10-2058

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DANNY ABRAHAMS, ANTHONY CELARDO, KEVIN CHRISTMAN, LAUREN EPSTEIN, MERYL JACKELOW, EVAN SKIDMORE, DAVID TINDAL and LEE WOLBROM,

Plaintiffs-Appellants

-against-

MTA LONG ISLAND BUS,

Defendant-Appellee

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BRIEF FOR PLAINTIFFS-APPELLANTS IN AN APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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JURISDICTIONAL STATEMENT

This action was commenced pursuant to Title II of the Americans With Disabilities Act ("ADA") on the ground that the defendant failed to follow the "public participation" requirements of the section of Title II pertaining to paratransit services (42 U.S.C. §12143) and the accompanying regulations (49 C.F.R. §37.137) in eliminating a substantial portion of paratransit services in Nassau County. Consequently, the district court had subject matter jurisdiction over this action. 42 U.S.C. §12133; 29 U.S.C. §794b; 42 U.S.C. §2000-d. As the district court dismissed this action and denied an application for a preliminary injunction, this Court has jurisdiction over the appeal. 28 U.S.C. §§1291, 1292(a)(1). The order of the district court was entered on May 26, 2010 and the notice of appeal was filed on the same day. As the district court dismissed this action and denied an application for a preliminary injunction, this appeal is from a final order of the district court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

In dismissing this action and denying an application for a preliminary injunction, did the district court commit an error of law by misreading the regulations relevant to the "public participation" requirements under the ADA pertaining to paratransit service and holding that the requirements did not apply where defendant was eliminating a substantial portion of paratransit service?

Assuming that the district court did commit such error, were plaintiffs entitled to a preliminary injunction inasmuch as they demonstrated irreparable harm and that defendant violated the "public participation" portion of the ADA and accompanying regulations pertaining to paratransit services?

STATEMENT OF THE CASE

As stated in the affidavit of Thomas J. Charles, the defendant's Vice President of the Paratransit Division, defendant proposed to eliminate 9% of the Able-Ride paratransit service in Nassau County. Joint Appendix ("J.A.") 142, 193. The defendant's plans would concededly eliminate 100% of Able-Ride service in certain areas of Nassau County. Mr. Charles conceded in his affidavit that "it was . . . recognized that the service changes would create hardship for Able-Ride customers who live and work in the affected areas." J.A. 143.

Plaintiffs commenced this action challenging the defendant's unilateral decision to eliminate 9% of its Able-Ride service (and 100% of Able-Ride service in certain areas) and create a hardship for the affected Able-Ride customers as being violative of the section of Title II of the ADA that governs paratransit services (42 U.S.C. §12143) and the regulations issued pursuant to that section. J.A. 13-23. In particular, this action demonstrated that defendant violated the section of the ADA that governs paratransit services and the regulations issued pursuant to that section that require "public participation" with regard to changes

in paratransit service. See 42 U.S.C. §12143(c)(6) and (7) and 49 C.F.R. §37.137(c) (regulation issued based on that statute).

Plaintiffs sought a preliminary injunction and were initially granted a temporary restraining order. J.A. 48-49. The defendant opposed the motion for a preliminary injunction and moved to dismiss this action. J.A. 105-193. The defendant's motion to dismiss this action was made on two grounds: (a) plaintiffs allegedly do not have a private right of action based upon the regulations issued pursuant to 42 U.S.C. §12143 and (b) that even if the plaintiffs have a private right of action, the statute and the regulations issued under that statute purportedly do not apply to the circumstances involved here. Plaintiffs opposed the motion to dismiss.

The United States District Court for the Eastern District of New York (Sandra J. Feuerstein, J.) dismissed this action and denied the application for a preliminary injunction. J.A. 198-210. The district court did not decide the issue of whether plaintiffs have a private right of action and did not consider whether the defendant's actions violated the ADA and its regulations. Rather, the district court held that the "public participation" regulations only applied to the "development" of paratransit services and not changes in those services and that those regulations did not apply because the defendant was otherwise in compliance with the ADA. J.A. 206.

Plaintiffs appeal here from the order of the district court. J.A. 214. Under the clear language of 49 C.F.R. §37.137(c), there is an ongoing public participation requirement with regard to "the continued development and assessment of services to persons with disabilities." Moreover, while 49 C.F.R. §37.135(c)(1) states that an entity like defendant is immune from the public participation requirements of 49 C.F.R. §37.137(a) and (b) if it is otherwise compliant with the ADA, that regulation does not grant to immunity to defendant from the requirements of 49 C.F.R. §37.137(c). Consequently, the district court erred in holding that 49 C.F.R. §37.137(c) was inapplicable here.

With regard to the other issues, plaintiffs have a private right of action under 49 C.F.R. §37.137(c) and the defendant's actions with regard to the elimination of paratransit service violated that regulation. Consequently, the district court erred in dismissing this action and plaintiffs demonstrated a likelihood of success on the merits. As defendant did not contest plaintiffs' argument that they would suffer irreparable harm, the district court erred in denying a preliminary injunction.

RELEVANT STATUTES AND REGULATIONS

I. The Americans With Disabilities Act.

A. Introduction

The ADA was enacted in 1990 to address several areas of discrimination against persons with disabilities. Those areas are principally employment (Title I

of the ADA); public services (Title II of the ADA) and public accommodations and services operated by private entities. (Title III of the ADA). As stated in the preamble to the ADA, the purpose of the ADA is "(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong consistent enforceable standards addressing discrimination against individuals with disabilities;...and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. §12101(b). This Court has consistently held that the ADA must be construed broadly to effectuate its remedial purposes. See, e.g., Loeffler v. Staten Island University Hospital, 582 F.3d 268, 287 (2d Cir. 2009); Henrietta D. v. Bloomberg, 331 F.3d 261, 279 (2d Cir. 2003).

B. General Provisions of Title II of the ADA.

As the paratransit services at issue here are a public service, it is undisputed that Title II of the ADA is the applicable portion of the ADA here.

In Part A of Title II, the general sections of Title II, discrimination is defined as follows (42 U.S.C. §12132):

> Subject to the provisions of this subchapter, 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.

With regard to enforcement of the ADA against the above definition of discrimination, 42 U.S.C. §12133 states that "the remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this Title." 29 U.S.C. §794a(2) states that "the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §2000d et seq] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." A private right of action can be maintained under 42 U.S.C.A. §2000d against the provider of public services like the defendant. Barnes v. Gorman, 536 U.S. 181, 185 (2002).

C. Paratransit Services and Title II of the ADA.

42 U.S.C. §12143 is the section of Title II of the ADA relevant to the provision of paratransit services as a public service. 42 U.S.C. §12143(a) states as a general rule:

> It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system… to fail to provide with respect to the operations of its fixed route system, in accordance with this section, paratransit and other special transportation services to individuals with disabilities…

42 U.S.C. §12143(b) requires the Secretary of Transportation to issue regulations to carry out this section, and 42 U.S.C. 12143(c) states the required content of those regulations. 42 U.S.C. §12143(c)(6), labeled "Public participation," states as follows:

> The regulations issued under this section shall require that each public entity which operates a fixed route system hold a public hearing, provide an opportunity for public comment, and consult individuals with disabilities in preparing its plan under paragraph (7).

Paragraph (7) of 42 U.S.C. §12143(c), labeled "Plans," states:

> The regulations issued under this section shall require that each public entity which operates a fixed route system-
>
> (A) within 18 months after July 26, 1990, submit to the Secretary, and commence implementation of, a plan for providing paratransit and other special transportation services, which meets the requirements of this section; and
>
> (b) on an annual basis thereafter, submit to the Secretary, and commence implementation of, a plan for providing such services.

42 U.S.C. §12143(e)(1) defines the term "discrimination" as used above at 42 U.S.C. §12143(a) as "a failure of a public entity to which the regulations issued under this section apply to submit, or commence implementation of, a plan in accordance with subsections (c)(6) and (c)(7) of this section."

42 U.S.C. §12143(f)(1) states that nothing in 42 U.S.C. §12143 prevents a public entity from providing paratransit services at a level greater than that required by the section.

D. Paratransit Regulations Enacted Pursuant to 42 U.S.C §12143

The relevant paratransit regulation issued pursuant to 42 U.S.C. §12143 here is 49 C.F.R. §37.137(c), which states as follows

> (c) Ongoing requirement. The entity shall create an ongoing mechanism for the participation of individuals with disabilities in the continued development and assessment of services to persons with disabilities. This includes, but is not limited to, the development of the initial plan, any request for an undue financial burden waiver, and each annual submission.

Also relevant to the consideration of this action is 49 C.F.R. §37.135(c)(1), which states as follows:

> (1) If an entity has met and is continuing to meet all requirements for complementary paratransit in §§37.121-37.133 of this part, the entity may submit to FTA an annual certification of continued compliance in lieu of a plan update… The requirements of 49 C.F.R. §§37.137(a) and (b), 37.138 and 37.139 do not apply when a certification is submitted under this paragraph.

Therefore, the requirements of 42 U.S.C. §12143(c)(7) and 49 C.F.R. §37.137(c) must be followed even if 49 C.F.R. §§37.137(a) and (b) do not apply to the annual certification.

FACTS

I. Introduction

At issue here is whether the defendant complied the "public participation" requirements of 42 U.S.C. §12143 and the regulations enacted pursuant to that

statute in deciding to eliminate 9% of paratransit service in Nassau County (commonly known as "Able-Ride") and eliminate all paratransit service in the northeastern portion of that county. This section will present the "public participation" steps taken by the defendant with regard to the decision to make the service elimination.

II. Accessible Transportation Oversight Committee (ATOC) January Meeting.

There is a committee of people with disabilities and people who use Able-Ride known as the "Accessible Transportation Oversight Committee." ("ATOC"). ATOC met on January 12, 2010, and the agenda notes for that meeting regarding Able-Ride service cuts states as follows: "What service cuts and changes will take place? We will have more information after the March hearings. The posters with the hearing dates will be made available February 9th." J.A. 68.

III. Notice of the Public Hearing.

Posters with the hearing dates were then placed in Able-Ride vehicles. The poster (J.A. 70) indicated in small print that the public hearing in Nassau County was to be held at the Chateau Briand restaurant in Carle Place on Monday, March 1, 2010.

While the poster notes that a hearing was to be held in changes in the levels of service of "New York City Transit, the Manhattan and Bronx Surface Transit Operating Authority, MTA Staten Island Railway, MTA Long Island Railroad,

MTA Bridges and Tunnels, MTA Long Island Bus, and MTA Bus," the poster specifically notes that "other service-related changes are proposed that may also affect the operation and general provision of service of subway, bus and rail lines, and the paratransit services of Access-A-Ride and Able-Ride. Although these proposed changes do not require public hearing, they are described in informational material available on the MTA website." J.A. 70.

In stating that no public hearing was required for the Able-Ride changes, the poster left the impression that the Able-Ride changes were not to be considered at the scheduled public hearing. In any event, for one to understand the Able-Ride changes, one had to look for "informational material available on the MTA website" without the poster explaining where they could be found on the MTA website. The poster assumed that all Able-Ride users had access to the MTA website or were computer literate or could navigate the MTA website which was noted at the January 12, 2010 ATOC meeting as being confusing and at which MTA admitted was difficult to read.

As for the information which was on the MTA website, defendant's counsel produced the document that was referred to in the poster. J.A. 72-73. The documents may have been in pdf format which cannot be read by blind and visually impaired customers who use screen readers.

The document only stated that the proposed plan was to "eliminate service to geographic areas not required by ADA to be covered ("non-ADA trips")." J.A. 72-73. In other words, in order to figure out whether one was affected by the proposed Able-Ride service elimination, an Able-Ride user would have to:

(a) know where to find the ADA and its regulations and be able to access those laws.

(b) understand those laws and

(c) once having accessed and understood the laws, consult a bus map to see where they and their destinations are in proximity to fixed bus routes.

Since the bulk of the service changes were apparently intended for the Oyster Bay, Bayville and Syosset areas, there was no reason why such notice should not have been provided in the poster or in the website material connected to the poster as they were in the March 10, 2010 letter informing Able-Ride users of the areas that would be most affected by the proposed service changes. J.A. 98. And since defendant knew the addresses of Able-Ride users, there was no reason why defendant could not have contacted the Able-Ride users directly about the public hearing with specifics on what and where the Able-Ride changes were going to be rather than the convoluted notice system used by the defendant that was calculated to ensure that Able-Ride users **not** attend the public hearing and **not**

understand the nature of the proposed Able-Ride cuts prior to those cuts being made official.

IV. The Public Hearing.

The public hearing was held at the Chateau Briand on March 1st. At the outset of the hearing, defendant's hearing officer Christopher Boylan noted that the hearing "will provide the public with the opportunity to comment on proposed changes to rail, bus and subway services, the student MetroCard discounted fares and the Rockaway/Broad Channel resident rebate." J.A. 75. Mr. Boylan also noted that "other service adjustments are proposed that do not require a public hearing but may affect . . . paratransit service." Id.

Many people came to the public hearing to protest various cuts. Unlike Able-Ride users who were not given explicit information as to where the service cuts would occur, persons using other MTA services were presented with explicit information as to whether their bus lines or train routes were affected by the cuts. Therefore, persons using MTA services other than Able-Ride users were sufficiently alerted so that they could come to the hearing to make their comments heard. For example, a Sandy Portnoy was present at the hearing to protest cuts to the Port Washington Long Island Railroad line. J.A. 76-79.

Only two Able-Ride users attended the hearing (J.A. 80-89) and the testimony of one of them (Lynette Perez) indicated the inadequacy of the notice

provided by defendant to Able-Ride users of the proposed cuts. The testimony of the Able-Ride users indicated that neither understood the service changes proposed for Able-Ride, and as stated in the affidavit of Therese Brezinzski of the ATOC, she was under the impression that the proposed Able-Ride cuts were not going to be considered at the proposed hearing. J.A. 103.

Statements made by some non-disabled riders at the public hearing seemed to have swayed defendant to rescind some of the cuts in service for them (J.A. 90-91), so participation and attendance at the public hearing was meaningful and relevant for some non-disabled riders.

V. ATOC meeting held the day before paratransit cuts are announced and the March 10, 2010 notice to Able-Ride users.

There was another meeting of the ATOC on March 9, 2010, one day before the March 10, 2010 letter was sent to the Able-Ride users informing them of the service changes. As stated in the agenda for that meeting (J.A. 93), "A draft of service cuts for Able-Ride was handed out, discussed and explained in detail." However, by that time, the service cuts were already a fait accompli and defendant's representatives were not interested in consulting with members of ATOC or have ATOC members participate in determining how cuts, if any were necessary, should be made. J.A. 103.

The defendant mailed a letter dated March 10, 2010 to each Able-Ride user regarding the service cuts after they were approved by the defendant. J.A. 98. While defendant was able to mail to each Able-Ride rider the notice stating that the service cuts had been approved by the defendant, defendant refused to give similar mail notice to Able-Ride users of the proposed Able-Ride cuts prior to their approval by defendant or notice of the public hearing with a clear explanation of the cuts and where they would take effect and that Able-Ride cuts were to be discussed at the public hearing. And while the defendant rescinded some proposed Long Island Bus cuts based on the public comment at the hearing, the defendant did not rescind any of the proposed Able-Ride cuts.

VI. The April 22, 2010 Public Information Session.

After plaintiffs commenced this action on April 7, 2010 and the district court issued a temporary restraining order on April 9, 2010, defendant held a "public information session" with regard to the Able-Ride service changes on April 22, 2010. J.A. 144.[1]

Notice of this "public information session" was not sent to all Able-Ride users. As for the "public information session" itself, the session largely was taken up with Mr. Charles explaining the service changes and answering questions from the public. Unlike the March 1, 2010 hearing held at the Chateau Briand where the

[1] The April 22, 2010 public information session was held after the MTA had made its decision to eliminate Able-Ride service.

defendant gave "an opportunity for members of the public to comment on the proposed changes," that were considered by the defendant, the April 22, 2010 public information session was not aimed at soliciting comment on the proposed changes from the public that defendant would then consider. Rather, the session was aimed at telling the audience that the defendant was going to make the cuts in service. J.A. 195.

SUMMARY OF ARGUMENT

The district court committed an error of law in dismissing this action. The "public participation" requirements under the regulations require the participation of individuals with disabilities in both the continued development and assessment of paratransit services to people with disabilities, and an entity like the defendant is not exempt from those requirements merely because it is otherwise in compliance with the ADA. The defendant violated the regulations in failing to sufficiently seek such public participation prior to eliminating 9% of paratransit service in Nassau County and 100% of such service in some areas, and based on a decision of this Court, plaintiffs have a private right of action to bring this action under the regulations. Therefore, not only did the district court err in dismissing this action, it also erred in not granting a preliminary injunction to the plaintiffs.

POINT I

THE DISTRICT COURT ERRED IN HOLDING THAT THE PUBLIC PARTICIPATION REQUIREMENTS WERE INAPPLICABLE HERE.

The district court held that the public participation requirements of the paratransit regulations were inapplicable because (a) they only applied to the development of paratransit services and (b) they were inapplicable because defendant was otherwise in compliance with the ADA. J.A. 206. The district court totally misread the regulations, and the public participation requirements are applicable here. Consequently, in committing an error of law, the district court abused its discretion (McDaniel v. County of Schenectady, 595 F.3d 411, 416 (2d Cir. 2010) and this Court in de novo review (Padmore v. Holder, __F.3d__, 2010 WL 2365863 *3 (2d Cir. 2010) should reverse the order of the district court dismissing this action.

At issue is the application of 49 C.F.R. §37.137(c), which places an ongoing requirement on entities like the defendant to "create an ongoing mechanism for the participation of individuals with disabilities in the continued development and assessment of services to persons with disabilities." As the regulation applies to both "continued development and assessment," the district court clearly erred in holding that the regulation only applies to "development."

The district court also clearly erred in holding that because defendant was otherwise in compliance with the ADA, it was exempt from the provisions of 49 C.F.R. §37.137(c). The regulation relied upon by the lower court, 49 C.F.R. §37.135(c)(1), provides an exemption from the provisions of §§37.137(a) and (b) but omits any mention of §37.137(c). Consequently, the district court erred in holding that the exemption applied to §37.137(c) when there was no mention of that section in the portion of the regulation upon which it relied.

The district court's citation to a statement of the Department of Transportation (J.A. 206) also fails to support its decision. The Department of Transportation statement is not contrary to plaintiffs' position and indeed support plaintiffs' position. That statement appears only to pertain to §§37.137(a) and (b) and specifically notes that "because the regulation already requires a mechanism for continuing public participation (see §37.137(c)), the Department is not persuaded that the public participation process accompanying plan updates is essential to provide public input to providers about paratransit service." Therefore, the Department of Transportation statement appears to recognize explicitly the applicability of §37.137(c) here.

Consequently, the district court erred in dismissing plaintiffs' action on the ground that the public participation requirement was not applicable here.

POINT II

PLAINTIFFS HAVE DEMONSTRATED A CLEAR LIKELIHOOD OF SUCCESS ON THE MERITS AND IRREPARABLE HARM AND ARE ENTITLED TO A PRELIMINARY INJUNCTION.

A. Introduction

This point will discuss the two issues not addressed by the Court below. Those issues are (a) whether plaintiffs have a private cause of action to bring this action and (b) whether defendant violated the "public participation" portion of 42 U.S.C. §12143 and the accompanying regulations.

In sum, based upon a decision of this Court, plaintiffs implicitly have a private right of action under the statute and its regulations. Moreover, based upon the record of this case, defendant clearly failed to comply with the "public participation" requirements of the ADA. As plaintiffs did demonstrate a likelihood a success on the merits and defendant did not contest the issue of irreparable harm,[2] the district court erred in not granting a preliminary injunction to plaintiffs.

B. Plaintiffs have a Private Cause of Action.

The District Court found that plaintiffs have a private cause of action under Title II of the ADA, said title including 42 U.S.C. §12143, the section regulating

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[2] See Keirnan v. Utah Transit Authority, 339 F.3d 1217, 1220 (10th Cir. 2003) (reduction of transportation to person with disability considered irreparable harm where plaintiff would lose opportunity to attend religious services and medical appointments).

paratransit services. The dispute between the parties is whether plaintiffs have a private right of action under 49 C.F.R. §37.137, a regulation issued pursuant to 42 U.S.C. §12143.

Because 49 C.F.R. §37.137 is merely implementing the language of 42 U.S.C. §12143 and largely dovetails that statute and since defendant would concede that plaintiffs would have a private right of action under 42 U.S.C. §12143, plaintiffs have a private right of action under 49 C.F.R. §37.137 as well.

While there have been no cases interpreting whether there is a private right of action under 49 C.F.R. §37.137, an application of the general principles on the cases relating to what regulations permit a private right of action clearly demonstrate that there is a private right of action under 49 C.F.R. §37.137.

Numerous cases have held that a regulation that simply effectuates the express mandates of the controlling statute may be enforced by means of a the private right of action available under that statute. See, e.g., Alexander v. Sandoval, 532 U.S. 275, 284 (2001); Iverson v. City of Boston, 452 F.3d 94, 100-101 (1st Cir. 2006); Ability Center of Greater Toledo v. City of Sandusky, 385 F.3d 901, 906 (6th Cir. 2004). Indeed, in a decision interpreting the Supreme Court's decision in Alexander v. Sandoval, the Eastern District Court for New York held in Stamm v. New York City Transit Authority, 2006 WL 1027142 *12 (E.D.N.Y. 2006), that "a plaintiff might be able to sue to enforce a regulation which merely

applied or authoritatively construed a statute which itself could be enforced by a private right of action." In Stamm, this Court found support for the position that the transportation regulations involved here do no more than apply or interpret the provisions of Title II of the ADA, stating: "*See* 49 C.F.R. §37.1 ("The purpose of this Part [49 C.F.R. Part 37] is to implement the transportation and related provisions of title II and III" of the ADA.) Id.

Therefore, in analyzing whether 49 C.F.R §37.137 provides plaintiffs with a private right of action, this Court must examine two issues: (a) could the underlying statute that the regulation is based upon (42 U.S.C. §12143) be enforced by a private right of action and (b) assuming that 42 U.S.C. §12143 is enforceable by a private right of action, is 49 C.F.R. §37.137 a regulation that is merely applying or authoritatively construing 42 U.S.C. §12143? The answer to both of those questions is in the affirmative.

As stated previously, Title II of the Americans With Disabilities Act which includes 42 U.S.C. §12143 is enforceable by a private right of action. At several subsections of 42 U.S.C. §12143, it is stated that violations of 42 U.S.C. §12143 are considered discrimination for the purposes of Title II's general definition of discrimination at 42 U.S.C. §12132. 42 U.S.C. §12143(a), (e). Discrimination for the purposes of 42 U.S.C. §12132 can be remedied through 42 U.S.C. §12133, which implicates the remedies of 29 U.S.C. §794a which implicates the remedies

of 42 U.S.C. §2000d. As discussed above, there is a private right of action under 42 U.S.C. §2000d. Barnes v. Gorman, 536 U.S. 181, 185 (2002). Consequently, defendant correctly concedes that there is a private right of action under Title II of the ADA, which would include 42 U.S.C. §12143.

Several courts including this Court have implicitly recognized that there is a private right of action under 42 U.S.C. §12143. See Anderson v. Rochester-Genesee Regional Transportation Authority, 337 F.3d 201 (2d Cir. 2003); Disability Rights Council v. Washington Metropolitan Area Transit Authority, 239 F.R.D. 9 (D.D.C. 2006); Martin v. Metropolitan Atlanta Rapid Transit Authority, 225 F.Supp.2d 1362 (N.D. Ga. 2002); Liberty Resources, Inc. v. Southeastern Pennsylvania Transportation Authority, 155 F.Supp.2d 242 (E.D. Pa. 2001). Had this Court and the other courts not found a private right of action existing under 42 U.S.C. §12143, they would have been obliged to sua sponte dismiss the actions on the ground that the courts did not have subject matter jurisdiction to entertain the issue pursuant to F.R.C.P. Rule 12(h)(3). See, e.g., Hertz Corp. v. Friend, ___U.S. ___, 130 S.Ct. 1181, 1193 (2010).

As plaintiffs have a private right of action under 42 U.S.C. §12143, the other issue this Court must address, as held by this Court in Stamm, is whether 49 C.F.R. §137.37 is one that "merely applied or authoritatively construed" 42 U.S.C. §12143. The language of 42 U.S.C. §12143 itself, and in comparison to the

language of 42 U.S.C. §137.37, demonstrates that 49 C.F.R. §137.37 is one that "merely applied or authoritatively construed" 42 U.S.C. §137.37 and thus a regulation in which the plaintiffs do have a private right of action.

The key subsections of 42 U.S.C. §12143 at issue in this case are 42 U.S.C. §12143(c)(6) (the "public participation" subsection requiring a public hearing, opportunity for public comment, and consultation with individuals with disabilities) and 42 U.S.C. §12143(c)(7) (the subsection placing an ongoing requirement on an entity like the defendant to engage in public participation in the development and assessment of paratransit services). Both of these subsections required the issuance of regulations by the Secretary of Transportation.

More importantly, in defining what is to be considered "discrimination" under the privately actionable 42 U.S.C. §§ 12132 and 12143(a), the paratransit statute at 42 U.S.C. §12143(e)(1) notes that discrimination under those statutes also includes an entity's failure to comply with 42 U.S.C. §12143(c)(6) and (7) and the regulations issued under those sections (which would be 49 C.F.R. §137.37). Consequently, a violation of the regulations is "discrimination" actionable through 42 U.S.C. §12143(e)(1) and ultimately through 42 U.S.C. §12143(a), 42 U.S.C. §12132, 42 U.S.C. §12133, 29 U.S.C. §794a and 42 U.S.C. §2000d. Therefore, through the clear language of 42 U.S.C. §12143(c)(6) and (7) and §12143(e),

plaintiffs clearly have a private right of action under both those statutes and their implementing regulation, 49 C.F.R. §37.137.

A comparison between 42 U.S.C. §12143(c)(6) and (7) and 49 C.F.R. §37.137 demonstrates that the language of the regulation meets the requirement in Stamm that the plaintiffs may enforce a regulation "which merely applied or authoritatively construed a statute." 42 U.S.C. §12143(c)(6) requires "public participation", a public hearing, an opportunity for public comment, and consultation with individuals with disabilities. Similarly, 49 C.F.R. §37.137 requires "public participation" (49 C.F.R. §37.137[b]), a public hearing (49 C.F.R. §37.137[b][4]); an opportunity for public comment (49 C.F.R. §37.137[b][3]) and consultation with individuals with disabilities (49 C.F.R. §37.137[b][1],[2]). Similarly, 42 U.S.C. §12143(c)(6) and (7) mandate that the requirements of 42 U.S.C. §12143(c)(6) be ongoing, as does the ongoing requirement section of the regulation (49 C.F.R. §137.37[c]).

Consequently, as 49 C.F.R. §37.137 merely applies and authoritatively construes the privately actionable 42 U.S.C. §12143(c)(6) and (7), plaintiffs have a private right of action under that regulation.

Defendant seems to make the argument that violations of the sections of the statute pertaining to public participation are not discrimination as opposed to issues involving customer service. Defendant is wrong.

Violations of the portions of the paratransit statute and its accompanying regulations on public participation in paratransit plan development are just as much discrimination as customer service. 42 U.S.C. §12143(e)(1) defines "discrimination" to include violations of the "public participation in paratransit plan development" sections of the statute (42 U.S.C. §12143[c][6] and [7]) as the term "discrimination" is used at 42 U.S.C. §12143(a). Therefore, violations of the "public participation in paratransit plan development" sections of the statute and their accompanying regulations are just as much "discrimination" under the privately actionable 42 U.S.C. §12143(a) as discrimination based on the customer service provisions of the statute and accompanying regulations. Consequently, contrary to defendant's position, the distinction between the customer service and public participation portions of the paratransit statute is a distinction without a difference.

Taking the argument one step further, in Anderson v. Rochester-Genesee Regional Transportation Authority, 337 F.3d 201 (2d Cir. 2003), this Court implicitly found a private right of action to enforce the customer service regulations connected to 42 U.S.C. §12143. Consequently, as discussed above, as customer service discrimination should be treated no differently from the public participation discrimination involved here, this Court has implicitly held that there

is likewise a private right of action to enforce the public participation regulations connected to 42 U.S.C. §12143 at issue here.

C. Defendant violated the "public participation" regulation.

Under 49 C.F.R. §37.137(c), defendant had an ongoing obligation to create a mechanism for the participation of individuals with disabilities in the continued development and assessment of services to persons with disabilities. Said obligation applied to events well beyond the mere development and submission of a plan, and certainly applied here where defendant proposed to eliminated 9% of all Able-Ride service and 100% of all Able-Ride service in some portions of Nassau County. The defendant totally failed to create a mechanism for the participation of individuals with disabilities with regard to the decision to make massive cuts in Able-Ride service.

The record of this case demonstrates that the defendant did not allow people with disabilities to in any way participate in the decision or ask the advice or opinion of people with disabilities before deciding to eliminate 9% of all Able-Ride service and 100% of all Able-Ride service in certain areas of Nassau County. The defendant not consult with the ATOC before deciding on eliminating Able-Ride service or sought the ATOC's participation in that decision in any meaningful way. Instead, the defendant told the ATOC that it would be eliminating the Able-Ride service after it was a fait accompli.

The "public information session" held by defendant on April 22, 2010 after the decision to cut the Able-Ride service was made was exactly as described in Mr. Charles' affidavit. It was a public information session in which Mr. Charles presented information about the Able-Ride cuts and answered questions about the cuts. Defendant does not even allege that it was seeking comments or advice from people with disabilities and their advocates at the "public information session" regarding the Able-Ride cuts and how defendant could possibly save money without making such drastic cuts that even Mr. Charles admits would create a "hardship" for some people.

Defendant maintained both in its poster giving notice of the March 1, 2010 public hearing and at the outset of that public hearing that it was not required to hold a public hearing and seek comments from the public. The defendant apparently did not view its March 1, 2010 public hearing as a "public hearing" on the Able-Ride cuts. The public statement that no hearing was required on the proposed Able-Ride cuts discouraged people with disabilities from attending the public hearing.

Consequently, defendant failed to solicit public comment and public participation on the Able-Ride cuts from people with disabilities as required by the paratransit statute and its accompanying regulations.

Finally, and most egregiously, defendant purposely avoided giving sufficient notice of the proposed Able-Ride cuts to people with disabilities until after the cuts had been made.

In this case, defendant went out of its way **not** to inform people with disabilities in Nassau County about the proposed Able-Ride cuts before the cuts were made. Rather than mail Able-Ride users with a notice about the cuts prior to their approval or the public hearing (as it mailed Able-Ride users with notice of the Able-Ride cuts after they had been made) or use other media as required by the regulations, Able-Ride posted the information about the cuts on its website, possibly in pdf form.

That notice was faulty in the following ways: (1) if it had been in pdf form, some people with visual impairments would have been unable to access the document, (2) even if every Able-Ride user had access to a computer or was computer-literate, the MTA website was confusing, (3) the notice cited to the ADA, requiring Able-Ride users to have to find the ADA and its regulations and then understand the ADA and its regulations, (4) assuming Able-Ride users were able to find the ADA and its regulations and then understand them, they would have then had to consult a Long Island Bus map to determine whether they would be affected by the service changes, (5) even though defendant knew which communities would be most affected by the service cuts (northeastern Nassau

County), the notice did not state that those communities would be most affected by the service cuts, and (6) the notice informed Able-Ride users that the Able-Ride cuts were not a subject of the public hearing. On the other hand, non-disabled persons in other communities were placed on notice about which Long Island Railroad lines and which Long Island Bus routes would be affected by service cuts and they were able to come to the public hearing prepared to provide public comment with regard to their railroad or bus line.

In sum, defendant's handling of the Able-Ride service eliminations which Mr. Charles concedes would cause hardship to some riders was calculated **not** to provide notice to people with disabilities in Nassau County of the service eliminations until after the decision on the service eliminations had been made by defendant. As defendant's egregious actions were a deliberate intent to avoid public participation, consultation, and comment on the Able-Ride service cuts, defendant's actions were in violation of both the paratransit statute of Title II of the ADA and the regulations issued pursuant to that statute.

CONCLUSION

The order of the district court dismissing this action and denying plaintiff's application for a preliminary injunction should be reversed and plaintiff's application for a preliminary injunction should be granted.

Dated: Garden City, New York
July 20, 2010

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1. This brief complies with the type-volume limitation of Fed. R.App.P. 32(a)(7)(B) because this brief contains 6248 words, excluding the parts of the brief exempted by Fed. R. App.P. 32(a)(7)(B)(iii).
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Dated: July 20, 2010