IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

JULIANNA BARBER, by and through her next friend, Marcia Barber; and
MARCIA BARBER;

Plaintiffs,

v.

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

Defendants.

MEMORANDUM BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Defendants, through the Colorado Attorney General, respectfully submit the following Memorandum Brief in Support of their Motion for Summary Judgment.

PRELIMINARY STATEMENT

The sole remaining claim in this case is a claim for compensatory damages pursuant to section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (the “Rehabilitation Act”) brought by a mother and her daughter. The Rehabilitation Act prohibits discrimination based on one's disabilities.

In Colorado, individuals between the ages of 15 and 16 may obtain a minor driving instruction permit. In 2004, when the events that led to the filing of this lawsuit occurred, minors with such permits were allowed to practice driving under the supervision of a licensed parent, stepparent or guardian. C.R.S. § 42-2-106(1)(b)(2004).

Minors with a learner's permit are required to obtain 50 hours of supervised driving and have their permit for 1 year before obtaining their license after they turn sixteen. Marcia Barber (mother) is blind, and thus not licensed to operate a motor vehicle. She was not qualified pursuant to statute to supervise Julianna Barber (daughter) while Julianna accumulated experience necessary for her to receive an unrestricted driver's license when she turned sixteen. Marcia Barber maintains that Defendants discriminated against her on the basis of her disability when they allegedly failed to make reasonable modifications by allowing Julianna's grandfather to supervise her driving while she had her instructional permit prior to her sixteenth birthday. Julianna maintains that although she is not disabled and was not discriminated against, she sustained damages as a result of the alleged discrimination against her mother. See Barber, et al., v. State of Colorado, et al., 2006 WL 213970 (D. Colo. 2006).

The claims initially asserted by Plaintiffs in this action included claims for injunctive relief to force Defendants to make such a reasonable modification under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132. In 2005, in response to Plaintiff's concerns, the Colorado General Assembly passed, and the Governor signed, a bill amending § 42-2-106(1)(b) to allow supervision by a grandparent with power of attorney. In 2006 the General Assembly broadened the statute further to allow all parents who do not have licenses to designate another licensed driver over the age of 21 to supervise their minor children's driving. As acknowledged by Plaintiffs, this new statute rendered moot Plaintiffs' claims for injunctive relief. As such, the parties stipulated to dismiss all claims for injunctive relief, as well as all claims under Title II of the Americans with Disabilities Act and all claims of Plaintiffs Madeline Barber, the Colorado Cross

Disability Coalition, and the American Council of the Blind of Colorado. Accordingly, the sole remaining claim is brought by Marcia and Julianna Barber for compensatory damages against the Entity Defendants for alleged violation of the Rehabilitation Act. (See Docket #36 at p. 16; Docket # 52 and 55).

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Julianna Barber is a resident of Colorado Springs, Colorado. At the time of the filing of the Second Amended Complaint she was 16 years old. (Second Amended Complaint at ¶ 4).

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

3. Marcia Barber does not have a driver's license. (Second Amended Complaint at ¶ 29).

4. Julianna's father, though not disabled, does not have a driver's license. (Second Amended Complaint at ¶ 28).

5. Colorado Residents are eligible to apply for a minor's driver's license at age 16. Colo. Rev. Stat. § 42-2-104 (1)(c). (Second Amended Complaint at ¶ 21).

6. At the age of 15, individuals may obtain a minor's instruction permit under certain circumstances. (Second Amended Complaint at ¶ 22).

7. In order to obtain an instructional permit, a person who is 15 years old, 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). (Second Amended Complaint at ¶ 24).

8. Prior to 2005, the permit issued pursuant to this section authorized 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." (**Exhibit A**, prior version of § 42-2-106(b)).

9. Such permit also entitled 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 **Exhibit A**).

10. Julianna Barber was born on September 8, 1989. She turned 15 on September 8, 2004. (Second Amended Complaint at ¶ 23).

11. One month after her fifteenth birthday, on October 13, 2004, Julianna Barber obtained a minor's instruction permit. She completed a driver's education course on October 23, 2004. (Second Amended Complaint at ¶ 25; **Exhibit B**, Deposition of Julianna Barber at p. 23, l. 8).

12. In late October or early November 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. She was ultimately referred to Steve Tool, who at that time was the Senior Director of the Colorado Division of Motor Vehicles. (**Exhibit C**, Deposition of Marcia Barber at p. 32, ll. 11-20).

13. Mr. Tool investigated the issue. All of Marcia Barber's interactions with Mr. Tool were pleasant and professional. Marcia Barber admits that Mr. Tool was very supportive and understood her issues. Marcia Barber never spoke with or had any interaction with Michael Cooke. (**Exhibit C**, Deposition of Marcia Barber at p. 45, ll. 2-25; p. 46, ll. 1-18).

14. Marcia Barber admits that Steve Tool could not simply disregard the statute and allow Julianna's grandfather to supervise because "his hands were tied" as a result of the statutory language. (**Exhibit C** Marcia Barber Deposition at p. 45, ll. 14-23; **Exhibit D**, Deposition of Steve Tool at p. 22, ll. 15-20). However, he was very interested in finding a solution and sought guidance from the Colorado Attorney General's Office and further inquired into amending the statute at issue to accommodate all parents who do not have a driver's license. (**Exhibit D**, Deposition of Steve Tool at p. 28, ll. 7-13).

15. Marcia Barber's request was initially denied because the state statute only permitted a licensed parent, stepparent, or guardian to supervise a minor's driving. (**Exhibit D**, Deposition of Steve Tool at p. 33, ll. 21-25). The only reason her request was denied was because of the express statutory language. (**Exhibit D**, Deposition of Steve Tool at p. 34, ll. 1-3).

16. Marcia Barber admits that Tool was very interested in finding a solution. (**Exhibit C** Marcia Barber Deposition at p. 46, ll. 1-3; p. 63). Along these lines Marcia Barber was advised that as a result of her inquiries, the statute at issue was in the process of being amended (**Exhibit C** Marcia Barber Deposition at p. 46, ll. 2-7).

17. Approximately two months after her discussion with Steve Tool, in January of 2005, Marcia Barber called the Colorado Attorney General, John Suthers, to discuss the

issue. Mr. Suthers advised Marcia Barber that it was pretty clear that this was a legislative oversight and that the statute should be changed. At that point Marcia Barber advised Suthers that amendment of the statute was already in the works. (**Exhibit E**, Deposition of John Suthers at pp. 17-18).

18. In addition to the long term solution of the amendment of the statute, they discussed the immediate issue of Julianna. Mr. Suthers advised Marcia Barber that he was certain that he could assist her in solving her immediate situation until the law was changed. (**Exhibit E**, Deposition of John Suthers at pp. 17, 21; p. 28, ll. 15-25; p. 29, ll. 1-9; pp. 30-31).

19. Specifically, Mr. Suthers discussed with Marcia Barber the possibility of signing or drafting some sort of document or limited delegation of authority that would comply with the spirit of the statute to allow Marcia Barber's father to supervise the driving until such time as the statute was amended. (**Exhibit E**, Deposition of John Suthers at 17-18, 20, 27-28, 31-32).

20. However, Marcia Barber was unwilling to sign any document whatsoever to allow her father to supervise the driving. (**Exhibit C**, Deposition of Marcia Barber at p. 51, ll. 5-24; p. 55, ll. 19-25; p. 56, ll. 1-5). She made this point very clear to Mr. Suthers. (**Exhibit E**, Deposition of John Suthers at pp. 18, 22, 24-25, 26-27, 29, 33-34, 35). Suthers specifically advised Marcia Barber that she would not be relinquishing any parental rights and that they simply needed to come up with some device by which she would designate the grandfather of the child, for purposes of driving with the child, to comply with the statute. (**Exhibit E**, Deposition of John Suthers at p. 18, ll. 1-18; p. 22, ll. 12-23).

21. However, it became apparent to Suthers that Marcia Barber was both unwilling to sign any designation or document and that she was not intent on solving the immediate problem, but was in fact setting up a lawsuit. (**Exhibit E**, Deposition of John Suthers at p. 33, ll. 3-7)

22. Marcia Barber admits that the requirement that an unlicensed parent sign a designation document to allow someone else to supervise the driving was a requirement that any unlicensed parent would have to meet whether or not they were disabled (**Exhibit C**, Deposition of Marcia Barber at p. 66, ll. 5-16). Additionally, Julianna admits that because her mother is required to sign an affidavit of financial responsibility it was important that the parent maintain some control as to who supervises the driving and designate in writing who could supervise the driving. (**Exhibit B**, Deposition of Julianna Barber at 33-34).

23. As a result of Marcia Barber's inquiries, and the efforts of the Defendants, effective July 1, 2005, the Colorado Legislature amended the above referenced statute. A minor driver under the age of 16, who obtained an instruction permit was entitled to drive under the supervision of the parent, stepparent, grandparent with power of attorney, or guardian who holds a valid driver's license. (See **Exhibit F**, Amended Colo. Rev. Stat. § 42-2-106(b) effective July 1, 2005).

24. The Department of Motor Vehicles was both involved in and in favor of making this legislative change as a result of Plaintiffs' requests. (**Exhibit D**, Deposition of Steve Tool at pp. 11-13).

25. The Colorado Legislature again amended the referenced statute to add: "If the parent, stepparent, grandparent with power of attorney, or guardian or foster parent,

who signed the affidavit of liability pursuant to section 42-2-108(1)(a), does not hold a valid Colorado driver's license, the parent, stepparent, grandparent with power of attorney, or guardian or foster parent may appoint an alternate permit supervisor. An alternate permit supervisor shall hold a valid Colorado driver's license and be twenty-one years of age or older." The Department of Motor Vehicles suggested and supported this amendment. (**Exhibit D**, Tool Deposition at p. 33, ll. 2-20).

26. Marcia Barber testified in her deposition that she was very pleased with the statutory changes and stated "that's all I ever wanted." (**Exhibit C**, Marcia Barber Deposition at p. 75, ll. 5-9).

27. In order to be qualified to get her driver's license, Julianna needed to have a permit for 1 year, and during that year acquire 50 hours of behind the wheel experience. Thus, the earliest date she could have acquired her license was one year after receiving her permit on October 13, 2005. (**Exhibit B**, Julianna Barber Deposition at p. 25, ll. 15-25; p. 26, ll. 9-17).

28. Julianna acquired her 50 hours of driving experience in one year and one month. Julianna took the test to obtain her driver's license in November 10, 2005, and obtained her license on November 14, 2005. (**Exhibit B**, Julianna Barber Deposition at p. 40, ll. 15-24; **Exhibit H**, License).

30. After obtaining her permit, Julianna acquired her 50 hours of driving experience and practiced her driving and logged hours in October and November of 2004 immediately after she obtained her permit. She logged the other hours in May, June, July, August, September, October and November of 2005. (**Exhibit I**, Log Sheet; Exhibit B, Julianna Barber Deposition at p. 46, ll. 13-24).

31. The statute allowing a permitted minor driver to drive with a grandparent with power of attorney went into effect on July 1, 2005. Although Marcia Barber did not want to sign a power of attorney, she signed a designation pursuant to amended statute on August 10, 2005, designating Julianna's grandfather to supervise, thus delaying the ability of the grandfather to supervise for one month. (**Exhibit J**, Designation; **Exhibit B**, Julianna Barber Deposition. p 32, ll. 4-25). There was enough time for Julianna's grandfather to supervise the driving for Julianna to get her license within a year after getting her permit, as required by law of all 15 year olds. (**Exhibit J**, Designation Form; **Exhibit C** Marcia Barber Deposition at pp. 66-67).

32. After the change in the statute, two days after her last driving session with her driving instructor, Julianna began to drive with her grandfather. (**Exhibit B**, Julianna Barber Deposition at p. 31; **Exhibit I**, Log Sheet).

33. Julianna was not eligible to obtain her license when she turned 16, because she received her permit 1 month after her fifteenth birthday, and was required to have such permit for 1 year before receiving a license. Pursuant to statute, however, after she turned 16, Julianna could practice her driving with any licensed driver over 21 years of age. Three days after her last driving session with grandfather on October 2, 2005, she began driving with Barry Wick, a friend of her mothers. (**Exhibit B**, Julianna Barber Deposition at p. 36, l. 25; p. 37, ll. 1-14; **Exhibit I**, Log Sheet).

34. She completed her 50 hours and took her final drivers test for obtaining her license on November 10, 2005. She received her license on November 14, 2005, approximately thirteen months after obtaining her learner's permit. (**Exhibit H**, License; **Exhibit B**, Julianna Barber Deposition p. 38-39).

35. Julianna admits that she was not discriminated against. (Barber v. State, 2006 WL 213970 at *1; **Exhibit B**, Julianna Barber Deposition at p. 45, ll. 13-21).

36. Julianna admits that the Defendants were not purposefully trying to discriminate against the disabled and that the issue resulted from a legislative oversight and that the law was appropriately changed (**Exhibit B**, Julianna Barber Deposition at p. 49, ll. 5-18).

37. Julianna admits she has not sustained any damages whatsoever. (**Exhibit B**, Julianna Barber Deposition at p. 47, ll. 1-25; p. 48, ll. 1-3; p. 50, ll. 20-23).

38. Marcia Barber has not seen any psychologists, social workers or counselors and has not taken any medications for anything related to anxiety or emotional distress as a result of this incident. (**Exhibit D**, Marcia Barber Deposition at p. 43, ll. 13-19).

STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In response to a motion for summary judgment, the burden shifts to the party opposing the motion to produce factual evidence, not mere allegation or argument, to show a triable issue of facts exists. Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991). The party opposing the motion must show specific facts in an affidavit, discovery response, or other document sworn under penalty of perjury showing the need for trial. Burk v. K Mart Corp., 956 F.2d 213, 215 (10th Cir. 1991); Handy v. Price, 996 F.2d 1064, 1066 (10th Cir. 1993).

ARGUMENT

I. Elements of Plaintiffs' Claim for Compensatory Damages under the Rehabilitation Act.

Section 504 of the Rehabilitation Act states: "No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...." 29 U.S.C. § 794(a). Thus, the four elements of a prima facie claim under the Rehabilitation Act are: (1) that the plaintiff is disabled under the Act; (2) that she would be "otherwise qualified" to participate in the program; (3) that the program receives federal financial assistance; and (4) that the program has discriminated against the plaintiff. Schrader v. Fred A. Ray, M.D., P.C., 296 F.3d 968, 971 (10th Cir.2002); Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1151 (10th Cir.1999); McGeshick v. Principi 357 F.3d 1146, 1150 (10th Cir. 2004). Additionally, because all claims except Plaintiffs' claims for compensatory damages under the Rehabilitation Act were dismissed, Plaintiffs must prove intentional discrimination in order to recover compensatory damages. Powers v. MJB Acquisition Corp., 184 F.3d 1147 (compensatory damages not available under section 504 of the Rehabilitation Act unless intentional discrimination); Tyler v. City of Manhattan, 118 F.3d 1400 (10th Cir.1997) (compensatory damages for mental and emotional injury not available under ADA absent intentional discrimination).

II. Plaintiffs Fail to Meet the Elements Necessary to Sustain a Rehabilitation Act Claim for Damages.

A. The 2004 Statute Provided Marcia Barber with an Appropriate Avenue to Designate an Alternate to Supervise her Daughter's Driving.

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

> At the same time, the position urged by respondents--that we interpret § 504 to reach all action disparately affecting the handicapped--is also troubling. Because the handicapped typically are not similarly situated to the nonhandicapped, respondents' position would in essence require each recipient of federal funds first to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then to consider alternatives for achieving the same objectives with less severe disadvantage to the handicapped. The formalization and policing of this process could lead to a wholly unwieldy administrative and adjudicative burden….. Had Congress intended § 504 to be a National Environmental Policy Act for the handicapped, requiring the preparation of "Handicapped Impact Statements" before any action was taken by a grantee that affected the handicapped, we would expect some indication of that purpose in the statute or its legislative history. Yet there is nothing to suggest that such was Congress' purpose.

Alexander v. Choate 469 U.S. 287. "Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance." Alexander v. Choate 469 U.S. at 287 citing Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979)(emphasis added). It does not require the state to evaluate the impact of facially neutral regulations and determine how they can be implemented in a way most favorable to the handicapped.

> Tennessee's refusal to pursue this course does not, as respondents suggest, inflict a "gratuitous" harm on the handicapped. On the contrary,

> to require that the sort of broad-based distributive decision at issue in this case always be made in the way most favorable, or least disadvantageous, to the handicapped, even when the same benefit is meaningfully and equally offered to them, would be to impose a virtually unworkable requirement…

Alexander 469 U.S. 287, 105 S.Ct. at 724.

Plaintiffs maintain that Marcia was denied access to the program that allowed her to supervise her daughter's driving because she was not allowed to designate her father as a supervisor. However, she was not denied access to a governmental benefit. She had the same ability to designate a supervising driver as a non-disabled parent without a license. Marcia Barber always had the authority to designate any licensed driver over 21 of her choosing to supervise her daughter's driving. Under the former statute, she could have executed a limited guardianship or power of attorney empowering and limiting another individual to supervise the driving. She could have made the appointment without court intervention. See Colo. Rev. Stat. § 15-14-102 (4) ("Guardian" means an individual at least twenty-one years of age, resident or non-resident, who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent or by court. The term includes a limited, emergency, and substitute guardian but not a guardian ad litem."); Colo. Rev. Stat. § 15-14-105 (A parent or guardian of a minor or incapacitated person, by power of attorney, may delegate to another person, for a period not exceeding twelve months, any power regarding care, custody, or property of the minor….); Colo. Rev. Stat. § 15-14-201 ("a person becomes a guardian of a minor by appointment by a parent or guardian by will or written instrument or upon appointment by the court….) (A copy of these statutes is attached as **Exhibit K**). Thus, the Plaintiffs had, but never exercised, the option of appointing Juliana's grandfather as a limited guardian solely for the purpose of supervising Juliana's driving under the previous statute. Indeed, she admits that she never even explored the

possibility of executing a document that would not relinquish any parental rights, but would instead simply empower another individual to supervise the driving. (**Exhibit C** at p. 51, ll. 13-17). She never inquired as to whether she could simply file a piece of paper with the Department of Motor Vehicles saying she was giving a limited guardianship for the purpose of supervising her daughter's driving. (**Exhibit C** at 55-56, ll. 24-25, ll. 1-5).

The additional requirement of a written instrument is not onerous. See e.g. Theriault v. Flynn 162 F.3d 46 (1st Cir. 1998) (State did not discriminate against motorist with cerebral palsy, in violation of Americans with Disabilities Act, when motorist was required to take road test, not ordinarily required, before driver's license allowing driving with hand controls was renewed); Bailey v. Anderson 79 F.Supp.2d 1254 (D.Kan. 1999) (State did not discriminate against motorist with vision impairment in violation of ADA by requiring her to submit report from driving instructor regarding her driving ability as condition for instruction permit); Briggs v. Walker 88 F.Supp.2d 1196 (D.Kan. 2000) (State director of vehicles did not discriminate against wheelchair restricted applicant for instruction permit to operate vehicle in violation of the ADA, by requiring that applicant submit medical certification as to her ability to operate vehicle safely before permit would be granted).

B. Assuming *Arguendo* 2004 Statute Discriminated, Defendants Immediately Amended the Statute and Offered Marcia Barber an Appropriate Modification.

It is undisputed that when Marcia Barber raised the issue, the Defendants implemented proceedings to change the statute. The Department of Motor Vehicles took immediate action to support the amendment of the statute to address the legislative oversight. In order to resolve the immediate issue of Julianna's driving until amendment of the statute, Marcia Barber spoke with the Colorado Attorney General himself. Mr. Suthers

advised Marcia Barber that he was certain that he could assist her in solving her immediate situation until the law was changed. He discussed with Marcia Barber the possibility of signing or drafting some sort of document or limited delegation of authority that would comply with the spirit of the statute to allow Marcia Barber's father to supervise the driving until such time as the statute was amended. (**Exhibit E**, Deposition of John Suthers at 17-18, 20, 27-28, 31-32). However, Marcia Barber admits that she was unwilling to sign any document whatsoever to allow her father to supervise the driving. Indeed, she made this point very clear to Mr. Suthers. (**Exhibit C**, Deposition of Marcia Barber at p. 51, ll. 5-24; p. 55, ll. 19-25; p. 56, ll. 1-5; **Exhibit E**, Deposition of Suthers at pp. 18, 22, 24-25, 26-27, 29, 33-34, 35). Suthers specifically advised Marcia Barber that she would not be relinquishing any parental rights and that they simply needed to come up with some device by which she would designate the grandfather of the child, for purposes of driving with the child, to comply with the statute. (**Exhibit E**, Deposition of Suthers at p. 18, ll. 1-18; p. 22, ll. 12-23). Thus, it is undisputed that Plaintiffs were offered accommodations relating to the 2004 statute. Despite acknowledging that it was important that such accommodation be in writing, they refused to sign any document whatsoever to facilitate the requested accommodation until August of 2005 when Marcia Barber executed a document allowing her father to supervise Julianna's driving.

The Defendants remained willing to make accommodations to address the immediate driving question while they worked to get the statute amended. Even the Colorado Attorney General himself indicated that Marcia Barber could sign a very limited document rather than go through a formal guardianship process in order to allow an alternate to supervise the driving.

III. Plaintiff's Claim for Compensatory Damages under the Rehabilitation Act Fails because they have failed to Produce any Evidence of Intentional Discrimination and they Acknowledge that there was no Intentional Discrimination.

A plaintiff cannot obtain compensatory damages from the state under the Rehabilitation Act without showing intentional discrimination. Powers v. MJB Acquisition Corp., 184 F. 3d at 1153 (entitlement to compensatory damages under § 504 of the Rehabilitation Act requires proof of intentional discrimination). Plaintiffs admit no intentional discrimination occurred. Thus, their remaining claim for damages fails. Tyler v. Manhattan, 118 F.3d at 1402-03. In Tyler, after concluding that a plaintiff must demonstrate intentional discrimination to recover compensatory damages under the Rehabilitation Act, the Tenth Circuit affirmed the dismissal of a claim for compensatory damages under the ADA because the plaintiff merely alleged acts that had a disparate impact upon the disabled.

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

Tyler v. City of Manhattan 118 F.3d at 1403. Similarly, in this case there is a complete absence of any evidence of intentional discrimination. Indeed, Plaintiffs concede that the gravamen of their claim is based upon a theory of disparate impact. (See Plaintiffs' Memorandum in Response to Defendants' Motion to Dismiss, Docket # 17, at pp. 4, 5, 8). While this theory was sufficient to avoid dismissal of Plaintiff's claims for injunctive relief, it is insufficient here, in the complete absence of any evidence supporting a claim for intentional discrimination.

Both Plaintiffs concede that the 2004 statute was a mere legislative oversight, and there was no intent to discriminate against the disabled. Moreover, the Defendants undertook extraordinary efforts to change the statute prior to Julianna's sixteenth birthday. Effective July 1, 2005, the statute was amended to permit a minor driver under 16, who has a minor's instruction permit, to accumulate driving experience under the supervision of a licensed "grandparent with power of attorney." Prior to the statutory change, Defendants undertook efforts to accommodate Plaintiffs until the statute was changed. The Senior Director of the Colorado Division of Motor Vehicles investigated the issue. Marcia Barber admits that he was very supportive and understood her issues and pursued an amendment to the statute. She further admits that he could not simply disregard the statute and allow Julianna's grandfather to supervise because "his hands were tied" as a result of the statutory language. Far from intentionally discriminating, or being deliberately indifferent to her, he did everything he could to accommodate her situation.

Approximately two months after her discussion with Steve Tool, in January of 2005, Marcia Barber called the Colorado Attorney General, John Suthers to discuss the issue. Mr. Suthers advised Marcia Barber that it was pretty clear that this was a legislative oversight and that the statute should be changed and that he was certain that he could assist her in solving her immediate situation until the law was changed. He discussed with her the possibility of signing or drafting some sort of document or limited delegation of authority that would comply with the spirit of the statute to allow Marcia Barber's father to supervise the driving until such time as the statute was amended. However, Marcia Barber admits that she was unwilling to sign any document whatsoever. The admissions of the Plaintiffs as well as the efforts on behalf of the Defendants to reasonably

accommodate Marcia Barber belie any claim of intentional discrimination or deliberate indifference.

IV. Plaintiffs Admit They have not Sustained any Damages.

Rule 56 "mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. at 322. Even assuming arguendo that Plaintiffs could prove an intentional violation of the Rehabilitation Act, this in and of itself does not entitle them to an award of compensatory damages.

> Consequently, we hold that damages liability under section [the ADA] must be based on something more than a mere violation of that provision. There must be some cognizable injury in fact of which the violation is a legal and proximate cause for damages to arise from a single violation.

Armstrong v. Turner Industries, Inc. 141 F.3d 554, 562 (5th Cir. 1998). "Compensatory damages are such as will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury. Damages awarded to a person as compensation, indemnity, or restitution for harm sustained by him." Black's Law Dictionary 390 (6th ed.1990).

Here, plaintiffs admit no cognizable injury exists. Marcia Barber testified in her deposition that she was very pleased with the statutory changes and stated “that’s all I ever wanted.” (**Exhibit C** at p. 75, ll. 3-9). Julianna admits she has not sustained any damages whatsoever. Marcia Barber is claiming emotional distress damages but she has not seen any psychologists, social workers or counselors and has not taken any medications for anything related to anxiety or emotional distress as a result of this incident.

Thus, even assuming arguendo that Plaintiffs could muster the evidence to prove a violation of the Rehabilitation Act, they admittedly sustained no damage whatsoever.

The only possible damage is the one month delay in obtaining Julianna's license and the allegation that she had to compress her driving experience into a few months and did not get driving experience in a full range of road conditions. However, the evidentiary record reveals that the Defendants' efforts permitted Julianna to receive her license in a timely manner. Julianna needed to have a permit for 1 year, and during that year acquire 50 hours of behind the wheel experience. Thus, the earliest date she could have acquired her license was one year after receiving her permit, October 13, 2005. She practiced her driving with various people, including her grandfather, during nine of the thirteen months between receiving her permit and getting her license. She acquired her 50 hours of driving experience in one year and one month from the date she obtained her permit and obtained her driver's license on November 14, 2005, one month after she was eligible.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I certify that on November 8, 2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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