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.

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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

I. Plaintiffs' Claim for Compensatory Damages Fails because they have Failed to Produce any Evidence of Intentional Discrimination.

Plaintiffs concede that they must prove intentional discrimination in order to proceed with the remaining claim. 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). Despite having this burden, Plaintiffs failed to produce any facts that support intentional discrimination. In fact, Marcia Barber repeatedly commented on the sympathetic reaction of the Director of the Colorado Division of Motor Vehicles in dealing with her situation.

> Q: Were your interactions with Steve Tool pleasant and professional?
>
> A: Yes.

> Q: How would you describe his demeanor when he was dealing with you?
>
> A: Him personally?
>
> Q: Yes.
>
> A: He was very sympathetic.
>
> Q: What do you mean by that? What led you to believe that he was sympathetic?
>
> A: I think that he, out of all of the people that I talked to, understood the crux of the issue and saw the common sense value of offering a reasonable accommodation, but his hands were tied.
>
> Q: What do you mean his hands were tied?
>
> A: He had to follow the statute and the direction of the Attorney General's office. They would not allow him to provide a reasonable accommodation.
>
> Q: Did he seem genuinely concerned?
>
> A: Yes.
>
> Q: And did he seem interested in finding a solution?
>
> A: Yes.

(See **Exhibit C**, Deposition of Marcia Barber at pp. 45-46, Attached to Defendants' Memorandum Brief in Support of Motion for Summary Judgment).[1] Moreover, the Director of the Department of Motor Vehicles unequivocally testified that he had no intention or desire in any way to discriminate against Marcia Barber. (See **Exhibit D**, at p. 34). Marcia Barber further admits that she had no contact whatsoever with the other Defendant in this case, Michael Cooke, the Director of the Colorado Department of Revenue.

> Q: So you did not have any conversation with Michael Cooke?

[1] Pursuant to D.C.Colo.LCivR 56.1(C)(3), unless otherwise noted all references to lettered exhibits are attached to Defendants' Memorandum Brief in Support of Motion for Summary Judgment.

A: No. (**Exhibt C**, at p. 46).

In addition, Plaintiffs admit that the 2004 statute was a mere legislative oversight, that there was no intent to discriminate against the disabled, and that the State acted promptly in clarifying the statute. 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; **Exhibit D**, Tool Deposition at p. 33, ll. 2-20; **Exhibit C** Marcia Barber Deposition at p. 46, ll. 2-7). 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).

Far from intentionally discriminating, or being deliberately indifferent to Plaintiffs, Defendants did everything they could to accommodate what they understood to be Plaintiffs' request. Perhaps there was some miscommunication regarding her request. Defendants sought to amend the statute as soon as possible to enable Julianna's grandfather to supervise her driving. That was what they understood the request for accommodation to be. Accordingly, there is a complete absence of any evidence that the challenged conduct was motivated by "discriminatory animus." See Tyler v. City of Manhattan, 118 F.3d 1400, 1405 (10th Cir.1997) (citations omitted). Moreover, there is a lack of evidence supporting Plaintiff's conclusory allegation that the Defendants were deliberately indifferent. On the contrary, Defendants took immediate action to clarify the statute as a direct result of Plaintiffs' situation. In fact, although it was late in the process, they were able to get the statute clarified that very year in such a way that satisfied Plaintiffs in sufficient time so that Julianna Barber could have obtained her driver's 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). 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).

In concluding that a plaintiff must prove intentional discrimination to recover compensatory damages, the Tenth Circuit in Powers relied heavily upon Ferguson v. City of Pheonix, 157 F.3d 668 (9th Cir. 1998). See Powers v. MJB Acquisition Corp., 184 F. 3d at 1153. Ferguson is particularly instructive here, where the Defendants have already voluntarily and expeditiously remedied the equitable or injunctive claims. In Ferguson, deaf and hearing-impaired users of 9-1-1 emergency telephone service commenced an action under the ADA, the Rehabilitation Act, and § 1983 against city and the police department commander seeking declaratory, injunctive and damages relief. They maintained that the City's 9-1-1 emergency service did not respond effectively, or in some instances at all, to their Telecommunications Device for the Deaf ("TDD"). Plaintiffs relied on TDDs to communicate by telephone. It was undisputed that the Plaintiffs had been victims of various crimes and when they attempted to call 9-1-1 via their TDDs, the City's 9-1-1 system failed to work. Further, the city's TDD was operated in contravention of Department of Justice Regulations. After entering into a consent decree and settling the injunctive issues, the defendants filed a motion for summary judgment on the damage claim. The trial court found no evidence of intentional discrimination or deliberate indifference and granted summary judgment to the defendants on the compensatory damage claim. In affirming summary judgment, the Ninth Circuit first noted, that:

> Substantial corrective remedies are available to plaintiffs, however, regardless of intent. In the present case, equitable relief is sufficient to remedy the problem. The principal purpose of this litigation as evidenced by the prayers for relief was to gain declaratory and permanent injunctive relief compelling compliance with the ADA and the Rehabilitation Act. The

> corrective action has already been taken by the City, so the basic problem itself has been solved.

Ferguson v. City of Phoenix 157 F.3d at 674 -675. As noted by the trial court in that case, "The district court found no intentional violations, even saying that plaintiffs' evidence 'is hardly the stuff of intentional conduct or deliberate indifference.'" Ferguson v. City of Phoenix 157 F.3d at 675 quoting Ferguson, 931 F.Supp. 668, 697 (D. Ariz 1996).

> The district court held that in order to show intentional discrimination, the plaintiffs had to show that the City had been "deliberately indifferent to the strong likelihood that their action or inaction was violating plaintiffs' federally protected rights." In so doing, the court utilized a "deliberately indifferent" standard in place of the "discriminatory animus" test laid out in *Guardians. Guardians,* 463 U.S. at 584, 103 S.Ct. 3221. In the present case, we need not determine which standard is proper, since plaintiffs' claims fail under either one. In light of the evidence in the record, the situation clearly appears to be no more than at times some not uncommon bureaucratic inertia as well as some lack of knowledge and understanding about the DOJ Manual's requirements. There is nothing to show, even suggest, any deliberate indifference or discriminatory animus on the part of the City towards plaintiffs.

Ferguson v. City of Phoenix 157 F.3d at 675.

Similarly in the case at hand, when the Barbers raised the issue, they were directed to the most senior individual in the Department of Motor Vehicles. That individual, Steve Tool, immediately sought advice from the Attorney General's office.

> Q: Do you recall what you did in response?
>
> A: First thing I did was look at the statute. And then subsequent to that, I contacted the attorney general's office for an opinion. I think we were very sympathetic to their so-called plight and wanted to try to accommodate them and asked for guidance from the AG's office.

(See Steve Tool Deposition at p. 13, ll. 23-24; p. 14 ll. 1-5 attached hereto as **Exhibit L**).

Mr. Tool, as the head of the Department, relied on that advice to tell Ms. Barber that a

grandfather was not a guardian *per se*. (See **Exhibit 4** attached to Plaintiffs' Response to Motion for Summary Judgment, Letter from Steve Tool to Marcia Barber dated November 22, 2004). The letter simply states the legal conclusion of the Attorney General that a grandparent is not a guardian by virtue of being a grandparent. The letter then goes on to state that the division is working with legislative staff to get the statute amended, a direct response to Ms. Barber's request for accommodation. As noted in Plaintiff's response Mr. Tool also stated that he thought the request to have the grandparent supervise was reasonable, but the statute would not allow it. (See **Exhibit D**, at p. 22, ll. 15-20; p. 23, ll. 12-16; p. 33, ll. 21-25; p. 34. ll. 1-3). As a result, the Department then worked on amending the statute to accommodate her request.

> A: I mean, I think we did everything we could to try to accommodate her. And I had an interest in trying to do that.

(See **Exhibit D**, at p. 29, ll. 9-11).

> A: I think we continued to work on drafting the change in the legislation – I mean, the legislative session had begun, and we had gone through the process of including grandparent and were proceeding down that path.

(See **Exhibit D**, at p. 24, ll. 22-25; p. 25. l. 1). The Department acted in reliance on the language of the statute and the advice of the Attorney General's office in concluding that without some written document, the grandfather could not supervise the driving. It is undisputed that the Department immediately undertook efforts to amend the statute prior to Julianna's sixteenth birthday. These actions belie any claim of discriminatory animus or deliberate indifference.

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

Plaintiffs maintain that Marcia was discriminated against because she is disabled and was not allowed to designate her father as a supervisor. Plaintiffs do not deny that

Marcia could have executed a limited guardianship or power of attorney empowering and limiting another individual to supervise the driving. 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."); 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 to Defendant's Motion for Summary Judgment as **Exhibit K**). Thus, Marcia Barber had, but never exercised, the option of appointing Juliana's grandfather solely for the purpose of supervising Juliana's driving. 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. 51-52, ll. 13-25; 1-2). 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 or a power of attorney designating her father to supervise. (**Exhibit C** at 55-56, ll. 24-25, ll. 1-5).

In response to Defendants' Motion for Summary Judgment, Marcia Barber now makes the conclusory assertion that she would have signed a designation similar the one she executed in August of 2005, had that been offered to her and the fact that she signed the document later entitles her to an inference that she would have signed one previously.

However, she provides no evidence that she ever requested or even mentioned execution of such a document to any of the Defendants.

> Q: Okay. Did you follow up on his (Suthers) suggestion about exploring any kind of guardianship or limited guardianship?
>
> A: No. That's an unreasonable requirement. That's the crux of the issue.
>
> Q: Did you inquire with anyone or with him as to whether you could simply file a piece of paper saying that you were giving a limited guardianship for the purposes of supervising your daughter's driving?
>
> A: No. I continued to say, I am entitled to a reasonable accommodation under the ADA.

(**Exhibit C**, Marcia Barber Deposition at p. 55, ll. 19-25; p. 56, ll. 1-5). The gravamen of Plaintiffs' argument is that requiring a writing for a disabled person is *per se* unreasonable. Indeed, she testified to this repeatedly in her deposition. The regulations associated with the ADA and Rehabilitation Act "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.'" Urban by Urban v. Jefferson County School Dist. R-1 89 F.3d 720, 727 (10th Cir. 1996) quoting 28 C.F.R. § 35.130(b)(7). However, the United States Supreme Court has held that that section 504 does not require affirmative action to accommodate the disabled. See Southeastern Community College v. Davis, 442 U.S. 397, 410-11, (1979); Urban by Urban v. Jefferson County School Dist. R-1 89 F.3d at 728. The Rehabilitation Act is based upon equal access to state programs and facilities. Urban at 728. Thus an accommodation is required when the disabled cannot "receive benefits *without* accommodation." Id (emphasis in original).

> We also stated that a federally-funded education system may violate section 504 when the school system's practices "*preclude* the handicapped from obtaining system benefits realized by the nonhandicapped." *Id.* at 853 (emphasis added). Thus section 504 requires accommodation in a neighborhood school when disabled children cannot receive educational benefits *without* accommodation; it does not require a school district to modify its program in order to accommodate a single child in a neighborhood school, especially if that child is already receiving educational benefits in another environment.

Urban by Urban v. Jefferson County School Dist. R-1 89 F.3d at 728.

Here, it is not disputed that Marcia Barber had the same access to the driving program as any unlicensed parent. Like any unlicensed parent she had an avenue to designate in writing someone to supervise her daughter's driving. However, she determined that such writing was not reasonable. This flies in the face of the express provisions of the ADA and Rehabilitation Act which are designed to allow for equal access. As this Court noted in its Order Granting in Part and Denying in Part Defendants' Motion to Dismiss p. 4, fn 1, the inquiry is "whether those with disabilities are as a practical matter able to access benefits to which they are entitled" (citations omitted). Defendants maintain that Plaintiffs were able to access these benefits by a simple act of signing a limited guardianship or power of attorney limited to the sole issue of supervision of driving.

Finally, Plaintiff's contention that requiring a written document is not safety related lacks any semblance of credibility. The Plaintiffs themselves point out the fundamental interest parents have in raising their children. The statute requires a written document from a parent when allowing someone else to supervise his or her child's driving in order to ensure that a parent has ultimate responsibility and agreement regarding supervision. The Court should remain mindful of the general principle that courts will not second guess the public health and safety decisions of state legislatures. See Young v. City of

Claremore, Okla., 411 F. Supp. 2d 1295, 1310 (N.D. Okla. 2005). Plaintiffs acknowledge the importance of a writing supporting such designation. Julianna admits that it was important that her mother maintain some control as to who supervises the driving and designate such in writing. Moreover, the Attorney General's Office expressly advised that the statute relating to supervision of minor unlicensed drivers is to promote and protect the public safety. (See 2/23/05 letter from Dodd to Menendez attached to Plaintiffs' Response). Indeed, allowing such designation in the absence of a writing would be irresponsible. For example, some parents may not want certain relatives to supervise their child's driving. The requirement of a writing ensures that the parent maintains control over who, and who does not, supervise, and enhances public safety by ensuring that parents control their child's practice. Finally, a writing ensures that state officials maintain some tracking method to ensure that only those responsible individuals designated by a parent supervise.

WHEREFORE, Defendants respectfully request that the Court grant Defendants' Motion for Summary Judgment.

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CERTIFICATE OF SERVICE

I certify that on December 18, 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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