

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

CENTER FOR INDEPENDENCE OF THE
DISABLED, NEW YORK, et al.,

Plaintiffs,

-against-

METROPOLITAN TRANSPORTATION
AUTHORITY, et al.,

Defendants.

No. 17-cv-02990 (GBD)

**PLAINTIFFS' PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF
LAW**

FINDINGS OF FACT

A. New York City Subway System Elevators Break Down Frequently and Unexpectedly.

1. By the Metropolitan Transportation Authority's own data and admission, the elevators that provide access to the New York City ("the City") subway system for the certified class in this civil-rights lawsuit are unavailable, on average, at least 3.5% of the time.¹

Defendants' Statement of Material Undisputed Facts Pursuant to Local rule 56.1, ECF. No. 161 ("Defs. SOF") at ¶ 32.

2. Furthermore, in order to successfully complete one subway trip in the system, elevator-dependent passengers will typically require four or more elevators, and because the vast majority of Accessibility Elevators are not redundant, any one inoperable elevator will result in a failed trip. Pls.' Local Rule 56.1 Statement of Undisputed Facts, ECF. No. 150 ("Pl. SOF") ¶¶ 8–10.

¹ The accuracy of the MTA's statistical elevator data is disputed by Plaintiffs. Because the data reporting system is old and outdated, the MTA's outage recording system relies on control desk workers to input every outage into its outage database which necessarily introduces a lag time and the possibility of human error with every recorded elevator outage. Plaintiffs' Local Rule 56.1 Statement of Undisputed Facts, ECF No. 150, at ¶¶ 99–107.

3. As such, and assuming *arguendo* that MTA's 96.5% average uptime percentage is accurate, it still must be understood in the context by which an elevator-dependent passenger riding from point A to point B would be impacted.

4. Plaintiffs' Expert Andrew Schwarz undertook such a statistical analysis using one year of recent MTA data collected from swipes through accessible fare gates from routes between Manhattan and the outer boroughs during time periods typically considered rush hour. Decl. Michelle Caiola in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, ECF No. 173 ("Caiola Opp. Decl."), Ex. 27 ¶¶ 7–9.

5. The results indicated that a typical daily commuter reliant on elevators would experience a failed trip about 8-15% of the time. Plaintiffs' Response to Defendants' Local Rule 56.1 Statement and Additional Material Facts, ECF No. 177, ("Pl. 56.1 Resp.") ¶ 93.

6. Moreover, many of the trips analyzed by Mr. Schwarz failed at far higher rates; in some cases, failed trips comprised more than 50% of hypothetical morning or evening commutes. Caiola Opp. Decl., Ex. 27 ¶ 4.

7. Commuter impact can also be surmised from considering 2014-2015 MTA elevator availability data from its Elevator and Escalator Reporting and Maintenance System ("EERMS") database which shows that on average, more than 12% of elevators were out of service on any given day in this time period and roughly 25 elevator outages per day system-wide. Declaration of Sasha Blair-Goldensohn in Support of Plaintiffs' Opposition to Defendants' Summary Judgment Motion, ECF No. 175 ("Blair-Goldensohn Opp. Decl.") ¶ 8.

8. More recent snapshots of the MTA's elevator outage status webpage also reveal dozens of elevators out-of-service at any given time. Blair-Goldensohn Opp. Decl. ¶¶ 15–16.

9. Dr. Salzberg, the MTA's expert statistician, found that any given elevator in the system had availability of less than 80% in at least one month during the 4.5 years of data he examined. Declaration of Michelle Caiola in Support of Plaintiffs' Motion for Summary Judgment, ECF No. 163, ("Caiola Decl."), Ex. 62 at 114:16–117:05.

10. Moreover, Dr. Salzberg also found that 80% of MTA elevator outages are due to unexpected breakdowns as opposed to planned maintenance or scheduled outages. Caiola Decl. Ex. 1 at 3.

11. Plaintiffs' expert, David Rishel, a nationally recognized accessible transportation management expert, conducted an analysis of down-time for four MTA elevators that he inspected and found that for each elevator, "60% or more of the down-time recorded for these elevators was recorded as 'Repair.'" Caiola Opp. Decl., Ex. 5 at 41 (noting also that "a high percentage of repair time on elevators is an indication that the elevator has not been well maintained.").

12. Even when technically operable, MTA elevators are often in such a degraded condition, due to cleanliness issues or inoperable features, as to be functionally unusable. *See* Caiola Opp. Decl., Ex. 20 at 4 (2019 report by the Manhattan Borough President's Office finding that 54.3% of surveyed subway elevators were visually unclean and 53.5% had odor problems); Pl. SOF ¶¶ 88–89 (analysis of the MTA ADA Compliance Unit's inspection reports, finding an average of 2.19 ADA deficiencies per elevator).

B. The MTA Fails to Take Necessary Action to Address Chronic Elevator Outages.

1. The MTA Has Deficient Maintenance Practices.

13. A May 2017 report by the New York City Comptroller found that only approximately one-fifth of the elevators and escalators in the audit sample received all their scheduled preventative maintenance leading to the conclusion that “[a]s a result of these deficiencies NYCT cannot ensure that its 407 elevators and escalators are presently, and will continue to be, in good operating condition.” Caiola Decl., Ex. 26 at D0001126038, D0001126044.

14. The Comptroller’s findings regarding the MTA’s deficient preventative elevator maintenance are reinforced by Mr. Rishel, who, after conducting comprehensive, hands-on inspections of four MTA subway elevators with an expert elevator mechanic, concluded that while “there is what appears to be a good maintenance program on paper, the extent of deficiencies we encountered and the severity of the deficiencies we identified in our inspections indicates that this maintenance program is not being effectively executed.” Caiola Opp. Decl., Ex. 5 at 7.

15. Defendants admit that if they performed all the preventative maintenance listed in their new, as of October 2018, maintenance protocol, their elevators would be unavailable due to planned maintenance a mere .8% of the time. Def. SOF at ¶ 19.

16. Rishel observed that the MTA addressed recurring issues at each elevator with stopgap measures, if at all, during routine preventative maintenance—such as Elevator and Escalator (“E&E”) maintainers apparently regularly replacing hydraulic fluid rather than fixing leaks. Pl. SOF ¶ 51.

17. It follows then that an MTA-commissioned study emphasized that “[a] significant proportion of [the MTA’s elevator and escalator equipment] have a high probability of experiencing a corrective maintenance event within the next 2 weeks.” Pl. SOF ¶ 46.

2. The MTA Fails to Ensure Adequate Staffing of Elevator Maintainers.

18. The MTA cannot refute the fact that its elevator and escalator division is insufficiently staffed. As of June 2017, the MTA still had 30 maintainer vacancies in their E&E department, Pl. SOF ¶ 24, and the MTA has put forth no evidence showing this vacancy rate has narrowed.

19. As former MTA E&E Division Chief Antonio Suarez admits, “[t]he primary reason for elevators and escalators being observed out of service is that NYCT is unable to hire all the authorized maintainers in its budget.” Pl. SOF ¶ 24.

20. MTA also fails to ensure that its maintainers have the necessary training and skills needed to effectively maintain and repair elevators, leading to even more unnecessary breakdowns or extended outages. Caiola Decl., Ex. 21 at D0000573746 (February 2017 email from Antonio Suarez stating “[m]any of our maintainers are unable to troubleshoot the equipment and this results in us having to send people back to the equipment time and again”); Caiola Decl., Ex. 20 at D0000573523 (February 2017 email from Antonio Suarez stating “[s]ince we are unable to hire top candidates, repairs are not as effective, equipment breaks down more often and more visits to the equipment are necessary”).

3. The MTA Fails to Replace Outdated Elevators and Equipment such as its Remote Monitoring System.

21. As former MTA E&E Division Chief Antonio Suarez has admitted when discussing the MTA’s elevators, “[w]e continue to add equipment and fail to acknowledge the need to replace it at the end of its useful life.” Pl. SOF ¶ 72.

22. This lack of investment is apparent from the MTA’s current 2015-2019 Capital Plan, which funds the replacement of just 16 Accessibility elevators² even though the MTA’s former head of the E&E division recommended that no fewer than 66 such elevators be replaced. Pl. SOF ¶ 65-66.

23. It follows that consultants hired by the MTA concluded that “under the current operational and asset replacement program — it appears there may be adverse impact on both availability and operational cost performance of MTA[.]” Caiola Decl., Ex. 28 at D0000950826.

24. The MTA also cannot effectively utilize its remote monitoring system to accurately inform the public about elevator outages, because as MTA-hired consultant AECOM admitted, the “infrastructure backbone over which Lift-Net operates is in need of overhaul” and has not been modernized in 30 years. Caiola Decl., Ex. 34 at D0002077122–23.;

25. Instead of relying on its outdated monitoring software to automatically notify customers of outages, the MTA instead independently verifies each outage, causing a lag time of up to 45 minutes between when an elevator breaks down and when a passenger can receive notification of that fact. Caiola Decl., Ex. 59 at 80:25–81:04; Caiola Decl., Ex. 49 at 17–18.

²Accessibility elevators are elevators on the path of accessible travel through a station, as opposed to non-Accessibility elevators, which are part of the necessary path of travel through deeply underground stations but which require passengers to take at least one flight of stairs on their path of travel through a station. Pl. SOF ¶ 79.

4. The MTA's Preferential Treatment of Non-Accessibility Elevators Also Shows it Could Do Better.

26. In contrast to its neglect for the replacement of Accessibility elevators, *supra* ¶ 22, the MTA has committed extra funds for the capital replacement of 26 of its 44 non-Accessibility elevators in its 2015-2019 Capital Plan. Pl. SOF ¶ 67.

27. In 2017 the MTA awarded a \$12 million contract to outsource the maintenance of 18 of these non-Accessibility elevators to third-party contractors thus circumventing the deficient staffing and training of its in-house maintainers. *Supra* ¶¶ 18–20; Caiola Decl., Ex. 42 at D113465; Caiola Decl., Ex. 59 at 124:02–12.

28. Moreover, the MTA employs full-time elevator operators in many of their non-Accessibility elevators, ensuring a higher level of cleanliness and operability. Pl. SOF ¶¶ 84–85.

C. The MTA Provides no Accommodations for Class Members Harmed by Routinely Inoperable Elevators.

29. The record reflects that the MTA does virtually nothing to assist passengers routinely stranded by outages.

30. The MTA instead relies on passengers to redirect themselves on alternate MTA Transit, ignoring the inequivalence of its bus system and the fact that in a subway system that is 76% inaccessible, a passenger may have to travel for hours merely to re-route themselves within the system. Pl. 56.1 Resp. ¶¶ 4, 78.

31. Unlike peer subway systems, the MTA has never considered providing shuttle service to customers who are stranded by outages. Pl. SOF ¶ 109, 111.

32. The MTA does not have a regular practice of making announcements about elevator outages on trains or in stations and only makes these announcements for outages scheduled to last longer than three months. Pl. SOF ¶ 108.

D. Class Members Are Harmed by the MTA's Failures.

33. The MTA’s deficient elevator maintenance and nonexistent accommodations harm passengers with disabilities who must rely on elevators to access the subway system.

34. Since moving to the City in November 2014 Plaintiff Chris Pangilinan has kept a detailed log of every elevator outage he has encountered while attempting to use the subway to commute to work and for social engagements. Pl. SOF ¶ 105.

35. Despite checking the MTA website before nearly every trip, Mr. Pangilinan has been impacted by outages on 14.9% of all attempted subway trips. Pl. SOF ¶ 106.

36. Plaintiff Sasha Blair-Goldensohn attempts to ride the subway nearly every day to commute to work, pick up his kids from school, and to travel generally throughout the city, but describes the experience as “kind of like a bit of a torment every time you're going to any station and you're in a wheelchair,” due to the frequent and arbitrary outages he encounters at least weekly. Pl. SOF ¶¶ 122–25.

37. Some class members, such as power chair user Monica Bartley, have been deterred from regular reliance on the subway system at all. Pl. SOF ¶ 150.

38. To commute to work, Ms. Bartley instead uses the MTA’s significantly more time-consuming and inflexible paratransit program because after repeatedly encountering unexpectedly inoperable elevators (which can lead to a two-hour detour for her to exit the system) she concluded that she cannot use the subway to reliably travel to work in the same way New Yorkers without disabilities can. Pl. SOF ¶¶ 150–51.

CONCLUSIONS OF LAW

A. Federal and local disability law prohibit discrimination against people with disabilities in public programs, services, and activities.

39. Plaintiffs bring this action for declaratory and injunctive relief pursuant to Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12131 *et seq.*; Section 504 of the Rehabilitation Act of 1973 (“Section 504”), 29 U.S.C. § 794 *et seq.*; and the New York City Human Rights Law (“NYCHRL”), N.Y.C. Admin. Code § 8-101 *et seq.*

40. Plaintiffs state a claim under the ADA and Section 504 if they show that (1) they are “qualified individuals” with a disability; (2) that Defendants are subject to these laws; and (3) that Plaintiffs were excluded from participation in or denied the benefits of the services, programs, or activities of the public entity, or were subjected to discrimination by the entity. 42 U.S.C. § 12132; *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003).

41. Discrimination under U.S.C. § 12132 includes the failure to take reasonable measures to eliminate accessibility barriers. *Tennessee v. Lane*, 541 U.S. 509, 531 (2004) (citing 42 U.S.C. § 12131(2)).

42. Further, people with disabilities must be provided with meaningful access to public services, *Alexander v. Choate*, 469 U.S. 287, 301 (1985), and they can be deprived of meaningful access due to a “public entity's failure to modify existing facilities and practices.” *Disabled in Action v. Bd. of Elections in City of N.Y.*, 752 F.3d 197 (2d Cir. 2014).

43. Partial or impeded access is not sufficiently meaningful access. *See Brooklyn Ctr. for Indep. of Disabled v. Bloomberg*, 980 F. Supp. 2d 588, 648 (where a facility’s ramps are so steep that they become an impediment or its bathrooms are unfit for use by individuals with mobility disabilities, the facility is not “readily accessible” regardless of whether the individual manages to enter) (citation omitted)

44. Furthermore, “[e]ach [access] barrier is a building block for a finding that the [program], viewed in its entirety, is not readily accessible. *Brown v. Cnty. of Nassau*, 736 F. Supp. 2d 602, 616-17 (E.D.N.Y. 2010),

45. The MTA’s liability is broader under the NYCHRL than its federal counterparts, as “state and federal civil rights statutes can serve only as a floor below which the [NYCHRL] cannot fall.” *Ya Chen Chen v. City Univ. of N.Y.*, 805 F.3d 59, 75 (2d Cir. 2015).

46. It is undisputed that Plaintiffs are qualified individuals with disabilities. Caiola Decl., Ex. 57 at 3.

47. The MTA itself admits that its subway system is a relevant program subjecting Defendants to the ADA and Section 504. Caiola Decl. Ex. 57 at 3.

B. Defendants’ failure to maintain their elevators results in a denial of meaningful access.

48. Under the ADA’s implementing regulations a public transportation entity must maintain the elevators “that are required to make . . . facilities readily accessible” in “operative condition.” 49 C.F.R. § 37.161(a).

49. In addition to mandating that inoperable “[a]ccessibility features shall be repaired promptly,” ADA regulations further requires transportation entities to take “reasonable steps to accommodate individuals with disabilities who would otherwise use the [inoperable] feature.” 49 C.F.R. 37.161(b).

50. Any pattern of unreliable elevator service, meaning more than isolated or temporary interruptions in service, *see* 49 C.F.R. § 37.161(a)-(c), is evidence of ADA discrimination under 42 U.S.C. § 12132.

51. The MTA admits that its elevators are inoperable, on average, 3.5% of the time and, if it performed all its planned maintenance, that planned work would only account for .8% unavailability. *Supra* ¶¶ 1, 14.

52. Because trips typically require four or more elevators it is undisputed that class members will be impacted on far more than 3.5% of trips, as Mr. Schwarz concluded in finding that a typical daily commuter would experience a failed trip 8–15% of the time, or approximately once a week if only commuting. *Supra* ¶¶ 1, 4.

53. Undisputed evidence provides that the MTA could, and does not, do more to ensure that its elevators are sufficiently available to customers. The MTA does not follow its own maintenance protocol, replace outdated equipment, or even hire and train the staff as needed to provide adequate maintenance and service. *Supra* ¶¶ 12-15, 17-19, 20-23.

54. This is highlighted by the fact that the MTA does not provide its Accessibility elevators with the equal care and concern it affords non-Accessibility elevators. *Supra* ¶¶ 25-27.

55. The MTA’s “pattern of neglected maintenance” is the direct cause of pervasive problems with elevators, limiting everyday access for people with disabilities to an unacceptable degree. *Cupolo v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078, 1083–85.

56. Seemingly high uptime elevator percentages do not insulate a transit provider from liability if a pattern of neglect is found. *See e.g., Cupolo*, 5 F. Supp. at 1080–85 (granting plaintiffs’ preliminary injunction despite system-wide elevator availability of 97% because evidence of “pervasive problems” included 76 entrapments over 14 months, “elevators that pose a threat of catastrophic failure, [because of] pooling of hydraulic oil at the bottom of elevator shafts,” and “persistent problems in performing adequate maintenance on [BART’s] elevators”).

C. Defendants’ failure to provide any accommodations during the resulting frequent outages is a further denial of meaningful access to the class.

57. Rather than take “reasonable steps to accommodate individuals with disabilities who would otherwise use the [MTA’s inoperable] feature,” 49 C.F.R. 37.161(b), the MTA essentially does nothing to accommodate passengers who are routinely stranded by outages.

58. Far from meeting its requirement to provide accommodations that it knows “may be necessary” to afford plaintiff an equal opportunity to use its service, *see Sinisgallo v. Town of Islip Hous. Auth.*, 865 F. Supp. 2d 307, 336 (E.D.N.Y. 2012), the MTA instead relies on impacted passengers to re-route themselves on the limited, and often inferior, forms of accessible NYCT transit.

59. However, “the opportunity to [participate in a public benefit] at some time and in some way—would render meaningless the mandate that public entities may not afford [] persons with disabilities services that are not equal to that afforded others.” *Disabled in Action*, 752 F.3d at 199. The MTA cannot rely on its bus system to shirk its duty to actively accommodate passengers who are routinely stranded by outages.

D. Class members are harmed by the MTA’s elevator maintenance failures.

60. When faced with the relevant question of “whether those with disabilities are as a practical matter able to access benefits to which they are legally entitled,” *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273 (2d Cir. 2003), the undisputed record in this case establishes that Plaintiffs cannot meaningfully access the subway system in the way they are entitled to do so.

61. The undisputed evidence of every class member who provided testimony in this case, Pl. SOF ¶¶ 122–61, and Mr. Schwarz’s finding that a typical daily commuter on the examined routes would experience a failed trip 8–15% of the time or approximately once per week provide that class members are denied meaningful access as a direct result of Defendants’ failure to maintain elevators or provide accommodations during outages.

E. Defendants' post-litigation, halfhearted attempts at legal compliance cannot establish that they provide meaningful access.

62. Mere policy changes that can be reversed at any time do not deprive this Court from holding that Defendants deny meaningful access here. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

63. Courts are particularly reluctant to accept defendants' arguments when they involve supposedly rectified accessibility barriers. *See, e.g., Cupolo*, 5 F. Supp. 2d at 1084 (rejecting defendant's argument that it had taken initiatives to rectify BART's lacking elevator maintenance program because "the programs that BART is instituting now may improve the reliability of BART's elevators in the long run, but the record does not indicate that the problems with BART elevator service have already been solved").

64. Most of the post-litigation efforts the MTA claims to now be taking directly address the Plaintiffs' allegations, giving credence to Plaintiffs' claims that the practices and policies in place at the time of filing were inadequate.

65. Moreover, recent policy changes do not moot this suit, as these policies could be reversed at any time and there is little proof here that these policies are being effectively implemented.

Dated:

IT IS SO ORDERED.

Hon. George B. Daniels
U.S. District Judge