No. _____

In The
Supreme Court of the United States

DONNIKA IVY; BERNARDO GONZALEZ; TYLER DAVIS, AS NEXT FRIEND OF JUANA DOE, A MINOR; ERASMO GONZALEZ; ARTHUR PROSPER, IV,

Petitioners,

v.

COMMISSIONER MICHAEL WILLIAMS, IN HIS OFFICIAL CAPACITY AS HEAD OF THE TEXAS EDUCATION AGENCY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JOE T. SANDERS, II
Counsel of Record
OLGA KOBZAR
SCOTT, DOUGLASS & MCCONNICO, L.L.P.
303 Colorado St., Suite 2400
Austin, TX 78701
512-495-6300
jsanders@scottdoug.com

JOSEPH P. BERRA
JAMES C. HARRINGTON
WAYNE KRAUSE YANG
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Dr.
Austin, TX 78741

Attorneys for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Title II of the ADA and Section 504 of the Rehabilitation Act prohibit state agencies from denying access to their programs, services, or activities to individuals on account of their disabilities, including hearing-disabled individuals like Petitioners. The Fifth Circuit held, 2-1, that despite evidence of the Texas Education Agency's ("TEA's") pervasive involvement in every aspect of a state-mandated, driver-education program, such involvement did not rise to the level of a "service, program, or activity" of the state when it was farmed out to a private vendor. The opinion underscores an existing, and growing, uncertainty in federal and state jurisprudence and presents the following question:

> Did the Fifth Circuit err in deciding that the relationship between public and private actors does not invoke dual obligations to accommodate in any context other than an express contractual relationship between a public entity and its private vendor?

PARTIES TO THE PROCEEDING BELOW

Petitioners, the Appellees below, are Donnika Ivy, Bernardo Gonzalez, Tyler Davis, as next friend of Juana Doe, a minor, Erasmo Gonzalez, and Arthur Prosper, IV, individually and on behalf of all others similarly situated (together, the "Ivy Plaintiffs"); and

Respondent, the Appellant below, is Commissioner Michael Williams, in his official capacity as head of the Texas Education Agency ("TEA").

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, the Ivy Plaintiffs make this Disclosure of Corporate Affiliations and Corporate Interest:

> The Ivy Plaintiffs have no parent corporation, and there are no publicly held corporations that own 10% or more of their stock.

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The majority and dissenting opinions of the Court of Appeals for the Fifth Circuit (App. 1-18 and App. 18-32) are reported at *Ivy v. Williams*, 781 F.3d 250 (5th Cir. 2015). The opinion of the District Court for the Western District of Texas (App. 33-55) and the Court of Appeals' order denying rehearing en banc (App. 56-57) are not reported.

STATEMENT OF JURISDICTION

The Court of Appeals for the Fifth Circuit rendered its judgment on March 24, 2015, and denied the petition for rehearing en banc on July 16, 2015. App. 55. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1254(1). The basis of jurisdiction in the court of first instance is under 28 U.S.C. §§1331 and 2201.

STATUTORY PROVISIONS INVOLVED

At issue in this appeal are the accommodations provisions of Title II of the ADA, mandating that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132.

Section 504 of the Rehabilitation Act provides that no person "shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal funding assistance." 29 U.S.C. §794(a).

STATEMENT OF THE CASE

This is a disabilities-discrimination case. Petitioners were denied access to a mandatory driver-education program managed by a state agency but administered by private vendors, in violation of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act ("Section 504"). The issue in contention is whether the TEA, as the state agency in charge of the state driver-education program, can avoid liability for the program's failure to provide equal access to hearing-disabled individuals simply because one of the program's components – classroom instruction – is provided through private driver-education schools licensed by the TEA. Because the question of when a relationship between a public agency and a private entity invokes dual obligations to accommodate has been addressed inconsistently by the state and federal courts, this Court's intervention is necessary to articulate a clear test.

At the time the lawsuit was filed, Petitioners Donnika Ivy, Arthur Prosper, IV, and Bernardo and Erasmo Gonzalez were between the ages of eighteen and twenty-one. Juana Doe, a minor at the time of filing, is represented in the lawsuit by her domestic partner Tyler Davis. All Petitioners contacted a number of Texas driver-education schools through their family members or video phone services, requesting that an American Sign Language ("ASL") interpreter be provided to them in order to complete a driver-education course. The schools refused to accommodate them. Petitioners and other similarly affected individuals also contacted a deaf-resource specialist, who asked the TEA to provide Petitioners with accommodations. Those efforts were likewise unsuccessful. TEA further refused, and continues to refuse, to require driver-education schools to comply with the ADA. Respondent Williams, as the Commissioner of Education, is the head of the TEA. In this Brief, "TEA" refers to Williams in his official capacity.

In 2010, the Texas Legislature amended the requirements for issuance of state driver licenses to mandate that a first-time applicant under the age of twenty-five may not obtain a driver license unless the applicant has completed a TEA-approved driver-education course and obtained a TEA certificate of completion. Tex. Transp. Code §521.142(d), §1601. The Legislature further provided that the TEA is the primary agency charged with supervising the schools and administering the state driver-education program and is the only entity permitted to generate

official certificates of completion issued to students at the end of the driver-education course. Tex. Educ. Code §1001.053, .055. After completing the driver-education program, graduates submit the course-completion certificates to the Department of Public Safety ("DPS") to obtain their Texas driver license from the State of Texas. *See* The Department of Public Safety Driver Education Checklist, available at http://www.txdps.state.tx.us/DriverLicense/DriverEducationChecklist.htm (last visited October 4, 2015).

To implement these requirements, the Legislature authorized the TEA to: (1) establish the driver-education curriculum; (2) designate educational materials; (3) license driver-education schools and courses; (4) develop parent-taught course materials; (5) license instructors; (6) control the issuance of a uniform certificate of completion; (7) resolve complaints against the schools; (8) visit schools; and (9) reexamine the schools for compliance. *See* Tex. Transp. Code §521.142(d), §1601; Tex. Educ. Code §§1001.053-.056, .101, .1015, .153, .206, .251-.257. The Legislature further provided the TEA may license the schools only upon determining that they comply with "all county, municipal, state, and federal regulations." Tex. Educ. Code §1001.204(7).

The TEA exercises exclusive and pervasive control over all aspects of driver education in Texas. *See* Tex. Admin. Code §176.1007 *et seq*. By the time a student at any Texas driver-education school completes her course and obtains a course-completion

certificate, the following steps have taken place: (1) the TEA has evaluated and licensed the school of her choice; (2) the TEA has approved the course materials used by that school; (3) the TEA has certified the instructor who taught the course; and (4) the TEA has provided her school with a uniquely-numbered, course-completion certificate. *See* Tex. Admin. Code §176 *et seq*. The TEA regulates the minimum amount of time the student must spend on each section of the course, the order of those sections, the maximum amount of time for each break the student is permitted to take, her minimum passing grade, the number of students taking the course with her, and even the layout of her classroom. *Id.* §176.1007(b); §176.1013(b). All of the above steps were envisioned and approved by the Legislature. *See* Tex. Educ. Code §1001 *et seq*. In none of these core agency duties has the TEA considered or implemented accommodations for the deaf to ensure their access to the driver-education program and ultimately the course-completion certificate required to obtain a Texas driver license.

Moreover, the TEA sells the course-completion certificates and serial numbers that the schools deliver to the students. Tex. Educ. Code §1001.055. These certificates are required for students to obtain a driver license. Under the TEA's own regulations, the certificates are "government record[s]." Tex. Admin. Code §176.1001(1), (12). The TEA further regulates the form in which the certificates are printed and delivered to the students. Tex. Admin. Code §176.1018; Tex. Educ. Code §1001.055. Yet the TEA

continues to refuse to acknowledge its responsibility to ensure that the driver-education program it designs, administers, supervises, and controls is accessible to the deaf community.

After numerous unsuccessful attempts to obtain equal access to the program, Petitioners sued Williams, in his official capacity as head of the TEA, challenging the TEA's failure to provide them reasonable accommodations to complete the driver-education courses required to obtain a Texas driver license. App. 2-4. The district court twice denied the TEA's Motion to Dismiss on standing and jurisdictional challenges – once when Petitioners sued in their individual capacities, and again after Petitioners amended their pleadings to bring the case as a class action on behalf of all others similarly situated. App. 33-35. With its second Motion to Dismiss, the TEA requested certification for interlocutory appeal, which the district court granted after denying the TEA's Motion to Dismiss. App. 52-55.

The Court of Appeals for the Fifth Circuit reversed the district court's order denying the TEA's motion to dismiss and rendered judgment dismissing the Petitioners' claims with prejudice for failure to state a claim upon which relief can be granted. App. 18. Judge Weiner dissented, noting his "firm conviction that TEA's involvement in driver education in Texas does constitute a service, program, or activity under Title II of the ADA," and stating that he "would affirm the district court's judgment denying TEA's motion to dismiss and permitting the case to proceed

on the merits." App. 18. Petitioners' request for a rehearing en banc was denied on July 16, 2015, the "court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor." App. 57.

REASONS THE WRIT SHOULD BE GRANTED

The Fifth Circuit's narrow and restrictive construction of "program, service, and activity" and its refusal to consider that Petitioners have been deprived of the benefit of the state-developed curriculum has far-reaching consequences on the balance between private and public entities' duties to accommodate disabled individuals. This is especially true because of the inconsistency and confusion across the state and federal court opinions interpreting public/private arrangements in the context of disability accommodations. Without this Court's intervention, the Fifth Circuit's ruling not only absolves state agencies of their Title II and Rehabilitation Act duty to ensure access when state programs or services are delivered by private "licensees," but also relieves them of any obligation to make ADA compliance a condition of licensing – or even to inform private actors of their Title III obligations.

Under such a narrow reading, nothing short of entering into a contract with a private entity – a contract that expressly states that the private entity

provides services on behalf of the state, like a contract-benefits administrator or a food-service vendor – could subject state agencies to Title II liability in a public/private arrangement. There is nothing in the disability discrimination statutes to support the Fifth Circuit's interpretation. In fact, it is contrary to the spirit of the ADA and the Rehabilitation Act and would create an incentive for every agency to restructure state programs so that certain functions are administered by private entities and then argue that the agency owes no duty to the public whatsoever.

Using the roadmap created by the TEA and approved by the Fifth Circuit, each state agency in the nation could, without running afoul of the ADA or Section 504, avoid having to provide accommodations for the deaf simply by "licensing" private businesses to administer the component of the state program that requires direct interaction with the public. Food-stamp administration, unemployment benefits, issuance of driver licenses, and countless other services, in every state, could then be outsourced to private "licensees" without a state obligation to even tell the licensees they must provide access to disabled individuals. The only way the disabled community could then enforce the ADA would be to sue each licensee individually – an unconscionable result.

To allow state agencies to override the ADA by describing state program matrices as "licensor-licensee" arrangements is contrary to unambiguous Congressional intent to eliminate disability discrimination. *See Frame v. City of Arlington*, 657 F.3d 215,

223 (5th Cir. 2011) (en banc) (holding that disability discrimination statutes provide "a broad mandate of comprehensive character and sweeping purpose intended to eliminate discrimination against disabled individuals, and to integrate them into the economic and social mainstream of American life") (citations and internal quotations omitted); Findings and Purposes of ADA Amendments Act of 2008, Pub. L. No. 110-325, §2, Sept. 25, 2008, 122 Stat. 3553 ("Congress finds that . . . in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act 'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and provide broad coverage.").

This issue – when Title II and Rehabilitation Act liability applies to public/private arrangements – is not going away, and the incentive to shift responsibility for public-facing functions to private licensees will only create more litigation and more injustice for disabled individuals. The Fifth Circuit majority itself noted that the issues in Petitioners' case present a "question for which the statutes, regulations, and case law provide little concrete guidance." App. 10. The Supreme Court should take this opportunity to address an important and recurring problem, a problem that affects those who need the Court's protection the most.

ARGUMENT

I. Lack of clarity across state and federal jurisprudence deprives the disabled of statutory protections when private entities are involved in the administration of a state program.

As this Court has noted, Title II applies to all programs, services, and activities of a state or local government entity "without any exception." *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998); *see also Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 45 (2d Cir. 1997) (holding that "programs, services, or activities" is a "catch-all phrase that prohibits all discrimination by a public entity, regardless of the context."). A number of courts have addressed the issue of public/private arrangements in administering various services offered to the public. Some determined that such arrangements are not "programs, services, or activities" of the state where the state had minimal involvement in the activities themselves, and because the relationship between the entities was purely regulatory and limited to licensure. *See Tyler v. City of Manhattan*, 849 F. Supp. 1429, 1441-42 (D. Kan. 1994) (licensing of liquor stores); *Reeves v. Queen City Transp.*, 10 F. Supp. 2d 1181, 1186 (D. Colo. 1998) (licensing of buses between city and various ski and gambling resorts); *Noel v. New York Taxi and Limousine Comm'n*, 687 F.3d 63, 69 (2d Cir. 2013) (licensing of taxi cabs). Other courts have held that Title II does apply when the public/private relationship stems

from such state-regulated functions as safety, health, and education. *See, e.g.*, *Paulone v. City of Frederick*, 718 F. Supp. 2d 626, 636 (D. Md. 2010) (stating that a city may be liable under Title II if evidence showed that the city did not provide interpreters to probationers who must attend private DUI alcohol awareness classes); *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 317-18 (E.D.N.Y. 2009) (holding that an agency tasked by state law to "administer the State's mental health service system, plan the settings in which mental health services are provided, and allocate resources within the mental health service system" through "administration" and "oversight" of private facilities conducted a "service, program, or activity" under the ADA).

Until the present case, no court has addressed a situation where a state legislature created a mandatory prerequisite for obtaining a state benefit and then placed a state agency in charge of both designing the program to obtain that prerequisite and licensing businesses to deliver a portion of the program to the public. However, several state courts have found that Title II liability applies when a state is extensively involved in a program with strong parallels to driver education – the state-created lottery. In this context, courts have unanimously held that a public agency in charge of a lottery program bears Title II liability to ensure access to the lottery, regardless of the fact that public distribution of the program is delivered by the agency's private licensees.

For instance, the West Virginia Supreme Court in *Paxton v. State Dept. of Tax and Revenue* held that a lottery commission is liable under Title II for the failure of its licensees to accommodate disabled individuals on their premises. 451 S.E.2d 779, 786 (W. Va. 1994). The court noted that "when [the legislature] *created* the lottery system, the legislature wanted the lottery to be controlled by the Commission *through a license system which was supervised by the Commission*." *Id.* at 783 (emphasis added). The court concluded the Lottery Commission incurred liability under Title II. *Id.*

The Virginia Supreme Court came to a similar conclusion regarding its lottery: "Because the Virginia Lottery is responsible for the operation of the lottery, it is responsible for any VDA or ADA violations [by its licensees]. . . ." *Winborne v. Virginia Lottery*, 677 S.E.2d 304, 307 (Va. 2009).

Like both the West Virginia Lottery Commission and the Virginia Lottery, the TEA controls a state-created system through a licensing regime it develops and heavily regulates. Moreover, like both of these lottery commissions, the TEA provides the end product – a course-completion certificate it deems to be a "government record" – that is issued to the public. *See* Tex. Admin. Code §176.1001(1). Finally, like the New York State Department of Health and the Office of Mental Health in *Disability Advocates*, the TEA plans and administers a state-mandated program in a manner that results in denial of equal access for thousands of individuals, based on their disabilities.

See Disability Advocates, 598 F. Supp. 2d at 318. However, despite these unmistakable parallels, the Fifth Circuit held that the TEA incurs no liability for its actions.

The lack of consistency among courts – and ensuing uncertainty that incentivizes agencies to shirk responsibility for disability accommodations – requires this Court to articulate a clear test so that the lower courts may properly analyze the public agency/private entity arrangements to determine when dual Title II and Title III liability arises.

A. TEA's involvement in driver education is inextricably intertwined with the schools' delivery of instruction and invokes TEA's Title II obligations.

The Texas Legislature created a requirement that the TEA design and administer the driver-education program for use by all Texans. *See* Tex. Educ. Code §1001 *et seq*. The statute anticipates that the TEA will exert pervasive influence and control over driver-education schools and the ultimate product delivered by the schools – the course-completion certificate. *See id.* The TEA's involvement with driver education is so extensive that it cannot be compared to licensing of taxis, liquor stores, buses, barber shops, and beauty schools. It is not a purely commercial, industry-driven service. Rather, to receive the state-granted privilege to drive, every Texan under the age of twenty-five must complete a

driver-education course. The Texas Legislature, in giving the TEA its mandate, expressly stated that the agency should adopt all rules necessary to ensure access by all of the state's citizens. Tex. Educ. Code §§1001.053(3), .204(7). Accordingly, the TEA has an independent obligation, apart from that of its licensees, to comply with disability laws in designing and administering course-curriculum and driver-education requirements. The TEA has failed to do so, and the Fifth Circuit condoned it.

Until the Fifth Circuit's decision in the present case, no cases held that Title II liability did not apply to a program mandated by a state legislature. Rather, in *Tyler*, the court noted that the plaintiff's claims were not barred insofar as they involved the denial of a program, service or activity provided by the state entity, but went on to hold that restaurants and stores that received state liquor licenses did not qualify as "services, programs, or activities" under Title II because the state did not contract to provide those services. 849 F. Supp. at 1441-42.

Similarly, in *Reeves*, the court held that a certificate of public necessity issued to a private company providing buses to gambling facilities did not create Title II liability because the agency's primary function was licensing and registration, not transportation services. 10 F. Supp. 2d at 1184. But the court specifically concluded that the defendant did "not offer, directly or indirectly . . . services or programs to the public." *Id.* at 1184. Only after coming to that

conclusion did the court hold the public utility defendant was not liable under Title II. *Id.* at 1185-88.

In *Noel*, the court likewise held that a municipal taxi licensing program did not create an obligation to ensure ADA compliance by the taxi operators. 687 F.3d at 69. The *Noel* court explicitly recognized that the taxi industry is *expressly exempt* from Title III liability under the ADA, and therefore, "the exemption compels the conclusion that the ADA, as a whole, does not require the New York City taxi industry to provide accessible taxis." 687 F.3d at 74.

Importantly, these cases did not involve state-mandated programs. The state legislatures did not, for instance, create a mandatory liquor consumption program, with the requirement that such liquor be purchased from state-licensed liquor stores. *See Tyler*, 849 F. Supp. at 1441-42. Nor did they create a gambling-resort-attendance-program serviced by state-licensed buses. *See Reeves*, 10 F. Supp. 2d at 1186. There was likewise no state law that New York residents must take city cabs to work. *See Noel*, 687 F.3d 69. In short, none of these cases exempted from Title II liability a program mandated by a state legislature.

Yet here, the Fifth Circuit has held, for the first time, that when a state legislature creates a mandatory prerequisite for obtaining a state benefit and places a state agency in charge of designing that program and licensing the businesses that will deliver a component of that program to the public, the beneficiaries of the program – the students – are

owed no protection by the state agency, even though the Texas Legislature required the TEA to adopt all rules necessary to ensure compliance with state and federal laws, including the ADA. Tex. Educ. Code §§1001.053(3), .204(7).

B. The Fifth Circuit ignored that Petitioners are the direct beneficiaries of a state-developed, driver-education curriculum.

Critically, the Fifth Circuit overlooked the fact that Title II and Section 504 liability arises not only when disabled individuals are denied access to a state program or service, but also when they are denied the *benefits* of a state program or service:

> no qualified individual with a disability shall . . . be denied the *benefits* of the services, programs, or activities of a public entity. . . .
>
> 42 U.S.C. §12132 (emphasis added).
>
> [n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, . . . be denied the *benefits* of, or be subject to discrimination under any program or activity receiving federal funding assistance.
>
> 29 U.S.C. §794(a) (emphasis added).

Even if there could be a question (and there is not) about whether the driver-education system developed and regulated by the TEA and taught through the driver-education schools is a state

program, there is no question that establishing the driver-education curriculum, which is the sole responsibility of the TEA, is the agency's own program or activity. *See* Tex. Educ. Code §1001.101 (TEA's "commissioner by rule shall establish or approve the curriculum and designate the textbooks to be used in a driver education course for minors and adults, including a driver education course conducted by a school district, driver education school, or parent or other individual"). There is also no question the TEA's curriculum is designed for the benefit of the students who ultimately take the driver-education courses. Indeed, the enabling statute defines "driver education" as instruction "to prepare persons for written and practical driving tests that lead to authorization to operate a vehicle." *Id.* §1001.001(6).

Petitioners have been deprived of the benefits of the TEA-established curriculum because the curriculum, like the program as a whole, is not accessible to the hearing-disabled. Petitioners have also been denied access to the course-completion certificates developed by the TEA as part of its administration of the driver-education program. By attempting to enroll in driver-education courses, Petitioners seek the benefits of the TEA's efforts to design and develop a comprehensive driver-education program and therefore qualify as beneficiaries of the agency's activities. By neglecting to conduct an inquiry into whether Petitioners were denied a *benefit* of a state program or activity, the Fifth Circuit introduced further confusion into the analysis of when a state

activity invokes Title II liability. For this reason alone, the Fifth Circuit's ruling cannot stand.

II. The Supreme Court must address when a relationship between a public agency and a private entity invokes the agency's obligation to accommodate disabled individuals.

In the twenty-five years since the passage of the ADA and the forty-plus years since the passage of the Rehabilitation Act, this Court and a number of circuit courts have acknowledged that disability-discrimination statutes should be broadly construed to effectuate their purpose. *See, e.g.*, *Yeskey*, 524 U.S. at 209; *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998); *Gilbert v. Frank*, 949 F.2d 637, 641 (2d Cir. 1991). Yet several decisions, including the Fifth Circuit opinion in this case, continue to make narrow, restrictive, and often contradictory interpretations of the ADA and Section 504. This Court's guidance is necessary to articulate a test to determine the state's duty to prevent discrimination in public/private program arrangements. Without such guidance, the courts in state and federal jurisdictions have offered, and will continue to offer, conflicting and contradictory explanations of the scope of Title II liability.

State courts cannot consistently apply the ADA and Section 504 because they have failed to articulate a clear test to determine whether and when dual Title II and Title III liability arises. In *Paxton*, the West

Virginia Supreme Court concluded that the state's Lottery Commission was required, under Title II, to ensure its lottery retail licensees complied with the ADA. *See* 451 S.E.2d at 786. In reaching this conclusion, the *Paxton* court indicated the amount of control exercised by a public entity over a private one plays a part in determining whether Title II applies to the public entity. *See id*. at 785 (distinguishing the Lottery Commission's licensing of lottery outlets from the liquor and building permits considered in *Tyler*, "where the city had no control over the premises or services").

In another state-lottery case, however, the Virginia Supreme Court downplayed the importance of control exercised by a public entity over a private actor when determining whether Title II liability arises, and instead focused on whether the public entity was "responsible for the operation" of the program or activity at issue. *See Winborne*, 677 S.E.2d at 307 (noting while it "is correct that the Virginia Lottery has no power to . . . control the day-to-day operations of the retailers," it is not absolved of its ADA obligations because it "is responsible for the operation of the lottery"). Taken together, these cases do not provide a clear test to determine whether and when dual Title II and Title III liability arises and seem to contradict each other on the issue of whether the amount of control exercised by a public entity over a private one is relevant in this context, or whether the scope of precise responsibilities is the deciding factor.

State courts interpreting the ADA are unlikely to get any help from the federal courts because the federal district and circuit courts also lack a clear and consistent test for when dual Title II and Title III liability arises. For example, the United States District Court for the Middle District of Florida held the Florida Department of Highway Safety and Motor Vehicles (DHSMV) was not responsible for an ADA violation carried out by a private DUI school it licensed because, unlike the Lottery Commission in *Paxton*, "whose sole purpose is to conduct the lottery, the DHSMV provides a plethora of services, only one of which is to license the DUI programs to these private entities and then regulate and supervise the programs." *Wendel v. Florida Dep't of Highway Safety & Motor Vehicles*, 80 F. Supp. 3d 1297, 1306 (M.D. Fla. 2015).

On the other hand, the United States District Court for the District of Colorado held that Title II's application is not decided based on how many services an agency provides, but rather is limited "to programs *inherent* to the public entity." *Reeves*, 10 F. Supp. 2d at 1185 (emphasis added).

Finally, the United States District Court for the Northern District of California instead focused on whether the public entity formally contracted with the private entity to carry out a portion of the state program when deciding whether Title II applies. *See Indep. Hous. Servs. of San Francisco v. Fillmore Ctr. Assocs.*, 840 F. Supp. 1328, 1344 (N.D. Cal. 1993) (finding the City Redevelopment Agency was subject

to Title II because urban renewal was a program or activity of the agency and the agency contracted with a housing development to carry out a part of the program). Just like the state cases discussed above, these federal cases do not provide a consistent test to define the threshold upon which dual Title II and Title III liability arises.

Adding to the confusion in this area is the fact that *Paxton* has been interpreted in markedly different ways by various federal courts. In *Paxton*, the court found the Lottery Commission liable under Title II and therefore required to ensure the lottery retailers it licensed complied with the ADA. *See Paxton*, 451 S.E.2d at 786. The *Paxton* court considered the amount of control exercised by the Lottery Commission over the lottery retail licensees when determining whether Title II applied. *See id.* at 785. However, in *Noel*, the Second Circuit stated the issue of control was not essential to the *Paxton* decision. *See* 687 F.3d at 71. Instead, the *Noel* court considered the crucial fact in *Paxton* to be that "through its contract vendors the Lottery Commission furnishes the lottery devices and services that allow the licensee to conduct lottery sales," meaning that the Lottery Commission "provide[s] an aid, benefit or service on a continuing basis to its licensee." *Id.* at 71 (internal quotations omitted) (citing *Paxton*, 451 S.E.2d at 785). In the present case, however, even though the TEA provides an aid, benefit or service on a continuing basis to the driving schools by issuing the course-completion certificates needed by the schools to

certify their students, the Fifth Circuit held that no Title II liability exists. App. 7-8, 12.

In *Reeves*, the Colorado District Court also analyzed *Paxton*, but concluded it was the "statutory framework" that "compelled the Court to conclude that the lottery is the service provided by the Lottery Commission." 10 F. Supp. 2d at 1187 (citing *Paxton*, 451 S.E.2d at 785) (internal quotations omitted). The Colorado District Court noted the *Paxton* court "relied heavily on the state statutes that created the Lottery Commission [and] . . . noted that state statutes charged the Lottery Commission with operation of the state lottery on a continuous basis." *Id.* (internal quotations omitted). However, in the present case, the Fifth Circuit held that while "multiple provisions of Texas law empower the TEA to perform actions that would likely redress the named plaintiffs' injuries," that statutory scheme does not make driver education a state "program, service, or activity." App. 7, 12-13.

Taking yet another approach, the Florida District Court's *Wendel* case did not discuss the statutory framework or the presence or absence of contractual arrangements between the Lottery Commission and its licensees, but instead concluded the "sole purpose" of the Lottery Commission was to conduct the lottery, suggesting that this factor contributed to the *Paxton* court's decision to find that Title II applied to the Lottery Commission. *See Wendel*, 80 F. Supp. 3d at 1306.

The Fifth Circuit recognized, as it must, that existing case law provides "little concrete guidance" on the subject, but has not offered any more clarity. App. 10. Just like the *Wendel* court, the Fifth Circuit did not mention the statutory framework in place in West Virginia when discussing *Paxton*. Instead, the Fifth Circuit read *Paxton* to say that the Lottery Commission contracted with the lottery providers – a fact not developed in the *Paxton* opinion. App. 10; *Paxton*, 451 S.E.2d at 785. Taken together, the state and federal ADA opinions involving public/private arrangements create significant confusion, leaving one to wonder why the Lottery Commission in *Paxton* was subject to Title II but the TEA in the present case is not. This, in turn, will make it difficult for future courts to determine when dual Title II and Title III liability arises in the public/private program context.

Uncertainty in the application of ADA requirements across the country, especially in light of the Fifth Circuit's statement that the "lack of a contractual or agency relationship between driver-education schools and the TEA" is the reason no liability exists, increases the likelihood that conflicts will continue to arise. App. 16. State agencies will be incentivized to avoid contractual arrangements with private vendors, instead characterizing such relationships as "licensing" agreements. Unless this Court takes up the issue and articulates a clear standard for when a public agency's involvement constitutes a program, service, or activity of the agency or confers a benefit of a state activity, the lower courts are left with little guidance

on what arrangements would invoke an agency's responsibility to accommodate disabled individuals.

CONCLUSION

Decades after Congress passed the Americans with Disabilities Act and the Rehabilitation Act to prohibit discrimination based on disability, questions regarding the scope of the ADA and Section 504 protections remain. The Fifth Circuit's opinion in this case, as well as other state and federal jurisprudence construing dual Title II and Title III liability, demonstrate confusion as to when an agency's actions in managing and controlling private entities' core functions make those functions a part of the agency's programs, services, or activities or the benefits of such programs, services, or activities. This uncertainty incentivizes state agencies to "farm out" program tasks to their licensees to curtail the costs of ADA compliance. As it stands, hearing-disabled young adults in Texas do not have state-ensured access to the state-mandated program they must complete to obtain a first driver license. More agencies in more states are likely to follow the TEA's lead and deny accommodations to the disabled if this remains uncorrected. The Supreme Court should foreclose such circumvention of Congressional intent and provide much-needed clarity to the disabled community by articulating a clear test for when a public/private arrangement invokes an agency's Title II and

Section 504 obligations. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOE T. SANDERS, II
Counsel of Record
OLGA KOBZAR
SCOTT, DOUGLASS &
MCCONNICO, L.L.P.
303 Colorado St., Suite 2400
Austin, TX 78701
512-495-6300
jsanders@scottdoug.com

JOSEPH P. BERRA
JAMES C. HARRINGTON
WAYNE KRAUSE YANG
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Dr.
Austin, TX 78741

Attorneys for Petitioners

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-50037

DONNIKA IVY; BERNARDO GONZALEZ; TYLER DAVIS, as next friend of Juana Doe, a minor; ERASMO GONZALEZ; ARTHUR PROSPER, IV,

Plaintiffs-Appellees

v.

COMMISSIONER MICHAEL WILLIAMS, in his official capacity as head of the Texas Education Agency,

Defendant-Appellant

Appeals from the United States District Court for the Western District of Texas

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(Filed Mar. 24, 2015)

Before JOLLY, WIENER, and CLEMENT, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Plaintiffs-appellees Donnika Ivy ("Ivy") and the other named plaintiffs (collectively, the "named plaintiffs") are deaf individuals who brought a putative

class action against defendant-appellant Michael Williams in his official capacity as head of the Texas Education Agency (the "TEA"). They request injunctive and declaratory relief requiring the TEA to bring driver education into compliance with the Americans with Disabilities Act ("ADA") and Rehabilitation Act. The district court denied the TEA's motion to dismiss but certified its order for immediate appeal under 28 U.S.C. § 1292(b). We granted leave for the TEA to file an appeal, and we now REVERSE and RENDER judgment dismissing the case.

FACTS AND PROCEEDINGS

In Texas, individuals under the age of 25 cannot obtain driver's licenses unless they submit a driver education certificate to the Department of Public Safety ("DPS"). Tex. Transp. Code Ann. § 521.1601.[1]

[1] We note that § 521.1601 contains an error. The currently-effective version refers to Texas Education Code § 1001.101(a)(1) and (a)(2), even though there are not two subparts in the currently-effective version of § 1001.101(a). This problem was produced by the 2013 amendment to the Texas Education Code, which eliminated subsections (1) and (2) from § 1001.101. *Compare* Act of June 14, 2013, 2013 Tex. Sess. Law Serv. Ch. 716, § 1 (H.B. 3483), *with* Act of June 19, 2009, 2009 Tex. Sess. Law Serv. Ch. 1413, § 1 (S.B. 1317).

The parties do not mention this error in the statute, however. We assume without deciding that the parties are correct that the overall effect of the statute is that individuals 18 years of age or older can take the driver education class for adults that is provided for in Texas Education Code § 1001.1015, even though

(Continued on following page)

Driver education certificates, in turn, are only available from private driver education schools licensed by the TEA. Tex. Educ. Code Ann. § 1001.101(a).[2] The named plaintiffs are all deaf individuals who contacted a variety of TEA-licensed private driver education schools, all of which informed the named plaintiffs that the schools would not accommodate

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§ 1001.1015 is not mentioned in the currently-effective version of Texas Transportation Code § 521.1601.

[2] There are two exceptions that allow certain young adults to obtain driver education certificates through sources other than private driver education schools. *See* Tex. Transp. Code Ann. § 521.1601. First, individuals may receive driver education certificates by taking a class taught by a parent or another specified close relative. *Id.* § 521.205. All parties assume that the parent-taught course is available only for individuals who are under 18 years old, but the statute itself does not appear to limit parent-taught courses to those under 18. *See id.* § 521.1601 (stating that those under 25 years of age must: (1) take a parent-taught class, public driver education class, or private minor driver education class, or (2), if they are over 18 years old, take a private minor or adult driver education class). We assume without deciding that the parent-taught class is not available to those who are over 18 years old. If that is the case, parent-taught classes are not an option for any of the named plaintiffs because the only named plaintiff who was under 18 when the lawsuit was filed did not have a parent or other specified relative who could offer the parent-taught class.

Second, individuals can obtain driver education certificates from driver education classes offered at public schools. Tex. Educ. Code Ann. § 29.902. It is unclear whether any of the named plaintiffs are public school students who can receive driver education certificates through these public school programs. But the TEA has not argued that the named plaintiffs had this public school option available. We assume without deciding that it was unavailable to the named plaintiffs.

them.[3] Because they cannot obtain driver education certificates, the named plaintiffs cannot obtain driver's licenses.

A Deafness Resource Specialist with the Texas Department of Assistive and Rehabilitative Services informed the TEA of the inability of deaf individuals like the named plaintiffs to receive driver education certificates. But the TEA declined to intervene, stating that it was not required to enforce the ADA and that it would not act against the private driver education schools unless the United States Department of Justice ("DOJ") found that the schools had violated the ADA. The Deafness Resource Specialist filed a complaint against the TEA with the DOJ, which the DOJ apparently dismissed.

Ivy filed a lawsuit in federal district court against the TEA and a private driver education school, requesting injunctive and declaratory relief against both parties under the ADA. She later dismissed the private driver education school from the lawsuit. After some additional procedural steps that are not relevant here, the lawsuit became a putative class action with multiple named plaintiffs and the TEA as the sole remaining defendant. The live pleading, the Fourth Amended Complaint, requests injunctive and declaratory relief requiring the TEA to bring

[3] At least one of the named plaintiffs has only a limited ability to read English, so a written driver education course would not be feasible.

driver education into compliance with the ADA. The TEA filed a motion to dismiss for want of jurisdiction and for failure to state a claim. The district court denied these motions, certified its order for interlocutory appeal, and stayed the case. We granted the TEA leave to file an interlocutory appeal.

STANDARD OF REVIEW

We review de novo the denial of a motion to dismiss for want of jurisdiction and for failure to state a claim. *Young v. Hosemann*, 598 F.3d 184, 187-88 (5th Cir. 2010).

DISCUSSION

We first consider the TEA's argument that the named plaintiffs lack standing to bring their claims. Finding that they have standing, we next consider whether they adequately state a claim upon which relief can be granted. We conclude that they do not, so we dismiss the case.

A. Standing

There are three requirements for standing: (1) the plaintiff must have suffered an "injury in fact," (2) there must be "a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party before the court," and (3) "it

must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks and alterations omitted).

Here, the injury alleged is quite obvious – the named plaintiffs' inability to receive driver education certificates, which in turn prevents them from receiving driver's licenses. The TEA challenges the named plaintiffs' standing under the second and third prongs. The TEA argues that there is no causal connection between the named plaintiffs' injury and the TEA's conduct because it is the driver education schools, not the TEA, that refuse to accommodate the named plaintiffs. This contention is meritless. While driver education schools' actions are one cause of the injury, it is equally clear that the named plaintiffs' alleged injuries are also "fairly traceable" to the TEA's failure to inform private driver education schools of their ADA obligations and its failure to deny licenses to driver education schools that violate the ADA.[4]

The TEA next argues that a court order could not redress the plaintiffs' alleged injuries. It advances three main arguments in support of this contention. First, it argues that it does not have the statutory

[4] It is a separate question whether the TEA was legally required to perform these actions. That question goes to the merits of the case, not standing.

authority under Texas law to ensure private driver education schools' compliance with the ADA. We disagree; multiple provisions of Texas law empower the TEA to perform actions that would likely redress the named plaintiffs' injuries. For example, the TEA can issue a license to a driver education school only if the school "complies with all county, municipal, state, and federal regulations, including fire, building, and sanitation codes and assumed name registration." Tex. Educ. Code Ann. § 1001.204(7). Thus, the TEA has the power to withhold licenses from driver education schools that fail to comply with the DOJ's ADA regulations.[5] Further, Texas law provides that the TEA "has jurisdiction over and control of" driver education schools and is allowed to "adopt and enforce rules necessary to administer" the chapter on driver education. Tex. Educ. Code Ann. §§ 1001.051; 1001.053(a)(3). These provisions give the TEA the power to enact regulations relating to ADA compliance in driver education schools.

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[5] The TEA argues that the meaning of "all county, municipal, state, and federal regulations" is limited by the specification that these regulations "includ[e] fire, building, and sanitation codes and assumed name registration." *See id.* § 1001.204(7). We disagree. Under Texas law, "including" is defined as a "term[ ] of enlargement and not of limitation or exclusive enumeration," and its use "does not create a presumption that components not expressed are excluded." Tex. Gov't Code Ann. § 311.005(13). Hence, the list following the word "including" does not limit the plain meaning of the phrase "all . . . federal regulations," a term that clearly encompasses the DOJ's ADA regulations.

Second, the TEA argues that a federal court cannot order it to ensure that driver education schools comply with the ADA because the court would effectively be commandeering the state into implementing a federal program. This argument misses the mark. While the federal government cannot require states to implement a federal program, the federal government *can* require the states to comply with federal law. *Reno v. Condon*, 528 U.S. 141, 150-51 (2000). The named plaintiffs are arguing that driver education schools are a "service, program, or activity" of the TEA. If they are correct, requiring the TEA to comply with the ADA in providing driver education would only require the state itself to comply with federal law, so the anti-commandeering doctrine would not be implicated.

Third, the TEA argues that withholding or revoking licenses from driver education schools would only shut down schools, not improve their compliance with the ADA. Similarly, the TEA argues that any potential fines would not necessarily change the schools' behavior. But it seems highly unlikely that all driver education schools would choose to shut their doors or accept fines rather than comply with the ADA. Instead, it is likely that the TEA's action would help redress the named plaintiffs' injuries. Thus, the redressability requirement for standing is satisfied.

B. Failure to State a Claim

The named plaintiffs' lawsuit fails on the merits, however. They sued under both the Rehabilitation Act and Title II of the ADA. It is uncontested that the TEA receives federal funding, which is a prerequisite for Rehabilitation Act coverage. *See* 29 U.S.C. § 794(a), (b)(1)(A). Besides this special prerequisite for the Rehabilitation Act, the ADA and Rehabilitation Act "are judged under the same legal standards, and the same remedies are available under both Acts." *Kemp v. Holder*, 610 F.3d 231, 234 (5th Cir. 2010) (per curiam). Further, "[t]he parties have not pointed to any reason why Title II and [the Rehabilitation Act] should be interpreted differently." *Frame v. City of Arlington*, 657 F.3d 215, 224 (5th Cir. 2011) (en banc). Thus, "[a]lthough we focus primarily on Title II, our analysis is informed by the Rehabilitation Act, and our holding applies to both statutes." *Id.*

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. It is uncontested that the TEA is a public entity and that the named plaintiffs are qualified individuals with disabilities. The key question is whether the named plaintiffs have been "excluded from participation in or . . . denied the benefits of the services, programs, or activities of [the TEA]." *Id.* To answer that question, we must decide whether driver education is a service,

program, or activity of the TEA. We hold that it is not, although this is a close question for which the statutes, regulations, and case law provide little concrete guidance.

Starting with the plain text of Title II of the ADA, the phrase "services, programs, or activities of a public entity" is undefined. The Supreme Court has interpreted the phrase with reference to what "services, programs, or activities" are *provided* by the public entity. *See Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) (holding that prisons have "programs, services, or activities" because they "provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs'"). Here, the TEA itself does not teach driver education, contract with driver education schools, or issue driver education certificates to individual students. Instead, the TEA licenses and regulates private driver education schools, which in turn teach driver education and issue certificates. Thus, the TEA's program provides the licensure and regulation of driving education schools, not driver education itself. Title II of the ADA therefore suggests that driver education is not a program, service, or activity of the TEA.

The Rehabilitation Act does define "program or activity," defining it as "all the operations of" a public entity. 29 U.S.C. § 794(b). In the context of interpreting this definition, we have explained that "Webster's Dictionary broadly defines 'operations' as 'the whole process of planning for and operating a business or other organized unit,' and defines 'operation' as 'a

doing or performing esp[ecially] of action." *Frame*, 657 F.3d at 227 (alteration in original) (quoting Webster's Third New International Dictionary 1581 (1993)). Here, as explained above, the TEA does not operate or perform driver education because it does not teach driver education or contract with the schools that do so. Thus, driver education seems to fall outside of the ambit of the Rehabilitation Act's definition of "program or activity."

Turning to the regulations, the ADA tasks the Attorney General with promulgating regulations that implement Title II. 42 U.S.C. § 12134(a).[6] Unfortunately, these regulations do not further define what it means to be a service, program, or activity of a public entity.

The most relevant regulation is 28 C.F.R. § 35.130(b)(1)(v). Section 35.130(b)(1) provides that a public entity cannot discriminate against qualified individuals with disabilities "in providing any aid, benefit, or service," whether the state acts "directly or through contractual, licensing, or other arrangements." Subsection (v), which is not cited by the parties, provides that a state may not "[a]id or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates

[6] The Attorney General's regulations are eligible for *Chevron* deference. *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program." 28 C.F.R. § 35.130(b)(1)(v).

But the regulations simply beg the ultimate question here. Section 35.130(b)(1) does not allow a state to discriminate "in providing any aid, benefit, or service," but it does not define what it means for the state to "provid[e]" an "aid, benefit, or service." As detailed above, the TEA does *not* provide driver education. Similarly, section 35.130(b)(1)(v) prohibits a state from aiding entities that discriminate against "beneficiaries of the public entity's program," but it does not define what it means for a program to be the "public entity's." It does not seem that a program of driver education belongs to the TEA.

Another regulation provides that "[t]he programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered." 28 C.F.R. § 35.130(b)(6). But we agree with the named plaintiffs that this statement does not automatically immunize licensed activities from the ADA's gamut, given that the regulations also provide that a public entity cannot discriminate "directly or through contractual, licensing, or other arrangements." 28 C.F.R. § 35.130(b)(1).

Looking further to the interpretative guidance provided by the DOJ, the DOJ has specifically stated that a public entity "is not accountable for discrimination in the employment or other practices of [a company licensed by the public entity], if those

practices are not the result of requirements or policies established by the [public entity]." Department of Justice, Title II Technical Assistance Manual § II-3.7200, *available at* http://www.ada.gov/taman2.html (last visited Feb. 19, 2015).[7] Here, any failure of the driver education schools to comply with the ADA or Rehabilitation Act cannot be said to be "the result of requirements or policies established by the" TEA. Instead, the named plaintiffs' claim is at most that the TEA's *failure* to establish requirements or policies has allowed private driver education schools to be inaccessible. Thus, the DOJ's interpretative guidance indicates that the TEA is not accountable for the driver education schools' inaccessibility because the TEA's requirements and policies have not caused it.

Finally, as to case law, the named plaintiffs cite two lottery cases as their primary authority for finding that driver education is a program of the TEA. In those state supreme court cases, each court held that the state lottery was a program of the state lottery commission, so the ADA required the commission to make the lottery program accessible. *Winborne v. Va. Lottery*, 677 S.E.2d 304, 307-08 (Va. 2009); *Paxton v. State Dep't of Tax & Revenue*, 451 S.E.2d 779, 784-85 (W. Va. 1994). Thus, even though the inaccessible lottery agents were private parties, the commission could be held liable under the ADA because it ran a

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[7] The DOJ's interpretative guidance is eligible for *Skidmore* deference. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

lottery program that was inaccessible as a whole. *Winborne*, 677 S.E.2d at 307-08; *Paxton*, 451 S.E.2d at 785.

But there are two important differences between these lottery cases and this case. First, there, it was clear that the lottery commissions were running lotteries, not just licensing lottery agents. After all, the lottery commissions themselves conducted the lotteries; the agents that sold the tickets were just one component of that entire program. Here, in contrast, the TEA just as clearly does not provide any portion of driver education; it merely licenses driver education schools. Second, in the lottery cases, the lottery commissions contracted with the lottery providers, which were paid commissions for acting as agents for the state. *Winborne*, 677 S.E.2d at 307; *Paxton*, 451 S.E.2d at 785. Here, there is no such agency or contractual relationship.[8] These cases are therefore unpersuasive.

The only other cases that have held a public entity liable for a private actor's inaccessibility involved similar situations where the private actors had a contractual or agency relationship with the public entity. *See, e.g.*, *Castle v. Eurofresh, Inc.*, 731

[8] The amici seem to argue that a contractual or agency relationship exists because driver education schools pay significant fees to be licensed by the TEA. We disagree. If driver education schools were acting as agents of the TEA in administering its driver education program, we would expect the *TEA* to pay the schools, not the other way around.

F.3d 901, 910 (9th Cir. 2013) (holding that state could be liable under ADA for inaccessibility of company it contracted with to provide state inmates with jobs); *Indep. Hous. Servs. of S.F. v. Fillmore Ctr. Assocs.*, 840 F. Supp. 1328, 1344 (N.D. Cal. 1993) (holding that "[t]he crucial distinction" that rendered the public entity liable for a private actor's inaccessibility was that the public entity "ha[d] contracted with [the private actor] for [it] to provide aid, benefits, or services to beneficiaries of the [public entity's] redevelopment program"). In the absence of such a contractual or agency relationship, courts have routinely held that a public entity is not liable for a licensed private actor's behavior. *See, e.g.*, *Noel v. N. Y. C. Taxi & Limousine Comm'n*, 687 F.3d 63, 72 (2d Cir. 2012) (holding that public entity is not liable for inaccessible taxi companies it licenses and regulates); *Bascle v. Parish*, No. 12-CV-1926, 2013 WL 4434911, at *5-6 (E.D. La. Aug. 14, 2013) (same); *Reeves v. Queen City Transp., Inc.*, 10 F. Supp. 2d 1181, 1187 (D. Colo. 1998) (holding that public utility company is not liable for inaccessible bus company it licenses where there is no contract between them); *Tyler v. City of Manhattan*, 849 F. Supp. 1429, 1441-42 (D. Kan. 1994) (holding that city is not liable for inaccessible restaurants and liquor stores it licenses).

The importance of a contractual or agency relationship is also demonstrated by the DOJ's interpretative guidance, which provides three examples of a private actor's activities being covered by Title II because of the "close relationship" between the

private actor and a public entity. *See* Department of Justice, Title II Technical Assistance Manual § II-1.3000. All three examples involve some form of contractual or agency relationship: a restaurant with a "concession agreement with a State department of parks"; a "joint venture" between a city and a private corporation; and a nonprofit organization that runs group homes "under contract with a State agency." *Id.* Thus, we conclude that the lack of a contractual or agency relationship between driver education schools and the TEA cuts strongly against holding that driver education is a program of the TEA.

The named plaintiffs essentially argue that the TEA's pervasive regulation and supervision of driver education schools transforms these schools into agents of the state. But we hold that the mere fact that the driver education schools are heavily regulated and supervised by the TEA does not make these schools a "service, program, or activity" of the TEA. Otherwise, states and localities would be required to ensure the ADA compliance of every heavily-regulated industry, a result that would raise substantial policy, economic, and federalism concerns. Nothing in the ADA or its regulations mandates or even implies this extreme result. Thus, we join the Second Circuit in holding that public entities are not responsible for ensuring the ADA compliance of even heavily-regulated industries. *See Noel*, 687 F.3d at 72 ("[C]ontrol over the taxi industry, however pervasive it is at this time, does not make the private taxi industry 'a program or activity of a public entity.' ").

Beyond heavy regulation, the named plaintiffs allege only that the TEA provides sample course materials to driver education schools and sells blank driver education certificates to them. The provision of such sample course materials and blank certificates is simply not enough to turn the schools into proxies for the TEA.

Admittedly, this case is further complicated by the fact that the benefit provided by driver education schools – a driver education certificate – is necessary for obtaining an important governmental benefit – a driver's license. Given the broad remedial purposes of the ADA, it would be extremely troubling if deaf young adults 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. But this concern does not transform driver education into a TEA program or service. Instead, it is partly resolved by the fact that the ADA regulations offer a potential avenue for relief against the DPS. *See, e.g.*, 28 C.F.R. § 35.130(b)(8) (providing that a public entity cannot "apply eligibility criteria that screen out or tend to screen out" 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"). That is, the DPS may well be required to give exemptions to certain deaf individuals who cannot obtain driver education certificates, given that using these certificates as

an eligibility criteria allegedly "screen[s] out or tend[s] to screen out" deaf people and may not be "necessary for the provision of the" driver's license program. But the named plaintiffs have not sued the DPS, so we need not decide this issue.

We conclude that the TEA does not provide the program, service, or activity of driver education. Thus, it is not required to ensure that driver education complies with the ADA.

CONCLUSION

For the foregoing reasons, we REVERSE the district court's order denying the TEA's motion to dismiss and RENDER judgment that the case is dismissed with prejudice for failure to state a claim upon which relief can be granted.

WIENER, Circuit Judge, concurring in part and dissenting in part:

I concur in the panel majority's holding that the named plaintiffs have standing to bring their ADA claims. I respectfully dissent on the merits, however, in the firm conviction that TEA's involvement in driver education in Texas does constitute a service, program, or activity under Title II of the ADA, which in turn requires TEA to ensure that its licensee driving schools accommodate the deaf. Convinced that the named plaintiffs have stated a claim for

which relief may be granted, I would affirm the district court's judgment denying TEA's motion to dismiss and permitting the case to proceed on the merits.

1. Service, Program, or Activity

This case turns entirely on whether Texas, through TEA, conducts a service, program, or activity by licensing the driving schools that train all drivers between 17 and 25 years of age who seek driver's licenses. As the majority opinion acknowledges, neither the statutes and regulations nor the case law provide a precise definition of "services, programs, or activities."[1] We differ, however, because the guidance to be derived from these sources inexorably leads me to the conclusion that the phrase is sufficiently broad and flexible to apply to TEA's licensing in this case. The indisputable truism that virtually every adult, including those between 17 and 25 years old, must have the opportunity to be licensed to drive a car (or, in Texas, a truck), given driving's unique and indispensable importance in their daily lives, confirms to me beyond cavil that TEA does in fact engage in the public "program" of driver education. That in turn warrants our mandating that TEA ensure that every driving school accommodates deaf students.

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[1] 42 U.S.C. § 12132; *see also* 28 C.F.R. § 35.130.

2. Contract; Agency; Licensing

The majority opinion rests its holding on its perceived distinction between contractual and agency relationships, on the one hand, and licensing relationships on the other. This to me is a classic distinction without a difference. First and foremost, no such dichotomy appears in the text of Title II.[2] As for the implementing regulations, if the term "services, programs, or activities" hinged on the technical legal formalities of agency or contract and distinguished them based on the formalities of licensing, such a clear rule would surely be set out in the text, not relegated to subtext. The fact that 28 C.F.R. § 35.130 is couched in the language of standards, not rules, suggests that DOJ interprets Title II to encompass a greater set of public/private interactions than the majority opinion recognizes. Indeed, the regulations explicitly forbid public entities from engaging in discrimination through "contractual, *licensing*, or other arrangements."[3] Not only does 28 C.F.R. § 35.130(b)(1) specifically include licensing regimes, but the breadth of the additional, catch-all phrase, "other arrangements," cuts against the majority's narrow construction that

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[2] *See* 42 U.S.C. § 12132. This distinction is also entirely absent from the text of the Rehabilitation Act, which prohibits discrimination in the implementation of "any program or activity" by entities receiving federal assistance. *See* 29 U.S.C. § 794(a); *see also Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011) (en banc) ("The ADA and the Rehabilitation Act generally are interpreted *in pari materia*.").

[3] 28 C.F.R. § 35.130(b)(1) (emphasis supplied).

only contractual or agency relationships qualify as programs and that licensing does not. To me, it's not a matter of undefined labels but of the substance of each particular public/private relationship.

I also read DOJ's Technical Assistance Manual as supportive of a more expansive view of "services, programs, or activities." Surely, if the rule to be gleaned from the four examples in section II-1.3000 were that only contractual or agency relationships between public and private entities could invoke dual Title II and Title III obligations, but that licensing could not, the manual would have stated so plainly. Instead, the manual makes only the general point that, "[i]n many situations, however, public entities have a *close relationship* to private entities that are covered by title III, with the result that certain activities may be at least indirectly affected by both titles."[4] "Close relationship" is not synonymous with or restricted to "contractual or agency relationship," and I am reluctant to so narrow DOJ's language. Rather, I see the four illustrations that follow not as delineating the outer limits of what constitutes a "close relationship," but as presenting four non-exclusive, typical examples of public-private interactions – non-exclusive examples that occur often in the real world and thus are useful to include as illustrations. The

[4] DEP'T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT TITLE II TECHNICAL ASSISTANCE MANUAL COVERING STATE AND LOCAL GOVERNMENT PROGRAMS AND SERVICES § II-1.3000 (1993) (emphasis supplied), *available at* http://www.ada.gov/taman2.html.

driver education system at issue here, however, is *sui generis* – atypical if not unique – so it is unsurprising that the manual presents no close analogy. What the manual does do, however, is instruct us to focus on the closeness of the particular relationship – here, the one between TEA and private driving schools – not on the legalistic labeling of the relationship as licensing.

Finally, the panel majority's perceived distinction between contractual and agency relationships and licensing relationships is nowhere apparent in the limited case law on this issue. It may well be that a contractual or agency relationship is a sufficient condition to finding that a public entity's program encompasses a private entity's activities, but it is neither the only one nor a necessary one.[5] The critical issue is not whether a contract exists,[6] but (1) whether

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[5] *See Paulone v. City of Frederick*, 718 F. Supp. 2d 626, 636 (D. Md. 2010) (allowing a Title II claim against a city for its failure to ensure that private entities participating in the city's alcohol awareness program were ADA compliant, though no contract appears to have existed between the city and the private entities).

[6] *See Castle v. Eurofresh, Inc.*, 731 F.3d 901, 910 (9th Cir. 2013) ("Title II's obligations apply to public entities *regardless of how those entities chose to provide or operate their programs and benefits.*" (emphasis supplied)). The majority appears to read *Independent Housing Services of San Francisco v. Fillmore Center Associates*, 840 F. Supp. 1328, 1344 (N.D. Cal. 1993), as making a "crucial distinction" between a state development agency, which might be liable under Title II for a private housing development's discriminatory practices, and a fire department, which would not be (even if it saved the development from a fire, thus rendering it "significant assistance"), on

(Continued on following page)

a private party services the beneficiaries of the public entity's program, and (2) how extensively the public entity is involved in the functions and operations of the private entity. If the private entity does so serve, and the public and private entities are closely intertwined, then under those particular circumstances, the private entity's activities might be fairly considered an integral and inseparable part of the public entity's program.

3. TEA and Driving Schools Are Inextricably Intertwined

The crux of the plaintiffs' case (and mine!) is that, even though the driving schools perform the actual day-to-day instruction, instruction is but one component of the broader program of driver education that is continually overseen and regulated in discrete detail by TEA. When Chapter 1001 of the Texas Education Code is considered as a whole, it reveals that

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the basis of the agency's contract with the housing development, and the fire department's lack of a contract. The court in *Independent Housing* noted "that the fire department has not contracted with [the housing development] for [it] to provide any aid, benefit, or service to beneficiaries of the fire department's program," whereas the state agency "has contracted with [the housing development] for [it] to provide aid, benefits, or services to beneficiaries of the [a]gency's redevelopment program." *Id.* In my view, the "crucial distinction" in *Independent Housing* is the fact that the public entity used a private entity to implement its urban renewal program, not that this arrangement was formalized in a contract.

TEA superintends a wide-ranging driver training program in support of Texas's overarching policy goal of ensuring safe roads for all. Chapter 1001 does not merely establish TEA's authority over driver *education* – and consequently, its role as gatekeeper to the uniquely pervasive and indispensable state function of licensing its drivers – but also the agency's role in ensuring driving *safety.* The named plaintiffs do not discuss driving safety schools, but it is notable that Chapter 1001 gives TEA oversight of both driver *education* and driving *safety*, under the general umbrella of driver *training*.[7]

TEA plays a significant hands-on role in licensing drivers, but its role in driving safety is anything but remote or marginal. For example, Texans who receive specified minor traffic tickets may have those tickets dismissed if the drivers complete a driving safety course certified and licensed by TEA.[8] The way that the state interfaces driver training and the receipt of state benefits indicates that its intimate participation

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[7] *See* TEX. EDUC. CODE § 1001.001(9) (defining a "driver training school" as a "driver education school or driving safety school").

[8] *See Information for Driving Safety Class Participants*, REGION 13, http://www4.esc13.net/drivers/faqs-drivers/idsinfo (last visited Mar. 24, 2015). Some automobile insurance companies also provide discounts for individuals who have completed such a course, a public-private interaction that TEA facilitates. *See id.*; *see also* EDUC. § 1001.105 (requiring TEA to "enter into a memorandum of understanding with the Texas Department of Insurance for the interagency development of a curriculum for driving safety courses").

at all levels of the private driving school industry is more than merely regulatory. Through TEA, the state employs and manages this industry to achieve its own public ends. Again, the fact that the state's active involvement in this industry is labeled licensing does not diminish, much less block, its qualifying as a program of the state for the purposes of the ADA.

4. TEA's Role

The powers granted to TEA in Chapter 1001 further support the view that private driving instruction forms one component of an overall state program. This is because TEA exerts more rigorous oversight of providers of driver education than would be expected in most run-of-the-mill licensing regimes. Every driving school's curriculum must be approved by TEA, and the agency "designate[s]" the textbooks that may be used.[9] Furthermore, TEA's enforcement powers over driver education schools are broad and varied[10] –

[9] EDUC. § 1001.101(a).

[10] *See id.* § 1001.454(a) ("The commissioner may revoke the license of a driver training school . . . or may place reasonable conditions on the school . . . if the commissioner has reasonable cause to believe that the school . . . has violated [Chapter 1001 or a rule adopted under it]."); *id.* § 1001.456(a) ("[T]he agency may, without notice: (1) order a peer review; (2) suspend the enrollment of students in the school or the offering of instruction by the instructor; or (3) suspend the right to purchase driver education certificates."); *id.* § 1001.553 (noting that the commissioner may separately impose administrative penalties of up to $1,000 per day per offense on schools found in violation of the chapter or the rules adopted under it); *see also id.* § 1001.153(a)

(Continued on following page)

its power to order a peer review, for example, suggests a greater degree of involvement in the driving schools' operations than is typical of a plain vanilla licensing arrangement.[11] The requirement that driving school owners and staff be of "good reputation and character" signals a heightened level of concern for the reliability of these schools' services – a concern that is consistent with TEA as a public provider of a social services program.[12] Similarly, the fact that each driver education school must post a significant bond, payable to TEA for its direct use in paying refunds to students, portrays a higher and more intimate level of agency involvement in these licensees' activities than would be expected if TEA were purely a hands-off licensing entity.[13] And TEA has the right to inspect every school physically at least once a year as a condition of license renewal[14] – more frequently if the school has a history of regulatory violations.[15]

(allowing the commissioner to set a fee for investigating complaints against a school, payable by schools that are ultimately found to be at fault).

[11] *See id.* § 1001.456(a). A peer review is an "objective assessment of the content of the school's . . . curriculum and its application," "conducted by a team of knowledgeable persons selected by the agency," and paid for by the school under review. *Id.* § 1001.456(c).

[12] *Id.* § 1001.204(9).

[13] *See id.* § 1001.207.

[14] *See id.* § 1001.303.

[15] *See id.* § 1001.454(c).

Beyond TEA's intertwined involvement with driver education schools, however, is the fact that through TEA the state also employs driver training to teach civic responsibility, including lessons having nothing to do with the mechanics of driving. Chapter 1001 requires TEA to ensure that information about litter prevention[16] and organ donation[17] is included in all driving courses certified by the agency. That the Texas Legislature has chosen to promote these important civic and community values through the vehicle of driver training is another indication that the private driving school industry participates in a public program of TEA.[18]

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[16] *See id.* § 1001.107.

[17] *See id.* § 1001.108.

[18] In section 1001.111, there is even more evidence that the state sees good driving habits as a component of good citizenship. For drivers younger than 25, driving safety courses take on the attributes of civic education. Students are not just instructed on traffic rules. In addition, they are educated on "the role of peer pressure," *id.* § 1001.111(b)(2)(D), "the effect of poor driver decision-making on [their] family, friends, school, and community," *id.* § 1001.111(b)(2)(E), and the importance of assertiveness, as drivers and as passengers, *see id.* § 1001.111(b)(2)(F). They must also sign "a written commitment . . . to family and friends that the student will not engage in dangerous driving habits." *Id.* § 1001.111(b)(3). Implicit in these requirements is the idea that a responsible driver is a responsible citizen. To be clear, driver education courses, not driving safety courses, are at issue in this case; Chapter 1001, however, covers both driver education and driving safety as two parts of an overall driver training program managed by TEA.

All of this makes abundantly clear that driver education is not merely a passively licensed, private, for-profit industry, but constitutes a means by which TEA substantively and substantially effectuates the policy goals that the state has charged it with implementing and maintaining. The fact that driver education forms part of the academic curriculum in some public schools only reinforces the conclusion that this entire infrastructure is truly a "program" of the state of Texas.

As the panel majority acknowledges, 28 C.F.R. § 35.130(b)(1)(v) is the regulation that is most relevant to this case. It contemplates precisely the instant situation: A public entity may well discriminate indirectly by furnishing significant assistance to a private entity that discriminates directly by failing to provide the public entity's program to disabled beneficiaries. The regulation, in other words, covers a public entity that farms out the practical implementation of its program to private entities while retaining and exercising considerable oversight, regulation, and other substantive involvement. In this case, the driving school students are the direct beneficiaries of TEA's program, and TEA furnishes operating licenses and course completion certificates to private schools that in turn discriminate on the basis of disability. In my view, the plaintiffs have stated a viable cause of action: The State of Texas cannot legislatively mandate driver education, then evade ADA responsibility via a "flea-flicker" lateral from TEA to private licensees.

5. "Parade of Horribles" Is Inapt

TEA claims that affirming the district court in this case could lead to requiring the state to police ADA compliance by all heavily regulated, licensed industries, such as massage parlors and tattoo artists – a typical "parade of horribles" frequently advanced by desperate public defendants. That may well be, but the one and only issue before us today is the discrete driver education scheme mandated by the Texas legislature and created and administered by TEA. It is sufficiently distinct and distinguishable from all others that affirming the district court surely will not open those floodgates. There exist obviously meaningful differences between this particular public/private operation and virtually every other private operation that Texas licenses. TEA's role is not just about consumer protection, as is the focus of the several occupational codes cited by the state. I repeat here for emphasis that, in this day and age, the driving of private and personal vehicles is a uniquely important, pervasive, and indispensable entitlement, and driving responsibly is a civic duty that the state seeks to promote with this unique regulatory scheme that it entrusts to TEA. Nothing about this is changed by the fact that state-licensed driver education schools happen to be private enterprises.

To illustrate this distinction between driver education and essentially all other heavily regulated businesses and industries, consider a hypothetical world in which every driver education school in Texas shuts down, so that no person under the age of 25 could

obtain a driver's license via private instruction. Texas would undoubtedly fill the void itself – perhaps by adding courses at community colleges and expanding the driver education programs that currently exist in its public schools. But if, by contrast, each and every massage therapist or tattoo artist school in Texas were to close, the state surely would not respond by entering the business of training massage therapists or tattoo artists. Unlike driver education schools, those industries do not serve as private mechanisms for achieving public ends and public policy.

Viewing the case law from this perspective, the distinction becomes even more apparent. Liquor stores,[19] buses to gambling and ski resorts,[20] and taxi cabs[21] are not services of the state. Like Kansas, Colorado, and New York, Texas might well regulate these industries, but it is not likely to replicate them. Again, the feature that sets driver education apart from all the rest is the pervasiveness of driving private vehicles in a state like Texas. States regulate other industries to prevent unlicensed operators from doing harm. In contrast, driver education alone is a positive good and an end unto itself. Texas has chosen to educate drivers via private driving schools, and it

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[19] *See Tyler v. City of Manhattan*, 849 F. Supp. 1429 (D. Kan. 1994).

[20] *See Reeves v. Queen City Transp., Inc.*, 10 F. Supp. 2d 1181 (D. Colo. 1998).

[21] *See Noel v. N.Y.C. Taxi & Limousine Comm'n*, 687 F.3d 63 (2d Cir. 2012).

regulates this private industry not simply to protect consumers from unlicensed operators, but first and foremost to ensure that important training goals for this large segment of the state's adult population are met to the state's satisfaction. Texas has an inherent interest in driver education that it does not have in any of the other licensed endeavors, accounting for its extensive involvement through TEA.[22]

Finally, I acknowledge the concern that requiring TEA to take a more active role in promoting handicap accessibility in driver education would unduly expand its role. True, it may well impose an unanticipated ADA burden on the agency. Yet Congress made the conscious calculation to impose this burden on public entities. In light of this nation's unseemly history of systematically excluding persons with disabilities from public life and public activities, Congress intentionally wrote the ADA "to provide a clear and *comprehensive* national mandate for the *elimination* of

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[22] Cases in which Title II has been held to apply to public entities supervising the activities of private industries consistently involve issues of inherent state interest, such as health care and education. *See, e.g.*, *Paulone v. City of Frederick*, 718 F. Supp. 2d 626, 636 (D. Md. 2010) (allowing a deaf plaintiffs Title II claim to proceed after a city did not provide interpreters to probationers who were required to attend private alcohol awareness classes, including a victim impact panel sponsored by Mothers Against Drunk Driving); *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 317-18 (E.D.N.Y. 2009) (ruling that Title II covered a state entity that licensed private entities to operate adult homes for individuals with disabilities).

discrimination."[23] It might not be convenient for TEA to require ADA compliance by its licensed driver education schools, but the ADA's sweeping purpose is clear.[24] And, after all, TEA may rely on the ADA's safety valve of reasonableness. Although TEA is obligated to make "reasonable modifications in policies, practices, or procedures," if it finds that such modifications are too strenuous, it may "demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity," and be excused from compliance.[25] A public entity's obligations under Title II are broad, but they are not unlimited.

For the foregoing reasons, I respectfully dissent from the panel majority's reversal of the district court's denial of TEA's motion to dismiss.

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[23] 42 U.S.C. § 12101(b)(1) (emphases supplied).

[24] *Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011) (en banc) ("The ADA is a 'broad mandate' of 'comprehensive character' and 'sweeping purpose' intended 'to eliminate discrimination against disabled individuals, and to integrate them into the economic and social mainstream of American life.'" (quoting *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001))).

[25] 28 C.F.R. § 35.130(7).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DONNIKA IVY, BERNARDO GONZALEZ, ERASMO GONZALEZ, ARTHUR PROSPER IV, AND TYLER DAVIS AS NEXT FRIEND OF JUANA DOE, A MINOR,	§	
PLAINTIFFS,	§	CAUSE NO. A-11-CA-660-LY
V.	§	
MICHAEL WILLIAMS, COMMISSIONER, IN HIS OFFICIAL CAPACITY, AS HEAD OF TEXAS EDUCATION AGENCY,	§	
DEFENDANT.	§	

ORDER

Before the court in the above styled and numbered cause are Defendant Texas Education Agency Commissioner Michael Williams's ("Agency") Fourth Amended Motion to Dismiss and, In the Alternative, For Certification Under 12 U.S.C. § 1292(b) filed October 7, 2013 (Clerk's Document No. 78), Plaintiffs' response filed October 28, 2013 (Clerk's Document No. 79), and the Agency's reply filed November 12, 2013 (Clerk's Document No. 81). Having considered the motion, response, reply, the case file, and the

applicable law, the court will deny the Agency's motion and will certify this order for interlocutory appeal to the Court of Appeals for the Fifth Circuit.

By this action, Plaintiffs, on behalf of themselves and a class of others similarly situated, allege they are being discriminated against based on their hearing disability and that they are being improperly denied access to the State of Texas's mandatory driver-education program, which is designed and managed by the Agency. Plaintiffs specifically allege that the Agency, by failing to provide accommodations for hearing-impaired individuals seeking to obtain a first Texas driver's license, is in violation of Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act ("Section 504"). *See* 42 U.S.C. §§ 12131-12134; 29 U.S.C. § 794.

On September 24, 2012, the court rendered an order that granted in part and denied in part the Agency's second amended motion to dismiss. However, that order was rendered moot upon Plaintiffs filing a Fourth Amended Complaint on September 16, 2013. In light of the Plaintiffs' new live pleading, the Agency moves the court again to dismiss the action. The Agency urges several arguments that were fully briefed and orally argued to the court previously, and also presents the court with new arguments.[1] Specifically, the Agency again contends that this

[1] On April 20, 2013, the court held a hearing on the previous motion to dismiss.

action should be dismissed for lack of subject-matter jurisdiction, because Plaintiffs cannot show that they have suffered an injury that is at all redressable by the Agency in the event the court renders a decision favorable to Plaintiffs. *See* Fed. R. Civ. P. 12(b)(1). The Agency also contends that it has Eleventh Amendment immunity from Plaintiffs' claims to the extent Plaintiffs claim their injuries arise from the fact that those under 25 years of age in Texas are required to complete a driver-education course in order to obtain their first driver's license, because the Agency is not charged with the enforcement of this statutory requirement as it is undisputed that the Agency does not issue driver licenses. Additionally, the Agency again contends that Plaintiffs have failed to state a claim for which relief may be granted arguing that (1) the State of Texas through the Agency cannot be held vicariously liable under the ADA for the alleged, unlawful acts of its driver-education school licensees; and (2) the driver-education programs at issue here are not programs of the Agency within the meaning of the ADA or Section 504. *See* Fed. R. Civ. P. 12(b)(6), (c). Finally, should the court render an order denying the motion to dismiss, the Agency requests that the court specially certify such order for discretionary interlocutory appeal to the Fifth Circuit. *See* 12 U.S.C. § 1292(b).

Federal law

"[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. Section 504 provides that no qualified individual with a disability, "shall, solely by reason of her or his disability, be excluded from 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 jurisprudence interpreting the ADA is applicable to Section 504. *See Frame v. City of Arlington*, 657 F.3d 215, 223-24 (5th Cir. 2011).

A "public entity" is broadly defined under federal law as "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1). Although the ADA does not explicitly define "services, programs, or activities," courts broadly construe Title II as covering a variety of community services and programs. *See Frame*, 657 F.3d at 225; *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998). Indeed, the operative language of Title II must be read in conjunction with applicable implementing regulations. *See Crandon v. United States*, 494 U.S. 152, 158 (1990). The Congress left to the Attorney General and Department of Justice the task of giving meaning through regulations to the ADA' s broad prohibition of discrimination in public services. Therefore, the promulgated regulations that implement Title II must be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron,*

U.S.A., Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837, 844 (1984).

Under Title II regulations,

> [a] public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.

28 C.F.R. § 35.160(b)(1). The regulations also provide,

> 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.

28 C.F.R. § 35.131(b)(6). Although public-entity services, programs, or activities operated under contractual or licensing arrangements may not discriminate against qualified individuals with disabilities, "the 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." 28 C.F.R. § 35.131(b)(1), (6); 28 C.F.R. Pt. 35, App.B (reference to paragraph (b)(6)).

Texas law

The Texas statutes related to applying for a Texas driver's license were amended effective March 1, 2010. As a result, the Texas Department of Public Safety ("Department") may issue to a person younger than 25 years of age a first driver's license only if the person submits to the Department an Agency driver-education certificate ("course-completion certificate") that represents the individual has completed and passed an Agency-approved driver-education course. *See* Tex. Transp. Code Ann. § 521.1601 (West Supp. 2012); Tex. Educ. Code Ann. §§ 1001.101(a) (West Supp. 2012); *see also* Tex Educ. Code Ann. § 1001.055 (West Supp. 2012) (course-completion certificates are provided by Agency to driver-education schools or parent-taught course providers that have courses approved by Department and are licensed by Agency). The Department by rule provides for approval of a driver-education course for individuals under age 18, who may obtain the required Agency course-completion certificate by successfully completing an approved parent-taught course conducted by a "parent, stepparent, foster parent, legal guardian, step-grandparent, or grandparent of the person." *See* Tex. Transp. Code Ann. §§ 521.1601, .205 (West Supp. 2012). For individuals age 18 to 25, however, the only option available to obtain the required Agency course-completion certificate is to take an Agency-approved

course at an Agency-licensed privately operated driver-education school.

Texas law provides the mechanism by which the Agency licenses and disciplines privately operated driver-education schools and driver's-education course providers. *See* Tex. Educ. Code Ann. §§ 1001.151-.214 (West Supp. 2012). All privately operated driver-education schools must hold a driver-education-school license. *Id.* at § 1001.201. The Agency shall approve an application for a driver-education-school license upon the school's meeting several criteria. *See id.* § 1001.204 (requirements for school license). Among the criteria is the requirement that the driver-education school be in compliance with all federal laws. *See id.* at § 1001.204(7). Texas law also authorizes the Agency to require that privately operated driver-education schools employ special policies as conditions to licensure, such as policies related to course cancellation and refund of enrollment fees. *See id.* §§ 1001.401-.404. Additionally, if a licensed school is found in violation of any requirement under the Texas Education Code, the Agency has authority to take certain disciplinary or enforcement actions. *Id.* at §§ 1001.451-.458. Among the authorized actions are that the Agency may revoke the school's license, place special conditions on the school, subject the school or course provider to peer review, suspend enrollment of the school's students, suspend the school or course provider's right to obtain course-completion certificates, and impose an administrative fine on the school or course provider. *Id.*

Fourth amended complaint

Plaintiff Tyler Davis, who brings claims on behalf of the minor plaintiff Juana Doe, pleads that Doe is estranged from her parents, who are not willing to instruct Doe in the parent-taught course for minors. Further Doe is unable to complete the classroom portion of the driver-education course without adequate aids or services or a course specifically designed for people with hearing disabilities and is unable to locate a school willing to offer those accommodations. Plaintiffs Donika Ivy, Bernardo and Erasmo Gonzalez, and Arthur Prosper IV are each at least 18 years old and none are yet 25 years old. Ivy, the Gonzalezes, and Prosper each have called multiple driver-education schools, which all refused to accommodate their hearing disabilities.

Plaintiffs allege that the injury they each suffer from the Agency is not the inability to obtain driver's licenses, "While [the Agency's] inaction is ultimately the direct cause for Plaintiffs' license ineligibility, their injury here is based on lack of equal access to the driver-education courses and [the Agency's] failure to ensure accommodations for the deaf individuals."

Plaintiffs seek (1) a declaratory judgment that the Agency bears an independent responsibility under federal disability law to effect policies and procedures providing for access to driver-education courses to people with disabilities; (2) declaratory judgment that the Agency's past discrimination denied access in

violation of the ADA and the Rehabilitation Act; (3) permanent injunction to cease all discrimination and eliminate all barriers to accessibility of driver education; and (4) permanent injunction requiring the Agency to establish effective policies and programs providing for access for people with hearing disabilities through qualified interpreters and other aids, as appropriate, and to enforce such policies and programs with licensed driver education schools.

Request to dismiss Plaintiffs' claims for lack of standing

Federal courts possess jurisdiction over only those disputes that constitute cases or controversies. *Raines v. Byrd*, 521 U.S. 811, 818 (1997). An action is properly dismissed for lack of subject-matter jurisdiction if a court lacks statutory or constitutional power to adjudicate the matter. *See Home Builders Ass'n of Miss. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). For a dispute to be a case or controversy for federal-court jurisdiction, a plaintiff must have suffered an injury in fact, there must be a causal connection between the plaintiff's injury and the conduct complained of, and it must be likely, as opposed to speculative, that the injury will be reduced by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). If any element is missing, the plaintiff lacks standing to maintain the claim in federal court. *Okpalobi v. Foster*, 244 F.3d 405, 425 (5th Cir. 2001). Additionally, where, as here, a plaintiff seeks prospective declaratory or injunctive

relief, it is insufficient to show that it suffered harm from unlawful conduct in the past. To satisfy the case-or-controversy requirement for prospective injunctive and declaratory relief, the plaintiff must show either "continuing harm or a real and immediate threat of repeated injury in the future." *See Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 388 (5th Cir. 2003). Motions to dismiss for lack of standing are considered under Rule 12(b)(1). *Harold H. Huggins Realty v. FNC, Inc.*, 634 F.3d 787, 795 n.2 (5th Cir. 2011).

The party asserting jurisdiction bears the burden to prove that the court has jurisdiction to determine the issues presented. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). In determining a motion to dismiss for lack of subject-matter jurisdiction, the court may consider (1) the complaint alone, presuming the allegations to be true; (2) the complaint supplemented by undisputed facts; (3) the complaint supplemented by undisputed facts and by the court's resolution of disputed facts. *Freeman v. United States*, 556 F.3d 326, 334 (5th Cir. 2009). Unlike a motion to dismiss for failure to state a claim, the district court is empowered to consider matters outside the complaint and matters of fact that may be in dispute. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). When examining a factual challenge to subject-matter jurisdiction that does not implicate the merits of plaintiff's claims, the district court has substantial authority to weigh the evidence and satisfy itself as to

the existence of its power to hear the case. *See Clark v. Tarrant County*, 798 F.2d 736, 741 (5th Cir. 1986).

The Agency contends that Plaintiffs lack standing because they are unable to show that even if Plaintiffs prevail on their claims, the Agency does not have the ability to redress the claims. Specifically, the Agency argues that the Plaintiffs' injunctive-relief request seeks relief beyond the Agency's statutory authority. The Agency contends that there is no statutory provision authorizing the Agency to mandate that a school or course provider take any particular affirmative action in how they teach the Agency's minimum curriculum. Further, the Agency contends that absent any statutory authority that the Agency mandate particular actions for a school or course provider, such as securing an interpreter or utilizing other learning aids for hearing impaired individuals to use in the driver education courses licensed by the Agency, the Plaintiffs' request for an injunction cannot be met. The Agency's position rests on their assertion that Texas law requires that it is the private driver-education schools or course providers who must comply with the federal law.

Plaintiffs respond that it is the Agency's refusal to enact regulations requiring privately operated driver-education schools to include accommodations for hearing impaired individuals who are taking the Agency-licensed driver education courses which has prevented her from acquiring the Agency course-completion certificate. Plaintiffs request that the court order the Agency to adopt and enforce rules that

require driving schools to accommodate hearing-impaired individuals through qualified interpreters or other means of assistance.

Plaintiffs assert that the Agency has the statutory authority to "adopt and enforce rules necessary" to administer the driver-education program. *See id.* at § 1001.053(3). Plaintiffs also argue that it is this authority – the Agency's power to adopt and enforce rules – that requires the Agency to ensure that the schools provide disability accommodations. Plaintiffs contend that the Agency may develop appropriate course materials, media, and other auxiliary aids, adapting requirements for instructors and coordinate with other state agencies to ensure suitable accommodation in the provision of driver education. Plaintiffs respond that their request for relief does not necessarily include a request for a sign-language interpreter. "While a sign language interpreter would be one way to accommodate Plaintiffs and potentially cure their injuries, that is not the remedy Plaintiffs seek directly from the [Agency]." Further Plaintiffs argue that compliance with Section 504 and the ADA,

> not the exact means of achieving it (e.g., through an interpreter or otherwise), is what Plaintiffs seek here. Requiring driver-education schools to comply with the ADA and imposing sanctions for non-compliance is *necessary* to fulfill [the Agency's] responsibility for its driver-education program.

Further, Plaintiffs are not demanding an order directing the Agency to as the Agency phrases it, "to

exercise its enforcement authority in a particular manner." Rather, Plaintiffs seek a declaration that the Agency has an affirmative duty to provide them with equal access to the driver-education program. The exact means of compliance, Plaintiffs contend, are up to the Agency.

Issue is joined regarding a solely legislative act – how Texas licenses drivers between the ages of 18 and 25. This is not a case about public academic education. Under the statutory scheme, a private driving school may only be licensed if it is in compliance with "all county, municipal, state, and federal laws." *Id.* at §§ 1001.205(5). Based on the statutory scheme, compliance with federal law, including the ADA and Section 504, lies with the driving schools or the course providers in how they deliver the Agency's driver's-education curriculum. The court has no disagreement with this proposition.

Under Title II, however, it is the Agency that must comply with federal law. Based on the statutory scheme, the Agency can adopt and enforce disability-discrimination-compliance regulations so that hearing-impaired individuals have access to the required Agency's driver-education programs and ultimately the Agency's course-completion certificates. *See id.* at §§ 1001.053(a)(3), .051, .206(7). Access to the course-completion certificates, although related to delivery of the Agency's driver-education curriculum, is different from access to the required Agency curriculum that is delivered by private driver's education schools or course providers. The court doubts that the Agency

may avoid the reach of the ADA' s regulations by farming out the state statutory or regulatory approval to a licensed entity that is not in compliance or need not comply with the ADA. The court does not reach this question on motion to dismiss. The court holds that Plaintiffs have shown that a favorable decision on their claim against the Agency can redress their alleged injuries and that Plaintiffs have standing to pursue their claims.

Request to dismiss Plaintiffs' claims based on sovereign immunity

The Agency also contends that it has Eleventh Amendment immunity from Plaintiffs' claims because the Agency does not enforce the requirement that individuals under 25 years of age must complete a driver education course to obtain their first driver's license. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The core function of the Amendment is to bar the authority of federal courts to litigate suits brought by citizens against the states. *See Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 276 (5th Cir. 2005) (en banc). Although by its express terms, the Amendment "bar[s] only federal jurisdiction over suits brought against one State by citizens of another State or foreign state," the Supreme Court has long held that

it also precludes jurisdiction where, as here, a citizen brings suit against her own state in federal court. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-68 (1997).[2]

There are two exceptions to the rule of sovereign immunity. A state may waive its immunity by consenting to suit or Congress may abrogate state sovereign immunity pursuant to the enforcement power conferred by section 5 of the Fourteenth Amendment. *See, e.g.*, *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999).

The ADA specifically provides that "[a] State shall not be immune" from suits under the act because of sovereign immunity." 42 U.S.C. § 12202. This is a valid abrogation of sovereign immunity as applicable to Title II ADA claims and is a valid exercise of congressional power to the extent that it "applies to the class of cases implicating the fundamental right of access to court" and "insofar as Title II creates a private right of action for damages against the States for conduct that actually violates the Fourteenth Amendment." *See United States v. Georgia*, 546 U.S. 151, 159 (2006).

Plaintiffs contend that the Agency's sovereign-immunity argument is moot, because the Agency

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[2] The Eleventh Amendment protects "state agents, and state instrumentalities" as well as the states themselves. *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997).

waived sovereign immunity under Section 504. Particularly, Plaintiffs argue that Section 504 prohibits discrimination against qualified individuals with disabilities by recipients of federal financial assistance. States and public entities receiving federal financial assistance specifically waive their Eleventh Amendment immunity from claims under Section 504. *See* 42 U.S.C. § 2000d-7. A state, or its agency, accepting federal funds knowingly consents to be sued under Section 504. *See Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 453 (5th Cir. 2005) (state entity's "receipt of federal education funds constituted a knowing and voluntary waiver of sovereign immunity as to claims under § 504"); *see also Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 282 (5th Cir. 2005). Further, when a plaintiff's ADA claim is identical to their Section 504 claim, it is unnecessary to decide whether the defendant is entitled to immunity from the ADA. *See Bennett-Nelson*, 431 F.3d at 454-55.

Plaintiffs' rights urged and the remedies they seek under Section 504 and Title II are the same. As did the plaintiffs in *Bennett-Nelson*, here Plaintiffs' alleged failure-to-accommodate claims under both Section 504 and Title II of the ADA are identical in scope. *Id.* at 450, 455. As the Agency has waived its immunity under Section 504, it is not immune from a similar claim under the ADA.

Request to dismiss Plaintiffs' claims for failure to state a claim for which relief may be granted

The Agency contends that Plaintiffs have failed to state a valid claim for relief as Plaintiffs have failed to show that the Agency's authority over driver education, including its activities in developing program requirements, curriculum, instructor programs, licensing, supervising and regulating driver-education courses, and issuing course-completion certificates does not amount to "services, programs, or activities" of the Agency for purposes of the ADA or Section 504. The Agency argues that it does not operate its own "driver-education program" but is only a licensor of privately run driver-education schools. Further, the Agency argues that driver-education courses in Texas are administered as programs and activities of the Agency's licensees, not the Agency itself. The Agency also argues that its establishment of minimum course standards, curriculum standards, and licensing standards for driver education schools and course providers does not constitute anything more than the establishment of criteria by which the Agency determines whether a school or course provider should be licensed.

Plaintiffs respond that the Agency's program is not solely a licensing operation but is an educational program in and of itself, which by state law the Agency marshals and regulates. Specifically, Plaintiffs note that it is the Agency that designs the driver-education program's minimum requirements and curriculum, develops a program of study for instructors,

certifies the schools and instructors who make the Agency's curriculum available to the public, determines whether enforcement actions should be taken against a driving school, executes any enforcement action, and ultimately issues the course-completion certificates required to be obtained before an individual's first Texas driver's license may be issued if that individual is under the age of 25.[3]

The Agency's services, programs, and activities are to be considered separately under Title II of the ADA, from any licensee driver-education school's programs and activities, which are considered under Title III of the ADA. *See* 42 U.S.C. § 12132. Under Section 504, a program or activity includes, "all of the operations of a . . . department, agency, special purpose district, or other instrumentality of a State or of a local government." 29 U.S.C. § 794(b). Unlike most self-directed private businesses, driver-education schools rely on the Agency for instructions on the content of their ultimate product, and the Agency develops those requirements based on its legislative mandate. Activities related to the establishment and operation of the driver-education program and supervising individual schools are part of the Agency's daily operations, and thus qualify them as a program,

[3] As an answer has been filed in this action, the Agency's motion to dismiss for failure to state a claim may also be considered as a motion for judgment on the pleadings. *See* Fed. R. Civ. P. 12(c) ("Rule 12(c)"). However, whether the motion is deemed a Rule 12(c) or a Rule 12(b)(6) motion is immaterial because the court applies the same process in evaluating either motion.

service, or activity for which the Agency is responsible under both Section 504 and Title II.

A "motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). Although a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, in order to avoid dismissal, the plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007). The plaintiff's obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* The Supreme Court expounded on the *Twombly* standard, explaining that a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. In evaluating a motion to dismiss, the court must construe the complaint liberally and accept all of the plaintiff's factual allegations in the complaint as true. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2009).

In deciding a Rule 12(b)(6) motion to dismiss, a court may consider not only the allegations made in the plaintiff's complaint, but also any documents attached to or incorporated with the pleadings and all matters of which judicial notice may be taken. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir.2000); *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996). In addition, a court may permissibly refer to matters of public record. *Cinel v. Connick*, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994). "Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Collins*, 224 F.3d at 498-99 (citing *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)).

The court holds that Plaintiffs have stated sufficient facts that, when construed in their favor, allows the court to infer that the driver-education program administered by the Agency is a "service, program, or activity of a public entity" under Title II of the ADA and Section 504. Regarding driver education, the Agency is performing its core function, developing educational requirements that its licensees must meet before offering the course to the public. Further, the Agency is vested with monitoring the driver-education schools for enforcement actions and ultimately issues completion-certificates for those who successfully complete a driver-education course. Plaintiffs have shown sufficient facts that the Agency's role goes beyond only licensing driver-education

schools. The Agency's motion to dismiss for failure to state a claim, therefore, will be denied.

Request for certification of discretionary interlocutory appeal

As the motion to dismiss will be denied, the court addresses the Agency's request that the court certify the order for discretionary interlocutory appeal to the Fifth Circuit. *See* 12 U.S.C. § 1292(b). The Agency argues that "the question of whether a Texas state agency's licensing of private entities subject that state agency to liability under the ADA for the activities of the private licensee is a controlling question in this matter that – if resolved by the Fifth Circuit on interlocutory appeal – would materially advance the resolution of this litigation as it is the central legal question over which the parties have substantial disagreement."

Plaintiffs oppose the Agency's request – "As currently worded, [the Agency]'s request for interlocutory appeal should be denied because the proposed question will not resolve this litigation."

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such

> order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

12 U.S.C. § 1292(b).

Having considered the Agency's request and Plaintiffs' opposition, the court concludes that the issues addressed by this order denying the Agency's motion to dismiss (1) involves controlling questions of law (2) as to which there is substantial ground for difference of opinion and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. *Id.* The court declines, however, to frame the controlling question of law in this action as suggested by the Agency, as it inadequately sets forth the question of law about which there is substantial ground for a difference of opinion.

The key question in this action is not the Agency's liability for the actions of its licensees, but the Agency's liability for the driver-education program it created, and whether the Agency's extensive and continuous involvement in the administration of the driver-education program makes it a "service, program, or activity" of the Agency, which is within the scope of Title II of the ADA and Section 504.

The court orders that the instant order be certified for an immediate appeal to the Fifth Circuit. *Id.* Further, the court will stay all matters in this cause until the Circuit resolves the interlocutory appeal on the merits or declines to accept it. *Id.*

IT IS ORDERED that the Fourth Amended Motion to Dismiss filed October 7, 2013 (Clerk's Document No. 78) is **DENIED**.

IT IS FURTHER ORDERED that this Order is **CERTIFIED FOR DISCRETIONARY INTERLOCUTORY APPEAL** to the Fifth Circuit. *See* 12 U.S.C. § 1292(b).

IT IS FURTHER ORDERED that all proceedings are **STAYED** in this action pending further order of the court.

SIGNED this 17th day of December, 2013.

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 14-50037

DONNIKA IVY; BERNARDO GONZALEZ; TYLER DAVIS, as next friend of Juana Doe, a minor; ERASMO GONZALEZ; ARTHUR PROSPER, IV,

Plaintiffs-Appellees

v.

COMMISSIONER, MICHAEL WILLIAMS, in his official capacity as head of the Texas Education Agency,

Defendant-Appellant

Appeal from the United States District Court for the Western District of Texas, Austin

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ON PETITION FOR REHEARING EN BANC

(Filed July 16, 2015)

(Opinion: March 24, 2015, 5 Cir., ___, ___, F.3d ___)

Before JOLLY, WIENER, and CLEMENT, Circuit Judges.

PER CURIAM:

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for

Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP, P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E B Clement
UNITED STATES CIRCUIT JUDGE