No. 15-486

In the Supreme Court of the United States

DONNIKA IVY, ET AL., PETITIONERS

v.

MIKE MORATH, TEXAS COMMISSIONER OF EDUCATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR

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QUESTIONS PRESENTED

1. Whether this case is moot and, if so, whether the Court should vacate the court of appeals' decision and remand with directions to dismiss as moot.

2. Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12132, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2012 & Supp. II 2014), apply to a Texas state agency's involvement in a driver education program that culminates in a state certificate that is a precondition for obtaining a state license to drive.

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INTEREST OF THE UNITED STATES

This case presents the question whether Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12132, and Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. 794 (2012 & Supp. II 2014), impose an obligation on a Texas state agency to ensure that persons with disabilities have nondiscriminatory access to the driver education program in the State. The Attorney General enforces and issues regulations under Title II of the ADA, see 42 U.S.C. 12133-12134, and coordinates implementation and enforcement by executive agencies of the Rehabilitation Act, see Exec. Order No. 12,250, 3 C.F.R. 298 (1980 comp.). The United States therefore has a substantial interest in the Court's disposition of the question presented. At the invitation of the Court, the

United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. The ADA establishes a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Title II addresses discrimination by public entities, such as state agencies. 42 U.S.C. 12131(1)(B). It provides that "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. The Title II question in this case is whether the driver education program in Texas is a program "of" a state agency, or instead a program solely of private driver education schools. If it is a program of a state agency, that agency has an obligation under Title II to ensure that persons with disabilities have nondiscriminatory access to the program.

At the direction of Congress, 42 U.S.C. 12134, the Attorney General has issued regulations implementing Title II. See 28 C.F.R. Pt. 35. One such regulation forbids disability discrimination by a public entity in providing any "aid, benefit, or service," regardless of whether the public entity acts "directly or through contractual, licensing, or other arrangements." 28 C.F.R. 35.130(b)(1).

b. The Rehabilitation Act imposes an obligation on recipients of federal funding that parallels the obligation that Title II imposes on public entities. It provides that no otherwise qualified individual may, on the basis of his or her disability, be "excluded from the participation in, be denied the benefits of, or be sub-

jected to discrimination under" any "program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). Accordingly, an additional question in this case is whether the driver education program at issue is a program of a Texas agency that receives federal funding, obligating the agency to ensure that persons with disabilities have nondiscriminatory access to the program. As with the ADA, the Department of Justice's coordination regulations apply the prohibition on discrimination when the funding recipient acts "directly or through contractual, licensing, or other arrangements." 28 C.F.R. 41.51(b)(1); see note 8, *infra*.

2. Texas law requires anyone under age 25, as a prerequisite to receiving a driver's license, to obtain a state driver education certificate. Tex. Transp. Code Ann. § 521.1601 (West Supp. 2015); see Pet. App. 2.[1] To obtain the certificate, the applicant must generally complete and pass a state-approved driver education course given by a private driver education school. Pet. App. 3; see Tex. Educ. Code Ann. § 1001.055 (West Supp. 2015). A state agency licenses the private driver education schools, Tex. Educ. Code Ann. § 1001.201, and provides them with driver education certificates (or certificate numbers) for a fee, *id.* § 1001.055. A state driver education certificate "is a government record," 16 Tex. Admin. Code § 84.100(1) and (12) (2016), and unauthorized possession or distribution of such a certificate is a felony, Tex. Educ. Code Ann. § 1001.555(a) and (c). Once an applicant has obtained the state certificate, he or she may take a driver's test and, if successful, obtain his or her driver's license. See Tex. Transp. Code Ann. § 521.161 (West 2013).

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[1] There are exceptions to this requirement that are not relevant here. See Pet. App. 3 n.2.

A state agency controls almost every aspect of the schools' operations.[2] It establishes statewide curriculum requirements for driver education, Tex. Educ. Code Ann. §§ 1001.101, 1001.1015; designates the educational materials to be used, *ibid.*; specifies the amount of time that must be spent on in-person and behind-the-wheel instruction, *id.* §§ 1001.101(b), 1001.1015(b); and requires instruction on certain specified topics, *id.* §§ 1001.1015(b)(2), 1001.102, 1001.1025, 1001.107-1001.110. The state agency ratifies the particular curriculum of each school as part of the licensing process. *Id.* § 1001.204(b)(13). It also individually licenses each school's instructors, *id.* §§ 1001.251, 1001.253, and approves the hiring of each school's key staff members, 16 Tex. Admin. Code § 84.104(c).

3. Petitioners are Texas residents with hearing disabilities. Pet. App. 3; J.A. 66-70. They were unable to obtain the necessary driver education certificates because they live in areas with no licensed driver education schools that would accommodate their disabilities. Pet. App. 3-4 & n.2; J.A. 70-71.

An advocate brought the accommodation issue to the attention of the Texas Education Agency (TEA), which at that time was the agency with responsibility for driver education schools and certificates. Pet. App. 4; see J.A. 70-72. The TEA did not take any steps to ensure that people with hearing disabilities are able to obtain the driver education and state certificates; instead, it recommended that the advocate file a complaint against a particular school with the U.S. Depart-

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[2] Because responsibility for the driver education schools and certificates shifted from one state agency to another state agency during the pendency of this lawsuit, see pp. 6-7, *infra*, this brief simply refers to "the state agency."

ment of Justice. J.A. 72. The advocate filed a complaint against the TEA itself with the Department of Justice. *Ibid.* The complaint was referred to the Department of Education, and a regional office of the Department's Office for Civil Rights dismissed the complaint on the view that the TEA did not have an affirmative obligation to monitor individual driver education schools' compliance with Title II of the ADA or the Rehabilitation Act. *Ibid.*; see Pet. App. 4.[3]

4. Petitioners filed suit in federal court against the state official in charge of the TEA under Title II of the ADA and Section 504 of the Rehabilitation Act. Pet. App. 4; J.A. 70. Their complaint sought declaratory and injunctive relief, on behalf of themselves and a putative class of similarly situated people, that would require the TEA to ensure access to driver education courses and driver education certificates for people with hearing disabilities. Pet. App. 4-5; J.A. 92-93. Petitioners did not move for class certification in the district court. See J.A. 1-7. The district court denied the State's motion to dismiss, holding that the driver education program is a program, service, or activity of the State. Pet. App. 33-55.

5. The court of appeals, on interlocutory review, reversed, Pet. App. 1-18, holding that the state agency's role in driver education is insufficient to trigger application of Title II of the ADA and the Rehabilitation Act, *id.* at 9-18. The court reasoned that the driver education program is not a program of the State because the state agency does not itself "provide[]" driver education; instead, it merely "licenses and regulates private driver education schools." *Id.* at

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[3] The regional office's letter is not in the record; the United States will lodge the letter with the Court upon request.

10; see *id.* at 11-12. The court also concluded that the lack of a "contractual or agency" relationship between the state agency and private driver education schools "cuts strongly against" holding the State liable under Title II of the ADA and the Rehabilitation Act. *Id.* at 14-16.

The court acknowledged that "the benefit provided by driver education schools—a driver education certificate—is necessary for obtaining an important governmental benefit—a driver's license." Pet. App. 17. And it recognized that it would be "extremely troubling" if individuals with hearing disabilities "were effectively deprived of driver's licenses simply because they could not obtain the private education that the State of Texas has mandated as a prerequisite for this important government benefit." *Ibid.* But the court nonetheless concluded that those considerations were insufficient to make the driver education program a program of the State. *Ibid.*

Judge Wiener concurred in part and dissented in part. Pet. App. 18-32. He concluded that the "TEA's involvement in driver education in Texas does constitute a service, program, or activity under Title II of the ADA," *id.* at 18, because the agency "farms out the practical implementation of its program to private entities while retaining and exercising considerable oversight, regulation, and other substantive involvement," *id.* at 28.

6. After the court of appeals issued its decision and denied rehearing, the Texas legislature passed a law that shifted authority over driver education from the TEA to a different state agency, the Texas Department of Licensing and Regulation (TDLR). See 2015 Tex. Gen. Laws 3624-3647 (H.B. 1786). The law sub-

stituted the TDLR (or one of its components) for the TEA in various state statutes but generally left intact the substantive requirements for obtaining a driver education certificate and driver's license. See *ibid.*[4]

7. In their merits brief before this Court, petitioners assert new facts (Br. 12-13) that raise the question whether a live controversy remains in this case.

SUMMARY OF ARGUMENT

I. Based on the new facts in petitioners' brief, it appears that this case soon will become moot.

A. In the complaint, five named plaintiffs challenge Texas's requirement that they obtain driver education certificates as a precondition for driver's licenses. In their merits brief, petitioners assert that four of the five now have obtained the necessary certificates, and the fifth has moved out of state and soon will age out of the certificate requirement. As a result, it appears that the petitioners' individual claims will be moot.

Petitioners contend that the class claims in their complaint permit this Court to conclude that their case is not moot. If a class had been certified, then the case would have remained live. But petitioners did not move for class certification, and the district court therefore did not consider the issue. The mere presence of class allegations in the complaint is insufficient to keep the case alive, and no exception to the mootness doctrine for class claims applies.

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[4] The relevant state regulations still refer to the TEA, see 16 Tex. Admin. Code Ch. 84, but the TDLR has begun the process of updating them, see TDLR, *Driver Education and Safety: Proposed Driver Education and Safety Administrative Rules*, https://www.tdlr.texas.gov/driver/driverproprules.htm (last visited Aug. 29, 2016).

B. Accepting petitioners' representations as true, once the case becomes moot, this Court should exercise its equitable discretion to vacate the court of appeals' decision and remand the case with instructions to dismiss it. Vacatur is the Court's ordinary practice when a case becomes moot on appeal, and vacatur appears appropriate on the facts of this case.

II. If the Court reaches the merits, it should hold that the anti-discrimination protections in Title II of the ADA and Section 504 of the Rehabilitation Act apply to Texas's role in the driver education program. The State therefore must ensure that persons with disabilities have nondiscriminatory access to that program.

A. Title II of the ADA makes it unlawful to deny qualified persons with disabilities the benefits of the "services, programs, or activities of a public entity." 42 U.S.C. 12132. The Rehabilitation Act similarly forbids denying qualified persons with disabilities the benefits of "any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). The question under both statutes in this case is whether the driver education program at issue is one "of" the state agency.

Three factors, taken together, make the driver education program here a program of the state agency: (1) the state agency comprehensively controls the curriculum, teachers, facilities, and operations of the private driving schools; (2) the state agency provides, via the driving schools, state certificates to students who successfully complete the program; and (3) the state driver education certificate is a prerequisite for obtaining a state driver's license.

In holding otherwise, the court of appeals failed to appreciate the extent to which the state agency is involved in providing driver education. It also failed

to recognize that under the text of Title II, it makes no difference whether a State provides a program directly or does so through a private intermediary.

B. Under longstanding Title II and Rehabilitation Act regulations, a public entity is responsible for ensuring nondiscriminatory access for a benefit that it provides "directly or through contractual, licensing, or other arrangements." 28 C.F.R. 35.130(b)(1), 41.51(b)(1). Those regulations permissibly interpret the statutes, and they confirm that the state agency here is responsible for ensuring that persons with disabilities have nondiscriminatory access to the driver education program. The State provides benefits in the form of driver education and state certificates through an arrangement with the private driving schools.

The court of appeals declined to rely on the regulations in large part because the State does not have an agency or contractual relationship with the private driver education schools. But the regulations' reference to "other arrangements" demonstrates that a formal agency or contract agreement is not required. That makes sense, because when a State exercises comprehensive control over a program, but relies on private entities to implement it, it makes no practical difference whether it acts through regulations or through contracts or agency agreements.

C. Mere licensing or regulation does not make a state agency responsible for a private entity's treatment of persons with disabilities. When the State licenses a liquor store, for example, it may not discriminate in deciding who may obtain a license or require the licensee to discriminate against its customers. But the State is not generally responsible for ensuring

that the liquor store does not discriminate in its own activities.

This case, however, involves far more than mere licensing. The State comprehensively controls the content of the driver education program in ways that go well beyond what would be expected in most run-of-the-mill licensing regimes. It provides state certificates that signify successful completion of the program under conditions deemed sufficient by the State. And it makes the state certificate a precondition for obtaining a state driver's license.

D. Applying Title II of the ADA and the Rehabilitation Act to the State will further those statutes' purposes because it will ensure that persons with disabilities have nondiscriminatory access to the State's driver education program. The state agency is well positioned to determine what methods for ensuring access work best, and it is the only entity that can ensure nondiscriminatory access for persons with disabilities throughout the State.

Applying Title II and the Rehabilitation Act to the State will not impose an undue burden. The State is required to take "appropriate steps" to ensure that communications with individuals with disabilities are "as effective as communications with others," 28 C.F.R. 35.160(a)(1), and it has flexibility in determining the precise solution. What the State cannot do is avoid all responsibility for making the driver education program accessible to qualified people with disabilities.

ARGUMENT

I. BASED ON PETITIONERS' ASSERTIONS, IT APPEARS THAT THIS CASE SOON WILL BECOME MOOT

A. Petitioners' Representations Suggest That This Case Soon Will Be Moot

1. In the operative complaint, petitioners sought access to driver education courses so that they could obtain the state driver education certificate required for them to obtain Texas driver's licenses. J.A. 91-93. Petitioners sought declaratory and injunctive relief, but not damages. *Ibid.* Petitioners now state (Br. 12-13 & 16 n.4) that four of the five named plaintiffs have obtained their state driver education certificates, and that the fifth plaintiff has moved to Louisiana and also will turn 25 years old on September 23, 2016, exempting him from the driver-education-certificate requirement.

Taking these facts as true, petitioners have either obtained the relief sought in the complaint or will no longer be subject to the challenged state requirement. It therefore appears that each of petitioners' individual claims either are, or will soon become, moot. See *deFunis* v. *Odegaard*, 416 U.S. 312, 316-318 (1974) (per curiam) (case is moot when "[a] determination by this Court of the legal issues tendered by the parties is no longer necessary to" obtain the relief sought in the complaint, and "could not serve to prevent it"); see also *Camreta* v. *Greene*, 563 U.S. 692, 710-711 (2011) (case is moot when plaintiff has moved away and become an adult and "is no longer in need of any protection from the challenged practice").

2. Petitioners do not contend that their individual claims remain alive. They instead contend (Br. 16-22) that the case is not moot because the complaint contains class-action allegations. The complaint seeks

relief on behalf of individuals with hearing disabilities who are under age 25 and seek Texas driver's licenses. J.A. 73, 92-93. The mere presence of class-action allegations in the complaint, however, does not prevent a case from becoming moot. "A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified." *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 404 (1980). When a class is certified, the class "acquire[s] a legal status separate from the interest asserted by" the named plaintiff, and so the mootness of the named plaintiff's claim does not render the entire action moot. *Sosna* v. *Iowa*, 419 U.S. 393, 399-401 (1975). But petitioners did not move for class certification in the district court, and no class was certified. See J.A. 1-8.

Petitioners note (Br. 19-20) that when class certification is denied before the named plaintiffs' claims became moot, the named plaintiffs may seek review of that denial and, if they prevail on that issue, review of the merits. *Geraghty*, 445 U.S. at 404-407. Under those circumstances, the corrected class-certification ruling "'relates back' to the date of the original denial." *Id.* at 406-407 n.11. But that rationale does not aid petitioners, because there has not been a class-certification ruling. There is therefore "simply no certification decision to which [the] claim[s] could have related back." *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1530 (2013); see *Geraghty*, 445 U.S. at 404 (right of named plaintiff whose claim became moot to continue litigating is "limited to the appeal of the denial of the class certification motion").

Petitioners refer to their claims as "inherently transitory." Br. 18 (citation omitted). But this case

does not involve the exception to mootness for claims so "inherently transitory" that a district court would "not have even enough time to rule on a motion for class certification." *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 51-52 (1991) (challenge to post-arrest detention pending probable-cause determination). The challenged requirement applies to all individuals under the age of 25, see Tex. Transp. Code Ann. § 521.1601, and individuals may start driver education at age 14, see Dep't of Motor Vehicles, *Applying for a New License (Teen Drivers) in Texas*, http://www.dmv.org/tx-texas/teen-drivers.php (last visited Aug. 29, 2016); see also 16 Tex. Admin. Code § 84.106(b)(1)(A). Given the broad range of individuals subject to the requirement, in many cases, there will be ample time for the court to rule on a plaintiff's motion for class certification before that plaintiff ages out of the requirement. In fact, petitioners make no claim that, had they filed a motion for class certification, the district court would not have had time to rule on it before their claims became moot.

Petitioners rely (Br. 21) on the statement in *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663 (2016) that "until certified, a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Id.* at 672 (internal citation omitted). But petitioners' class claims were before the district court for eleven months. J.A. 3, 7, 43-49. Yet they did not file a motion for class certification at any time during that period, and they do not assert that anything prevented them from doing so. In those circumstances, petitioners are in no position to claim they were denied a fair opportunity to show that class certification was warranted.

Petitioners' argument therefore reduces to a request for an equitable exception to the mootness doctrine that would apply any time a complaint includes class allegations. This Court has never recognized such an exception, and it should not do so in this case. See generally U.S. Amicus Br. at 25-32, *Genesis HealthCare Corp., supra* (No. 11-1059) (outlining circumstances in which a case pleaded as a class action does not become moot despite mootness of the named plaintiffs' claims).

The federal government has not independently verified the facts asserted by petitioners regarding mootness, and it appears that the State has had no opportunity to address these facts or their legal consequences. But taking the asserted facts as true, this case soon will become moot.

B. Vacatur Of The Court Of Appeals' Decision Appears To Be Appropriate

1. When a case becomes moot on its way to or before this Court, the Court has discretion to determine the appropriate disposition. See *Alvarez* v. *Smith*, 558 U.S. 87, 94 (2009) (citing 28 U.S.C. 2106). The Court's "established (though not exceptionless) practice in this situation is to vacate the judgment below." *Greene*, 563 U.S. at 712 (internal quotation marks omitted); see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). The Court ordinarily vacates upon mootness to "clear[] the path for future relitigation of the issues between the parties and eliminate[] a judgment, review of which was prevented through happenstance." *Munsingwear, Inc.*, 340 U.S. at 40; see *Smith*, 558 U.S. at 94.

Whether vacatur is appropriate ultimately depends on principles of equity. See *U.S. Bancorp Mortg. Co.*

v. *Bonner Mall P'ship*, 513 U.S. 18, 24-27 (1994). The Court has explained that a party seeking review of an adverse ruling who "is frustrated by the vagaries of circumstance" or by "unilateral action of the party who prevailed below" should not be "forced to acquiesce in the judgment," while a prevailing party who has voluntarily settled a case ordinarily has "forfeited his legal remedy," including any right to vacatur. *Id.* at 25. The Court also "account[s] [for] the public interest" in assessing the appropriateness of vacatur. *Id.* at 26.

2. Under the facts as petitioners have described them, vacatur appears to be appropriate in this case. According to petitioners' representations, four petitioners found ways to obtain their driver education certificates independent of this litigation. If so, they can hardly be faulted for doing so (especially because the litigation has lasted more than five years). See *Smith*, 558 U.S. at 95-97 (vacatur appropriate when plaintiffs obtained return of seized property through a process unrelated to the federal case). The fifth plaintiff assertedly moved out of state and will soon age out of the challenged requirement, facts this Court already has characterized as "happenstance" that should not preclude vacatur. *Greene*, 563 U.S. at 713. If petitioners' representations are accurate, this is therefore not a case where petitioners have taken action that would disqualify them from obtaining the normal remedy of vacatur.

Moreover, the public interest would be served by vacating the judgment. The court of appeals' decision places a roadblock in the path of hundreds of young prospective drivers in Texas who have hearing disabilities and need driver's licenses to function in their

daily lives. Thus, under the facts as petitioners present them, it would be appropriate for this Court to vacate the decision of the court of appeals in order to remove that roadblock and permit future litigation of the issues raised in this case.[5]

II. THE ANTI-DISCRIMINATION PROTECTIONS IN TITLE II OF THE ADA AND SECTION 504 OF THE REHABILITATION ACT APPLY TO THE TEXAS AGENCY'S DRIVER EDUCATION PROGRAM

If the Court reaches the merits, it should hold that Title II of the ADA and the Rehabilitation Act apply to Texas's involvement in driver education.

A. The Driver Education Program At Issue Is A Program Of The State Under Title II Of The ADA And The Rehabilitation Act

1. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" includes "any department, agency, special purpose district, or other instrumentality of a State." 42 U.S.C. 12131(1)(B). Accordingly, under the terms of Title II, when a "program[]" is one of a state agency, that state agency must ensure that "qualified individual[s] with [] disabilit[ies]" have nondiscriminatory access to the program.

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[5] If the Court vacates the decision below, it should not remand for further proceedings on class certification, see Pet. Br. 24, because as explained above, the case will be moot and petitioners did not file, and thus the district court did not decide, any motion for class certification.

It is undisputed that the Texas agency with authority over driver education is a "public entity" and that petitioners are "qualified individual[s] with [] disabilit[ies]." See Pet. App. 9. Driver education in Texas also is a "program," because it is a systematic approach for ensuring that young drivers are qualified to obtain licenses. See *Webster's Third New International Dictionary* 1812 (1986) (defining "program" as "a plan of procedure: a schedule or system under which action may be taken toward a desired goal"). The sole question thus is whether driver education is a program "of" the Texas state agency with the authority over it, or is instead exclusively a program of private driving schools. For reasons explained below, driver education is a program of the Texas agency. That agency therefore has an obligation under Title II to ensure that persons with disabilities have nondiscriminatory access to the program.

The result is the same under the Rehabilitation Act. That Act provides: "No otherwise qualified individual with a disability in the United States, * * * 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). The parties previously did not dispute that the state agency with responsibility for driver education receives federal funds.[6] Thus, the

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[6] The complaint alleged that the TEA receives federal funding, J.A. 91, and that point was not disputed before the court of appeals, Pet. App. 9. But then responsibility over driver education shifted from the TEA to the TDLR. See pp. 6-7, *supra*. The parties have not yet addressed whether the TDLR receives federal funding. That factual issue can be resolved on remand.

sole question under Section 504, like the question under Title II, is whether driver education is a program of the Texas state agency. Because it is, that agency has a duty under Section 504, as well as under Title II, to ensure that persons with disabilities have access to it.[7]

2. Three factors, taken together, establish that driver education is a state program: A state agency comprehensively controls the program; the state agency provides, through the private driving schools, state certificates to students who successfully complete the program; and the state certificate is a precondition for a person to obtain a state driver's license.

a. The state agency exercises comprehensive "control of" the driver education program. Tex. Educ. Code Ann. § 1001.051. Specifically, the state agency not only establishes the curriculum requirements for driver education, *id.* §§ 1001.101(a), 1001.1015(a), it designates the specific educational materials to be used, *id.* § 1001.101(a). State law also specifies the amount of time a student must spend on classroom and behind-the-wheel instruction. *Id.* § 1001.101(b). And state law requires instruction on particular topics (such as alcohol awareness, motorcycle awareness, litter prevention, organ donation, and distracted driving). *Id.* §§ 1001.1015(b)(2), 1001.102, 1001.1025(a), 1001.107-1001.110.

Beyond that, the state agency, by regulation, specifies numerous other details of the instruction that is to

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[7] Section 504 defines program or activity to include "all of the operations of" a state agency, 29 U.S.C. 794(b) (2012 & Supp. II 2014), while Title II contains no similar definition. That difference is not material to the resolution of the merits question presented in this case.

be provided. It designates the minimum amount of time to be spent on certain topics; it limits the amount of time that may be spent on breaks, self-study assignments, videos, and guest speakers; it limits class size; and it designates the score needed to pass the driver education course and receive a state driver education certificate. 16 Tex. Admin. Code §§ 84.106(b)(1) and (2), 84.109(b). The state agency also spells out how schools should handle absent students, cancellations, refunds, and student complaints. *Id.* §§ 84.109, 84.111, 84.114.

As far as control over personnel goes, the state agency must approve the hiring of each school's key staff, 16 Tex. Admin. Code § 84.104(c), and each individual driver education teacher must obtain a state license, Tex. Educ. Code Ann. § 1001.251, by (*inter alia*) completing specified training, *id.* § 1001.253(b), and passing a state background check, *id.* § 1001.2511(b). Each school also must be licensed, and the school and teacher licenses must be renewed each year. *Id.* §§ 1001.301, 1001.302, 1001.304; 16 Tex. Admin. Code §§ 84.102(g), 84.105(f)(3) and (h).

The State's detailed control over the driver education program is significant. When a student receives driver education from a state-accredited school, where state-certified teachers use state-approved materials to provide instruction from a state-approved curriculum, it is a powerful indication that the program is a state program.

b. In addition, the state agency provides driver education certificates to private driver education schools, which then distribute the certificates, on behalf of the State, to students who successfully complete the program. A state certificate signifies that the student has

"completed and passed" a satisfactory course of driver education. Tex. Transp. Code Ann. § 521.1601. The State treats the certificates as "government record[s]," subject to state tracking requirements. 16 Tex. Admin. Code § 84.100(1) and (12); see Tex. Educ. Code Ann. § 1001.055. And the unauthorized possession or distribution of state certificates is a felony. Tex. Educ. Code Ann. § 1001.555(a) and (c). The State's role in providing state certificates to students who successfully complete the driver education program is further evidence that the program itself is a state program.

c. Finally, a state driver education certificate is a prerequisite for another important state benefit—a driver's license. Tex. Transp. Code Ann. § 521.1601; see Pet. App. 17. This close connection between the certificate and the license reinforces that the entire driver education program is a program of the State. The State has a strong interest in ensuring that it licenses only safe drivers, see, *e.g.*, *Mackey* v. *Montrym*, 443 U.S. 1, 17-19 (1979), and it legitimately furthers that interest by controlling access to driver's licenses for young drivers by requiring them to obtain state certificates that signify successful completion of driver training at schools where the curriculum is largely determined by the State. But having done so under the scheme here, the State cannot reasonably contend that it has no responsibility to ensure that its driver education program is accessible to persons with disabilities.

3. The court of appeals concluded that a program is a program "of a public entity" only when the public entity "provides" the program. Pet. App. 10. Because driver education is actually taught by private driving school teachers, the court concluded, the driver train-

ing program is not provided by the State. *Ibid.* That analysis is doubly flawed.

First, the court of appeals failed to appreciate the critical respects in which the State provides the driver education program. Among other things, the State designs the curriculum, furnishes course materials, approves the hiring of key personnel, licenses the teachers, and provides the state certificates.

Second, the text of Title II refers to "programs * * * of a public entity," 42 U.S.C. 12132; it draws no distinction between programs that the State provides directly and those that it provides indirectly through a private intermediary. Similarly, the Rehabilitation Act refers to a recipient's "program" without specifying that the funding recipient must directly provide all aspects of the program itself. 29 U.S.C. 794(a).

The court of appeals relied (Pet. App. 10) on *Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206 (1988). But *Yeskey* did not hold that a State escapes Title II liability if it provides a program indirectly through an intermediary, rather than providing all aspects of the program directly itself. There was no question in the case that the State provided the prison boot-camp program itself. See *id.* at 208-211. And nothing in *Yeskey* suggests that the Court would have reached any different conclusion if the State had enlisted a private entity to deliver the instruction for the State's boot-camp program.

B. Federal Regulations Confirm That Title II Of The ADA And The Rehabilitation Act Apply To The State's Involvement In The Driver Education Program

1. Congress has specifically directed the Attorney General to "promulgate regulations" to implement Title II. 42 U.S.C. 12134(a); see *Olmstead* v. *L.C.*, 527

U.S. 581, 591 (1999). Congress also specified the Attorney General's regulations shall be consistent with the coordination regulations issued under Section 504 of the Rehabilitation Act. 42 U.S.C. 12134(b); see 42 U.S.C. 12201(a) (providing that "nothing in this chapter shall be construed to apply a lesser standard" than under the Rehabilitation Act and its implementing regulations). One of those coordination regulations specifies that a federal funding recipient may not discriminate "directly or through contractual, licensing, or other arrangements," 28 C.F.R. 41.51(b)(1) (current Department of Justice coordination regulation); see 43 Fed. Reg. 2134, 2138 (Jan. 13, 1978) (adopting that language).[8]

Consistent with Congress's directive, the Attorney General promulgated a comparable regulation under Title II. It provides that a public entity "in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements," discriminate on the basis of disability. 28 C.F.R. 35.130(b)(1). Because that regulation is consistent with the text of Title II and with the Section 504 coordination regulations, at a minimum, it "warrant[s] respect." *Olmstead*, 527 U.S. at 598; *ibid.* (reserving the question whether the Attorney General's Title II regulations warrant deference under *Chevron U.S.A.*

[8] Each federal agency issues its own Rehabilitation Act regulations applicable to entities receiving funds from it, and the Attorney General coordinates implementation and enforcement of the Act. See Exec. Order No. 12,250, 3 C.F.R. 298 (1980 comp.); see also 28 C.F.R. 41.4; see generally *Olmstead*, 527 U.S. at 590 n.4.

Inc. v. *NRDC, Inc.*, 467 U.S. 837, 842-844 (1984), or under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)).[9]

2. The Attorney General's regulations confirm that Title II and the Rehabilitation Act apply to the driver education program at issue. In the terms of the regulation, the State is providing "benefit[s]" in the form of driver education and state certificates "through * * * arrangements" with private driving schools. 28 C.F.R. 35.130(b)(1), 41.51(b)(1).

3. The court of appeals declined to give weight to the regulations on the ground that the regulations do not answer the question "what it means for the state to 'provid[e]' an 'aid, benefit, or service.'" Pet. App. 12 (brackets in original). But they do: the regulations state that the public entity may be liable when it acts "directly or through contractual, licensing, or other arrangements." 28 C.F.R. 35.130(b)(1), 41.51(b)(1).

The court also suggested that the State is not providing a benefit through an arrangement with private driving schools because it lacks an "agency or contrac-

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[9] Title III of the ADA, unlike Title II, has a detailed set of prohibitions, one of which specifies that "[i]t shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity." 42 U.S.C. 12182(b)(1)(A)(i). Because Title II contains only a general prohibition, and then leaves it to the Attorney General to spell out the forms of discrimination that are covered, no inference can be drawn from Congress's failure to enact a prohibition in Title II that tracks the prohibition in Title III. See *Armstrong* v. *Schwarzenegger*, 622 F.3d 1058, 1066-1067 (9th Cir. 2010).

tual relationship" with the schools. Pet. App. 14. But the regulation expressly applies when a State has an arrangement "other" than a contractual one, and "other arrangements" is a term that is not limited to acting through an agent. 28 C.F.R. 35.130(b)(1).

Nor would it make any sense to limit a State's responsibilities under Title II of the ADA and the Rehabilitation Act to arrangements to provide benefits through contracts and agency agreements. If the State is arranging for the benefit to be provided, it should not be able to escape its obligations under Title II of the ADA and the Rehabilitation Act by adopting an arrangement that does not take the form of a contract or an agency agreement. Indeed, in terms of the State's level of involvement in providing the benefit, it makes no difference whether the State exercises its control over the intermediary through regulations, contracts, or agency agreements. For example, the State has adopted extensive rules and regulations that govern how private driver education schools must carry out its program. The State could have put all of these requirements in contracts with individual driver education schools, but that would not change in any way the extent of the State's role in driver education.

C. Mere Licensing Or Regulation Of A Private Entity Does Not Make A Public Entity Responsible For The Private Entity's Operations Under Title II Of The ADA Or The Rehabilitation Act

1. There is a critical difference between the responsibilities of a state agency that merely licenses or regulates a private business and those of a state agency that enlists a private entity to implement the State's own program. For example, when a State licenses a business, such as a liquor store, the State cannot dis-

criminate against qualified persons with disabilities in setting the criteria for obtaining a license, and it may not require the liquor store to discriminate against customers with disabilities. But the State, as licensor, is not generally responsible for the store's treatment of its customers; it is the store's responsibility not to discriminate in its day-to-day operations.

The Title II regulation and its commentary explain this distinction. As discussed, when the State provides benefits indirectly "through contractual, licensing, or other arrangements," 28 C.F.R. 35.130(b)(1), a public entity does not avoid responsibility under Title II by using a private entity to carry out its program. But when a public entity's role is limited to licensing, its obligations are more restricted. The State may not "administer a licensing or certification program" in a discriminatory manner or "establish requirements for the program[]" that discriminate. 28 C.F.R. 35.130(b)(6). The State is not responsible under Title II, however, for all of a licensed entity's operations: "The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part." *Ibid.*

2. The Department of Justice's technical assistance manual illustrates this distinction through examples. Where a State "prohibits the licensing of transportation companies that employ individuals with missing limbs as drivers" and "XYZ company refuses to hire an individual" who is qualified based on that rule, the discrimination is attributable to the State's licensing requirements and the State is responsible under Title II. Dep't of Justice, *The Americans with Disabilities Act: Title II Technical Assistance Manual* § II-3.7200, http:/www.ada.gov/taman2.html (last visited Aug. 29,

2016) (*Title II Manual*). But "[t]he State is not accountable for discrimination in the employment or other practices of XYZ company, if those practices are not the result of requirements or policies established by the State." *Ibid.*

At the same time, the *Title II Manual* explains, where "public entities have a close relationship to private entities" in carrying out state programs, both the public and private entities may be liable under the ADA. § II-1.3000. For example, when a "city engages in a joint venture with a private corporation to build a new professional sports stadium," "the public entity must ensure that the relevant requirements of title II are met; and the private entity must ensure compliance with title III [of the ADA, which applies to public accommodations, see 42 U.S.C. 12182]." *Title II Manual* § II-1.3000. The point of this and other examples is to illustrate the distinction between a public entity "merely * * * licens[ing]" the private entity, *id.* § II-3.7200, and a public entity tasking a private entity to effectuate its own program.

3. The Title II decisions in the lower courts generally recognize this distinction. For example, in *Noel* v. *New York City Taxi & Limousine Comm'n*, 687 F.3d 63 (2012), the Second Circuit held that a city's licensing and regulation of taxi services did not make the city liable for the taxis' failure to provide access to persons with disabilities. *Id.* at 70-72. Relying on the *Title II Manual*, the court explained that the city's "licensing standards" are covered by Title II, but the "licensee's activities themselves are not covered." *Id.* at 70 (emphasis omitted) (quoting *Title II Manual* § II-3.7200).

Similarly, in *Tyler* v. *City of Manhattan*, 849 F. Supp. 1429 (D. Kan. 1994), the court concluded that a city's issuance of licenses and building permits for liquor stores and restaurants does not make the city responsible for making those facilities accessible to persons with disabilities. *Id.* at 1441-1442. Relying on the Title II regulation, the court explained that "[a]lthough *City programs* operated under contractual or licensing arrangements may not discriminate against qualified individuals with disabilities," *id.* at 1441, "'[t]he programs or activities of licensees or certified entities are not themselves programs or activities of the public entity merely by virtue of the license or certificate,'" *ibid.* (brackets in original) (quoting 28 C.F.R. Pt. 35, App. B, at 689).

At the same time, courts have found public entities liable under Title II for state programs carried out in part by private entities. For example, in *Paxton* v. *State Department of Tax & Revenue*, 451 S.E.2d 779, 785 (W. Va. 1994), and in *Winborne* v. *Virginia Lottery*, 677 S.E.2d 304, 305-307 (Va. 2009), two state supreme courts concluded that state agencies were responsible for state lottery licensees' failure to accommodate persons with disabilities. The courts explained that the state lottery commissions "offer[ed] more than a mere license to the entities which are given lottery outlets"; they "furnishe[d] the lottery devices and services that allow the licensee[s] to conduct lottery sales" and "control[led] and obtain[ed] substantial monies from the lottery system." *Paxton*, 451 S.E.2d at 785; see *Winborne*, 677 S.E.2d at 305-307 (explaining that state lottery was "established to produce revenue to be used for public purposes" and uses licensed agents to accomplish those purposes).

4. The court of appeals believed that the Texas agency merely "licenses and regulates" private driver education schools. Pet. App. 10. But as already discussed, the Texas agency's role goes well beyond mere licensing and regulation. It comprehensively controls the content of the driver education program in ways that go beyond what would be expected in most run-of-the-mill licensing regimes. It provides state certificates that signify successful completion of the program under conditions deemed sufficient by the State. And it makes the state certificate a precondition for obtaining a state driver's license. This is therefore a situation in which the State is providing benefits "directly or through contractual, licensing, or other arrangements." 28 C.F.R. 35.130(b)(1).

Judge Wiener encapsulated the distinction between mere licensing and the State's role here in practical terms. If "every driver education school in Texas shut[] down," he explained, the State "would undoubtedly fill the void itself." Pet. App. 29-30 (Wiener, J., concurring in part and dissenting in part). In contrast, while a State "might well" license and regulate liquor stores and taxi cabs, it is "not likely to replicate them," because they "do not serve as private mechanisms for achieving public ends and public policy." *Id.* at 30.

D. Application Of Title II Of The ADA And The Rehabilitation Act To The State's Driver Education Program Furthers The Statutes' Purposes Without Placing An Undue Burden On The State

1. Application of Title II of the ADA and the Rehabilitation Act to the state agency appropriately furthers the purpose of those statutes. That purpose is to ensure that persons with disabilities have access to important public benefits on a nondiscriminatory ba-

sis. That purpose is furthered when the State is obligated to ensure that the private driver education schools that implement its program make the schools accessible to persons with disabilities, so that they can obtain the important benefits of driver training, state certificates, and a state driver's license.

The court of appeals itself seemed to acknowledge that allowing the State to escape Title II of the ADA and Rehabilitation Act responsibility detracts from the achievement of the purposes of those Acts when it stated that it would be "extremely troubling" if people under age 25 who are otherwise qualified to drive are "effectively deprived of driver's licenses" because they cannot obtain the necessary driver education and certificate. Pet. App. 17. Holding the State accountable for ensuring that persons with disabilities have nondiscriminatory access to driving schools eliminates that troubling possibility.

It is true that individuals could seek a remedy against individual driver education schools under Title III of the ADA rather than proceeding against the State under Title II of the ADA and the Rehabilitation Act. See Br. in Opp. 2. But the driving schools' anti-discrimination responsibility as public accommodations under Title III (see 42 U.S.C. 12181(7), 12182) does not negate the state agency's own legal responsibility for ensuring that young adults with disabilities can obtain the state certificates and driver's licenses.

The State also is well positioned to ensure that persons with disabilities have nondiscriminatory access to the schools. The state agency has jurisdiction over the schools, Tex. Educ. Code Ann. §§ 1001.051, 1001.055, and it may refuse accreditation to schools that do not comply with federal law, *id.*

§ 1001.204(b)(7); see Pet. App. 7. The state agency also can coordinate among schools, and it has resources that are not available to an individual school.

From its unique vantage point in monitoring all schools, the state agency is able to determine which method or methods of ensuring access work best and whether experience demonstrates that alternative methods should be tried instead. The State also is the only entity that is in a position to provide a remedy that would enable all persons with disabilities throughout the State to have nondiscriminatory access to driving schools.

Title II also undoubtedly provides a more efficacious remedy than Title III. In this case, for example, if petitioners prevail, they could obtain a single statewide remedy. If only a Title III remedy were available, individuals with disabilities would have to proceed against the almost 500 licensed driver education schools in Texas. See TDLR, *Driver Education Schools and Classrooms*, https://www.tdlr.texas.gov/driver/drivereduschools.htm (last visited Aug. 29, 2016).

2. Holding the State responsible for ensuring access would not place an undue burden on the State. If petitioners were to prevail, the State would have flexibility in suggesting an appropriate Title II remedy to the district court. The Texas agency is required to "take appropriate steps to ensure that communications with [people] with disabilities are as effective as communications with others," 28 C.F.R. 35.160(a)(1), and is not required to take action that would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens," 28 C.F.R. 35.164; see 28 C.F.R. 35.130(b)(7).

The alleged discrimination is that driver education schools do not provide access to persons with hearing disabilities. If that allegation is proven, the State will be responsible for taking "appropriate steps" to ensure that communications with individuals with disabilities are "as effective as communications with others," 28 C.F.R. 35.160(a)(1), by "furnish[ing] appropriate auxiliary aids and services" to give individuals with hearing disabilities "an equal opportunity to participate in, and enjoy the benefits of" the driver education program, 28 C.F.R. 35.160(b)(1). These auxiliary aids and services could include qualified sign-language interpreters, written materials, or captioned videos, as appropriate. See 28 C.F.R. 35.104, 35.160(b)(2). The State could take on the operational and financial obligations of ensuring effective communication directly; require driving schools themselves to assume that obligation as a condition of licensing; or develop a hybrid scheme in which it would assist driving schools for which compliance would pose an undue burden. Cf. 42 U.S.C. 12182(b)(2)(A)(iii). What the State cannot do is disclaim any responsibility for making driver education certificates and driver's licenses available to qualified individuals with disabilities.

CONCLUSION

If petitioners' representations are accepted, the Court should vacate the decision of the court of appeals and remand the case with instructions to dismiss the case as moot. If the Court reaches the merits, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 29 U.S.C. 794 (2012 & Supp. II 2014) provides:

Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such de-

partment or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of title 20), system of career and technical education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510,[1] of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

2. 29 U.S.C. 794a provides:

Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any com-

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[1] See References in Text note below.

plaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) 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.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

3. 42 U.S.C. 12131 provides:

Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4)[1] of title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

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[1] See References in Text note below.

4. 42 U.S.C. 12132 provides:

Discrimination

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.

5. 42 U.S.C. 12133 provides:

Enforcement

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.

6. 42 U.S.C. 12134 provides:

Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

7. 42 U.S.C. 12201(a) provides:

Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

8. 28 C.F.R. 41.51 provides:

General prohibitions against discrimination.

(a) No qualified handicapped person, shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.

(b)(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A recipient may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap,

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or

(iii) That perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

(4) A recipient may not, in determining the site or location of a facility, make selections:

(i) That have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from federal financial assistance or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a

program limited by federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

(d) Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

(e) Recipients shall take appropriate steps to ensure that communications with their applicants, employees, and beneficiaries are available to persons with impaired vision and hearing.

9. 28 C.F.R. 35.130 provides:

General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of 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 public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid,

benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate

or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections—

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified

individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall 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.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of in-

dividuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(h) A public entity may impose legitimate safety requirements necessary for the safe operation of its

services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.