IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 05-cv-807-RB-CBS

JULIANNA BARBER, et al. by and through her next friend, Marcia Barber; et al.,

Plaintiffs,

v.

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

Defendants.

DEFENDANTS' REPLY TO MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

The Defendants, through the Colorado Attorney General, respectfully submit the following Reply to Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss filed August 31, 2005.

PRELIMINARY STATEMENT

Plaintiffs brought this action seeking damages, declaratory, and injunctive relief against the Defendants based on § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (the "Rehabilitation Act"), and Title II of the Americans with Disabilities Act, 42 U.S.C. § § 12131 – 34 (the "ADA").

Plaintiffs contend that Defendants violated the above statutes because a state statute in effect prior to July 1, 2005 failed to allow driving supervision by a person other than a parent, stepparent or guardian who is a licensed driver when a 15 year old obtains an instructional permit. Because Marcia Barber (mother) is not licensed to operate a motor vehicle, she was not qualified pursuant to statute to supervise her daughter while her daughter accumulated driving experience until she turned sixteen. Plaintiffs maintain that Defendants failed to make reasonable modifications by allowing Julianna's (daughter) grandfather to supervise her driving.

ARGUMENT

I Colo. Rev. Stat. § 42-2-106 is not discriminatory.

A facially neutral governmental restriction does not deny "meaningful access" to the disabled simply because disabled persons are more likely to be affected by it. Patton v. TIC United Corp. 77 F.3d 1235, 1246 (10th Cir. 1996) citing Alexander v. Choate, 469 U.S. 287, 303-04 (1985) (holding that a ceiling on the number of inpatient hospital days paid for by Tennessee's Medicaid program did not deny the disabled meaningful access to Medicaid services).

Plaintiffs' argue that the fact that the statute is facially neutral does not matter if it subjects people with disabilities to discrimination (disparate impact) or if the state has not made a reasonable modification. Based on the claims alleged, there is no discrimination here based upon disability. The statute does not subject disabled people to disparate treatment or impact. Any minor child that is less than 16 years of age and does not have a parent, stepparent, or guardian that is a licensed driver is affected by the statute. The statute applies whether the parent, stepparent or guardian is unlicensed due to revocation of a license, due to an inability to obtain a license for any reason, or simply because the parent, step parent, or guardian chooses not to drive. In such instances the minor driver may obtain driving experience before his or her 16th birthday with an approved driver education instructor who holds a valid driver's license, through assignment by the parent of a limited guardianship for purposes of driver's education only, or through a grandparent (after July 1, 2005). After the minor turns 16, he or she can drive with his or her instruction permit with any licensed driver over the age of 21.

There was no need for the state to make a modification under the original statute because there was no disparate impact. Julianna Barber could drive with a person designated by her mother through a limited guardianship.

II. Plaintiffs fail to state a claim.

A. Marcia Barber

Plaintiffs admit that they are required to prove the elements of an ADA claim with respect to Marcia Barber only. Assuming *arguendo* that this is true, Plaintiffs have failed to even meet this burden. The elements include:

> (1) that he [or she] is a qualified individual with a disability;
>
> (2) that he [or 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 the plaintiff's disability.

While Marcia Barber is disabled, she is not a qualified to supervise her daughter's driving because she is not a licensed driver. Because Marcia is not a licensed driver, and does not meet the eligibility requirements to become a licensed driver, or to supervise a minor driver, she is not a qualified individual to supervise her daughters' driving. Therefore, she fails to meet the first element of a claim.

In their Memorandum in Opposition to the Motion to Dismiss, Plaintiffs maintain that Marcia was denied access to the program that allowed her to supervise her daughter's driving because she was not allowed to designate her father as a supervisor. However, this claim lacks any merit whatsoever. Assuming that this, in fact, constitutes a "program", Plaintiff's claim still fails. Marcia Barber always had the authority to designate any licensed driver over

21 of her choosing to supervise her daughter's driving. Under the former statute, she could assign limited guardianship rights exclusively for purposes of the supervision.

However, Marcia alleges that this would "be a drastic loss of parental rights." Nothing could be further from the truth. Indeed, she could have executed a limited guardianship empowering and limiting another individual to supervise the driving. Moreover, she could have made the appointment without court intervention. See Colo. Rev. Stat. § 15-14-201 ("a person becomes a guardian of a minor by appointment by a parent or guardian by will or written instrument or upon appointment by the court….) See Colo. Rev. Stat. § 15-14-102 (4) ("Guardian" means an individual at least twenty-one years of age, resident or non-resident, who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent or by court. The term includes a limited, emergency, and substitute guardian but not a guardian ad litem.")(Similar to guardianships created by parents when their children go on a school trip.) Thus, the Plaintiffs had, but never exercised, the option of appointing Juliana's grandfather as a limited guardian solely for the purpose of supervising Juliana's driving under the previous statute.

Plaintiffs' assertion that the limited guardianship process is too onerous a process lacks merit. Pursuant to statute, "[a] person becomes a guardian of a minor by appointment by a parent … by written instrument…." Colo. Rev. Stat. § 15-14-201. The additional requirement of a written instrument is not onerous. See e.g. Theriault v. Flynn 162 F.3d 46 (1st Cir. 1998) (State did not discriminate against motorist with cerebral palsy, in violation of Americans with Disabilities Act, when motorist was required to take road test, not ordinarily required, before driver's license allowing driving with hand controls was renewed); Bailey v. Anderson 79 F.Supp.2d 1254 (D.Kan. 1999) (State did not discriminate against motorist with

vision impairment in violation of ADA by requiring her to submit report from driving instructor regarding her driving ability as condition for instruction permit); Briggs v. Walker 88 F.Supp.2d 1196 (D.Kan. 2000) (State director of vehicles did not discriminate against wheelchair restricted applicant for instruction permit to operate vehicle in violation of the ADA, by requiring that applicant submit medical certification as to her ability to operate vehicle safely before permit would be granted). Thus the requirement that Plaintiffs provide a limited guardianship was not onerous and not a violation of the ADA.

Even assuming *arguendo*, that Marcia was denied the ability to choose a supervisor for her daughter's driving, it was not because she is disabled. Plaintiffs fail to recognize the distinction between a disability and the result of the disability. Plaintiff's maintain in their response that "Plaintiff's 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, Juliana, while she practiced driving between the ages of 15 and 16." (Plaintiff's Memorandum in Opposition at p. 1). Marcia was not permitted to supervise the driving because she does not have a drivers license, not because she is blind. Plaintiffs would have this Court believe that the disability is not retinitis pigmentosa, but rather an inability to drive. Such arguments have been rejected by the courts. See Flight v. Gloeckler 68 F.3d 61, 64 (2nd Cir. 1995).

> Flight contends that his disability is not multiple sclerosis, but rather an inability to drive, but this argument is unpersuasive. A disability is a "physical or mental impairment," 29 U.S.C. § 706(8)(A), (B), i.e., "any *physiological* disorder or condition ... affecting" the neurological system. 34 C.F.R. § 104.3(j)(2)(i)(A) (emphasis added). Clearly, an inability to drive is not a physiological condition, but rather a *result* of a physiological condition, viz., Flight's neurological disorder.
> . . . . .

> The district court correctly noted that this provision is inapplicable because the distinction in the present case is not based upon Flight's disability, multiple sclerosis, but rather upon his inability to drive.

Both the ADA and the Rehabilitation Act require a claimant to show that the defendant's allegedly improper conduct was done *because of* claimant's disability. See 29 U.S.C. § 794 ("solely by reason of her or his disability"); 42 U.S.C. § 12132 ("by reason of such disability"). "The Act prohibits programs receiving federal financial assistance from discriminating against handicapped persons *solely* because of that handicap. Welsh v. City of Tulsa, Okl. 977 F.2d 1415, 1417 (10th Cir. 1992). "The duty to provide 'reasonable accommodations' under the ADA and the Rehabilitation Act arises only when a policy discriminates *on the basis of disability*." Weinreich v. Los Angeles County Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997) (emphasis in original). "A plaintiff proceeding under Title II of the ADA must, similar to a Section 504 plaintiff, prove that the exclusion from participation in the program was 'solely by reason of disability." Weinreich v. Lost Angeles County Metro. Transp. Auth., 114 F.3d at 978; Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026, 1036-37 (6th Cir. 1995).

Marcia Barber was not discriminated against because she is blind. She could not participate in supervising her daughter's driving because she does not have a license and no other parent, stepparent or guardian had a license. She is in the same position as any parent who does not have a license and others to supervise.

B. Plaintiffs fail to plead a claim with respect to Julianna Barber.

There is no allegation in the Amended Complaint that Juliana Barber is disabled. "[A]s a threshhold matter, any plaintiff asserting a claim under the ADA must establish that he or she is a 'qualified individual with a disability.'" Lanman v. Johnson County, __ F.3d __, 2004

WL 3017258, at *3 (10th Cir. 2004) (quoting 42 USC § 12112(a)). An ADA plaintiff bears the burden of proving that he is a "qualified individual with a disability." Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806 (1999). Accordingly, she fails to meet the first element of a disability claim. Additionally, she has not been denied access to a service or program. She has obtained her instruction permit. With such permit, before her 16th birthday, because neither of her parents were licensed drivers, she could gain driving experience in the presence of an authorized driving instructor or with a limited guardian. Under the current statute, she could gain driving experience in the presence of her grandfather. Thus she was not excluded from participation in or denied the benefits of Colorado's driver's program and fails to meet any element of an ADA or Rehabilitation Act claim. She is in the same situation as any other 15 year old who does not have a parent, stepparent, or guardian with a driver's license.

Plaintiffs argue that Julianna's claim survives because of her association with her disabled mother. In Tandy v. City of Wichita, 380 F.3d 1277 (10th Cir. 2004), relied on by the Plaintiffs, the Tenth Circuit noted that the parties stipulated that all plaintiffs were qualified individuals with disabilities and held they had standing because they had each suffered an injury in fact. In order to sue under an association theory, the disabled person must have been discriminated against which is not the case here.

C. Plaintiffs fail to plead a claim with respect to Madeline Barber.

Madeline Barber also fails to meet a single element of an ADA claim. Even if she were disabled, she is not otherwise qualified to receive an instruction permit or a driver's license because she is only 13 years old. To get relief under the ADA or the Rehabilitation Act, a claimant must be "disabled" (or "handicapped") *and* otherwise qualified. School Bd. of

Nassau County v. Arline, 480 U.S. 273, 285 (1987). "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979); Arline, 480 U.S. at 287 n.17; Pushkin v. Regents of Univ. of Colorado, 658 F.2d 1372, 1387 (10th Cir. 1981). Plaintiffs' contention that she will likely be affected in the future is speculative at best given the amendments to the statutes permitting grandparent supervision. To seek prospective relief under Article III, the plaintiff must be suffering a continuing injury or be under a real and immediate threat of being injured in the future. The threatened injury must be "certainly impending" and not merely speculative. Tandy at 1283

D. Plaintiff's "Reasonable Modification " theory fails.

Plaintiffs cite Tyler v. Manhattan, 118 F.3d 1400 (10th Cir. 1997) and Crowder v. Kitigwa, 81 F.3d 1480 (9th Cir 1996), for the proposition that they are now asserting a "reasonable accommodation" claim. However, neither of these cases support such a claim in light of the submissions before this Court.

In Tyler, the Tenth Circuit affirmed the dismissal of a claim for compensatory damages under the ADA because, as is the case before this Court, the plaintiff had not alleged intentional discrimination.

> The [trial] court concluded that compensatory damages for emotional distress were not available under the ADA absent intentional discrimination and that Tyler had not alleged intentional discrimination either in his complaint or in the pretrial order.

Tyler v. City of Manhattan 118 F.3d at 1402 -1403. The Tenth Circuit thus concluded:

> We have reviewed the pretrial order and agree with the district court that the order does not describe acts of intentional

> wrongdoing. Instead, it is apparent that the order describes acts and omissions which have a disparate impact on disabled persons in general but not specific acts of intentional discrimination against Tyler in particular. Furthermore, there are no allegations in the pretrial order that the City was motivated by animus toward the disabled generally or Tyler specifically.

Tyler v. City of Manhattan 118 F.3d at 1403. Thus the claim for compensatory damages for mental and emotional injuries was stricken. This case, rather than supporting the proposition for which Plaintiff's cite it, does not in fact address that issue, but instead supports Defendants motion to dismiss Plaintiffs' claim for compensatory damages due to the absence of any allegations of intentional discrimination. On the contrary, Defendants were simply enforcing a state statute. Plaintiffs' reliance on Crowder is also misplaced. In Crowder, a class of visually impaired persons who used guide dogs brought suit seeking exemption from imposition of 120-day quarantine on carnivorous animals entering Hawai'i on the ground that the program, which was designed to prevent importation of rabies, violated ADA and their constitutional rights. The Ninth Circuit held that the trial court erroneously entered summary judgment in favor of defendants because a genuine dispute of material fact existed as to whether plaintiffs' proposed alternatives to Hawai'i's quarantine were "reasonable modifications" under the terms of ADA. In Crowder, the plaintiffs had requested certain modifications to the state statute, however, the state legislature had previously considered the alternatives proposed by the plaintiffs and did not adopt them. Marcia Barber requested that her father (Julianna's grandfather) be permitted to supervise Julianna's driving. Specifically, Plaintiffs requested a modification to the statute at issue "of permitting Julianna to drive with her grandfather, who is a licensed driver, before she turned 16." (See Complaint at ¶35). Effective July 1, 2005, the statute was amended to permit a minor driver under 16, who has a minor's instruction permit,

to accumulate driving experience under the supervision of a licensed "parent, stepparent, GRANDPARENT WITH POWER OF ATTORNEY." [1] Thus, the requested modification or accommodation has been made and the claim fails as a matter of law.[2]

E. The Associations have no standing in this case.

Associations may bring actions under the ADA on behalf of their members only if the members have been discriminated against based on a disability, Addiction Specialists Inc. v. Township of Hampton, 411 F.3d 399 (3rd Cir. 2005), and that the members are suffering imminent or threatened injury. Lujan v. Defender of Wildlife, 504 U.S. 555 (1992). Since none of the individual Plaintiffs have stated a claim, the associations' claims must also fail.

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[1] As stated in the Memorandum Brief in Support of the Motion to Dismiss, the requirement that the grandparent have a limited power of attorney from the parent authorizing the grandparent to supervise the driving is designed to reinforce the General Assembly's intent in ensuring that a parent maintains some control over the driving instruction for his or her child. Plaintiffs do not appear to contest the necessity of this requirement.

[2] This also renders the claims for declaratory and injunctive relief moot as addressed in Defendants Motion to Dismiss.

CERTIFICATE OF SERVICE

I certify that on September 22, 2005, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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s/ James X. Quinn