IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

JULIANNA BARBER, by and through her next friend, Marcia Barber;
MADEINE BARBER, by and through her next friend, Marcia Barber;
MARCIA BARBER;
COLORADO CROSS-DISABILITY COALITION, a Colorado non-profit corporation; and
AMERICAN COUNCIL OF THE BLIND OF COLORADO, INC., a Colorado non-profit corporation,

Plaintiffs,

v.

STATE OF COLORADO, DEPARTMENT OF REVENUE;
STATE OF COLORADO, DEPARTMENT OF REVENUE, DIVISION OF MOTOR VEHICLES;
M. MICHAEL COOK, in her individual and official capacity as Executive Director of the Colorado Department of Revenue; and
STEVE TOOL, in his individual and official capacity as Senior Director of the Colorado Division of Motor Vehicles,

Defendants.

MEMORANDUM BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

The Defendants, through the Colorado Attorney General, respectfully submit the following Memorandum Brief in support of their Motion to Dismiss.

I. PRELIMINARY STATEMENT

Plaintiffs brought this action seeking damages, declaratory, and injunctive relief against the Colorado Department of Revenue, the Division of Motor Vehicles, the Executive Director of the Department of Revenue and the Senior Director of the Division of Motor Vehicles, all 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"). Specifically, Plaintiffs seek a declaration that the actions of all Defendants described in the Amended Complaint constitute a violation of the Rehabilitation Act and the ADA; an injunction ordering Defendants to cease the alleged discrimination; and damages under the Rehabilitation Act against the Colorado Department of Revenue and the Colorado Division of Motor Vehicles. Plaintiffs also seek an award of attorney fees and costs.

Plaintiffs contend that Defendants violated the above statutes which prohibit discrimination based on one's disabilities. Plaintiffs, a mother and her two daughters, maintain that the 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 blind, and thus not licensed to operate a motor vehicle, she was not qualified pursuant to statute to supervise her daughter while her daughter accumulated experience necessary for the daughter to receive an unrestricted drivers license when she turns sixteen. Plaintiffs maintain that Defendants failed to make reasonable modifications by allowing Julianna's (daughter) grandfather to supervise her driving while she has her instructional permit prior to her sixteenth birthday.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS[1]

1. Julianna Barber is a resident of Colorado Springs, Colorado. She is 15 years old. (Amended Complaint at ¶ 4).

[1] For purposes of this motion only, except as otherwise indicated, Defendants accept the facts as alleged by Plaintiffs as true and assumes that Plaintiffs can prove the facts alleged in the Amended Complaint.

2. Madeline Barber is a resident of Colorado Springs, Colorado. She is 13 years old. (Amended Complaint at ¶ 5).

3. Marcia Barber is a resident of Colorado Springs, Colorado, and is the mother of Julianna and Madeline. She suffers from retinitis pigmentosa and is limited in the major life activity of seeing. (Amended Complaint at ¶¶ 6-7).

4. Colorado Residents are eligible to apply for a minor's driver's license at age 16. Colo. Rev. Stat. § 42-2-104 (1)(c). (Amended Complaint at ¶ 23).

5. At the age of 15, individuals may obtain a minor's instruction permit under certain circumstances. (Amended Complaint at ¶ 24).

6. When only 15 years old, a person must be enrolled in an approved driver education course. In addition, the person must provide a written statement signed by the "parent, stepparent, or guardian and the instructor…" establishing such enrollment. Colo. Rev. Stat. § 42-4-106(1)(b). (Amended Complaint at ¶¶ 24-25).

7. Further, the permit issued pursuant to this section only authorizes the minor to drive "under the supervision of the parent, stepparent or guardian who cosigned the application for the minor's instruction permit if such parent, stepparent or guardian holds a valid driver's license." (Amended Complaint at ¶ 25).

8. Such permit also entitles the applicant to drive a motor vehicle, which is marked so as to indicate that it is a motor vehicle used for instruction and which is properly equipped for such instruction upon highways when accompanied by or under

the supervision of an approved driver education instructor who holds a valid driver's license. (See Attachment A, prior version of Colo. Rev. Stat. § 42-2-106(b)). [2]

9. Julianna Barber was born on September 8, 1989. She turned 15 on September 8, 2004. (Amended Complaint at ¶ 28).

10. On October 13, 2004, Julianna Barber obtained a minor's instruction permit. She completed a driver's education course on October 23, 2004. (Complaint at ¶ 27).

11. Julianna's father, though not disabled, does not have a driver's license. (Amended Complaint at ¶ 30).

12. Marcia Barber does not have a driver's license. (Amended Complaint at ¶ 31).

13. In October of 2004, Marcia Barber inquired if Julianna could be permitted to drive with her grandfather, a licensed driver, until Julianna turned 16 years of age. These requests were denied because the state statute only permitted a licensed parent, stepparent, or guardian to supervise a minor's driving. Additionally, Julianna, like any child who does not have a parent, stepparent or guardian who is a licensed driver, was entitled to drive a properly marked and properly equipped for instruction motor vehicle, under the supervision of an approved driver education instructor who holds a valid

[2] A trial court can take judicial notice of state statutes. F.R.E. 201; U.S. v. One (1) 1975 Thunderbird 2-Door Hardtop White in Color with Burnt Orange Vinyl Landau Top, Serial No. 5J87A127636, Utah License Cbe 492 576 F.2d 834, 836 (10th Cir.1978)

driver's license. (Complaint at ¶¶ 33-43; Attachment A, prior version of Colo. Rev. Stat. § 42-2-106 (1)(b)).

14. Once a minor who has an instruction permit turns 16 years of age, he or she can drive with any licensed driver over the age of 21. (Attachment A, prior version of Colo. Rev. Stat. § 42-2-106 (1)(a)).

15 Effective July 1, 2005, the Colorado Legislature amended the above referenced statute. A minor driver under the age of 16, who has obtained an instruction permit is now entitled to drive under the supervision of the parent, stepparent, GRANDPARENT WITH POWER OF ATTORNEY, or guardian who cosigned the application for the minor's instruction permit if such parent, stepparent, Grandparent with power of attorney, or guardian holds a valid driver's license. (See Attachment B, Amended Colo. Rev. Stat. § 42-2-106(b) effective July 1, 2005).

III. STANDARDS FOR DISMISSAL

If accepting all well pleaded allegations as true and drawing all reasonable inferences in favor of the Plaintiffs, it appears beyond doubt that no set of facts entitle Plaintiffs to relief, then the court should grant a motion to dismiss. See Tri-Crown, Inc. v. American Fed. Sav. & Loan Ass'n, 908 F. 2d 578, 582 (10th Cir. 1990).

IV. ARGUMENT

A. The ADA and the Rehabilitation Act

"The Rehabilitation Act is materially identical to and the model for the ADA…." Crawford v. Indiana Department of Corrections, 115 F.3d 481, 483 (7th Cir. 1997). The standards adopted by Title II of the ADA for State and local government services are

generally the same as those required under section 504 for federally assisted programs and activities. 28 CFR Pt. 35, App. A, Preamble to Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services (Published July 26, 1991). A Rehabilitation Act claim has the additional element of receipt of federal funds. Other than this, the elements are the same. Thus, the discussion of the elements required under the ADA is equally applicable to consideration of the Rehabilitation Act.[3]

The Americans with Disabilities Act of 1990 ("ADA") is found at 42 U.S.C. §§ 12101-12213. Title II, 42 U.S.C. § 12131-12132, prohibits discrimination in the provision of government programs, activities and services against a qualified individual with a disability:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Regulations promulgated under the ADA and the Rehabilitation Act forbid public entities from denying a disabled person "the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities." 28 C.F.R. § 35.130(b)(2).

[3] Unless otherwise noted, cases under the ADA and the Rehabilitation Act may be cited interchangeably for the two acts. See Toyota Motor Manuf. v. Williams, 534 U.S. 184, 193-94 (2002); Bragdon v. Abbott, 524 U.S. 624, 631 (1998); " 'Because the language of disability used in the ADA mirrors that in the Rehabilitation Act, we look to cases construing the Rehabilitation Act for guidance when faced with an ADA challenge,' and

The regulations require public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). [4]

In evaluating Plaintiffs' claims, the Court should apply the general standard of Tyler v. City of Manhattan, 849 F.Supp. 1429 (D.Kan.1994). That standard requires a Plaintiff to prove:

> (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.

Id. at 1439. "This general standard, which closely tracks the statute's language, is plainly correct." Gohier v. Enright, 186 F.3d 1216, 1219 (10th Cir. 1999); Amirault v. City of Roswell, 120 F.3d 270 (10th Cir. 1997).

B. Plaintiffs were not denied access to services or programs because of a disability.

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vice versa." Cummings v. Norton, __ F.3d __, 2005 WL 15464, at *__ n.2 (10th Cir. 2005) (quoting Kimber v. Thiokol Corp., 196 F.3d 1092, 1102 (10th Cir.1999)).

[4] Title II of the ADA uses the term "reasonable modification," whereas Title I of the ADA uses the term "reasonable accommodation." Notwithstanding the different statutory language, there appears to be little substantive difference between the terms. See 42 U.S.C. § 12111(9),(10); 28 C.F.R. § 35.130(b)(7); Dahlberg v. Avis, 92 F. Supp. 2d 1091, 1105 –1106 (D. Colo. 2000); Wong v. Regents of the Univ. of Cal., 192 F.3d 807, 816 n. 26 (9th Cir.1999).

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). To establish that defendant's alleged discrimination was "based on [claimant's] disability . . . the plaintiff must 'present some affirmative evidence that disability was a determining factor in [defendant's] decision.'" Selenke v. Medical Imaging of Colorado, 248 F.3d 1249, 1259 (10th Cir. 2001) (quoting Morgan v. Hitli, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997). The ADA forbids discrimination against a qualified individual because of the disability, not "discrimination on other bases." Buckley v. Consl. Edison Co. of N.Y., Inc., 155 F.3d 150, 156 (2nd Cir. 1998).

The statute of which Plaintiffs complain is facially neutral. There is no discrimination based upon disability. Indeed, 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 in the event the parent, stepparent or guardian is unlicensed due to revocation of their 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. 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. Thus, there is no burden placed on the Plaintiffs based on disability, much less "solely by reason of her or his disability".

Moreover, even if there were some distinction based on disability, such distinctions are valid as long as there is a rational basis for the distinction. See e.g. Thompson v. Colorado, 278 F.3d 1020, 1030-31 (10th Cir. 2001) ("Thus, a state statute violates the Equal Protection Clause if it makes distinctions between disabled and nondisabled without a rational justification.").

C. None of the individually named Plaintiffs state a valid claim under the ADA or Rehabilitation Act.

1. Elements of the claim.

As stated above, Plaintiffs are required to allege and prove:

> (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.

2. Marcia Barber

While Marcia Barber is disabled, she is not a qualified individual for purposes of the ADA or Rehabilitation Act. To the extent she maintains that she was not permitted to supervise her daughter's driving, she was not otherwise qualified to do so because she is not a licensed driver**.** For purposes of provision of prohibiting discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap," an "otherwise qualified person" is one who is able to meet all of the program's requirements in spite of his handicap. Southeastern Community College v. Davis, 442 U.S. 397 (1999). 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). Under Title II, a "qualified individual" is someone with a disability who "with or without reasonable modifications . . . meets the essential eligibility requirements" to receive public services or participate in a public program." 42 U.S.C. § 12131(2). 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. Therefore, she fails to meet the first element of a claim. Additionally, she has not been, and does not allege that she was denied access to a service or program because of her disability. Thus, she meets none of the requisite elements necessary to pursue an individual claim. She has sustained no injury at all. See e.g. Simenson v. Hoffman, 1995 WL 631804, at *2 (N.D.Ill. Oct. 24, 1995) (dismissing parents' ADA Title III claim of associational discrimination where their disabled child was refused treatment and parents could not show that the denial of

services and subsequent ejection from the facility constituted a separate and distinct denial of services to them);

3. 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. Under the current statute she can gain driving experience in the presence of her grandfather. Thus she has not been excluded from participation in or denied the benefits of Colorado's driver's program. Thus, she too, fails to allege any of the requisite elements necessary to state an individual claim.

4. Madeline Barber

Madeline Barber also fails to meet a single element of an ADA claim. First, there is no allegation that she is disabled. Second, 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). It necessarily follows that she has not been denied access to Colorado's driving program. Accordingly, she too fails to state a claim upon which relief can be granted.

5. The Colorado Cross-Disability Coalition and the American Council of the Blind of Colorado, Inc. lack standing.

Federal jurisdiction is limited by Article III, § 2, of the U.S. Constitution to actual cases and controversies. As a result, the plaintiffs' standing to sue "is the threshold question in every federal case, determining the power of the court to entertain the suit." Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Courts must assess whether standing exists based on the facts as they existed at the time the lawsuit was filed. See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190-91, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000); Steger v. Franco, Inc., 228 F.3d 889, 893 (8th Cir.2000) (citation omitted). To show Article III standing, a plaintiff has the burden of proving: (1) that he or she suffered an "injury in fact," (2) a causal relationship between the injury and the challenged conduct, and (3) that the injury likely will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

An "injury in fact" is a harm that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Id. at 560 (internal quotation marks and citations omitted). The plaintiff must show that he or she "sustained or is immediately in danger of sustaining some direct injury as the result of the challenged ... conduct and [that] the injury or threat of injury [is] both real and immediate...." City of Los Angeles v. Lyons, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (internal quotation marks and citations omitted).

In addition to these constitutional limitations, there are also three prudential limitations on standing: (1) generally, there is no jurisdiction over "generalized grievances" shared by all or a large class of citizens; (2) a plaintiff must assert his or her own legal rights and cannot rest his or her claim to relief on the legal rights of third parties. Warth, 422 U.S. at 499-500 (finding that without such limitations, courts would decide abstract questions of wide public significance better left to the legislative branch) (citations omitted); (3) "plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision ... invoked in the suit." Bennett v. Spear, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997).

On a motion to dismiss, a district court must "accept all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Thompson *v.* County of Franklin, 15 F.3d 245, 249 (2d Cir.1994) (quoting Warth, 422 U.S. at 501). Standing, however, "cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear on the record." FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (internal quotation

marks and citations omitted). "It is the burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating he is a proper party to invoke judicial resolution of the dispute." Id. (internal quotation marks and citations omitted).

Here, neither the Colorado Cross-Disability Coalition ("CCDC") nor the American Council of the Blind of Colorado, Inc. ("ACBC") allege an injury in fact. An organization may attempt to assert standing on its own behalf. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 n. 19, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). However, when asserting standing on its own behalf, an organization must be able to show some injury to the association itself that meets the constitutional standing requirements as well as the prudential limitations on standing, unless Congress evinced a clear intent to eliminate those prudential limitations under the statute in question. See id. at 378-79. As stated in Havens, courts conduct the same inquiry with respect to an organizational plaintiff as with an individual plaintiff: has it "alleged such a personal stake in the outcome of the controversy as to warrant [ ] invocation of federal-court jurisdiction." Id. (internal quotation marks and citations omitted). Neither CCDC nor ACBC meets these requirements. The only allegations are that members of these organizations "are likely to encounter" alleged discrimination, and that members have allegedly been injured. These argumentative averments are insufficient to establish standing.

D. Plaintiffs' claim of Association discrimination fails as a matter of law.

Both Title I (employment discrimination) and Title III (public accommodations offered by private entities) of the ADA contain an association provision prohibiting

discrimination based upon a non disabled plaintiff's association with a disabled individual. These provisions are designed to prohibit discriminatory stereotypes relating to association with a disabled individual. Indeed, the EEOC Interpretive Guidance provides three examples of forbidden association discrimination: (1) refusal to hire where the employer makes an unfounded assumption that the employee will miss work in order to care for a disabled relative; (2) discharging an employee who does volunteer work with AIDS victims, due to fear that the employee may contract the disease; and (3) denying health benefits to a disabled dependent of an employee but not to other dependents, even where the provision of benefits to the disabled dependent would result in increased health insurance costs for the employer. 29 C.F.R. Pt. 1630.8 app at 349 (1996).

There is no association provision in Title II of the ADA. Plaintiffs' claims are brought via Title II. Indeed, the only case law the undersigned could locate in the Tenth Circuit dealing with "association discrimination" were cases filed under Title I, of the ADA. In two cases from the Tenth Circuit, it is implied that there is no such claim for association discrimination in Title II.[5] Specfically, in Morgan v. City of Albuquerque, 25 F.3d 918 (10th Cir. 1994), Morgan brought suit pursuant to § 1983 against Albuquerque. After the jury entered a defense verdict, Morgan filed a motion for new trial alleging that

[5] Other circuits have held that although not expressly stated in the statutory language of Title II, the regulation implementing Title II implied that an association claim is allowed under Title II. See Innovative Health Systems v. City of White Plains, 117 F.3d 37 (2nd Cir. 1997)(Denial of zoning application based upon stereotypes and unfounded generalized fears associated with zoning application for a drug and alcohol rehabilitation center stated a claim under the ADA).

the trial court improperly allowed the city to strike two jurors on the basis of their association with physically disabled people.[6] In affirming the denial of her motion for new trial, the Tenth Circuit stated:

> Plaintiff next contends that the use of peremptory challenges to strike veniremen who have an association with persons with physical disabilities violates the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* Nothing in the ADA supports this contention. Even assuming that the ADA did bar use of peremptory challenges to remove physically disabled veniremen, there would be no grounds for an extension of such protection to persons who have some association with persons with disabilities--the ADA is intended only to remove discrimination against physically disabled persons themselves.

Morgan v. City of Albuquerque, 25 F.3d at 920. Additionally, in McGuinness v. University of New Mexico, 170 F.3d 974 (10th Cir. 1998), The Tenth Circuit affirmed the denial of relief of a claim under the ADA association discrimination provision. In that case McGuinness, a medical student, sued the University of New Mexico pursuant to the ADA alleging that the University failed to accommodate him based on his relationship with his disabled son.

> In his complaint, Mr. McGuinness attempted to assert a claim under the ADA but failed to distinguish between Title I and Title II; neither did he raise a claim under the statute's "association discrimination" provision, 42 U.S.C. § 12112(b)(4). Whereas Title I proscribes discrimination against employees or prospective employees because of their disabilities, *see* 42 U.S.C. §§ 12111-12112, Title II bars public entities from discriminating on the basis of disability in the provision of programs and benefits. *See* 42 U.S.C. §§

[6] The Plaintiff in that case, Morgan was also physically disabled, however, her disability was unrelated to the 1983 claim and her request for damages in the underlying 1983 case was not based on her disability.

> 12131-12132. In his response to the medical school's motion for summary judgement, Mr. McGuinness attempted to (1) separate his Title I and Title II claims, (2) add a claim under the Rehabilitation Act of 1973, and (3) assert an "association discrimination" claim under the ADA. *See* Aplt.App. at 374-76, 380-82.
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> . . . .
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> The district court granted summary judgment for the medical school on the ground that Mr. McGuinness was not disabled within the meaning of the ADA. Although Mr. McGuinness was not allowed to amend his complaint, the district court nevertheless ruled on the "association discrimination" claim. *See* Aplt.App. at 25-26. It held that Mr. McGuinness did not offer facts sufficient to support a cause of action under § 12112(b)(4) because he was neither employed by the medical school, nor did he show that the medical school discriminated against him because of his association with his disabled son.

McGuinness v. University of New Mexico School of Medicine 170 F.3d at 977. In analyzing McGuiness' association claim, the Tenth Circuit applied only the Title I analysis.

> Because the "association discrimination" provision falls under Title I of the ADA, the plaintiff must show an employment relationship with the defendant. *See Den Hartog,* 129 F.3d at 1081-82. To state a claim under Title I of the ADA, the defendant must be "an employer, employment agency, labor organization, or joint labor-management committee" that employs the plaintiff. 42 U.S.C. § 12111(2),(4). Mr. McGuinness has failed to show the existence of such an employment relationship between himself and the medical school.

Id.

There were no reported cases based upon "association discrimination" in this circuit until the Tenth Circuit issued its decision in Den Hartog v. Wasatch Academy, 129 F.3d 1076 (10th Cir. 1997). Den Hartog is a Title I case involving an employment

decision. In that case Den Hartog brought an association discrimination claim against his employer, a boarding school. Specifically, he alleged that he was terminated from his job as a result of his association with his adult son who had bipolar disorder.[7] In analyzing the basis for the association discrimination provision in Title I, the Court looked to the legislative purpose and various hypotheticals discussed at the House Committee meetings.

> The association provision has been the subject of very little litigation, and none in this court prior to the present case. It was apparently inspired in part by testimony before House and Senate Subcommittees pertaining to a woman who was fired from her long-held job because her employer found out that the woman's son, who had become ill with AIDS, had moved into her house so she could care for him. *See* H.R.Rep. No. 101-485, pt. 2, at 30 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 312 (citing this testimony as evidence of the need for the association provision).
> By the time the ADA was enacted, two separate House Committees had reported favorably on the bill (H.R.2273), and had issued Committee Reports describing certain intended applications (and unintended misapplications) of the association provision. The House Committee on Education and Labor posed the following pair of hypotheticals to illustrate the association provision's parameters:
> [A]ssume, for example that an applicant applies for a job and discloses to the employer that his or her spouse has a disability. The employer believes the applicant is qualified for the job. The employer, however, assuming without foundation that the applicant will have to miss work or frequently leave work early or both, in order to care for his or her spouse, declines to hire the individual for such reasons. Such a refusal is prohibited by this subparagraph.
> In contrast, assume that the employer hires the applicant. If he or she violates a neutral employer policy concerning

[7] Hartog's son had apparently attacked and threatened members of the school community.

> attendance or tardiness, he or she may be dismissed even if the reason for the absence or tardiness is to care for the spouse. The employer need not provide any accommodation to the nondisabled employee. The individuals covered under this section are any individuals who are discriminated against because of their known association with an individual with a disability.
> H.R.Rep. No. 101-485, pt. 2, at 61-62 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 343-44.
>
> . . . .
>
> In a floor debate held subsequent to the publication of these two reports, Congressman Bartlett, a sponsor of the bill, sought to answer what he characterized as some "frequent questions raised by business persons" about the ADA. *See* 136 Cong. Rec. H9072 (1990) (statement of Rep. Bartlett). One such question was the following: "If an able-bodied employee who is about to be terminated for cause, claims a relationship with a disabled individual, can he or she claim discrimination by association and be protected by the ADA?" Id. Congressman Bartlett answered that "[g]iven the hypothetical posed, the terminating employee would have to prove that the employer knew of the association and was terminating the employee because of that association, and not because he or she was otherwise [un]qualified." Id.

In addition, in providing a detailed analysis of association discrimination, the Tenth Circuit went on to discuss how other circuits had analyzed the issues associated with these types of claims.

> The few appellate cases that have been decided under the association provision have involved situations squarely anticipated by the 101st Congress. In Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209 (4th Cir.1994), for example, an employee was terminated because she missed work repeatedly and extensively primarily to care for her disabled son. The terminated employee sued, alleging association discrimination. Consistent with the legislative intent expressed in the House Education and Labor Committee Report, however, the court rejected the plaintiff's claim. *See*

> *id.* at 214. See also H.R.Rep. No. 101-485, pt. 2, at 61-62 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 344 ("If [a non-disabled employee] violates a neutral employer policy concerning attendance or tardiness, he or she may be dismissed even if the reason for the absence or tardiness is to care for the [disabled associate].").

Den Hartog v. Wasatch Academy 129 F.3d at 1082 –1083.

Interestingly, as discussed in Den Hartog, and as set forth in the congressional record that provides the guidelines and examples of association discrimination referenced above, an association discrimination claim cannot be based on a failure to accommodate the nondisabled–it can only be based on discrimination.

> Although no court has yet addressed the issue, it appears from the language and legislative history of the ADA, and also from the EEOC's "interpretive guidance" thereto, that the protection afforded to non-disabled employees who have an association with a disabled person differs in one significant respect from that afforded to disabled employees. This difference is the application of the ADA's "reasonable accommodation" requirements.
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> The ADA states that no covered employer "shall discriminate against a qualified individual with a disability because of the disability of such individual ...." 42 U.S.C. § 12112(a). In the context of this general prohibition, the word "discriminate" is a term of art which includes "not making reasonable accommodations." See 42 U.S.C. § 12112(b)(5) (1994); 29 C.F.R. § 1630.9(a) (1996). By the plain terms of § 12112(b)(5), however, the ADA does not require an employer to make any "reasonable accommodation" to the disabilities of relatives or associates of an employee who is not himself disabled.
> Specifically, 42 U.S.C. § 12112(b)(5)(A) (1994) defines the term "discriminate" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability *who is an applicant or employee,* ...." (emphasis added). Further, 42

> U.S.C. § 12112(b)(5)(B) (1994) defines "discriminate" to include "denying employment opportunities to *a job applicant or employee* who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments *of the employee or applicant.*" (emphasis added).
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> . . . .
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> We are confident that the lack of any reference to the associates or relatives of the employee or applicant in Section 12112(b)(5)'s articulation of the ADA's "reasonable accommodation" requirement is not due to any inadvertent omission. In its Report, the House Education and Labor Committee clearly expressed its intention that under the association provision, "[t]he employer need not provide any accommodation to the nondisabled employee." H.R.Rep. No. 101-485, pt. 2, at 61-62 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 344. *See* Subpart A, *supra.*
> Our conclusion in this regard has also been reached by the EEOC, which, pursuant to 42 U.S.C. § 12116 (1994), has issued regulations and Interpretive Guidance on the ADA. The Interpretive Guidance notes that where an associate or relative of the employee is disabled, but the employee himself is not disabled:
> an employer need not provide the applicant or employee without a disability with a reasonable accommodation because that duty only applies to qualified applicants or employees with disabilities. Thus, for example, an employee would not be entitled to a modified work schedule as an accommodation to enable the employee to care for a spouse with a disability.
> 29 C.F.R. Pt. 1630.8 app. at 349 (1996) (citing legislative history materials). [FN6] Thus, Wasatch *1085 was not required under the ADA to provide Den Hartog with any "reasonable accommodation" of *Nathaniel* 's disability.

Den Hartog v. Wasatch Academy 129 F.3d at 1083 –1085.

In this context, it is the nondisabled Julianna who requested an accommodation or modification of allowing her grandfather to supervise her driving. However, under existing law Defendants are not required to accommodate a nondisabled applicant.

Thus, even assuming *arguendo* that the association discrimination provisions in Title I applied, under existing law, Defendants have no obligation to provide an accommodation to a nondisabled applicant.

E. Plaintiff's claim for damages under the Rehabilitation Act fails as a matter of law.

The Supreme Court has held that punitive damages may not be awarded in a private suit brought under Title II of the ADA or section 504 of the Rehabilitation Act. Barnes v. Gorman, 536 U.S. 181, 189, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002). Thus, Plaintiffs cannot obtain punitive or exemplary damages in this case. Accordingly, their claim appears to be for compensatory damages. However, a plaintiff cannot obtain compensatory damages from the state under the Rehabilitation Act without showing intentional discrimination. See Powers v. MJB Acquisition Corp., 184 F. 3d 1147, 1153 (10th Cir. 1999) (entitlement to compensatory damages under § 504 of the Rehabilitation Act requires proof of intentional discrimination). Plaintiffs make no allegation of intentional discrimination. Thus, their claim for damages fails as a matter of law.

Moreover, the allegations of the Amended Complaint indicate that Julianna was not denied access to any service or program, much less denied because of her mother's disability. Julianna is no different than any family who has parents that don't drive. In such cases there was the option of gaining driving experience before her 16th birhtday with drivers instructor. Currently, there is the additional option of obtaining such experience in the presence of her licensed grandparent, provided her mother signs

a limited power of attorney authorizing the grandparent to supervise the driving. The modifications made to the statute belie any claim of intentional discrimination.

F. Plaintiffs' claims for injunctive and declaratory relief are moot.

In order to have jurisdiction to adjudicate a dispute, a federal court must have before it an actual case or controversy. Fischbach v. New Mexico Activities Association, 38 F.3d 1159 (10th Cir. 1994). A moot case must be dismissed because it does not pass this test. Id. When a case is moot, a live controversy no longer exists between the parties and the parties no longer have a stake in the outcome of the litigation. Adamson v. Bowen, 855 F.2d 668, 674-75 (10th Cir. 1988). At that point, the Constitution does not permit a federal court to consider what has become a mere academic exercise:

> Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction. This requirement exists at all stages of federal judicial proceedings, and it is therefore not enough that the dispute was alive when the suit was filed; the parties must continue to have a personal stake in the outcome. Because mootness is a matter of jurisdiction, a court may raise the issue *sua sponte*. When a party seeks only equitable relief, as here, past exposure to alleged illegal conduct does not establish a present live controversy if unaccompanied by any continuing present effects. In these circumstances, the party must "demonstrate a good chance of being likewise injured in the future."

McClendon v City of Albuquerque, 100 F.3d 863, 867 (10th Cir. 1996) [emphasis added, citations omitted]. A case must be dismissed on grounds of mootness unless the controversy exists at all stages of the proceedings, "not merely at the time the complaint

is filed." Preiser v. Newkirk, 422 U.S. 395, 401, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975).

For example, the Tenth Circuit has held that an ADA claim is mooted when policy changes are voluntarily implemented to alleviate alleged discrimination.

> A request for prospective relief can be mooted by a defendant's voluntary compliance if the defendant meets the "formidable burden" of demonstrating that it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." Laidlaw, 528 U.S. at 189-90, 120 S.Ct. 693. Such a burden will typically be met only by changes that are permanent in nature and that foreclose a reasonable chance of recurrence of the challenged conduct. *See id.* Wichita has met this burden with respect to the portion of appellants' injuries-in-fact which were based upon its driver-discretion policy.

Tandy v. City of Wichita 380 F.3d 1277, 1291 (10th Cir.2004).

Assuming *arguendo* that the statute did discriminate because of Marcia Barber's disability, the Defendants made reasonable modifications in order to accommodate Julianna by amending the statute at issue. 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 statue at issue was amended to permit Julianna to drive with her grandfather. Specifically, the statute now permits an minor driver under 16, including Julianna, who has a minor's instruction, to accumulate driving experience under the supervision of the "parent, stepparent, GRANDPARENT WITH POWER OF ATTORNEY, or guardian who cosigned the application for the minor's instruction permit if such parent, stepparent, GRANDPARENT WITH POWER OF ATTORNEY, or

guardian holds a valid driver's license."[8] Thus, the requested modification or accommodation has been made.

Similarly, because the Defendants modified the above referenced statute, Plaintiffs' claim for attorney fees also fails. Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, et. al., 532 U.S. 598 (U.S. 2001).

V. CONCLUSION

For the reasons set forth above, Plaintiffs' Amended Complaint should be dismissed.

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[8] 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.

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within Memorandum Brief in Support of Defendants' Motion to Dismiss upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado, this 11th day of July, 2005 addressed as follows:

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