have standing to sue on its own behalf, when the organization has suffered injury;[6] and it may have standing to sue on behalf of its members. The Organizational Plaintiffs bring claims only on the latter basis. As such, all they are required to show is that their "members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization[s'] purpose[s], and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000); Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).

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[6] See Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982).

The Amended Complaint alleges all of these elements. The Barbers are members of both organizations. (AC ¶¶ 45 & 52.) Each organization has alleged the prerequisites for standing: injury; caused by Defendants' conduct; that will be redressed by the requested relief.[7] See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). The Amended Complaint further alleges that both organizations have other members "likely to encounter the same discrimination encountered by the Barbers" who "have been injured and will continue to be injured by" that discrimination, and that the elimination of disability discrimination is at the core of organizations' purposes. (AC ¶¶ 46-56.) Because the Organizational Plaintiffs only seek injunctive relief, the participation of individual members is unnecessary. See Hunt, 432 U.S.at 343 (holding that associations have standing to represent their members where "'the association seeks a declaration, injunction, or some other form of prospective relief'"). The Organizational Plaintiffs thus have standing under the Hunt standard.

Defendants argue that the Organizational Plaintiffs suffered no injury. (See MTD at 12-14.) In so doing, however, they are applying the wrong standard. Injury to the organization is required for it to sue in its own right. See Havens, 455 U.S. at 379 n. 19. It is not, however, an element of representational standing under Hunt. See id. 432 U.S. at 342 ("an association may have standing to assert the claims of its members even where it has suffered no injury from the challenged activity"). Defendants have provided no evidence or argument to suggest that the Organizational Plaintiffs fail to meet the standard of Hunt and Friends of the Earth.

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[7] AC ¶¶ 34, 40, 43, 61, 65; id. at 10.

V. Plaintiffs Have Stated A Proper Claim for Association Discrimination.

A. Julianna and Madeline Barber Have Stated Claims Because They Have Been or Will Be Injured by Discrimination Against Their Mother.

Any person injured by an act of discrimination that is illegal under Title II or the RA may sue to challenge that discrimination. The Tenth Circuit recently held that standing under Title II and the RA reaches "to the full limits of Article III." Tandy v. City of Wichita, 380 F.3d 1277, 1287 (10th Cir. 2004). Because Julianna Barber has suffered -- and Madeline will suffer -- injury caused by Defendants' discrimination against their mother, which injuries will be redressed by the relief they request, they have Article III standing. See Lujan, 504 U.S. at 560-61. Because they allege that their injuries were (or will be) caused by discrimination against a person with a disability, they have properly pleaded claims under Title II and the RA.

The effect of Tandy's holding that standing under Title II and the RA extends to the full limits of Article III is that a nondisabled person or even a corporate entity has standing to pursue a claim under those statutes if he, she, or it was injured by discrimination against a person with a disability. Where Congress intended standing to "extend to the full limits of Art. III, the normal prudential rules do not apply; as long as the plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 103 n.9 (1979). Under this standard, the Supreme Court has recognized the standing of individuals injured by discrimination against others. For example, in Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972), the Court recognized that white tenants had standing under the Fair Housing Act based on the

fact that they lived in a building in which the owner had discriminated against African-Americans. The white tenants were not the targets of discrimination but had been injured by the discrimination because they had missed out on the advantages of an integrated community. Id. at 208-12; see also Addiction Specialists, Inc. v. Township of Hampton, 411 F.3d 399, 406 (3d Cir. 2005) ("the enforcement provisions of [Title II] and [the RA] do not limit relief to 'qualified individuals with disabilities'"). Thus Julianna and Madeline Barber have properly alleged claims under Title II and the RA because they were (or, in Madeline's case, will be) injured by Defendants' discrimination against their mother, Marcia Barber. (AC ¶¶ 34, 40, 43.)

Although it is not necessary in light of the Tenth Circuit's holding in Tandy -- which in and of itself confers standing on Julianna and Madeline Barber -- Title II regulations also explicitly recognize that a nondisabled person or an entity may have a claim for discrimination based on "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). The Tenth Circuit has not yet directly addressed this provision; however, three other circuits have held that it grants a cause of action to persons or entities who are injured by discrimination against a person with a disability with whom the plaintiff has a relationship or association. See Addiction Specialists, 411 F.3d at 406; MX Group, Inc. v. City of Covington, 293 F.3d 326, 334-35 (6th Cir. 2002); Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 47 (2d Cir. 1997). Under § 35.130(g), Julianna and Madeline Barber have standing because they were (or, in Madeline's case, will be) excluded from the minor instruction permit program based on

the known disability of their mother, that is, an individual with whom they were known to have a relationship or association. (See AC ¶¶ 7, 35-43.)

Defendants assert that "[t]here is no association provision in Title II of the ADA" (MTD at 15), apparently referring to the text of the statute itself, rather than the regulations. That assertion reflects an ignorance of the structure of Title II, which contains a single operative anti-discrimination provision, 42 U.S.C. § 12132, while leaving a detailed description of prohibited conducted to the Department of Justice regulations. Id. § 12134(a); see Chaffin, 348 F.3d at 858 ("'The language of Title II does not elaborate on the obligation of a public entity to an individual with a disability in the provision of "services, programs, or activities." We must rely for specifics on the regulations promulgated under Title II.'"); Does 1-5 v. Chandler, 83 F.3d 1150, 1153 (9th Cir. 1996) (Title II "regulations must be given 'legislative and hence controlling weight unless they are arbitrary, capricious, or clearly contrary to the statute.'").

Defendants cite two cases to argue that there is no claim for association discrimination under Title II. Neither provides a basis to reject the Supreme Court and Tenth Circuit precedent and regulatory language discussed above. The plaintiff in McGuinness v. Univ. of New Mexico School of Medicine, 170 F.3d 974 (10th Cir. 1998), brought his claim under the Title I associational provision. Because Title I addresses discrimination in employment, see, e.g., 42 U.S.C. § 12112, and because the plaintiff was not an employee of the defendant, the Tenth Circuit properly held that he did not have a claim under that provision. Id. at 979. The decision did not address association discrimination under Title II.

In Morgan v. City of Albuquerque, 25 F.3d 918, 920 (10th Cir. 1994), the court dismissed the plaintiff's ADA association discrimination claim in a single paragraph, without directly addressing, much less analyzing, either Title II or section 35.130(g). It is highly unlikely that the Tenth Circuit would uphold this conclusion after a more thorough analysis, especially in light of its broad reading of Title II standing, see Tandy, 380 F.3d at 1287, its recognition of the role of Title II regulations, Chaffin, 348 F.3d at 858, and the fact that three circuits have recognized and enforced section 35.130(g) while no circuit has explicitly rejected it.

B. Associational Discrimination Can Be Based on a Failure to Provide Reasonable Modifications.

Defendants argue that "an association discrimination claim cannot be based on a failure to accommodate the nondisabled." (See MTD at 20). This is incorrect.

As an initial matter, Plaintiffs are not asking that "the nondisabled" be accommodated. Marcia Barber -- whom Plaintiffs have properly alleged is disabled (AC ¶ 6) -- requested the reasonable modification of being permitted to designate another licensed driver to accompany her daughter while she practiced driving. This distinguishes the present case from Den Hartog v. Wasatch Academy -- from which Defendants quote at length -- because in the latter case, it was a nondisabled employee who requested an accommodation under Title I of the ADA. Id., 129 F.3d 1076, 1083-85 (10th Cir. 1997). Defendants apparently believe that because the modification Ms. Barber requested to address her own disability would also have the effect of reducing the injury to Julianna and Madeline (neither of whom is disabled), it is an "accommodation of the nondisabled." This is not the case: the modification was

necessitated by and requested by Marcia Barber, a person with a disability, in order that she could control her daughters' driving education without relinquishing guardianship.

In addition, Defendants' argument is based entirely on a single case interpreting Title I of the ADA, the provision governing discrimination in employment. Den Hartog, 129 F.3d at 1083-85. This case is thus inapposite, and important differences between Title I's reasonable accommodation provision and Title II's reasonable modification provision demonstrate that the modification requested here was required.

Title I requires "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee . . ." 42 U.S.C. § 12112(b)(5)(A). It is, on its face, limited to reasonable accommodations to a disabled applicant or employee. In contrast, Title II requires "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7). The latter does not limit accommodations to those for the disability of a specific person, but rather simply requires that the modification be necessary to avoid discrimination. In this case, as noted above, it was in fact a disabled person -- Marcia Barber -- who requested the modification. More importantly, that modification was necessary to avoid excluding Ms. Barber from her daughter's driving education, that is to avoid discrimination on the basis of disability. However characterized, the modification requested was required by Title II and the RA.

VI. Plaintiffs' Have Alleged Intent Sufficient to Recover Compensatory Damages Under the Rehabilitation Act.

Plaintiffs Marcia and Julianna Barber seek compensatory damages under the

RA. The parties agree that, in order to recover such damages, Plaintiffs must prove intent. Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1152 (10th Cir. 1999), cited in MTD at 22. Intent includes "deliberate indifference to the strong likelihood that pursuit of [Defendants'] questioned policies will likely result in a violation of federally protected rights." Id. at 1153. Plaintiffs' Amended Complaint satisfies this standard.

In the context of a request for reasonable modification, it is sufficient to allege that the plaintiff "alerted the public entity to his need for accommodation," and that the defendant's failure to act was "more than negligent, and involve[d] an element of deliberateness." Duvall v. County of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001). Plaintiff has properly pleaded that she repeatedly alerted Defendants to the need for the modification -- including asserting that her rights were being violated -- and that Defendants' refusal to provide the modification was deliberate, as evidenced by their letters and phone calls to her refusing her request. (AC ¶¶ 35-43.); see also Love v. Westville Correctional Ctr., 103 F.3d 558, 560 (7th Cir. 1996) (failure to provide accommodations constitutes intentional discrimination). Julianna and Marcia Barber have sufficiently alleged intent -- based on the deliberate indifference standard -- to state a claim for compensatory damages under the RA.

VII. Plaintiffs' Claim for Injunctive and Declaratory Relief are Not Moot.

Defendants argue that Plaintiffs' claims for injunctive relief are moot based on a change in the law that occurred after Plaintiffs filed their Amended Complaint. The statute as it now reads permits a driver between the ages of 15 and 16 to be accompanied by a parent, stepparent, grandparent with power of attorney, or guardian.

C.R.S. § 42-2-106(1)(b). Defendants essentially argue that the fact that the statute now mentions grandparents solves the problem, ignoring both the continuing requirement of assignment of rights -- through a power of attorney -- and the fact that not all parents with disabilities will themselves have a nondisabled parent with a driver's license who lives near enough to regularly accompany the child as she learns to drive.

Parents with disabilities should not be required to give up parental rights and take onerous additional steps in order to exercise their rights under Title II and the RA. Cf. Chaffin, 348 F.3d at 857 (holding that fact that disabled state fair goers could get into the fair was not sufficient because Title II requires "meaningful access"); Crowder, 81 F.3d at 1484 (holding that meaningful access not provided where burden on people with disabilities is greater than on the general public). In this respect, requiring a power of attorney is little better than requiring assignment of guardianship: both require the disabled parent to retain an attorney and prepare legal documentation; and both result in the assignment of at least part of the parents' rights. See, C.R.S. §§ 15-14-601 through 611 (detailing the legal requirements and effects of powers of attorney). Parents with disabilities should not be required to retain an attorney and give up rights in order to control their teenagers' driving education.

The statute as currently worded would also not moot the claims of the Organizational Plaintiffs, whose members may include parents with disabilities whose own parents (in other words, grandparents of prospective drivers) are either not alive, not resident in Colorado, or not licensed. See AC ¶¶ 48, 54.[8] Those individuals --

[8] These paragraphs allege that the Organizational Plaintiffs' "members (continued...)

without the ability to appoint an alternative, licensed, adult driver to accompany their children -- will face precisely the discrimination Ms. Barber encountered.

Ultimately, Defendant makes clear that this argument applies only to claims for "'prospective relief.'" (MTD at 24 (quoting Tandy, 380 F.3d at 1291).) As such, even if the Court should agree that the change in the statutory language moots the claims for prospective relief, the claims of Marcia and Julianna Barber for compensatory damages under the RA are not affected by this argument.

[8](...continued)
include parents who are blind and their children, who are likely to encounter the same discrimination encountered by the Barbers." Because the statute had not yet been amended when the Amended Complaint was filed, it does not allege that some of these members may not have grandparents available to accompany their children as they learn to drive. In addition, Marcia Barber's father is 80 years old; it is not clear that it will be appropriate for Marcia to designate him to accompany Madeline when that time comes. Should the Court determine that such these allegations are required, Plaintiffs respectfully request leave to amend.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss.

Respectfully submitted,

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Dated: August 31, 2005

Certificate of Service

I hereby certify that on August 31, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email address:

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