No. 08-1032

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JULIANNA BARBER AND MARCIA BARBER,

Plaintiffs-Appellants

v.

STATE OF COLORADO, DEPARTMENT OF REVENUE,
STATE OF COLORADO, DIVISION OF MOTOR VEHICLES,
M. MICHAEL COOKE, in her official capacity, and
JOAN VECCHI, in her official capacity,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado

The Honorable Robert E. Blackburn, United States District Judge
Civil Action No. 05-cv-00807-REB-CBS

APPELLANTS' OPENING BRIEF

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested.

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JURISDICTIONAL STATEMENT

The District Court's subject-matter jurisdiction arose under 28 U.S.C. §§ 1331 and 1343, because Plaintiffs-Appellants Julianna Barber and Marcia Barber (the "Barbers") allege discrimination on the basis of disability by Defendants-Appellees Colorado Department of Revenue, Colorado Division of Motor Vehicles, M. Michael Cooke, and Joan Vecchi (collectively the "Agency Defendants"), in violation of Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794 (Addendum Tab 3).

This Court's jurisdiction arises under 28 U.S.C. § 1291 because the Barbers appeal from a final judgment of the United States District Court for the District of Colorado. Judgment entered on May 22, 2007. (Joint Appendix ("JA") 256-58.) The Barbers filed a Motion to Reconsider and to Alter Judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure on May 29, 2007. (JA 259-74.) The district court denied that motion on January 24, 2008. (JA 303-06.) The Barbers filed their Notice of Appeal on February 4, 2008, within 30 days of that order. (JA 307-08.) This appeal is therefore timely pursuant to Rule 4(a)(4)(A)(v) of the Federal Rules of Appellate Procedure. This appeal is from a judgment pursuant to

Rule 56 of the Federal Rules of Civil Procedure dismissing the claims of the Plaintiffs-Appellants under Section 504.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by creating an exception to this Circuit's standard for compensatory damages under Section 504 for conduct that the defendant was on notice would violate federal rights but believed was required by state law.

2. Whether the district court improperly resolved disputed issues of fact, including, for example, determining on summary judgment that it is reasonable for a state agency to refuse to promptly grant an accommodation that its personnel agreed was reasonable, offering instead only to urge the state legislature to amend the state statute.

STATEMENT OF THE CASE

This case tests whether a defendant that denies an accommodation that its personnel admit is reasonable is shielded from damages liability, even if it engaged in intentional discrimination, by a state law that allegedly precluded the accommodation.

Marcia Barber, who is blind and therefore does not have a driver's license, filed this case after the state of Colorado repeatedly refused to grant her request for a reasonable accommodation to permit her 15-year-old daughter, Julianna, to

practice driving with her grandfather. The relevant state statute, as it read at the time, permitted a 15-year-old with a "minor's instruction permit" to drive under the supervision of a licensed parent, step-parent, or guardian. Colo. Rev. Stat. § 42-2-106(1)(b)(2004) (Addendum Tab 5). Ms. Barber requested the accommodation of permitting Julianna to practice driving with her grandfather. The Agency Defendants refused this request, informing Ms. Barber that, based on the language of section 42-2-106(1)(b), she would have to assign guardianship of Julianna for this to be permitted.

When the case was first filed, there were five plaintiffs: Marcia Barber; Julianna Barber; Marcia Barber's younger daughter; and two organizational plaintiffs, the Colorado Cross-Disability Coalition, and the American Council of the Blind of Colorado. For reasons unrelated to this appeal, all but the first two voluntarily dismissed their claims during the course of the litigation, leaving Marcia and Julianna Barber.

Defendants in the case are the Colorado Department of Revenue and the Colorado Division of Motor Vehicles ("DMV"), as well as the current heads of those two departments, M. Michael Cooke and Joan Vecchi, respectively.

The Barbers initially brought claims under both Section 504, which prohibits discrimination on the basis of disability by recipients of federal funding, 29 U.S.C. § 794(a), and Title II of the Americans with Disabilities Act ("ADA"),

42 U.S.C. § 12131 et seq., which prohibits such discrimination by public entities. The Barbers' claims alleged disability discrimination based on the Agency Defendants' refusal of Ms. Barber's request for a reasonable accommodation. During the course of the litigation, the Barbers dismissed their ADA claims and their claims for injunctive relief under Section 504, and proceeded only on claims for damages under Section 504.

On May 14, 2007, the district court granted the Agency Defendants' motion for summary judgment. (JA 251-55; Addendum Tab 1.) The court held that the Barbers had "easily met" the first prong of the test for deliberate indifference -- the prerequisite for damages under Section 504 -- because "Defendants frankly acknowledged that the statute as worded in 2004 potentially violated plaintiffs' rights" under the ADA and Section 504. (JA 253.) However, the district court concluded that "[a]n accommodation that would have required defendants to willfully ignore or violate [state] law is per se not reasonable." (JA 254.) This holding was not supported by legal citation.

Plaintiffs moved for reconsideration on the grounds that this holding was contrary to the Supremacy Clause, U.S. Const., art. VI, cl. 2, and cited to a number of other Section 504 and ADA cases in which accommodations were required that ran contrary to state law. (JA 267-72.)

The district court denied reconsideration. The court acknowledged the "uncontroversial conclusion that state statutes that violate the ADA will not stand." (JA 304; Addendum Tab 2.) However, it held -- again, without citation -- that a state agency cannot be "found to have intentionally discriminated . . . by virtue of adhering to a reasonable reading of a duly enacted state statute . . .." (JA 304 (emphasis in original).) Furthermore, although there was an extensive factual record supporting the reasonableness of Ms. Barber's request and its urgency in light of the General Assembly's purpose in providing for one year of supervised driving practice between the ages of 15 and 16, the court adopted the Agency Defendants' factual assertion that it was reasonable to deny Ms. Barber's requested accommodation and instead offer to attempt to amend the statute that conflicted with the requested accommodation. (JA 305.)

The Barbers appeal the district court's May 14, 2007 order granting the Agency Defendants' motion for summary judgment and its January 24, 2008 order denying Plaintiffs' motion for reconsideration.

STATEMENT OF FACTS

Colorado has established a graduated driver's licensing system under which minors may obtain a "minor's instruction permit" at the age of 15. Colo. Rev. Stat. § 42-2-106(1)(b). With this permit -- after a required driver education course -- the minor may drive with an authorized adult in the car. After at least 50 hours

of driving practice over the course of a year with the minor's instruction permit, and after attaining the age of 16, the minor is eligible to obtain a "minor driver's license," which permits the minor to drive unsupervised. Colo. Rev. Stat. §§ 42-2-104(4)(a)(I) - (II).

The Colorado General Assembly has explained that this system is in place to ensure that young drivers get plenty of practice -- over time and under appropriate supervision -- before they take to the road alone. The General Assembly's findings concerning teenage drivers state 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." Colo. Rev. Stat. § 42-2-105.5(1)(b) (Addendum Tab 6); see also Colo. Laws 1999 ch. 334, § 1(c) ("Graduated drivers licensing systems are designed to teach beginning drivers how to drive making certain that they accumulate sufficient behind-the-wheel experience in low-risk settings before they receive an unrestricted driver's license"); id. § 1(d) ("[a] graduated drivers licensing system is needed in Colorado to progressively develop and improve the skills of its teenage drivers in the safest possible environment to reduce the incidence of collisions and fatalities among teenage drivers."). (Addendum Tab 7.)

Plaintiff-Appellant Julianna Barber ("Julianna") turned 15 on September 8, 2004 and obtained her minor's instruction permit on October 13, 2004. (JA 90; 160 ¶ 5.) As such, the relevant period for her to practice driving with a minor's instruction permit -- and thus the relevant period for this case -- was October 13, 2004 to September 8, 2005. As the statute read in 2004, Julianna would have been eligible to drive only with a parent, step-parent or guardian, provided that individual had a valid driver's license. Colo. Rev. Stat. § 42-2-106(1)(b) (2004). None of these options was available to Julianna: her mother, Plaintiff-Appellant Marcia Barber ("Ms. Barber"), is blind and, as a result, does not have a driver's license; her father lives out of state; and she has no step-parent or other guardian. (JA 160 ¶¶ 3-4, 7.)

Faced with this conundrum, Ms. Barber requested the reasonable accommodation that Julianna be permitted to practice driving with her father, Julianna's grandfather. Ms. Barber first made this request to her local DMV office, who referred her to Steve Tool, then the Senior Director for the Colorado Division of Motor Vehicles. She called Mr. Tool and made her request to him. (JA 161 ¶ 14; 177:4-24; 187:6-8.)

Mr. Tool thought that this was a reasonable request. (JA 194:9-19; 195:12-17.) Because he was not a lawyer, however, Mr. Tool sought guidance from Robert Dodd, an Assistant Attorney General with the Colorado Attorney General's

office. (JA 188:20-22.) The answer Mr. Tool received from Mr. Dodd -- which he recited in a November 22, 2004 letter to Ms. Barber (the "Tool Letter") -- was that Julianna's grandfather could not supervise her driving unless he were "a legally appointed guardian." (JA 199; Addendum Tab 8.)

Mr. Tool's letter also conveyed the Attorney General's strict interpretation of the word "guardian" as used in that section:

> The term "guardian" is defined in Black's Law Dictionary as "a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for some peculiarity of status or defect of age, understanding of self-control, is considered incapable of administering his own affairs." In addition, it includes "one who legally has the care and management of the person, or the estate, or both of a child during its minority."

(JA 199 (emphasis in original).) Based on this definition, Mr. Tool denied Ms. Barber's request that her father be allowed to supervise Julianna's driving for purposes of section 42-2-106(1)(b). (JA 192:11-13, 199.)

Mr. Tool also noted at the end of the letter that he had been contacted by the office of a state senator about perhaps amending the statute. (JA 200.) The Colorado General Assembly, however, does not convene until the second Wednesday in January. See Colo. Const., art. v, § 7. Unless it took up an amendment to the minor's instruction permit statute as its first order of business, passed it immediately, and gave it an immediate effective date, this course not be

expected to yield results for the Barbers until the spring, that is, far into the relevant period for Julianna to practice driving.

The Tool Letter thus required either that Ms. Barber wait for the General Assembly to act -- hoping that it would consider and pass the proposed amendment at some indefinite time in the future -- or that she assign guardianship of Julianna to her grandfather. Ms. Barber did not believe it was reasonable that she be required to assign guardianship of her daughter to secure driving practice for her. She testified, "[i]t's a legal requirement . . . that would be imposed on me because of my disability that would not be imposed on any other ablebodied person. It called my parenting abilities into question. It required me to give up decision-making responsibility. I wasn't looking to give up my parenting role. I was simply looking for someone to supervise my daughter's driving practice." (JA 101 (pp. 48:11 - 49:10).)

Ms. Barber responded in writing to the Tool Letter, requesting that, as an accommodation, an exception be made to the literal requirements of section 42-2-106(1)(b) permitting another licensed driver over the age of 21 to supervise Julianna's driving. (JA 198.) Ms. Barber explicitly tied the need for the accommodation to her blindness, and explained that under the ADA, which she --

as a lay person -- believed governed,[1] a public entity was required to make reasonable modifications to avoid discrimination. She also made it clear that time was of the essence, stating, "I would greatly appreciate a timely response, as it has already been two months since my daughter completed her driver's education course and [she] has been unable to log practice time to maximize her ability to drive safely." (JA 198.)

Upon receipt of this letter, Mr. Tool again consulted Mr. Dodd. Although the Agency Defendants have asserted a privilege as to the substance of that call, the result was that Mr. Tool contacted Ms. Barber "and informed her that this accommodation could not be made." (JA 194:21 - 195:11.)

In January 2005, after her request for an accommodation had been denied twice -- and unwilling to assign guardianship of her daughter -- Ms. Barber called John Suthers, the Attorney General of Colorado. Ms. Barber and Gen. Suthers had attended the same high school, and Ms. Barber left him a phone message, which he returned. (JA 180:7-18.)

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[1] The requirements of Title II of the ADA are the same as those of Section 504. See Chaffin v. Kan. State Fair Bd., 348 F.3d 850, 859 (10th Cir. 2003); see also McGary v. City of Portland, 386 F.3d 1259, 1266 n.3 (9th Cir. 2004) ("Although Title II of the ADA uses the term 'reasonable modification,' rather than 'reasonable accommodation,' these terms create identical standards." (Citation omitted.))

There is considerable dispute concerning what was said during that phone call.

Ms. Barber testified, "I explained the situation to [Gen. Suthers] and asked for a reasonable accommodation under the ADA, and was informed that the ADA didn't apply to statutes, and that because I was not a licensed driver, my daughter would not be allowed to drive unless I was willing to assign guardianship." (JA 180:23 - 181:5; see also JA 201 ¶ 2.) She does not recall that Mr. Suthers made any further comments about trying to find a solution. (JA 181:6-10.)

Although Gen. Suthers claims that he discussed a "limited guardianship" with Ms. Barber (JA 207:17), Ms. Barber denies that Gen. Suthers made any such offer. (JA 181:11-15, 201 ¶¶ 3-4.) Because it would have required the alienation of parental rights -- a significant step not required of nondisabled parents of teenage drivers -- limited guardianship was, in any event, not a reasonable accommodation. Ms. Barber testified that even limited guardianship would have required her to "assign[ ] power over [her] children to another individual" (JA 101 (p. 49:9-10)) and to ask that individual to assume a great deal of legal responsibility. This was an "extra legal hardship . . . a requirement, a burden . . . being put on a person because of a disability." (JA 102 (p. 50:10-15.) It also would have required Ms. Barber to retain an attorney and possibly go to court,

expensive and time-consuming hurdles not required of nondisabled parents. (JA 102 (p. 51:18 - 52:2).)

Gen. Suthers's deposition testimony is, in any event, internally inconsistent on the question whether he offered Ms. Barber a "limited guardianship." For example, he testified that, "I believed that we could work this out by having a guardian take that responsibility, and it could be the father." (JA 118 (p. 27:13-15).) Gen. Suthers also testified that he was familiar with the steps necessary to create a formal guardianship and that he did not "know of a guardianship, a true guardianship, other than a formal guardianship" (JA 205:9-12), and that "if the department [was] going to insist on a court guardianship, let's go get one." (JA 209:13-15.)

The events following that phone call also lead to the inference that Gen. Suthers did not propose any solutions besides the assignment of full guardianship to Julianna's grandfather.

After they spoke, Ms. Barber sent Gen. Suthers two letters. In the first, dated January 21, 2005, she attached an excerpt from the ADA relating to "reasonable modifications" by a public entity. She also made clear -- as she had to Mr. Tool -- that she did not have time to wait for the statute to be amended: "I am respectfully requesting a more immediate and reasonable modification to the existing law so that my daughter -- who is eligible in all other respects -- may be

permitted to practice driving with her learner's permit now." Finally, she stressed how inappropriate it was to suggest that she assign guardianship and how painful it had been to hear that suggestion: "Please consider, if you are a parent, the impact of someone suggesting that another person might be a more suitable guardian, even temporarily, due to some physical attribute of yours." (JA 217.)

In her second letter, dated January 25, 2005, Ms. Barber explained that she had contacted the United States Department of Justice "for clarification . . . and was informed that the ADA CAN override state statutes according to whichever allows greater access to services for persons with disabilities." (JA 216 (emphasis in original).) There would have been no reason to seek such clarification if Gen. Suthers had not told her that "the ADA didn't apply to statutes," as she recalled her conversation with him. (JA 181:2.)

Gen. Suthers admits that he received these letters but that he did not respond to them. (JA 206:13-25; 208:22-24; 214:1-3.) He also admits, as he must, that he knew that where there is a conflict between federal and state law, "the Supremacy Clause would indicate . . . that the federal law trumps the state law . . ." (JA 277:17-24), and that the ADA "requires states to provide reasonable modifications of policies to persons with disabilities." (JA 278:15-17.)

On February 3, 2005, attorney Chris Méndez of the Legal Center for

People with Disabilities and Older People sent a letter to Mr. Dodd on Ms. Barber's behalf explaining the legal basis for Ms. Barber's request for a reasonable accommodation. (JA 168-72.) Mr. Dodd responded to this letter on February 23, 2005 (the "Dodd Letter"), stating unequivocally that, under section 42-2-106(1)(b), "it is critical that [young drivers] be under the direct and immediate supervision of someone with full parental authority." (JA 173 (emphasis added); Addendum Tab 9.) Although Mr. Suthers testified that he had "relay[ed] the substance of [his] conversation with Ms. Barber to Mr. Dodd" (JA 212:1-3), the "Dodd Letter" says nothing about the "limited guardianship" Mr. Suthers claims he offered only one month earlier. (JA 173-74.) At his deposition, Mr. Suthers reviewed the Dodd Letter and testified that he agreed with it. (JA 120 (pp. 36:7 - 37:5); 215:5-13.)

In sum, it is clear from the only two written responses the Agency Defendants offered -- the Tool Letter and the Dodd Letter -- as well as Gen. Suthers's adoption of the latter that the only options the Agency Defendants offered Ms. Barber were to assign full guardianship of Julianna to Julianna's grandfather or to wait and hope that the Colorado General Assembly might act.

The General Assembly passed an amended version of section 42-2-106(1)(b) which took effect on May 27, 2005. The amendment permitted minors with minor's instruction permits to drive with a "parent, stepparent, grandparent

with power of attorney, or guardian . . .." Colo. Rev. Stat. § 42-2-106(1)(b) (2005). This still required an assignment of legal rights -- through a power of attorney -- that was not required of non-disabled parents of teen drivers. It was not until August 10, 2005, that the Agency Defendants finally provided the accommodation the Barbers had long requested: they permitted Ms. Barber to simply designate her father to supervise Julianna's driving practice. The document Ms. Barber signed stated explicitly that "[b]y executing this Designation, I am in no way relinquishing any parental rights." (JA 134.)[2]

Even if, hypothetically, the May 27, 2005 amendment had removed all discriminatory conditions on Julianna's ability to practice driving, it came with only a little over three months left in the period during which the minor instruction permit was relevant. By September 8, 2005 -- when Julianna turned 16 -- Julianna would have been eligible to get a "temporary instruction permit" and practice driving with any licensed driver over the age of 21. Colo. Rev. Stat. § 42-2-106(1)(a)(2004). By May 27, Julianna had missed over two thirds of the practice driving deemed essential by the Colorado General Assembly; by August 10, she had missed all but one month of the relevant time.

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[2] It was not until 2006 -- long after it had ceased to be relevant to the Barbers -- that the statute was amended to permit a parent who did not have a license to appoint another driver over the age of 21 to supervise a minor driver between 15 and 16 years of age. See Colo. Rev. Stat. § 42-2-106(1)(b)(II) (2006).

After August 10, 2005, when the Agency Defendants finally permitted Julianna to practice driving with her grandfather, she rushed to acquire the remaining hours of practice driving necessary to secure her driver's license as close to her 16th birthday as she could. Instead of practicing steadily over the period from October, 2004, to October, 2005 -- as Colorado's graduated drivers licensing system anticipated -- Julianna practiced for approximately six hours between May and August 2005 (donated by a helpful driving instructor), obtaining the remainder of her required 50 hours between August 10 and when she was finally able to obtain her license in November, 2005. (JA 130-33; 184:6-13.) Julianna estimates she missed out on at least 100 hours of driving practice. (JA 221 ¶ 5.)

SUMMARY OF ARGUMENT

The district court granted summary judgment for the Agency Defendants based on the incorrect legal conclusion that a state statute can shield a state agency from compensatory damages liability under federal law and based on its improper resolution of disputed issues of fact concerning what accommodation was reasonable under the circumstances of this case.

A state statute does not shield state actors from liability for violations of federal law. To the contrary, "[a] discriminatory state law is not a defense to

liability under federal law; it is a source of liability under federal law." Quinones v. City of Evanston, 58 F.3d 275, 277 (7th Cir. 1995) (emphasis in original).

This Court has held that compensatory damages are available for intentional violations of Section 504, and "intentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights." Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1153 (10th Cir. 1999). "Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that . . . likelihood." Duvall v. County of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001) (citing City of Canton v. Harris, 489 U.S. 378, 389 (1988)). There is no "good faith" exception to the damages remedy under Section 504. Roberts v. Progressive Independence, Inc., 183 F.3d 1215, 1222-23 (10th Cir. 1999).

The undisputed facts demonstrate that the Agency Defendants were deliberately indifferent. They had knowledge: Ms. Barber requested -- early and often -- the accommodation that her father be permitted to supervise Julianna's driving practice, and did so with explicit reference both to federal anti-discrimination law and to the need for a speedy solution that would permit Julianna to start practicing her driving. (JA 166, 177, 180-81, 187, 216, 217.) It is equally clear that the Agency Defendants failed to act: both Mr. Tool and Mr.

Dodd explicitly rejected Ms. Barber's request in writing, the latter writing adopted by the Attorney General himself. (JA 120, 173-74, 199-200, 215.) It is undisputed both that Mr. Tool -- the Senior Director of the DMV -- thought Ms. Barber's request was reasonable (JA 194) and that the request was eventually granted, albeit only one month before it ceased to be relevant (JA 134). Finally, the Agency Defendants refused to provide the accommodation despite the fact that they knew that federal law trumped state law, and had been explicitly reminded of this principle by Ms. Barber. (JA 216, 277:17-24.)

These facts, at the very least, create genuine issues of material fact concerning the question whether the Agency Defendants engaged in intentional discrimination, making the issue inappropriate for summary judgment.

The district court also erred by resolving in favor of the Agency Defendants the disputed factual question whether it was reasonable for the state to reject the request that Julianna be permitted to practice driving with her grandfather beginning in October 2004 in favor of attempting to amend the statute in question during the next legislative session (JA 305), which session was not set to begin until the second Wednesday in January, 2005, see Colo. Const., art. v, § 7, and could not be expected to yield results for the Barbers until the spring at the earliest. The reasonableness of accommodations is a question of fact for the jury. In light of Mr. Tool's statement that Ms. Barber's request was reasonable, the

limited relevant time for Julianna's driving practice, and other evidence that must be considered in a light favorable to the Barbers, summary judgment was inappropriate.

ARGUMENT

I. Standard of Review

This Court "review[s] the district court's grant of summary judgment de novo, considering the evidence in the light most favorable to the appellant." Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1209 (10th Cir. 2003). "In reviewing such dispositions, this court repeatedly has emphasized that we must draw all inferences in favor of the party opposing summary judgment." O'Shea v. Yellow Tech. Servs., Inc., 185 F.3d 1093, 1096 (10th Cir. 1999). Indeed, "[t]he nonmovant is given 'wide berth to prove a factual controversy exists.'" Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 966 (10th Cir. 2002) (quoting Jeffries v. Kan., 147 F.3d 1220, 1228 (10th Cir. 1998)).

> Where different ultimate inferences may properly be drawn, the case is not one for summary judgment. The court must examine the summary judgment papers in the light most favorable to the party opposing the motion. All the ambiguities and disagreements must be resolved in favor of the party against whom summary judgment is sought.

Webb v. Allstate Life Ins. Co., 536 F.2d 336, 339-40 (10th Cir. 1976) (citations omitted).

In light of the extensive record set forth in the Statement of Facts, the district court's decision contravened this Court's standards on summary judgment.

II. Elements of a Claim for Intentional Discrimination under Section 504.

Under Section 504, a qualified individual with a disability may not, solely by reason of his or her disability, be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .." 29 U.S.C. § 794(a). To establish a claim under this provision, Ms. Barber is required to show that (1) she has a disability; (2) she is otherwise qualified to participate in the program; (3) the program receives federal financial assistance; and (4) the program discriminated against her. Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1151 (10th Cir. 1999). Discrimination under Section 504 can consist of a denial of a reasonable accommodation where necessary to ensure that a disabled person has meaningful access to a recipient's programs. See Chaffin v. Kan. State Fair Bd., 348 F.3d 850, 857 (10th Cir. 2003) (quoting Alexander v. Choate, 469 U.S. 287, 301 (1985)).

The remedies for a violation of Section 504 are those available for violation of title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d. 29 U.S.C. § 794a(a)(2) (Addendum Tab 4). Although neither remedies provision addresses damages, the Supreme Court has held that there is a compensatory damages remedy for violation of Section 504. See Barnes v. Gorman, 536 U.S.

181, 187-89 (2002). This Court has held that recovery of compensatory damages under Section 504 requires proof of intent and that "intentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights." Powers, 184 F.3d at 1153.

The Agency Defendants have stipulated that Ms. Barber is disabled and that they receive federal funding. (JA 160 ¶ 1; 161 ¶ 15.) The district court held, and the Agency Defendants did not cross-appeal, that Ms. Barber was "otherwise qualified" for the program at issue. (JA 21-22.) The only question at issue here is whether the Agency Defendants intentionally discriminated against Ms. Barber when they denied her request for a reasonable accommodation, making them liable for compensatory damages.

Julianna Barber brings suit not as a person with a disability, but as a "person aggrieved" by the illegal discrimination against her mother. See 29 U.S.C. § 794a(a)(2). The district court held, and the Agency Defendants did not cross-appeal, that Julianna had standing to bring claims for damages caused by the Agency Defendants' discrimination against her mother. (JA 30.)

III. Summary Judgment was Improper Because Plaintiffs Introduced Evidence Sufficient to Demonstrate that the Agency Defendants Intentionally or with Deliberate Indifference Violated Ms. Barber's Rights Under Section 504.

The Agency Defendants are liable to the Barbers for compensatory damages because they intentionally violated Ms. Barber's rights under federal law or were -- at the very least -- deliberately indifferent to the strong likelihood that their actions would result in a violation of those rights. See Powers, 184 F.3d at 1153. "Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that . . . likelihood." Duvall v. County of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001)) (citing City of Canton v. Harris, 489 U.S. 378, 389 (1988).) In the context of a request for reasonable accommodation, intentional conduct occurs when the plaintiff "alerted the public entity to his need for accommodation," and the defendant's failure to act was "more than negligent, and involve[d] an element of deliberateness." Duvall, 260 F.3d at 1139; see also Love v. Westville Corr. Ctr., 103 F.3d 558, 560-61 (7th Cir. 1996) (same).

Here, Ms. Barber repeatedly alerted the Agency Defendants to her need for accommodation -- explicitly noting the fact that the accommodation was required by federal law -- and the Agency Defendants repeatedly denied the request, at least twice in writing.

A. The Agency Defendants Had Knowledge that Harm to Ms. Barber's Federally Protected Rights was Substantially Likely.

The district court held that the first half of the Duvall test -- that the Agency Defendants had knowledge that harm to a federally protected right is substantially likely -- was "easily met. Defendants frankly acknowledged that the statute as worded in 2004 potentially violated plaintiffs' rights under the Americans With Disabilities Act and the Rehabilitation Act." (JA 253.) And indeed, there is an abundance of evidence that the Agency Defendants knew that harm to Ms. Barber's federally protected rights was substantially likely.

Between October, 2004, and February, 2005, Ms. Barber repeatedly requested -- orally and in writing -- the accommodation that Julianna be permitted to practice driving with her grandfather. A number of these requests explicitly referenced both federal antidiscrimination law and the fact that time was of the essence. There is only one year during which the ability to practice driving under supervision with a minor's instruction permit is relevant; for Julianna Barber, that year ended when she turned 16 on September 8, 2005. (JA 166, 177, 180-81, 187, 216, 217.)

Ms. Barber made her requests to the Senior Director of the DMV (JA 166), an Assistant Attorney General (JA 168-72), and the Attorney General (JA 180-81). The Attorney General was aware, and it is a reasonable inference that the Assistant

Attorney General -- as a licensed lawyer -- should have been aware, that "federal law trumps the state law." (JA 205:17-24.) In any event, Ms. Barber reminded the Attorney General of this in her January 25, 2005 letter. (JA 216.) It is thus undisputed that the Agency Defendants had knowledge of Ms. Barber's request and of the fact that denying it would likely result in a violation of her rights under federal law.

B. The Agency Defendants Failed to Act on the Knowledge that Harm to Ms. Barber's Federally Protected Rights was Substantially Likely.

Plaintiffs have also demonstrated that the Agency Defendants failed to act and that this failure to act was "more than negligent, and involve[d] an element of deliberateness." Duvall, 260 F.3d at 1139. It is undisputed that the Agency Defendants knowingly rejected Ms. Barber's request. The Senior Director of the DMV and the Assistant Attorney General both expressly denied Ms. Barber's request in writing, and the latter writing -- the Dodd Letter -- was adopted by the Attorney General in his deposition. (JA 173-74, 199-200, 215.) Both letters expressly informed Ms. Barber that she would have to assign full guardianship -- "full parental authority," in the words of one of the letters (JA 173) -- in order to permit someone else to supervise Julianna's driving practice.

The facts discussed in this Section III demonstrate that Plaintiffs established a claim for intentional violation of Section 504, and that summary judgment was

thus improper. See, e.g., Davis v. Flexman, 109 F. Supp. 2d 776, 791 (S.D. Ohio 1999) (holding that a genuine issue of material fact existed concerning intentional discrimination where the defendant had been informed of the need for an accommodation, had been provided with a copy of the ADA, and had been informed by the plaintiff that defendant had a legal obligation to provide the accommodation); Falls v. Prince George's Hosp. Ctr., No. Civ.A. 97-1545, 1999 WL 33485550, at *10 (D. Md. Mar. 16, 1999) ("[W]hile defendants may have had the best of intentions, and while they may have believed themselves to be within the confines of the law, they nevertheless intentionally violated [Section 504] by willfully withholding from plaintiff the reasonable accommodations to which she was entitled under the law. They had notice of the potential risk of their decision, and clearly refused the accommodation knowingly." (Citations omitted).)

IV. There is No Exception to the Deliberate Indifference Standard for State Agencies that Knowingly Violate Federal Law In Reliance on State Law.

Having held that the first part of the Duvall test -- knowledge of a likely violation of federal rights -- was "easily met" (JA 253), the district court ultimately held that the Agency Defendants could not be "found to have intentionally discriminated . . . by virtue of adhering to a reasonable reading of a duly enacted state statute, while simultaneously working to facilitate an expeditious legislative amendment thereto." (JA 304-05 (emphasis in original).)

This holding consists of two parts, both incorrect. The first -- that there is an exception to the deliberate indifference standard for state agencies that knowingly violate federal law in reliance on state law -- is a mistaken legal conclusion.

The second -- that it was reasonable for the Agency Defendants to deny Ms. Barber's request to permit her daughter to start practicing with her grandfather immediately so long as they cooperated in an attempt to amend the law -- represented an improper resolution of a disputed issue of fact. This second part will be addressed in Section V below.

A. When State Law Stands as an Obstacle to the Purposes of Federal Law, Federal Law Governs.

Federal law preempts a state law "where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941), quoted in Emerson v. Kan. City S. Ry. Co., 503 F.3d 1126, 1129 (10th Cir. 2007). Because section 42-2-106(1)(b) (2004) stood as an obstacle to the accomplishment of the purposes of Section 504 -- ensuring meaningful access for people with disabilities to the programs of recipients of federal funding -- the latter statute preempted and mandated a reasonable accommodation.[3]

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[3] See also 49 C.F.R. § 27.17 ("[t]he obligation to comply with this part (continued...)

A number of courts have held that reasonable accommodations are required under Section 504 and/or Title II of the ADA even where those accommodations would run contrary to state or local law or regulation. See, e.g., Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1177-78 (10th Cir. 2003) (holding that it was a disputed issue of fact whether the state would be required to make an accommodation in its Medicaid regulations); Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 777, 780 (7th Cir. 2002) (affirming summary judgment for plaintiffs that an accommodation in "flagrant violation" of city zoning code was reasonable); Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 44-45 (2d Cir. 1997) (holding that reasonableness of proposed accommodation was a question of fact despite the fact that it would violate city zoning ordinance), overruled on other grounds recognized by Zervos v. Verizon New York, Inc., 252 F.3d 163, 171 n. 7 (2d Cir.2001); Crowder v. Kitagawa, 81

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[3](...continued)
is not obviated or affected by any State or local law"); Brinn v. Tidewater Transp. Dist. Comm'n, 242 F.3d 227, 232-34 (4th Cir. 2001) (holding that Supremacy Clause dictated that prevailing plaintiff could recover under Section 504's attorneys' fee provision despite the fact that a state statute explicitly prohibited such recovery); S. Dak. Farm Bureau, Inc. v. Hazeltine, 202 F. Supp. 2d 1020, 1042-43 (D.S.D. 2002) (holding that Title II preempted provision of the state constitution where it was "impossible for the defendants to enforce and comply with" the state constitution without violating Title II); Galusha v. N. Y. State Dep't of Envtl. Conservation, 27 F. Supp. 2d 117, 124 (N.D.N.Y. 1998) (holding that where there was a possible inconsistency between Title II and state law, Title II trumped); Green v. Housing Auth., 994 F. Supp. 1253, 1257 (D. Or. 1998) (holding that Title II preempted Oregon state law concerning hearing ear dogs).

F.3d 1480, 1485-86 (9th Cir. 1996) (reversing summary judgment against a plaintiff requesting a modification of a state animal quarantine statute); Helen L. v. DiDario, 46 F.3d 325, 327 (3d Cir. 1995) (rejecting the argument that an accommodation was unreasonable because it required changes in the state budget that contravened the state constitution). These cases demonstrate that the fact that an otherwise reasonable accommodation requires a state agency to act contrary to state law does not render the accommodation unreasonable. See, e.g., Crowder, 81 F.3d at 1485 (holding that an accommodation modifying the requirements of a state statute was reasonable even though the state legislature had considered the question in passing the legislation).

B. There is No Exception to the Intentional Conduct Standard For State Agencies Attempting to Comply with State Law.

This Court has held that a defendant that intentionally violates a plaintiff's rights under Section 504 is liable for compensatory damages, and that such intent can be demonstrated through deliberate indifference to the likelihood of a violation of federal rights. Powers, 184 F.3d at 1153; see also Duvall, 260 F.3d at 1138; Bartlett v. N.Y. State Bd. of Law Exam'rs, 156 F.3d 321, 331 (2d Cir. 1998), rev'd on other grounds, 527 U.S. 1031 (1999). None of these cases -- nor any other of which Appellants are aware -- provides an exception for actions taken

in the belief that they are required by state law and, indeed, the district court provided no citation to support this conclusion. (JA 304-05.)

As Judge Easterbrook succinctly put it, in the context of an employment discrimination claim challenging actions taken pursuant to state law, "[a] discriminatory state law is not a defense to liability under federal law; it is a source of liability under federal law." Quinones, 58 F.3d at 277 (emphasis in original).

Several courts have held that Section 504 damages are appropriate for violations that were required by state law or regulation. For example, in Lovell v. Chandler, 303 F.3d 1039, 1056-58 (9th Cir. 2002), the Ninth Circuit held that damages for intentional conduct were appropriate where a state regulation itself violated Title II and Section 504. In Lovell, the program in question -- a state-run health insurance program -- explicitly excluded individuals with disabilities. The Ninth Circuit held that the plaintiffs were entitled to compensatory damages despite the state's argument that it had acted in good faith. Id. at 1056.

In Bartlett, a bar candidate requested an accommodation that the New York State Board of Law Examiners repeatedly rejected based on its written policies. The Second Circuit held that this constituted deliberate indifference to the strong likelihood of violating the plaintiff's federally protected rights, and upheld the award of compensatory damages. Id., 156 F.3d at 331.

C. The History of Section 504's Damages Remedy Demonstrates that No Such Exception is Appropriate.

The history and purpose of the compensatory damages remedy demonstrate that the exception created by the district court is not appropriate. The Supreme Court first recognized a claim for compensatory damages under Spending Clause legislation -- in that case, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. -- in Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992); it has subsequently recognized that this created a claim for compensatory damages under Title IV and thus Section 504 as well. See Barnes, 536 U.S. at 185. The Court in Franklin started from the premise that "[t]he power to enforce implies the power to make effective the right of recovery afforded" by the statute in question. Id., 503 U.S. at 68 (emphasis in original; citations omitted). Because "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe," a compensatory damages remedy was appropriate. Id. at 75. Here, the Barbers have submitted evidence of precisely the sort of intentional discrimination Section 504 was meant to proscribe; Franklin demonstrates that there is no reason to restrict the power to enforce that prohibition through the compensatory damages remedy.

Furthermore, as the Ninth Circuit pointed out in Lovell:

> The Supreme Court has said that the purpose of requiring proof of intent as a prerequisite for the recovery of monetary damages from a

> public entity is to ensure that the entity had knowledge and notice. The purpose is not to measure the degree of institutional ill will toward a protected group, or to weigh competing institutional motives.

Id. 303 F.3d at 1057 (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287-89 (1998); Franklin, 503 U.S. at 74; and Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 598 (1983)). As the Supreme Court elaborated in Gebser, the deliberate indifference standard requires "an official decision by the recipient not to remedy the violation." Id. at 290; see also Simpson v. Univ. of Colo., 500 F.3d 1170, 1177-78 (10th Cir. 2007) ("The funding recipient should be liable only 'for its own official decision,' not 'its employees' independent actions.'" (Quoting Gebser, 524 U.S. at 291)). There is no question here that the Section 504 violation was the recipient's "own official decision."

This is not a case in which Ms. Barber asked the employee behind the counter at the DMV for an accommodation, was refused, and sued for damages. Instead, after receiving such a refusal, Ms. Barber made her request to the head of the DMV, then to the Attorney General himself, then -- through counsel -- to an Assistant Attorney General. The first and third of these each explicitly rejected the request in writing, and Ms. Barber alleges the Attorney General did as well, though he disputes this. There can be no question -- or it is at best a disputed question -- that the recipient itself and the most senior attorneys employed by the

state of Colorado to advise the recipient had extensive and undisputed notice of the requested accommodation and made an official decision to deny it. The district court's holding immunizing this decision from a damages remedy is contrary to the Supreme Court's reasoning in Franklin and Gebser and this Court's reasoning in Simpson.

The Franklin Court warned -- in response to the dissent's argument that recognizing a damages remedy would invade the separation of powers -- that "selective abdication of the sort advocated [by the dissent] would harm separation of powers principles in another way, by giving judges the power to render inutile causes of action authorized by Congress through a decision that no remedy is available." Id., 503 U.S. at 74 (emphasis in original). The exception created by the district court here is just the sort of "selective abdication" that would hobble the enforcement of Section 504.

D. There Is No Good Faith Exception to the Damages Remedy under Section 504.

The district court's conclusion that the Agency Defendants did not intentionally discriminate appears to stem from the Agency Defendants' primary argument against deliberate indifference: that they were nice people who felt bad about Ms. Barber's situation and were trying to be helpful by cooperating in amending the statute. (See, e.g., JA 282-83.) This Court has explicitly held,

however, that there is no "good faith" exception to the damages remedy under Section 504. In Roberts v. Progressive Independence, Inc., 183 F.3d 1215 (10th Cir. 1999), the plaintiff brought a claim for compensatory damages for failure to accommodate under Section 504. The defendant argued that it was entitled to an instruction -- based on 42 U.S.C. § 1981a(a)(3) -- that the plaintiff was not entitled to compensatory damages where the defendant had demonstrated good faith efforts to accommodate him. Roberts at 1222. This Court held that such an instruction was improper, as § 1981a(a)(3) applied only to section 501 of the Rehabilitation Act, 29 U.S.C. § 791, not to Section 504. Roberts at 1223. There is no "good faith" exception to Section 504's damages remedy.

Two other circuits have explicitly held that the deliberate indifference standard does not require discriminatory animus. See Duvall, 260 F.3d at 1139 ("the deliberate indifference standard . . . is better suited to the remedial goals of Title II of the ADA than is the discriminatory animus alternative . . ."); Bartlett, 156 F.3d at 331 ("In the context of the Rehabilitation Act, intentional discrimination against the disabled does not require personal animosity or ill will.").

It does not matter that the Agency Defendants bore Ms. Barber no ill will. Because they had notice of her request and denied it knowing a violation of her federal rights was likely, they are liable for compensatory damages.

V. It is a Disputed Issue of Fact Whether The Agency Defendants' Proposed Alternative Was Reasonable.

The second part of the district court's holding excusing the Agency Defendants from a compensatory damages remedy was the factual determination that it was reasonable for the Agency Defendants to deny the requested accommodation while "working to facilitate an expeditious legislative amendment" to the statute in question. (JA 304-05.) Because the Barbers introduced evidence that this approach continued to deny them meaningful access to the program at issue until (at best) three months and (at worst) one month before it became irrelevant, summary judgment was improper.

A. The Agency Defendants' Proposed Alternative Denied the Barbers Meaningful Access.

The Agency Defendants' alleged alternative accommodation of seeking to amend the statute (1) was entirely speculative at the time it was offered to Ms. Barber because there was no guarantee as to whether or when the amendment would be enacted, and (2) ultimately left Julianna with at most three months of relevant driving practice. Because this did not provide meaningful access, it was not a reasonable accommodation.

A reasonable accommodation must provide meaningful access to the programs and activities of a recipient. See, e.g., Chaffin, 348 F.3d at 857 ("'to assure meaningful access, reasonable accommodations in the [public entity's]

program or benefit may have to be made.'" (quoting Alexander, 469 U.S. at 301).) Under Section 504, the Agency Defendants may not afford people with disabilities benefits of their programs that are "not equal to [those] afforded others." 28 C.F.R. § 41.51(b)(1)(ii). The program at issue here is the minor's driver instruction program, a program under which most teens -- with nondisabled parents -- receive a full year of driving practice between the ages of 15 and 16. At the point when Ms. Barber first requested the accommodation that Julianna be permitted to practice driving with her grandfather, the Barbers would have been able to take advantage of eleven months of that program, benefits largely equal to those afforded others.

In contrast, by deciding to deny Ms. Barber's request and instead attempt to amend the statute, the Agency Defendants chose a course that -- by definition -- would not yield results, if at all, until far later in the relevant year, benefits not remotely equal to those afforded others. During the period between October, 2004, and August, 2005, instead of the over 100 hours of driving practice Julianna predicts she would have had with her grandfather (JA 221 ¶ 5), her driving practice was limited to five and one half hours of the required driver's education course, and another approximately six hours donated by a driving instructor. (JA 130-33, 220 ¶ 4.) This is not meaningful access under any definition of the term.

B. Unreasonable Delay of An Accommodation Is Tantamount to Denial.

The district court held that the Agency Defendants acted reasonably as a matter of law by electing to deny the requested accommodation and instead attempt to amend the statute. (JA 304-05.) To the contrary, the predictable delay in affording the Barbers an accommodation constituted a violation of Section 504; the reasonableness of this path is at the very least a disputed question of fact.

Delay in granting an accommodation can constitute discrimination. See Selenke v. Medical Imaging of Colo., 248 F.3d 1249, 1262-63 (10th Cir. 2001) (noting that "a few courts have concluded that an employer's delay in providing reasonable accommodation may violate the ADA" but finding, under the facts of that case, no violation).[4] For example, in Guckenberger v. Boston University, 974 F. Supp. 106 (D. Mass. 1997), the court evaluated -- under Title II and Section 504 -- Boston University's system for requesting accommodations. It ultimately held that the complexity of the process and inexperience of the evaluators "caused the

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[4] The district court relied on Selenke in granting summary judgment to the Agency Defendants. (JA 305.) The facts in Selenke are distinguishable in a crucial respect: the defendant in Selenke repeatedly attempted to provide the plaintiff with precisely the accommodations she requested, any delay coming in the logistics of, for example, installing the vent she requested in the darkroom where she worked. See id., 248 F.3d at 1263. The Agency Defendants here made no effort to grant the accommodation Ms. Barber requested; had they decided to permit Julianna to practice driving with her grandfather, the accommodation could have been implemented almost instantly.

delay and denial of reasonable accommodations" which "violated the ADA and Section 504." Id. at 141. In the fair housing context, courts have recognized that "housing discrimination causes a uniquely immediate injury," and held that "an indeterminate delay [in a requested accommodation] has the same effect as an outright denial." Groome Resources Ltd., LLC v. Parish of Jefferson, 234 F.3d 192, 199, 200 (5th Cir. 2000); see also Bryant Woods Inn, Inc. v. Howard County, 124 F.3d 597, 602 (4th Cir. 1997) ("Under the Fair Housing Act, however, a violation occurs when the disabled resident is first denied a reasonable accommodation, irrespective of the remedies granted in subsequent proceedings.").[5]

Similar to housing discrimination, the injury here was "uniquely immediate": every month of delay was a month during which Julianna did not get the driving practice the Colorado General Assembly intended her to get. A

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[5] See also, e.g., Nakis v. Potter, No. 01 Civ. 10047 (HBP), 2004 WL 2903718, at *15 (S.D.N.Y. Dec. 15, 2004) (holding that question whether delay was unreasonable was a fact issue); Armstrong v. Reno, 172 F. Supp. 2d 11, 23 (D.D.C. 2001) (denying summary judgment on a claim for reasonable accommodation under Section 504 when defendant took over a year to provide an accommodation); Krocka v. Riegler, 958 F. Supp. 1333, 1342 (N.D. Ill. 1997) (Denying motion to dismiss in a case involving an eight-month delay); Cohen v. Montgomery County Dep't of Health and Human Servs., 817 A.2d 915, 925 (Md. App. 2003) (reversing the dismissal of a complaint for failure to accommodate, holding that "[s]imply because appellant received the accommodation she requested does not make that accommodation, no matter how belated, a 'reasonable accommodation.'").

contingent course of action -- legislative amendment -- that might never have occurred and at best involved a predictable delay of six to eight months did not provide meaningful access to the state-mandated one year of driving practice.

C. It Is Not Sufficient to Defeat a Claim for Compensatory Damages for the Agency Defendants to Do Something . . . Anything.

The Agency Defendants and the district court appeared to believe that so long as the Agency Defendants did something -- anything -- in response to Ms. Barber's request, they cannot have been deliberately indifferent. This not the case. The adequacy of the Agency Defendants' response is a disputed question of fact.

As an initial matter, there is no dispute that the Agency Defendants denied, outright, Ms. Barber's requested accommodation. In reality, they did not offer her any alternative accommodation -- that is, a deviation from state law or policy to account for her disability -- rather, they offered her what she and every other citizen of Colorado already had: the right to lobby the General Assembly to try to change the law.

Even if the Agency Defendants' proffer of assistance in amending the statute could be construed as an alternative accommodation, it is not enough to establish -- as a matter of law -- that they were not deliberately indifferent. A number of courts have held defendants liable for compensatory damages based on intent or deliberate indifference where the defendants took some -- but inadequate

-- action in response to a request for a reasonable accommodation. In Duvall for example, the plaintiff was a litigant in state court who, because he was hard of hearing, requested the accommodation of videotext display. The defendant court administrators denied the request and instead offered him an assistive listening device and scheduled the relevant trial in a courtroom designed for individuals with hearing impairments. The Ninth Circuit held that the plaintiff had "presented sufficient evidence to create a material issue of fact as to whether the refusal to provide videotext display prevented him from participating equally in the hearings at issue." Id., 260 F.3d at 1138. The court then went on to consider the question of deliberate indifference and whether, in light of the accommodations offered, the defendant could be said to have "fail[ed] to act," the second prong of the test established in that case. The court held that "a public entity does not 'act' by proffering just any accommodation," but rather has an obligation to "undertake a fact-specific investigation to determine what constitutes a reasonable accommodation . . ." Id. at 1139. Finally, the court held that the plaintiff's evidence that his requests for videotext were denied created a triable issue of fact on the question of deliberate indifference. Id. at 1140-41.

In the present case, the Agency Defendants knew of the time-limited nature of the program in question, and should have concluded that a solution that at best would continue to prevent Julianna from practicing driving for the next six to

eight months was not reasonable. Like the plaintiff in Duvall, Plaintiffs here have created a triable issue of fact on the question of deliberate indifference. See also Brown v. Woodford, No. C 05-2937 SI (pr), 2007 WL 735768, at *3 (N.D. Cal. Mar. 7, 2007) (holding that plaintiff prisoner had stated a claim for compensatory damages under Title II based on his request for the accommodation of special shoes for his club feet even though defendant prison had offered the accommodation of sedentary work and foot surgery); Swenson v. Lincoln County Sch. Dist. No. 2, 260 F. Supp. 2d 1136, 1146-47 (D. Wyo. 2003) (holding that the fact that the defendant school accommodated the plaintiff during part of the school day could be considered by the jury, but did not preclude a finding of intentional discrimination).

VI. There Are Disputed Issues of Fact Concerning Whether "Limited Guardianship" Was Offered And, if it Was, Whether it Was Reasonable.

The Agency Defendants argued below that Gen. Suthers offered Ms. Barber the option of assigning "limited guardianship" to Julianna's grandfather to permit him to supervise her driving. It is, first of all, a hotly contested question of fact whether such a option was even offered. Ms. Barber states that it was not (JA 180-81), and all of the written communications from the Agency Defendants stated that nothing less than full guardianship would do. (See, e.g., Tool Letter (JA 199) (quoting Black's Law Dictionary definition of "guardian" as a person

"lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person"); Dodd Letter (JA 173) (stating that the Agency Defendants would only permit someone with "full parental authority" to supervise Julianna's driving).) Based on these letters -- especially the Dodd Letter, which came after Gen. Suthers's alleged offer -- Ms. Barber is entitled to the inference that no such offer was made. There is, thus, a genuine issue of material fact whether the Agency Defendants offered the option of limited guardianship.

But more importantly, even if such an offer had been made, it would not have been a reasonable accommodation. "Limited guardianship" still requires an assignment of parental rights,[6] a steps not required of nondisabled parents who want their 15-year-olds to start practicing driving. Title II of the ADA -- which is interpreted in harmony with Section 504, see Chaffin, 348 F.3d at 859 -- prohibits the imposition of a surcharge on an individual with a disability in connection with the provision of reasonable modifications. 28 C.F.R. § 35.130(f). This provision

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[6] Colorado statute provides that "a guardian of a minor ward has the powers of a parent regarding the ward's support, care, education, health, and welfare." Colo. Rev. Stat. § 15-14-208(1). Section 15-14-206(2) provides that the court "may limit the powers of a guardian otherwise granted by this part 2 and thereby create a limited guardianship." Although a limited guardianship is, by definition, limited, it still involves the exercise of "powers of a guardian," id. § 15-14-206(2), which are simply "the powers of a parent." Id. § 15-14-208(1). Requiring Ms. Barber to assign limited guardianship to her father would have required her to assign to him some of her powers as Julianna's parent.

has been held to prohibit a six dollar fee for a disabled parking placard. See Dare v. Cal., 191 F.3d 1167, 1172 (9th Cir. 1999). It is, of course, far more onerous to require an individual to assign power to another person -- even limited power -- over her child to obtain an accommodation so that the child may learn to drive.

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). It is unreasonable to ask a disabled parent to give up all or any part of that control to have what nondisabled parents get without relinquishing parental rights: access for their children to Colorado's graduated driver licensing program to practice driving between the ages of 15 and 16.

Ms. Barber testified that while she loved her father dearly, she did not want to cede control -- even partial -- over Julianna to him. "If he and I had a difference of opinion on when she could drive or where she could drive or anything like that, I didn't want to come to contest those issues with my father, and he really didn't want that responsibility. All he wanted to do was be my eyes." (JA 104 (p. 64:14-19).) Because the Agency Defendants' hypothetical alternative accommodation required Ms. Barber to assign parental rights, it is per se unreasonable. This is

especially true here where the head of the DMV agreed that the accommodation Ms. Barber requested was reasonable and where that accommodation -- designating the grandfather without assigning him any parental rights -- was eventually granted a month before Julianna's 16th birthday.

Even if not per se unreasonable as an alienation of parental rights, assignment of limited guardianship would have required Ms. Barber to retain an attorney, draft legal documents, and perhaps go to court to ensure that this highly sensitive family matter was handled properly. As Ms. Barber explained,

> Having to research that and educate myself on the finer points of power of attorney versus limited guardianship versus full guardianship versus whatever was a hardship, a burden, and an extra step, a requirement being put on me because I didn't hold a license because of my disability. I was simply asking for a reasonable accommodation under the ADA that another licensed adult be allowed to supervise my daughter's driving.

(JA 104 (p. 65:1-9).) By requiring disabled parents to jump through legal hoops not required of nondisabled parents, even "limited guardianship" violates the prohibition on providing people with disabilities benefits that are "not equal to [those] afforded others." 28 C.F.R. § 41.51(b)(1)(ii).

The question whether this alternative was offered is disputed; and reasonableness of such a hypothetical offer is also a disputed issue of fact. See, e.g., Williams v. Philadelphia Housing Auth. Police Dep't, 380 F.3d 751, 771(3d

Cir. 2004) ("[T]he question of whether a proposed accommodation is reasonable is a question of fact." (Citations omitted.)). Summary judgment was thus improper.

CONCLUSION

For the reasons set forth above, the Barbers respectfully request that this Court reverse the district court's decision granting summary judgment on their claim for compensatory damages under Section 504.

STATEMENT REGARDING ORAL ARGUMENT

The Barbers respectfully request oral argument both because the district court's decision purported to create a new exception in established Supreme Court and Tenth Circuit law concerning compensatory damages under Section 504 and so that the undersigned might answer any questions the Court has concerning the extensive factual record.

CERTIFICATE REGARDING LENGTH OF BRIEF

As required by Fed. R. App. P. 32(a)(7)(C), undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i), and that this brief contains 10,310 words. Counsel relied on the word count of WordPerfect X3, which was used to prepare this brief.

Respectfully submitted this 25th day of April, 2008

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Certificate of Service and Digital Submission

The undersigned hereby certifies that,

1. Appellants' Opening Brief with Addendum was filed in writing and in Digital Form (as that term is defined in the General Order of August 10, 2007) and/or scanned PDF by esubmission to the United States Court of Appeals for the Tenth Circuit on April 25, 2008.

2. The Joint Appendix was filed in writing and on a compact disk to the United States Court of Appeals for the Tenth Circuit on April 25, 2008.

3. With the exception of the redaction of certain information covered by Paragraph C of this Court's General Order of August 10, 2007 from the electronic version of the Joint Appendix, the documents submitted in Digital Form or scanned PDF format are exact copies of the written documents filed with the Court.

4. The digital submission referenced in Paragraph 1 has been scanned for viruses with the most recent version of Symantec AntiVirus (version 10.1.6.6000) and, according to the program, is free of viruses.

5. On April 25, 2008, copies of Appellants' Opening Brief with Addendum and the Joint Appendix (in electronic and written versions) were sent to

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