ADA Obligations May Not Be Contracted Away

A Reminder to County Governments that Provide or Fund Legal Services and to Administrators of Courts that Appoint Attorneys in Conservatorship Cases

Both Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 prohibit disability discrimination "directly or through contractual, licensing or other arrangements." 28 C.F.R. § 35.130(b)(1); 28 C.F.R. § 42.503(b)(1). This provision ensures that "an entity may not do indirectly through contractual arrangements what it is prohibited from doing directly under" the ADA. H.R.Rep. No. 101-485(II), at 104, *reprinted in* 1990 U.S.C.C.A.N. 303, 387.

Title II prohibits disability discrimination by public entities such as state courts or county governments. 42 U.S.C. § 12132. Section 504 prohibits disability discrimination by recipients of federal financial assistance such as state courts and county governments.

Department of Justice ("DOJ") regulations implementing Title II have the force of law. *Marcus v. Kansas Dep't of Revenue*, 170 F.3d 1305, 1306 n.1 (10th Cir. 1999) (internal citations omitted). These regulations prohibit public entities from denying disabled individuals the opportunity to participate in or benefit from their services, providing unequal or ineffective services, or "otherwise limit[ing] [disabled people] in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others." 28 C.F.R. § 35.130(b)(1)(i), (ii), (iii), (vii); *see also* 28 C.F.R. § 42.503(b) (Section 504 regulation).

The DOJ's Title II regulations prohibit public entities from discriminating against recipients of services "directly or through contractual, licensing or other arrangements." 28 C.F.R. § 35.130(b)(1); *see also* 28 C.F.R. § 42.503(b)(1). In the legislative history of the identical language in Title III of the ADA, Congress explained that "the reference to contractual arrangements is to make clear that an entity may not do indirectly through contractual arrangements what it is prohibited from doing directly under this Act." H.R.Rep. No. 101-485(II), at 104, reprinted in 1990 U.S.C.C.A.N. 303, 387 (emphasis added).

In *Castle v. Eurofresh, Inc.*, 731 F.3d 901, 910 (9th Cir. 2013), the Court of Appeals ruled that a public entity is obligated to ensure that businesses with which it contracts comply with federal laws prohibiting discrimination on the basis of disability. "The law is clear – the State Defendants may not contract away their obligation to comply with federal discrimination laws." *Id.* at 910.

See also Henrietta D. v. Bloomberg, 331 F.3d 261, 286 (2d Cir. 2003) (holding state liable for Title II and Section 504 violations of contracting service provider); *Hunter ex rel. A.H. v. District of Columbia*, 64 F. Supp. 3d 158, 169 (D.D.C. 2014) (holding that obligations of public entity to ensure ADA compliance by contractors "go beyond simply including particular language in its contracts;" instead, the public entity has the obligation to ensure compliance); *Kerr v. Heather Gardens Ass'n*, No. 09-cv-00409-MSK-MJW, 2010 WL 3791484, at *9 (D. Colo. Sept. 22, 2010) ("a public entity cannot escape its obligations under Title II by delegating its duties to a private entity. [T]he public entity remains subject to Title II despite its delegation of authority or duty to another, private entity").

The provisions of these statutes and regulations, and the rulings of these cases apply to county governments providing conservatorship legal defense services through county-employed public defenders, to counties that provide such services through "contract" public defenders, and to state courts that appoint attorneys for disabled litigants for legal services that are paid with public funds.

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A Public Entity Cannot Avoid Its ADA Responsibilities by Delegating Services to a Third-Party Vendor*

I. THE ADA PLACES A SUPERVISORY DUTY ON A PUBLIC ENTITY

A public entity is responsible for ensuring compliance with the Americans with Disabilities Act and other disability rights laws throughout the program or service it is providing. A public entity must properly supervise the compliance by third-party contractors with disability rights laws, including the obligation to provide effective communication and meaningful participation in the program or service. At an absolute minimum, that means that the public entity must collect data from third-party contractors sufficient to demonstrate whether or not those entities are meeting their obligations.

A. THE ADA AND RELATED LAWS REQUIRE A PUBLIC ENTITY TO PROVIDE EFFECTIVE COMMUNICATION TO INDIVIDUALS WITH DISABILITIES

Under federal and state law, people have the right to be free from discrimination on the basis of disability. Title II of the ADA (42 U.S.C. § 12131, et seq.); Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794); Section 1557 of the Affordable Care Act ("ACA") (42 U.S.C. § 18116); California Disabled Persons Act ("DPA"), Cal. Civ. Code § 54, et seq. For people who have mental or developmental disabilities, that includes the right to receive communication that is as effective as communication with others. 28 C.F.R. §§ 35.160, 39.160. A public entity must "give primary consideration to the requests of individuals with disabilities" in determining what types of auxiliary aids and services will provide effective communication. 28 C.F.R. § 35.160(b)(2).

B. THE FAILURE OF A PUBLIC ENTITY TO PROPERLY SUPERVISE ANOTHER ENTITIES' COMPLIANCE WITH DISABILITY RIGHTS LAWS VIOLATES THE ADA AND SECTION 504

Courts have repeatedly interpreted the ADA and Section 504 of the Rehabilitation Act to impose "supervisory liability" on covered entities and found that a "failure to supervise" compliance with these laws can be actionable. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 284, 287 (2d Cir. 2003).

In *Henrietta D.*, the Second Circuit held that the State of New York could be held liable under Section 504 for its "failure to supervise properly" local entities in the delivery of federally funded social services. 331 F.3d at 284, 287. The Second Circuit explained that Spending Clause legislation such as Section 504 is interpreted under contract law principles and that the common law of contracts strongly suggests that the recipient of federal funds "is liable to *ensure* that localities comply with the Rehabilitation Act in their delivery of federally-funded social services." *Henrietta D.*, 331 F.3d at 286 (emphasis added). The Second Circuit held that under contract principles, "once a party has made a promise, it is responsible to the obligee to ensure that performance will be satisfactory, even if the promising party obtains some third party to carry out its promise." *Id*.

The Second Circuit also observed, as has the Ninth Circuit, that the fact that the U.S. Department of Justice "in its regulations directs its enforcement efforts at the State agency, and not the State's other agents . . . suggests that the Department believes the State has supervisory responsibilities." *Id.* (*citing Bonner v. Lewis*, 857 F.2d 559, 566 (9th Cir. 1988)). The *Henrietta D.* decision is also consistent with the holding in *Woods v. United States*, 724 F.2d 1444, 1447–48 (9th Cir. 1984) that "California had the power to permit local governmental units to administer the [Food Stamp] program, but it could not delegate its ultimate

responsibility to comply with the requirements of the [Food Stamp] Act").

The Second Circuit also grounded its finding of supervisory liability in *Henrietta D.* in the regulations implementing the ADA, which make clear that the duty to comply with the ADA's proscriptions against discrimination on the basis of disability is nondelegable. 331 F.3d at 286. A public entity may not discriminate on the basis of disability either "directly or through contractual, licensing, or other arrangements." 28 C.F.R § 35.130(b). Nor may a public entity "[a]id or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program." 28 C.F.R § 35.130(b)(1)(v).

In its 2010 Guidance to the ADA regulations, the U.S. Department of Justice explained that these regulations mean that:

> All governmental activities of public entities are covered, even if they are carried out by contractors. For example, a State is obligated by title II to *ensure* that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with title II's requirements.

ADA Title II Regulations 2010 Guidance, Section 35.102: "Application," *available at* https://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm. The U.S. Department of Justice also explained the application of this requirement in the context of jails, where states regularly administer services through counties or other local government entities.[1] The Title II Guidance provides that "even if the

[1] In providing this example, the U.S. Department of Justice specifically "noted that public entities contract for a number of services to be run by private or other public entities, for example, medical and mental health services, food services, laundry, prison industries, vocational programs, and drug treatment and substance abuse programs, all of which must be operated in accordance

State enters into a contractual, licensing, or other arrangement for correctional services with a public entity that has its own title II obligations, the State is still responsible for *ensuring that the other public entity complies with title II* in providing these services." *Id.* at Section 35.152: Detention and correctional facilities—program requirements (emphasis added).

District courts in California have found the reasoning in *Henrietta D.* "particularly persuasive here in holding that 'Congress's intent would best be effectuated by imposing supervisory liability on [] state defendants.'" *Independent Living Center of Southern California, et al. v. City of Los Angeles, et al.*, Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, case no. 12-CV-00551 (Nov. 29, 2012) at 10 ("*ILCSC v. L.A.* Order") (attached as Exhibit 5). In the *ILCSC v. L.A.* Order, District Judge James Otero noted that, in *Mei Ling v. City of Los Angeles, et al.*, case no. 11-CV-07774 (Aug. 30, 2012), District Judge Stephen Wilson also "agreed with this Court that Section 504 imposes supervisory liability." *ILCSC v. L.A.* Order, Exh. 5 at p. 10, n. 6. In the Northern District of California, District Judge Henderson held that a plaintiff alleging that the State Defendants had "failed to monitor [a local government entity's] compliance with state and federal laws" regarding disability access and had "failed to adequately investigate complaints" had stated an actionable claim under the ADA and Section 504. *Emma C. v. Eastin*, 985 F.Supp. 940, 948 (N.D.Cal. 1997).

In fact, courts have generally found that neither private nor public actors can insulate themselves from their "nondelegable" duty to comply with the ADA, even by seeking full indemnification for ADA violations. *See, e.g., Equal Rights Center v. Niles Bolton Associates*, 602 F.3d 597, 602 (4th Cir. 2010) (finding obstacle

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with title II requirements." ADA Title II Regulations 2010 Guidance, Section 35.152: Detention and correctional facilities—program requirements (emphasis added).

preemption applied to state law claims for indemnification in a Title III accessibility matter since allowing indemnification "diminishes [the] incentive to ensure compliance with discrimination laws"); *United States v. Bryan Co*., No. 11–CV–302–CWR–LRA, 2012 WL 2051861 (S.D. Miss. June 6, 2012) (permitting indemnification claims for violations of the ADA or FHA "would frustrate, 'disturb, interfere with, or seriously compromise the purposes of the' FHA and ADA" (*quoting Morgan City v. South Louisiana Elec. Co–op*., 31 F.3d 319, 322 (5th Cir.1994)).

In *City of Los Angeles v. AECOM Servs., Inc*., the Ninth Circuit observed with approval that, in *Equal Rights Center v. Niles Bolton Associates*, the Fourth Circuit had "emphasized the nondelegable nature of responsibility under the ADA." 854 F.3d 1149, 1156 (9th Cir.), *amended sub nom. City of Los Angeles by & through Dep't of Airports v. AECOM Servs., Inc.*, 864 F.3d 1010 (9th Cir. 2017), and *cert. denied sub nom. Tutor Perini Corp. v. City of Los Angeles, Cal.*, 138 S. Ct. 381, 199 L. Ed. 2d 279 (2017). In *AECOM*, the Ninth Circuit observed that it had previously "stated in the Title III context of landlords and lessees [that] a covered entity may not use a contractual provision to reduce any of its obligations under" the ADA, and that "[t]his principle applies equally to Title II's requirements for public services." *Id.* at 1160 (*citing Botosan v. Paul McNally Realty*, 216 F.3d 827, 833 (9th Cir. 2000)).

In other words, the decisions of the Ninth Circuit and of district courts within California have been fully consistent with *Henrietta D.*'s holding that the ADA and Section 504 require [public]agencies to properly supervise [third parties'] compliance with disability rights laws – and in some cases, have specifically endorsed that holding.

Like the State Defendants in *Emma C.*, a public entity has the obligation to

"monitor . . . compliance with state and federal laws" regarding disability access by the entities that provide publicly-funded services. 985 F.Supp. at 948. In order to comply with this obligation, a public entity must do more than simply inform third party contractors of their obligations to provide effective communication and ensure meaningful participation in the service for which an accommodation is needed. A public entity cannot ensure compliance with the ADA and Section 504 throughout the program or service without, at a minimum, collecting data sufficient to establish that people with mental or developmental disabilities are actually receiving effective communication and meaningful participation in the program or service provided by the public entity or third-party contractor.

*This memorandum was adapted from a brief supplied to Spectrum Institute by a high-impact civil rights litigation firm.