

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DISABLED IN ACTION OF	:	
PENNSYLVANIA	:	CIVIL ACTION
	:	
v.	:	No. 03-CV-1577
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY	:	

**PLAINTIFF DISABLED IN ACTION OF PENNSYLVANIA’S
MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff Disabled in Action of Pennsylvania (DIA), by and through its counsel, submits this Memorandum of Law and attached exhibits in support of its Motion for Partial Summary Judgment.¹ An analysis of the undisputed material facts and the relevant law reveals that Defendant Southeastern Pennsylvania Transportation Authority (SEPTA) has discriminated against individuals with disabilities in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12132 and 12147(a), and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. § 794. Specifically, as stated in Count I of Plaintiff’s Fourth Amended Complaint, SEPTA violated the ADA and Rehabilitation Act by (1) failing to provide access to persons with mobility disabilities, including those who use wheelchairs, when it altered and renovated the 15th and Market Streets Courtyard entrance (hereinafter 15th Street Courtyard) to the Market-Frankford Elevated Line, and (2) by failing to provide access to persons with mobility disabilities, including those who use wheelchairs, when it altered and renovated the southeast City Hall Courtyard entrance to the City Hall Station on the Broad Street Subway Line.

¹ The instant Motion for Partial Summary Judgment does not address Plaintiff’s key station alternative legal argument. It is limited to the argument that when a public entity “alters” a facility or part thereof to affect its access and usability, the alterations trigger a legal duty to make the facility or part thereof readily accessible to and usable by individuals with disabilities, including those who use wheelchairs.

I. FACTUAL BACKGROUND

A. Plaintiff Disabled in Action

Plaintiff Disabled in Action of Pennsylvania (DIA) is a non-profit corporation which advocates for the civil rights of and services for persons with disabilities. See Deposition of Nancy Salandra (Salandra Dep.) at 13-18; 23-42 (Exhibit B). DIA has approximately 450 current active members, many of whom use wheelchairs and use SEPTA for their public transportation. Exhibit B at 15. DIA assists persons with disabilities to achieve equality with non-disabled persons and to advocate for the elimination of discrimination against people with disabilities in all aspects of community life, including transportation and housing. Id. at 23-42. DIA has advocated for accessible entrances to both the City Hall Broad Street Subway Station and the Market-Frankford Elevated Line 15th Street Station. Id.

DIA's members and participants use and want access to SEPTA's Market-Frankford Elevated Line at 15th Street Station and the Broad Street Subway City Hall Station. Id. DIA is injured by SEPTA's violation of its ADA and Section 504 obligations by forcing DIA to advocate for the development and improvement of nondiscriminatory transportation services, instead of focusing its time and resources assisting persons with disabilities with other issues including accessible and affordable housing, attendant care services, equal employment opportunities and access to places of public accommodation. Id. at 40-42. DIA and its members are also directly and concretely injured by SEPTA's failure to provide access to the Market-Frankford Elevated Line 15th Street Station and the Broad Street Subway City Hall Station because members are unable to use these stations to get to and from meetings, programs and advocacy activities, which further curtails the organizational activities and goals of DIA. Id. at 39-41.

B. Southeastern Pennsylvania Transportation Authority

SEPTA is a state-created instrumentality that provides public transportation services in southeastern Pennsylvania, including the counties of Bucks, Chester, Delaware, Montgomery, and Philadelphia. Pa. Cons. Stat. Ann. § 1711; SEPTA Fiscal Year 2005 Capital Budget at 5 (Exhibit C). SEPTA provides a “vast network of fixed-route services including bus, subway, subway-elevated, regional rail, light rail, and trackless trolley, as well as customized community service.” *Id.* SEPTA’s City Transit Division provides a network of 82 subway-elevated, light rail, trackless trolley and bus routes generating approximately 850,000 passenger trips per day. *Id.* SEPTA receives federal financial assistance and thus, is subject to the Rehabilitation Act, 29 U.S.C. §§ 794(a)-(b)(1)(A). *Id.* at 13-18. SEPTA is a public entity as defined by Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131.

C. 15th Street Courtyard Renovations

The 15th Street Courtyard serves as an open-air entrance to the underground concourse which provides access to the Market-Frankford Elevated Line 15th Street Station, to the regional rail lines at Suburban Station, to the Broad Street Subway City Hall Station, and to the Subway-Surface lines. *See* photograph of directional signage within escalator headhouse (Exhibit D); Exhibit I *infra*. The 15th Street Courtyard is located on land owned by the City and leased to SEPTA. Statement by Andres Perez of June 15, 2000 (Exhibit E).

In February 2001, SEPTA began construction on an alteration and renovation of the 15th Street Courtyard. *See* SEPTA Capital Project Progress Reports from May 2000-August 2002 (Exhibit F). This renovation project included the demolition of existing stairs and headhouse and construction of new stairs and headhouse as well as replacement of escalators. The building

permit submitted for approval by SEPTA to the City of Philadelphia contains the following description of the project:

Demolition incorporates head house, stair, railings, limited wall, veneer, pavement and lighting systems. Also to be removed are planters, fountain and ceilings. Construction scope consists of glass head house, stair, (2) retail spaces, railings, storefront system, planters, lighting and paving installed, as well as new ceiling.

Building permit (Exhibit G). In a letter dated June 5, 2000, Linda Sallee, Project Architect with Bower Lewis and Thrower, describes the proposed project as including: 1) replacement of the enclosure over the existing escalator, 2) replacement of stairs, relocated closer to the intersection of 15th and Market Streets, and 3) replacement of guard rail and provision of planters at sidewalk level. Sallee Letter at 1 (Exhibit H). SEPTA produced photographs which depict the 15th Street Courtyard before, during and after the construction project. See construction photographs (Exhibit I). These photographs detail the extensive nature of the project, including the demolition of existing stairs, walls and headhouse and the construction of new stairs and headhouse as well as replacement of escalators. Id. No elevator was installed during the project and the newly renovated entrance is not readily usable by and accessible to individuals who use wheelchairs. Exhibits F-I *supra*.

While SEPTA identifies the demolition and construction project at the 15th Street Courtyard as part of the Suburban Station renovations, the 15th Street Courtyard project was funded separately from those renovations through a grant from the United States Department of Commerce, Economic Development Administration. Letter from Paul Raetsch, Regional Director, to John K. Leary, Jr., Former General Manager of SEPTA, and Andres Perez (Exhibit J); Letter from Egan to McLaughlin of Aug. 1, 2000 at 1 (Exhibit K) (“It should be noted that the EDA funding in an amount of \$700,000 is directed specifically to the 15th and Market plaza entrance”). In fact, the EDA grant received by SEPTA in the amount of \$700,000 represented

half of the project's \$1.4 million estimated total cost. Exhibit K; see also executed Financial Assistance Award (Exhibit L).

The 15th Street Courtyard primarily serves as an access point to the Market-Frankford Elevated Line 15th Street Station and the Broad Street Subway City Hall Station. Exhibit D *supra*; see also SEPTA rail system maps and 15th Street Station address information obtained from septa.org (Exhibit M). In its application for the EDA funding grant, SEPTA described the Courtyard entrance as a "key access point to the subways, trolleys and rail lines, which are the primary means of mobility for under-employed and entry-level workers in Center City Philadelphia." Letter from John K. Leary to Jack Corrigan of May 22, 1998 (Exhibit N). SEPTA's own signage affixed to the renovated escalator headhouse at the 15th Street Courtyard, which is viewed by SEPTA patrons as they descend the renovated escalator, clearly identifies it as an entrance to the Market-Frankford Elevated Line and the Broad Street Subway. Exhibit D *supra*. A leasing plan diagram maintained by MetroMarket Management, LLC, which operates the leasing space in the Suburban Station concourse, depicts the location of the 15th Street Courtyard and its close proximity to the Market-Frankford Elevated Line 15th Street Station. Metro-Market diagram (Exhibit O).

SEPTA patrons can and do access the Market-Frankford Elevated Line 15th Street Station from the altered and renovated 15th Street Courtyard. A pedestrian circulation study conducted by Dan Peter Kopple and Associates and submitted to SEPTA in May 1994 demonstrates that the 15th Street Courtyard is used by riders leaving and entering the 15th Street Market-Frankford Station. See Pedestrian Circulation Study with accompanying charts and diagrams (Exhibit P). This study included an actual observed count of the pedestrian flow in the 15th Street corridor leading to the 15th Street Market-Frankford Line Station both north and south of the turnstiles.

Exhibit P at bates stamp No. COP1908. As seen by the diagrams in this study, the 15th Street corridor is the pathway which runs north and south in front of the 15th Street Courtyard at concourse level and provides access to the Market-Frankford Elevated Line 15th Street Station. Id. at COP1926-1930. The count of the 15th Street corridor revealed that a substantial number of people travel through this corridor both north and south during the AM rush hour period. Id. at COP1914. (Total pedestrians: 4095 northbound & 1931 southbound north of the turnstiles and 1755 persons northbound & 5116 southbound south of the turnstiles). The pedestrian circulation study diagrams demonstrate that pedestrians in the past accessed the 15th Street corridor and 15th Street Station from the Courtyard entrance. Id. Now that the 15th Street Courtyard has been renovated and is highly visible to the public, pedestrians currently use it to access the Market-Frankford Elevated Line 15th Street Station.

D. City Hall Broad Street Subway Station Escalator Replacement

In 2003, SEPTA replaced an escalator in the southeast entrance of the City Hall Courtyard leading to the Broad Street Subway City Hall Station. See City Hall Station Renovations-Bower Lewis Thrower Architects Meeting Minutes at Item 20-03 and Fiscal Year 2003 Capital Budget, Escalator/Elevator Program update (Exhibit Q). This escalator serves as an exit for SEPTA patrons disembarking from the Broad Street Subway at the City Hall Station. See City Hall Station Survey Photographs (Exhibit R). In a letter dated February 11, 2005, counsel for SEPTA, Saul Krenzel, in providing supplemental responses to Plaintiff's discovery requests, admitted that, "SEPTA replaced an old escalator in the City Hall courtyard in 2003." See Exhibit S. SEPTA produced pictures which depict the escalator replacement project and the appearance of the escalator and the headhouse both before and after completion. See City Hall Escalator Replacement Construction Photographs (Exhibit T). SEPTA's Fiscal Year 2005

Capital Budget also contains two photographs depicting the new escalator and headhouse in the southeast City Hall courtyard, and identifies plans to replace the escalator in the Northwest courtyard entrance. Exhibit C *supra* at 42-43. SEPTA provided no elevator access for individuals who use wheelchairs in the City Hall Courtyard as part of its renovation project. Exhibits C & Q-T *supra*.

II. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P 56(c). *See also Pittston Co. Ultramar America v. Allianz Ins.*, 124 F.3d 508, 515 (3d Cir. 1997). If there is no genuine dispute concerning any facts material to its claims, summary judgment must be entered in favor of Plaintiff.

B. Plaintiff Has Standing To Pursue These Claims

Plaintiff Disabled in Action of Pennsylvania has sustained injury in its own right as a result of SEPTA's failure to make the 15th Street Courtyard Entrance to its transportation facilities and the southeast City Hall Courtyard Broad Street Subway entrance accessible to persons with disabilities, including those who use wheelchairs. Exhibit B *supra*. Plaintiff has expended its own time, money and resources in a variety of ways due to the inaccessibility of the identified transportation facilities. *Id.* DIA has paid for alternative transportation services for individuals unable to access SEPTA's transportation facilities at the identified entrances. *Id.* DIA's work has been interrupted as a result of the inaccessibility of the entrances. *Id.* Accordingly, DIA has standing to sue as an organization. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Alexander v. Riga*, 208 F.3d 419, 427 n.4 (3d Cir. 2000); *Robinson v.*

Block, 869 F.2d 202, 207, 210 n.9 (3d Cir. 1989); ADAPT v. Philadelphia Housing Authority, No. 98-4609, 2000 WL 433976 at *2-*3, *5-*6 (E.D. Pa. Apr. 14, 2000) (finding LRI had organizational standing to pursue Section 504 lawsuit concerning access to housing); Raver v. Capitol Area Transit, 887 F. Supp. 96, 97-98 (M.D. Pa. 1995) (determining that CIL of Central Pennsylvania had standing to pursue ADA paratransit case because the transit agency's paratransit violations had harmed the CIL's ability to serve its clients).

DIA also has standing to pursue this lawsuit on behalf of its members. DIA's members are individuals with disabilities who utilize SEPTA's transportation services and these individuals have been unable to access SEPTA's facilities at the identified entrances. Exhibit B *supra*. DIA's members are qualified individuals with disabilities as defined by the ADA and the Rehabilitation Act of 1973. *Id* at 27-33. DIA may pursue this case on behalf of its members because (1) those members have been harmed by SEPTA's failure to make the identified entrances wheelchair accessible and (2) the interests DIA seeks to protect are germane to its organizational purposes to eradicate transportation barriers that inhibit the ability of individuals with disabilities to live independently in their communities. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); Doe v. Stincer, 175 F.3d 879, 882-83, 885-86 (11th Cir. 1999).

**C. SEPTA Violated the ADA By Failing To Make The Altered
15th Street Courtyard Entrance and City Hall Broad Street
Subway Station Entrance Accessible To Individuals With Disabilities**

**1. Plaintiff Represents Individuals With Disabilities Protected
By The ADA and Section 504 and SEPTA Is Subject To The
Requirements Of Those Statutes**

There is no dispute that all of DIA's members are eligible under the ADA to use SEPTA's fixed route transportation system. Exhibit B. Therefore, they are qualified persons with disabilities under the ADA and Section 504. 42 U.S.C. §§ 12102(2), 12131(2); 29 U.S.C. §§ 705(9)(B), 705(20).

There also is no dispute that SEPTA is a public entity subject to Title II of the ADA, including the provisions governing public transportation. 42 U.S.C. § 12131(1)(B); Exhibit C; 74 Pa. Cons. Stat. Ann. § 1711. As the recipient of federal funds, SEPTA is also subject to Section 504 of the Rehabilitation Act. 29 U.S.C. §794; Exhibit C at 13-18. Since SEPTA is a federally-funded, public entity that operates a fixed route transportation system, it is required to comply with the new construction and alterations provisions of the ADA, 42 U.S.C. §12147, and Rehabilitation Act, 29 U.S.C. §794.

**2. Under the ADA, Congress Intended That Alterations
To Transportation Facilities Would Trigger Equal Access**

In enacting the ADA, Congress found that isolation, segregation, and discrimination against individuals with disabilities persists in the "critical area[] of . . . transportation." 42 U.S.C. §12101(a)(3). Accordingly, the ADA bars discrimination in public transportation. 42 U.S.C. §12147(a); see also S. REP. NO. 101-116, at 13 (1989) ("Transportation is the linchpin which enables people with disabilities to be integrated and mainstreamed into society"); H.R. REP. NO. 101-485, pt.3, at 63 (1990) ("The ADA is geared to the future-the goal being that, over time, access will be the rule, rather than the exception").

In recent cases, the United States Supreme Court and Circuit Courts have construed Title II of the ADA broadly to be “faithful to the Act’s demand for reasonable accommodation to secure access and avoid exclusion.” Tennessee v. Lane, 124 S. Ct. 1978, 1996 (2004) (Ginsburg, J., concurring); see id. (Ginsburg, J., concurring) (“Including individuals with disabilities among people who count in composing ‘We the People’, Congress understood in shaping the ADA would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation”); see also Olmstead v. L.C., 527 U.S. 581, 598 (1999) (finding that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA “that included disparate treatment among members of the same protected class”); Hason v. Med. Bd., 279 F.3d 1167, 1172 (9th Cir. 2002) (quoting Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 861 (1st Cir. 1998)) (finding that the ADA must be construed “broadly in order to effectively implement the ADA’s fundamental purpose of ‘providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities’”).

As they promulgated the ADA and regulations, Congress and the federal agencies understood that equal access would be achieved primarily as new construction and alterations occurred. Whenever a public entity, including a transit authority such as SEPTA, newly constructs or alters a facility or part of a facility, the new construction or alteration triggers the ADA’s mandate of equal access. Thus, regulations are substantially more stringent concerning when a public entity embarks on alterations and new construction than regulations concerning retrofitting of existing, non-altered facilities, i.e. when a public entity does not embark on its own volition to construct or alter a facility. Disabled in Action of Pennsylvania v. Sykes, 833 F.2d 1113 (3d Cir. 1987), cert. denied 485 U.S. 989 (1988); Kinney v. Yerusalim, 9 F.3d 1067, 1071 (3d Cir. 1993), cert.denied 511 U.S. 1033 (1994). This distinction “reflects Congress’

recognition that mandating changes to existing facilities could impose extraordinary costs. ‘New construction and alterations, however, present an immediate opportunity to provide full accessibility.’” Civic Ass’n of the Deaf v. Giuliani, 970 F. Supp. 352, 357 (S.D.N.Y. 1997) (quoting Kinney, 9 F.3d at 1074); DIA v. Sykes *supra*. Further, it is “discriminatory to the disabled to enhance or improve an existing facility without making it fully accessible to those previously excluded.” Id. (quoting Kinney, 9 F.3d at 1073). While “the obligation of accessibility for alterations does not allow for non-compliance based upon undue burden,” Kinney, 9 F.3d at 1071, if a transit authority did have to prioritize accessibility, “an accessible entrance would generally be the most important . . . since without it the facility will be totally unusable by many persons with disabilities.” H.R. REP. NO. 101-485, pt. 3, at 65 (1990).

In keeping with the intent of Congress, and to facilitate accessibility of public transportation systems, the ADA requires that transit authorities, when making an alteration to an existing station or part thereof, make the altered portion accessible to individuals with disabilities:

With respect to alterations of an existing facility *or part thereof* used in the provision of designated transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of Sec. 12132 of this title and Sec. 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for a public entity to fail to make such alterations in such a manner that, to the maximum extent feasible, the *altered portions* of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations.

42 U.S.C. § 12147(a) (emphasis added). The U.S. Department of Transportation regulations promulgated under this part of the ADA reiterates transit authorities’ responsibilities:

When a public entity alters an existing facility or *a part of* an existing facility used in providing designated public transportation services in a way that affects or could affect the usability of the facility or part of the facility, the entity shall make the alterations . . . in such a manner, to the

maximum extent feasible, that the *altered portions* of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations.

49 C.F.R. § 37.43(a)(1) (emphasis added); see also 28 C.F.R. § 35.151(b) (regulations promulgated by the Department of Justice under the ADA with almost identical language); Disabled in Action of Pennsylvania v. Sykes, 833 F.2d 1113 (3d Cir. 1987), cert. denied 485 U.S. 989 (1988) (holding that the alteration of the Columbia Avenue Subway Station entrance without making it accessible violated Section 504 of the Rehabilitation Act and its federal regulations, the relevant portions of which were identical to 49 C.F.R. § 37.43(a)(1)).

3. The 15th Street Courtyard And Southeast City Hall Escalator Are Part Of Existing Stations/Facilities Covered By The ADA Alterations Provisions

a. The 15th Street Courtyard Is Part Of The Market-Frankford Elevated Line 15th Street Station

The 15th Street Courtyard serves as an access point to SEPTA's transportation facilities, including the Market-Frankford Elevated Line, the Broad Street Subway, Suburban Station and the Subway-Surface Lines, but primarily serves as an entrance to the Market-Frankford Elevated Line 15th Street Station. Exhibit D & M. The pedestrian analysis completed by Dan Peter and Kopple Associates recognizes that persons use the 15th Street Courtyard to access the 15th Street corridor and the Market-Frankford 15th Street Station. Exhibit P at 1908;1914; 1926-1930. SEPTA's rail system maps identify the close proximity of the 15th Street Courtyard to the Market-Frankford Elevated 15th Street Station as well as the City Hall Broad Street Subway Station. Exhibit M. SEPTA's own correspondence recognizes that the Courtyard provides access to the Market-Frankford Elevated Line. Exhibit N.

According to the DOT regulations, a facility is defined as "all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, or other real or

personal property, including the site where the building, structure, or equipment is located.” 49 C.F.R. §37.3. This definition is very broad and supports Plaintiff’s claim that the 15th Street Courtyard is part of the Market-Frankford Elevated Line 15th Street Station. To access the 15th Street Station from the Courtyard, a pedestrian would descend either the stairs or escalator, then turn left into the 15th Street Corridor, ascend a flight of stairs and then proceed through turnstiles, and then descend another set of stairs to either the eastbound or westbound platforms. Exhibit O. By examining the diagrams of the 15th Street Courtyard and the 15th Street Corridor, it is readily apparent that they are connected aspects of the same facility, i.e. walks and/or passageways serving as an entrance to the Market-Frankford Elevated Line 15th Street Station.

SEPTA claims that the 15th Street Courtyard is only an entrance to Suburban Station. Since it constructed two street level elevators at 16th and JFK Blvd and 17th and JFK Blvd, providing access primarily to the Suburban Station concourse and platforms pursuant to its key station obligation, SEPTA claims it had no legal obligation to install an elevator at 15th Street. The problem with SEPTA’s defense is that it ignores the undisputed evidence that the Courtyard primarily serves as an entrance to, and thus is a part of, the Market-Frankford Elevated Line 15th Street Station. Therefore, the “existing facility used in providing designated public transportation,” for the purposes of 42 U.S.C. §12147(a) and 49 C.F.R. §37.43(a)(1), which the 15th Street Courtyard is a part of, is the Market-Frankford Elevated Line 15th Street Station. Neither the 15th Street Courtyard nor the Market-Frankford Elevated Line 15th Street Station is currently accessible to individuals who use wheelchairs. Because SEPTA altered part of the 15th Street Station, i.e. the 15th Street Courtyard entrance, it triggered a legal obligation under the ADA to make that entrance to that facility accessible. Renovations at Suburban Station or access

to Suburban Station are thus, irrelevant, to SEPTA's obligation to make the 15th Street Courtyard accessible.

b. The Southeast City Hall Headhouse And Escalator Is Part Of The Broad Street Subway City Hall Station

The photos produced by SEPTA in discovery are indisputable evidence that the Southeast City Hall Headhouse and Escalator is part of the City Hall Broad Street Subway Station. Exhibit R. The escalator at this location is clearly marked on the side of the headhouse as an exit for SEPTA patrons disembarking from the Broad Street Subway at City Hall Station. Id. The undisputed documentary evidence also clearly identifies the southeast City Hall Courtyard headhouse and escalator as being part of the City Hall Station on the Broad Street Subway. Exhibit C at 42-43; Exhibit Q. There is absolutely no question that the southeast City Hall Courtyard headhouse and escalator is part of the Broad Street Subway City Hall Station.²

4. The 15th Street Courtyard and City Hall Southeast Escalator Renovations Qualify As Alterations For Purposes Of The ADA

Both the 15th Street Courtyard and City Hall escalator construction projects unequivocally qualify as alterations for the purposes of the ADA, and therefore spark the ADA's mandate of accessibility. 42 U.S.C. § 12147(a). The federal regulations define an alteration as "a change to an existing facility, including, but not limited to remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions." 49 C.F.R. § 37.3.

Courts interpret the alterations provision broadly to effectuate accessibility. See Molloy v. Metropolitan Transp. Auth., 94 F.3d 808, 811-12 (2d Cir. 1996) (finding that staffing

² SEPTA's documents show that it plans to construct or reconstruct another escalator in the Northwest City Hall Coutyard which will again provide access to the Broad Street Subway. Because construction has not yet occurred, it is legally premature to request an elevator at that location at this time.

reductions are not an alteration because they are not changes to the physical structure of the facility, but holding that installation of movable ticket machines is an alteration, and requiring ticket machines to be readily accessible to and usable by individuals with disabilities); Kinney, 9 F.3d 1067 (holding that resurfacing sidewalks is an alteration, not merely a repair, and requiring that defendant make curb cuts to allow access by individuals in wheelchairs); Giuliani, 970 F. Supp. at 359 (finding that replacement of two-button emergency boxes with one-button boxes constitutes an alteration under the ADA because it was a “change to the physical and functional structure of the equipment,” and requiring that defendants restore the two-button boxes since the one-button boxes did not provide adequate access for the deaf citizens of the city). On the other hand, “Minor changes such as painting or papering walls, replacing ceiling tiles, and similar alterations that do not affect usability do not trigger the requirement that the altered areas must be made accessible.” H.R. Rep. No. 101-485, pt. 3, at 64 (1990); see also 49 C.F.R. § 37.3.

It is undisputed that the 15th Street Courtyard renovation project included the demolition of existing stairs, existing headhouse, existing escalators and construction of new stairs, a new headhouse and new escalators. Exhibits D-I supra. These renovations were substantial in nature and affected a change to the physical and functional structure of the entrance. The alterations to the 15th Street Courtyard clearly included “changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions.” There is also no question that the renovations affected the usability of the 15th Street Courtyard entrance since it involved the demolition and construction of new stairs and replacement of escalators. Thus, the ADA required that SEPTA make the 15th Street Courtyard entrance accessible to persons who use wheelchairs by installing an elevator.

Likewise, the renovation to the southeast City Hall Courtyard exit from the Broad Street Subway was substantial in nature as it affected a change in physical and functional structures. The photographs produced by SEPTA demonstrate the extensive nature of the replacement of the escalator and the replacement and rearrangement of existing structures to accommodate the new escalator. Exhibit T. The renovations affected the usability of the Broad Street Subway City Hall Station because the escalator and headhouse were not in use prior to the renovations. The construction project, once completed, provided an entirely new exit for use by SEPTA patrons disembarking from the Broad Street Subway at City Hall Station. Thus, SEPTA was also legally required to make the altered southeast City Hall Courtyard exit from the Broad Street Subway City Hall Station accessible to persons who use wheelchairs.

5. SEPTA Violated The ADA By Not Making The Altered Entrances Accessible To The Maximum Extent Feasible

The ADA provides that it shall be considered discrimination for a public entity to “fail to make ... alterations in such a manner that, to the maximum extent feasible, the *altered portions* of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations.” 42 U.S.C. §12147(a). The regulations specify that to the maximum extent feasible means that all changes that are possible must be made. 49 C.F.R. Part 37, App. D. A transit authority will only be excused in the “*occasional case* where the nature of an existing facility makes it *impossible* to comply fully with applicable accessibility standards through a planned alteration.” 49 C.F.R. §37.43(b) (emphasis added). SEPTA does not claim, nor can it claim, that it is impossible to make the 15th Street Courtyard entrance itself accessible to individuals with disabilities by installing an ADA-compliant elevator.

SEPTA may claim that it cannot provide direct access to 15th Street Station by installing an elevator in the 15th Street Courtyard and that providing an elevator thus, would serve no useful purpose. However, this argument is irrelevant and misses the point. The ADA mandates that the *altered portions* of the station are readily accessible to and usable by individuals with disabilities.” 42 U.S.C. § 12147(a). In reference to the 15th Street Courtyard, the installation of an elevator, which would provide access to persons in wheelchairs from street level to concourse level, is itself unequivocally feasible. The Courtyard is the part of the facility, i.e. the 15th Street Station, that the ADA requires that SEPTA make accessible, not necessarily the entire facility. This follows Congress’ goal that “over time, access will be the rule, rather than the exception.” H.R. REP. NO. 101-485, pt.3, at 63 (1990). This is the purpose Congress had in mind when developing the alterations provisions of the ADA. Because there was no structural barrier to installing an elevator at the 15th Street Courtyard, the ADA mandated that SEPTA provide access to persons who use wheelchairs. SEPTA failed to do so.

Likewise, the ADA mandated that SEPTA provide access to persons who use wheelchairs when it altered the southeast City Hall Courtyard escalator, which is part of the City Hall Broad Street Subway Station, to the maximum extent feasible. It is feasible for SEPTA to install an elevator in the City Hall Courtyard near the renovated escalator. An examination of design plans and diagrams of City Hall Broad Street Subway Station which were created as part of the City Hall Renovations project reveal that an elevator from the City Hall Courtyard at street level to the platform is possible. See City Hall Station Option 1C Design Plan (Exhibit U). On these design plans, there are proposed new skylights in the City Hall Courtyard located on the diagrams near both the renovated escalator and other stairs. Exhibit U. If you follow the skylights down on each diagram from street level, to the upper concourse, to the lower concourse

and then to the platform, it is apparent that there is direct access space available from the Courtyard straight through to the platform, in which an elevator can be placed. Exhibit U. Again, because there is no barrier to installing an elevator near the renovated southeast City Hall Courtyard escalator, the ADA mandated that SEPTA install such an elevator to provide access to persons who use wheelchairs.

The alterations to the southeast City Hall escalator are directly analogous to those in DIA v. Sykes, 833 F.2d 1113 (3d Cir. 1987), cert. denied 485 U.S. 989 (1988), which involved alterations to the Columbia Avenue Broad Street Subway Station. While decided before the ADA, the Court upheld the lower court's application of the Rehabilitation Act alteration provisions, 49 C.F.R. § 27.67 (b), which are nearly identical to the ADA alterations provisions, 42 U.S.C. §12147(a), to SEPTA's reconstruction of stairs, and construction of new stairs and an escalator, leading to the Subway.

It is undisputed that SEPTA made alterations to the 15th Street Courtyard entrance and the southeast City Hall Courtyard Broad Street Subway Station entrance. These alterations unequivocally affected the usability of existing stations/facilities or part thereof and SEPTA failed to make the altered parts of those stations/facilities readily accessible to individuals with mobility disabilities, including those who use wheelchairs, in violation of the ADA and the Rehabilitation Act. SEPTA continues to discriminate against individuals with disabilities every day that the entrances are not accessible. This illegal discrimination will only end when SEPTA makes the 15th Street Courtyard entrance and the southeast City Hall Courtyard Broad Street Subway entrance readily accessible to and usable by individuals with mobility disabilities, including those in wheelchairs.

III. CONCLUSION

For all the reasons set forth above, Plaintiff respectfully requests that the Court enter summary judgment in favor of Plaintiff and against SEPTA.

Respectfully submitted,

ROCCO J. IACULLO, ESQUIRE
Attorney Id. No. 86144
Disabilities Law Project
The Philadelphia Building
1315 Walnut Street, Suite 400
Philadelphia, PA 19107
(215) 238-8070

STEPHEN GOLD, ESQUIRE
Attorney Id. No. 09880
JEN FREEBERG
Law Student
125 South Ninth Street, Suite. 700
Philadelphia, PA 19107
(215) 627-7100

Attorneys for Plaintiff

DATED: March 29, 2005

CERTIFICATE OF SERVICE

I, Rocco J. Iacullo, Esquire, hereby certify that true and correct copies of Plaintiff's Motion for Summary Judgment, Memorandum of Law in support of that Motion, and proposed Order were served on the following by hand-delivery on this 29th day of March, 2005:

Saul H. Krenzel, Esquire
Adam A. DeSipio, Esquire
Saul H. Krenzel & Associates
The Robinson Building
42 S. 15th Street, Suite 800
Philadelphia, PA 19102

ROCCO J. IACULLO