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Access to the Courts: A Blueprint for Successful Litigation Under the Americans With Disabilities Act and the Rehabilitation Act

Marc Charmatz

Antoinette McRae

ACCESS TO THE COURTS: A BLUEPRINT FOR SUCCESSFUL LITIGATION UNDER THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT

MARC CHARMATZ AND ANTOINETTE MCRAE*

I. INTRODUCTION

For individuals with disabilities, "access to the courts" involves more than hiring a lawyer, filing a complaint, or proceeding through the numerous stages of the litigation process. "Access to the courts," in this context, means finding an accessible parking place, getting up the steps, opening courthouse doors, finding the courtroom, sitting at counsel tables, entering the jury box, sitting on the bench, and communicating effectively with judges, lawyers, courtroom personnel, and the jury. This article explores the obligations of state and local courts to provide reasonable modifications and auxiliary aids and services to ensure that parties, witnesses, judges and lawyers, and jurors with disabilities are guaranteed meaningful participation in judicial proceedings. These rights have been strengthened through lawsuits based upon two key federal statutes, Section 504 of the Rehabilitation Act (section 504)[1] and The Americans with Disabilities Act (ADA).[2]

Since 1973, section 504 has prohibited discrimination on the basis of disability by programs and activities that receive federal funds.[3] The statutory definition of "program or activity" is very broad.[4] Section 504 is implemented by comprehensive regulations promulgated by federal agencies. The regulations detail section 504 obligations for recipients of

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* Marc Charmatz is a senior attorney with the National Association of the Deaf Law and Advocacy Center in Silver Spring, Maryland. Mr. Charmatz is also an Adjunct Professor at the University of Maryland School of Law, where he teaches the Civil Rights of Individuals with Disabilities Seminar and Clinic. Antoinette McRae is a 2004 Juris Doctor Candidate at the University of Maryland School of Law and a former student-attorney in the school's Civil Rights of Persons with Disabilities Clinic.

1. 29 U.S.C. § 794 (2000).
2. 42 U.S.C. §§ 12101-12213 (2000).
3. 29 U.S.C. § 794(a) (2000).
4. A "program or activity" includes "a department, agency, special purpose district, or other instrumentality of a State or of a local government" that receives federal financial assistance federally funded educational institutions; private entities and corporations; and health care, housing, social service, or recreational organizations. *See* 29 U.S.C. § 794(b).

federal aid.[5] For example, programs and activities receiving federal financial assistance must "evaluate and modify [their] policies and practices that do not meet the [nondiscrimination] requirements."[6] Specifically, section 504 covers the operations of state and local courts that receive federal financial assistance because such courts are considered "instrumentalit[ies] of a State or of a local government."[7] Thus, courts are not permitted to exclude, deny benefits to, or discriminate against an individual with a disability solely because of that disability.[8]

The ADA, enacted on July 26, 1990,[9] built on section 504 by providing comprehensive anti-discrimination protection for individuals with disabilities. The ADA's coverage is not limited to programs and activities that receive federal financial assistance, but extends the anti-discrimination mandate to covered employers under Title I,[10] all of the functions of state and local governments under Title II,[11] and public accommodations under Title III,[12] regardless of whether they receive federal support. Some state and local courts may be covered under both the ADA and section 504. In other words, state and local courts are always covered under the ADA and are covered under section 504 when they receive federal financial assistance.

Individuals seeking protection under the ADA and section 504 have met with some adversity in federal courts throughout the United States. A core issue—the definition of an individual with a disability, i.e. who is entitled to protection under both federal statutes, has been whittled away by the United States Supreme Court.[13] A survey by the American Bar Association's Mental and Physical Disability Law Reporter of cases

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5. 28 C.F.R. §§ 42.501-.540 (2003).
6. 28 C.F.R. § 42.505(c)(1).
7. 29 U.S.C. § 794 (b)(1)(A).
8. 29 U.S.C. § 794(a); *see also* 45 Fed. Reg. 37,620, 37,630-31 (June 3, 1980).
9. Pub. L. 101-336, 104 Stat. 327 (1990).
10. 42 U.S.C. §§ 12111-12117 (2000).
11. 42 U.S.C. §§ 12131-12165 (2000).
12. 42 U.S.C. §§ 12181-12189 (2000).
13. *See* Toyota Motors Mfg., Kentucky, Inc. v. Williams, 534 U.S 184 (2002) (holding that individual with carpal tunnel syndrome was not disabled because of her ability to perform manual tasks in everyday life); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (holding that individuals with 20/200 uncorrected vision corrected with eyeglasses were not disabled); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) (holding that individual with monocular vision was not disabled); Murphy v. United Parcel Service, 527 U.S. 516 (1999) (holding that individual with hypertension was not disabled). *But see* Bragdon v. Abbott, 524 U.S. 624 (1998) (holding that individual who was HIV positive qualified as disabled under ADA); School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (holding that individual with tuberculosis qualified as disabled under §504).

brought under Title I[14] reveals, "of 328 decisions that resolved the claim (and have not been changed on appeal), 94.5 percent resulted in employer wins and 5.5 percent in employee wins."[15] The United States Supreme Court has further reduced the rights of employees with disabilities under Title I.[16] The situation has become so grave that disability advocates are attempting to have cases accepted for review by the United States Supreme Court withdrawn.[17]

Perhaps one of the few areas where individuals with disabilities have prevailed, at least for purposes of declaratory and injunctive relief, is in Title II[18] and section 504 cases dealing with "access to the courts." The relative success by individuals with disabilities in these cases stems from the statutory and regulatory language in both Title II[19] and section 504.[20] The terms "reasonable modifications"[21] and "auxiliary aids and

14. 42 U.S.C. §§ 12111-12117 (2000). Title I of the ADA deals with discrimination on the basis of disability in the context of employment, as opposed to Title II, which involves disability discrimination in the context of the programs, services, and activities of public entities, i.e. state and local governments.

15. Amy L. Albright, *2002 Employment Decisions Under the ADA Title 1-Survey Update*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 387 (2003). The ABA surveyed 442 cases; 309 cases resulted in employer wins, 18 in employee wins, and 115 in decision in which the merits of the claim were not resolved. *Id.* at 387. The Fourth Circuit heard thirty-two Title I cases in 2002. *Id.* at 388. Employers won twenty-five of the cases on summary judgment and one case on the merits. *Id.* Employees did not win one case, and in six cases there was no resolution. *Id.*

16. *See* US Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (holding that when an employer requests an accommodation under Title I of the ADA that interferes with seniority rights, a rebuttable presumption is created that the accommodation is not reasonable); Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002) (holding that Title I of the ADA covers disabilities that pose direct threats to one's own health); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that states are entitled to Eleventh Amendment immunity from monetary damages under Title I of the ADA); Hernandez v. Hughes Missile Syss. Co., 298 F.3d 1030 (9th Cir. 2002), *cert. granted sub nom.* Raytheon Co. v. Hernandez, 537 U.S. 1187 (2003) (considering whether Title I of the ADA confers preferential rehire rights for employees lawfully terminated for misconduct, such as illegal drug use).

17. Hason v. Med. Bd. of Cal., 279 F.3d 1167 (9th Cir. 2002), *cert. granted,* 537 U.S. 1028 (2002). In *Hason*, the Supreme Court granted certiorari to consider the first question in the writ of certiorari – whether Eleventh Amendment immunity bars suit under Title II of the ADA for denial of a medical license based on the applicant's mental illness. Med. Bd. of Cal. v. Hason, 537 U.S. 1028 (2002). *See also* Petition for Writ of Certiorari, 2002 WL 32101143 (Sept. 23, 2002). The Ninth Circuit had ruled that the applicant could sue the medical board because Congress, in enacting Title II of the ADA, had validly abrogated the states' Eleventh Amendment immunity. *Hason*, 279 F.3d at 1171. *See also* Kimel v. Fl. Bd. of Regents, 528 U.S. 62 (2000); Barden v. City of Sacramento, 292 F.3d 1073 (9th Cir. 2002).

18. 42 U.S.C. §§ 12131-12165 (2000).

19. *Id.*

20. 29 U.S.C. §794 (2000).

21. "Reasonable modifications" may include modifications to "rules, policies, or practices." *See* 42 U.S.C. § 12131(2).

services"[22] are linchpins enabling individuals with disabilities to have a genuine opportunity to be present, participate, and enjoy the benefits of court programs, activities, and services.[23] Additionally, courts have held that the Due Process Clause of the Fourteenth Amendment also protects an individual's right to "access to the courts."[24]

Part II of this article presents an overview of the federal statutes and regulations that protect an individual's "access to the courts" rights, focusing on Title II and section 504. In Part III, this article examines the Constitutional framework that supports the right to "access to the courts." Part IV examines federal cases where the above statutes were used to protect the "access rights of individuals" with disabilities.

II. FEDERAL STATUTORY PROTECTION OF ACCESS TO STATE, LOCAL, AND FEDERAL COURTS.

A. The ADA

In enacting the ADA, Congress entered specific findings and purposes:

> [I]ndividuals with disabilities . . . have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment . . . based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[25]

Further, Congress found persons with disabilities "continually encounter . . . [the] failure to make modifications to existing facilities," such as courthouses, and that discrimination against individuals

22. "Auxiliary aids and services" include "qualified interpreters . . . qualified readers, taped texts . . . acquisition or modification of equipment or devices; and . . . other similar services and actions." 42 U.S.C. § 12102(1) (2000).

23. 42 U.S.C. §§ 12131-12132. Under the ADA, public entities may not discriminate against an individual with a disability who "with or without reasonable modifications . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131.

24. *See, e.g.*, Lane v. Tennessee, 315 F.3d 680 (6th Cir. 2003) *cert. granted*, 123 S. Ct. 2622 (2003).

25. 42 U.S.C. § 12101(a)(7).

continued to exist in "access to public services."[26] Moreover, "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination."[27] The Act's purposes are to provide a "national mandate for the elimination of discrimination against individuals with disabilities," to provide clear, strong, and consistent enforcement standards, to ensure a central role for the federal government in enforcing the Act, and to use the regulation of commerce to protect persons with disabilities from discrimination.[28]

1. Title II of the ADA

Title II applies to all services, programs, and activities provided or made available by public entities. Because section 504 covered only programs and activities receiving federal financial assistance, the purpose of Title II is to apply the anti-discrimination mandate to all services, programs, and activities of state and local government regardless of the receipt of federal financial assistance. Prior to enacting the ADA, Congress heard evidence pertaining to the lack of protection for individuals with disabilities in small towns who were discriminated against in local government activities.[29] Unfortunately, state and local governments activities were "frequently the major activities" in these towns, making the exclusion of individuals with disabilities a substantial deprivation.[30] Until the enactment of Title II, these individuals had virtually no legal protection because section 504 was inapplicable to many small towns untouched by federal aid.[31]

Title II applies to "public entities." This term is defined to mean: "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government."[32] Title II also contains a broad definition of "discrimination" that states: "[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

26. 42 U.S.C § 12101(a)(3), (5).
27. 42 U.S.C. § 12101(a)(4).
28. 42 U.S.C. § 12104(b).
29. *See* S. REP. NO. 101-116, at 12-13 (1989) (testimony of Dr. Mary Flynn Fletcher).
30. *Id.* at 12.
31. *Id.* at 12-13.
32. 42 U.S.C. § 12131(1) (2000).

entity, or be subjected to discrimination by any such entity."[33] Title II defines "qualified individual with a disability" as:

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[34]

The plain and simple language of Title II has direct bearing on "access to the court" issues. Judges and lawyers, by the very nature of their work, are "qualified." So, too, are parties and jurors "qualified," regardless of whether or not they appear in court voluntarily. The services, programs, or activities of the courts are well known to all — trials to adjudicate civil disputes, criminal proceedings to assess guilt or innocence, parole and probation, etc. The terms signifying "discrimination," i.e. exclusion from participation in and denial of benefits, fit neatly when considering "access to the court" cases.

Title II does not define the term "reasonable modifications."[35] Further, Title II does not, itself, define the term "auxiliary aids and services." However, this term is defined in the "Definitions" Sections of the ADA and the ADA regulations. The comprehensive definition of auxiliary aids and services is a key legislative component in eliminating discrimination against individuals with disabilities in "access to court" cases. Otherwise, state and local governments could make an overly

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33. 42 U.S.C. § 12132 (2000). The terms "participation in" and "benefits of" may not apply in all court access cases. A defendant in a criminal or civil case may not understand that there is a "benefit" in being in court. That person may not be a voluntary "participant." Yet, that defendant, has a right not to be "subjected to discrimination" in dealings with the courts.

34. 42 U.S.C. § 12131(2) (2000). A similar definition is found in the ADA regulation. *See* 28 C.F.R. §35.104 (2003).

35. However, the term "reasonable accommodations" *is* defined in Title I of the ADA. The term "reasonable accommodation" may include--

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9) (2000).

simplistic argument that nondiscrimination only requires permitting an individual with a disability inside a courthouse. State and local courts must do more—they must ensure that there are effective "methods for making aurally delivered materials available to individuals with hearing impairments...methods making visually delivered materials available to individuals with visual impairments...and...other similar services and actions."[36] For example, a court should provide sign language interpreter services to ensure effective communication between the court and a deaf individual. Finally, the "Definitions" Section of the ADA contains a definition of the term "disability:" "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[37]

The definition of "disability" has proven troublesome in a variety of contexts, especially in employment cases.[38] Yet, in access to court cases,[39] courts often have allowed claims to proceed on the ground that the plaintiffs are disabled under federal law. This is so because the plaintiffs in these cases are most often individuals who have mobility impairments, or who are deaf or blind. These individuals have no difficulty in overcoming the initial hurdle of showing a disability to demonstrate their eligibility for protection under Title II and section 504. Thus, the nature of the disabilities of plaintiffs in courtroom access cases, combined with the definite applicability of Title II to courtrooms, gives these cases an opportunity for success unmatched by other ADA cases.

2. The DOJ Implementation of Title II of the ADA

The DOJ regulations implementing Title II (the "Title II Regulations") provide additional support for an individual attempting to secure his or her rights in an "access to the courts" case. The Title II Regulations contain provisions that connect the protections of Title II to state and local courthouses[40] and grant specific auxiliary aids and services to individuals with speech, hearing, and vision disabilities who appear in court.[41]

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36. 42 U.S.C. § 12102(1) (2000).
37. 42 U.S.C. § 12102(2) (2000).
38. *See supra* note 15.
39. *See* discussion *infra* Part IV.
40. 28 C.F.R. §§ 35.102, .104.
41. *See* 28 C.F.R. § 35.160(b)(1) (2003). Further, public entities, including courts were required by the Title II Regulations to perform, within one year of the ADA's effective date a self-assessment of their "current services, policies, and practices" and to "proceed to make the

The Title II Regulations' Preamble discusses what constitutes access to the courts. For instance, the Preamble shows Congress' intent that public buildings have elevators by using a *courthouse* as an example.[42] The Preamble also discusses computer-assisted transcripts in *courtrooms* as auxiliary aids.[43]

The applicability of Title II to state and local courts is discussed explicitly. The Title II Regulations state that Title II is not limited to the executive branch of state government, but rather, that it applies to the legislative branch and to "*judicial* branches of State and local governments" as well.[44] Furthermore, the prohibition against discrimination applies to "*all* services, programs, and activities" of state and local governments.[45] This language clearly demonstrates that that state and local courthouses are subject to the provisions of Title II.

The Title II Regulations also provide prerequisites for how individuals with disabilities must be treated by state and local courts. The Title II Regulations contain the boilerplate language that "No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity."[46] The regulations contain specific language ensuring effective communication between individuals with vision, hearing, and speaking disabilities, and state and local government personnel.[47] The Title II Regulations explicitly prohibit charging a

necessary modifications." 28 C.F.R. 35.105(a). .

42. 28 C.F.R. pt. 35, app. A

43. *Id.*

44. *Id.* (emphasis added).

45. *Id.* (emphasis added).

46. 28 C.F.R. § 35.130(a) (2003) A Vermont state court specifically held that the "Americans with Disabilities Act mandates that all state and federal courts are prohibited from discriminating based on disability." Vermont v. Bruyette, No. 984-9-96FrCr (D. Vt. Feb. 12, 1998) (Findings of Fact, Conclusions of Law and Order Regarding Provision of Sign Language Interpreters for Witness A.C. at Depostition and Trial) (on file with author). The court ordered a defendant to provide a sign language interpreter for all questions and answers during a deaf victim's deposition and trial testimony. *Id.*

47. 28 C.F.R. § 35.160 (2003). The regulation states:

> (a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.
>
> (b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.
>
> (2) In determining what type of auxiliary aids and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

person with a disability for the cost of interpreters and other auxiliary aids and services.[48] In its Analysis accompanying the Title II Regulations, the DOJ stated that interpreter costs could not be included as court costs. The DOJ reasoned that:

> The Department has already recognized that imposition of the cost of courtroom interpreter services is impermissible under section 504. The preamble to the Department's section 504 regulation for its federally assisted programs states that where a court system has an obligation to provide qualified interpreters, 'it has the corresponding responsibility to pay for the services for the interpreters.'. . . Accordingly, *recouping the costs of interpreter services by assessing them as part of court costs would also be prohibited.* [49]

The Title II Regulations contain some features that arguably limit the responsibilities of state and local courts to ensure access. First, a public entity is not required "to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature, including assistance in eating, toileting, or dressing."[50] Apparently, this is the "flip side" of a public entity's obligations to provide "reasonable modifications" and "auxiliary aids and services." It would extend Title II beyond manageable bounds if state and local courts were required to provide personal devices in all instances. Hearing aids and glasses, for example, need to be specifically designed for individuals. The "reasonable modification" or "auxiliary aid and service" requirements mandate that state and local courts

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Id.

48. 28 C.F.R. § 35.130(f).

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

Id.

49. 56 Fed. Reg. 35,705-06 (July 26,1991) (emphasis added) (quoting 45 Fed. Reg. 37, 622, 37,630 (June 3, 1980)).

50. 28 C.F.R. § 35.135.

accommodate the use of personal devices, but do not directly require that public entities provide them. In other words, modifying steps by providing a ramp is necessary, but not the wheelchair to get up the ramp.

Second, the language of the "existing facilities" provision of the regulations may limit the responsibilities of state and local courts to ensure access.[51] For example, under the "existing facilities" provision, the Title II Regulations state that a public entity "shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities."[52] A public entity is not necessarily required to "make each of its existing facilities accessible to and usable by individuals with disabilities."[53] This would arguably require a state or local court to make only one of its courtrooms accessible, not all of its courtrooms, but the general accessibility requirements would still apply to entrances, bathroom facilities, etc. A public entity is also not required "to take any action that would threaten or destroy the historic significance of an historic property."[54] Some state and local courts are located in historic buildings, thereby giving governments a possible defense for refusing to make structural changes.

Next, the "existing facilities" provision of the Title II Regulations does not require a public entity to "take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."[55] Finally, the "existing facilities" provision of the Title II Regulation offers various means of compliance for existing facilities — "redesign of equipment, reassignment of services to accessible buildings . . . home visits, delivery of services at alternative accessible sites, alteration of

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51. 28 C.F.R. § 35.150.

52. *Id.*

53. 28 C.F.R. § 35.150(1).

54. 28 C.F.R. § 35.150(2).

55. 28 C.F.R. § 35.150(3). The burden of proof rests with the public entity. *Id.* The decision that compliance would cause a burden must be made by the head of a public entity or a designee, and the reasons must be explained in a written statement. *Id.* Interestingly, the "fundamental alteration" and "undue financial and administrative burden" language is not found in the plain, statutory terms of Title II of the ADA. Nor does Title II of the ADA use the terms "undue hardship" in either the definition of "discrimination" or the definition of "qualified individual with a disability." By contrast, Title I of the ADA defines discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless . . . the accommodation would impose an undue hardship on the operation of the business of [the] covered entity." 42 U.S.C. § 12112(b)(5)(A) (2000). Title I defines "undue hardship" to mean "an action requiring significant difficulty or expense" and lists "factors to be considered" in determining whether an accommodation would impose an undue hardship. 42 U.S.C. § 12111(10)(A)-(B).

existing facilities and construction of new facilities . . . or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities."[56] Therefore, an individual with a disability does not always get to "select" the auxiliary aid and service, or the reasonable modification of choice. Public entities have some latitude in the means of making its program, activities, and services accessible for individuals with disabilities. In other words, an individual who wants access to a particular courthouse may be reassigned to another courthouse that is accessible as a way of making judicial services accessible.

On the other hand, the Title II Regulations give individuals with disabilities input as to how they wish to be accommodated. For example, the Title II Regulations state "in determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities."[57] Requiring that public entities give *primary consideration* to the requests of individuals with disabilities is another way of placing the burden on public entities to demonstrate that a particular auxiliary aid or service would result in an undue burden or a fundamental alteration. Individuals with disabilities are far more knowledgeable about their own auxiliary aid and service needs than public entities. If state and local courts want to provide an auxiliary aid or service not requested by an individual with a disability, they should shoulder the burden of proof that the auxiliary aid or service is effective.

Even today, there are a number of state laws that directly contradict the ADA by permitting the assessment of interpreter fees as court costs—placing an impermissible surcharge on deaf litigants.[58] A defendant found guilty in a criminal case, after being ordered to pay a fine, should not also have to shoulder the costs of being able to understand the proceedings against him/her. A potential plaintiff in a civil case should not have to decide whether to bring suit based on the

56. 28 C.F.R. § 35.150(3)(b).

57. 28 C.F.R. § 35.160(b)(2) (2003). The regulation implementing Title II of the ADA also requires public entities to provide TDDs or equally effective telecommunication systems when the public entity communicates with applicants and beneficiaries by telephone. *See, e.g.*, 28 C.F.R. §§ 35.161, .163 (2003).

58. *See, e.g.*, ALA. R. CIV. P. 43(f) ("The court may appoint an interpreter . . . and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court."); ARK. CODE ANN. § 16-89-104(2) (Michie 2003) ("If an interpreter is appointed by the court, the fee for the services of the interpreter shall be set by the court and shall be paid in such manner as the court may determine, except that an acquitted defendant shall not be required to pay any fee for the services of a court-appointed interpreter").

costs in communicating with a judge, but rather solely on the merits of a particular case. These blatantly discriminatory state laws are a particularly egregious example of the need for civil rights enforcement under Title II[59]

3. Early Judicial Application of the ADA to State Courthouses

Kroll v. St. Charles County[60] was one of the first federal cases to conclude that a local courthouse would "be in violation of the Americans with Disabilities Act, when the Act becomes effective."[61] The court in *Kroll* found that "[n]o sign language interpreters are employed or available at the courthouse to assist individuals with hearing impairments who were a party in a case, witness at a trial, juror, attorney, or individual seeking information from one of the court personnel."[62] The court also noted other barriers to people with disabilities, including, for example, the lack of electronic doors and the lack of space in certain areas to accommodate wheelchair users.[63]

In *Kroll,* the county signed a consent order to correct accessibility issues, but a proposed tax increase to fund the project was rejected.[64] When the plaintiffs filed a motion for contempt, the federal district court noted that the county courthouse would be in violation of the ADA, which would become effective the following year, and agreed to consider

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59. The U.S. Department of Justice has settled numerous Title II ADA complaints dealing with court access. *See, e.g.*, Final Settlement Agreement Between the United States of America and Metropolitan Government of Nashville and Davidson County, Tennessee, http://www.ada.gov/nashvil2.htm (last revised Sept. 9, 2003) (last visited Dec. 22, 2003) (on file with Margins: Maryland's Law Journal on Race, Religion, Gender and Class); Settlement Agreement Between the United States of America and Hancock County, Miss. (Feb. 11, 1997), http://www.ada.gov/hancocks.htm (last visited Dec. 22, 2003) (on file with Margins: Maryland's Law Journal on Race, Religion, Gender and Class).

60. 766 F. Supp. 744 (D. Mo. 1991).

61. *Id.* at 753 (Conclusion of Law 10). However, an even earlier case dealing with physical access to a courthouse exists. *See* Hill v. Shelby County, 599 F. Supp. 303 (D. Ala. 1984). In *Hill*, a sixty-eight year old woman with a lung condition that prevented her from climbing stairs was a defendant in a civil suit in Shelby County, Alabama. *Id.* at 304. The courthouse, built in 1905, was on the second floor and there were no elevators. *Id.* The woman sued the county under 42 U.S.C. § 1983, alleging a deprivation of a property interest without due process of law and denial of equal protection. *Id.* The woman claimed that her property interest was created by a provision of the state constitution and a state law ensuring full use of public facilities for individuals with disabilities. *Id.* The federal district court held that the woman was not deprived of due process or a property interest because county officials offered "to cooperate to make sure that [her] defense . . . [could] be fairly presented" so that she could participate in the proceeding without climbing stairs. *Id.*

62. *Kroll*, 766 F. Supp. at 747 (Findings of Fact, *St. Charles County Courthouse*, D. 40).

63. *Id.* at 746 (Findings of Fact, *St. Charles County Courthouse*, B. 22, C. 28).

64. *Id.* at 751-52 (Findings of Fact, *The Administration Building*, D. 123-26).

a property tax imposition if the county refused to fund the renovations.[65] The *Kroll* case offered early support to plaintiffs by highlighting the explicit link between courtroom access and the ADA.[66]

B. Section 504 of the Rehabilitation Act

Section 504 was the first civil rights law ensuring the legal rights of individuals with disabilities, but, unlike Title II, the statute applies only to recipients of federal financial assistance. As initially enacted, there was some legal authority for the now absurd proposition that if, for example, a state or local court received federal funds for improving jury service, but not child support, then the former, but not the latter, would be subject to section 504.[67] This proposition has been overruled by statute,[68] and today all operations of state and local courts are covered under section 504, which provides comparable protections to Title II.[69]

1. The Statutory Language of Section 504

Section 504 provides: "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of his or her 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."[70] Section 504 does not define the term "otherwise qualified individual with a disability",[71] and does not use the terms "reasonable

65. *Id.* at 753.

66. *See also Matthews v. Jefferson*, 29 F. Supp. 2d 525 (D. Ark. 1998). Mr. Matthews, who has paraplegia, had three hearings in a county court house and had to be carried up and down the stairs to get to a second floor courtroom. *Id.* at 528. He developed a urinary tract infection due to inaccessible restrooms. *Id.* The court granted summary judgment for Mr. Matthews under Title II of the ADA and 504, holding that the county failed to make its court facilities readily accessible to and usable to individuals with mobility impairments. *Id.* at 534.

67. *See* Grove City Coll. v. Bell, 465 U.S. 555 (1984).

68. 29 U.S.C. §794(b) (2000).

69. *See* Consol. Rail Corp. v. Darrone, 465 U.S. 624, 636 (1984).

70. 29 U.S.C. § 794(a) (2000). Section 504 is a civil rights statute that prevents discrimination against "*all* handicapped individuals . . . in employment, housing, transportation, education, health services, or any other Federally-aided programs." Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103, 1107 (9th Cir. 1987) (emphasis added) (citations omitted). The thrust of this mandate is "built around fundamental notions of equal access to state programs and facilities." Smith v. Robinson, 468 U.S. 992, 1017 (1984). Congress "made a commitment to the handicapped, that, to the maximum extent possible they shall be fully integrated into the mainstream of life in America." Strathie v. Dep't of Transp., 716 F.2d 227, 229 (3d Cir. 1983) (quoting S. REP. NO. 95-890, at 39 (1978)). The mainstream of American life includes state and county courthouses and judicial proceedings that occur within those settings. *See* DeLong v. Brumbaugh, 703 F. Supp. 399 (D. Pa. 1989); Kroll v. St. Charles County, 766 F. Supp. 744 (D. Mo. 1991).

71. The term "qualified handicapped person" is defined in the regulations implementing

modifications" or "auxiliary aids and service" in the text of the statute.[72] For purposes of section 504, it should not matter whether a particular courthouse or program in question receives federal financial assistance, so long as the court system itself receives this funding. The Civil Rights Restoration Act of 1987[73] amended various civil rights statutes, including section 504, by defining the term "program or activity" to mean "all of the operations of . . . a department, agency . . . or other instrumentality of a State or of a local government."[74] In other words, "all of the operations" of the state and local courts are subject to section 504 scrutiny, from parking to courthouse entry, to entering and exiting the courtroom, and including the administrative, as opposed to the judicial, decisions of a judge.[75]

2. The DOJ Regulations Implementing Section 504

The DOJ Regulations implementing section 504 (the "section 504 Regulations") contain a "general" prohibition on discrimination similar to the Title II Regulations.[76] Furthermore, the section 504 Regulations are entitled to substantial deference.[77] The regulations generally provide that "no qualified individual with a disability shall, because a public entity's

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§504 to mean: "(a) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question and (b) With respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services." 28 C.F.R. § 41.32 (2003).

72. The definition of an individual with a disability under the ADA is the same for §504. *See* 29 U.S.C. §705(9) (2000); 42 U.S.C. 12102(2) (2000).

73. Pub. L. No. 100-259, § 3(a), 102 Stat. 28 (1988). The Civil Rights Restoration Act legislatively overturned the United States Supreme Court decision in *Grove City Coll. v. Bell*, 465 U.S. 555 (1984), and *Consol. Rail Corp. v. Darrone*, 465 U.S. 624 (1984), dealing with program specificity. The receipt of federal funding obligates the recipient to ensure all of its operations comply with section 504, and not just those specific programs that benefited from the federal financial assistance. 29 U.S.C. § 794(b) (2000).

74. 29 U.S.C. § 794(b)(1)(a). Moreover, in *Galloway v. Superior Court*, the federal district court held that "[I]t is readily apparent that the Superior Court jury system falls within the purview of Section 504 of the Rehabilitation Act." 816 F. Supp. 12, 15 (D.D.C. 1993). The court cited the definition of "program," 29 U.S.C. § 794(b)(1)(A), noting that the Superior Court received federal financial assistance from the U.S. Department of Justice. *Id.*

75. *See, e.g.*, Avraham v. Zaffarano, 1991 WL 147541 (D. Pa. July 25, 1991).

76. *See* 28 C.F.R. pt. 42. In a 1981 letter, the Department of Justice advised the administrator of the Alaska court system that its administrative rule that deaf litigants pay the cost for sign language interpreter services in civil cases violated section 504 and the section 504 regulations. Letter from James P. Turner, Acting Ass't Attorney General, Civil Rights Division, U.S. Dep't of Justice, to Arthur T. Snowden, Administrative Director, Alaska Court System, at 2 (Mar. 6, 1981) (on file with author). The DOJ noted that the Alaska court system's failure to provide any auxiliary aids–interpreters or telephonic devices–may have precluded effective participation by deaf and hard of hearing persons in conducting business in the court system. *Id.*

77. Alexander v. Choate, 469 U.S. 287, 304 n.24 (1985); Consol. Rail Corp. v. Darrone, 465 U.S. 624, 635 and nn. 14-16 (1984).

facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity."[78] The regulations also provide that:

> A recipient that employs fifteen or more persons *shall provide appropriate auxiliary aids* to qualified handicapped persons with impaired sensory, manual, or speaking skills where a refusal to make such provisions would discriminatorily impair or exclude the participation of such persons in a program receiving Federal financial assistance. Such auxiliary aids may include may include brailled and taped material, qualified interpreters, readers, and telephonic devices.[79]

Like Title II, the non-discrimination requirements of section 504 mean more than "you are free to enter." If a party with impaired sensory, manual, or speaking skills can not understand the judge, the court system—not the party—must take the steps necessary to ensure effective participation.

The Analysis of the section 504 regulations is especially applicable, as it mandates "full accessibility" in state and local courts for "judges, jurors, plaintiffs, defendants, witnesses, or...spectators."[80] The plain language of section 504 is just as complete as that of Title II. There are no definitions of "qualified individual with a disability", "auxiliary aid or service", or "reasonable modifications" in the text of section 504. Yet, the statutory language of section 504, combined with the detailed regulatory provisions and analysis, provide effective tools for individuals with disabilities to ensure "court access."

3. Early Judicial Interpretation of section 504: Access Expanded

While the first United States Supreme Court decision to consider the meaning of section 504 took a rather limited view, other early United States Supreme Court decisions recognized the importance of section 504

78. 28 C.F.R. § 35.149 (2003).

79. 28 C.F.R. § 42.503(f) (2003) (emphasis added).

80. 45 Fed. Reg. 37,620, 37,627-33 (June 3, 1980) (Appendix B) (Analysis of Final Rule). The Analysis of the rule also addresses the provision of services, emphasizing that individuals with disabilities must receive court-provided services (e.g., appointed counsel) on an equal basis with non-disabled individuals. *Id.* The Analysis even explain when auxiliary aids and services would not be required, such as when a participant in a judicial proceeding continues to need a service outside the context of the proceeding. *Id.* at 37,630-31.

in vindicating the legal rights of individuals with disabilities. The Court first analyzed section 504 in 1979 when it decided *Southeastern Community College v. Davis.*[81] The Court held that, section 504 did not require a community college to make fundamental alterations to its registered nurse training program in order to accommodate an applicant with severe hearing loss.[82] The Court also held that the applicant failed to meet the legitimate and necessary physical requirements of the nursing program as established by the community college. Finally, the Court held that there was no section 504 violation when the college concluded that the applicant was unqualified.[83] Referencing 45 C.F.R. §84.3(k)(3), the applicable section 504 regulation, the Court defined a qualified handicapped individual as "a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity."[84]

Under *Davis*, the seminal case in all of civil rights jurisprudence as it relates to individuals with disabilities, the groundwork was laid for successful litigation in "access to the court" cases. Unlike postsecondary education, where colleges and universities have leeway in establishing their legitimate admission standards, the "fundamental alteration" defense has not worked when the due process rights of court access are at stake.[85] The definition of "qualified individual with a disability" is a key factor in any postsecondary education or employment case, but, again, the standard for who is qualified in a court access case is far less strenuous.[86] In other words, a criminal defendant is always "qualified" for purposes of section 504, as is a party in a civil case.

In the next section 504 case,[87] the United States Supreme Court held that:

> [A]n otherwise qualified handicapped individual must be provided with *meaningful access* to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; *to assure meaningful access,*

81. 442 U.S. 397 (1979).
82. *Id.* at 409-10.
83. *Id.* at 406-7, 414.
84. *Id.* at 406.
85. *See, e.g.*, Lane v. Tennessee, 315 F.3d 680 (6th Cir. 2003), *cert. granted*, 123 S. Ct. 2622 (2003).
86. *Id.*
87. Alexander v. Choate, 469 U.S. 287 (1985).

reasonable accommodations in the grantee's programs or benefits will have to be made.[88]

Here, the Court introduced a key phrase not found in the text of the statute: "meaningful access." Access must be real, and not merely a written policy with no "teeth." Again, the overly simplistic notion that the "Courthouse is Open To All" will not survive scrutiny if there is no ramp to get into the building, because the "benefit"—access to the court—can not be defined so as to exclude individuals with mobility impairments.

C. Statutory Protection in Federal Courthouses

Ironically, litigants with disabilities in federal courts have fewer court access rights than litigants in state and local courts. This is because the ADA and section 504 are federal laws that do not apply to the federal court system.[89] Unlike state and local entities, federal judicial agencies, i.e. the federal courts, do not fall within the purview of the ADA. Section 504 is also inapplicable to the federal judiciary, as this statute applies only to federally assisted programs, and federally conducted programs of executive agencies of the federal government.[90] Since the federal judiciary, a separate branch of government, is not an executive agency, section 504 is inapplicable to the federal courts.

While the ADA and section 504 cannot be enforced against federal courts, other federal laws and policies provide some court access rights in federal courts. The Architectural Barriers Act of 1968,[91] mandates removal of architectural and communication barriers in buildings and facilities that are constructed or altered with federal funds.[92] In addition, the Court Interpreters Act[93] governs access to federal courts for deaf, hard-of-hearing, and speech impaired individuals.[94] The Court Interpreters Act is limited to "judicial proceedings instituted by the United States, " i.e. criminal, civil, pre-trial, and grand jury proceedings.[95] If a deaf or speech-impaired person is a

88. *Id.* at 301 (emphasis added).

89. Both acts refer to state and local government, and neither refers to federal courts. *See* 29 U.S.C. § 794(b); 42 U.S.C. § 12131(1).

90. 29 U.S.C. § 794(a), (b) (2000).

91. 42 U.S.C. § 4151-4157 (2000).

92. *Id.*

93. 28 U.S.C. § 1827 (2000).

94. 28 U.S.C. § 1827(b)(1) (2000).

95. *Id. See also* 28 U.S.C. § 1828 (providing for special interpretation services in

plaintiff in a suit, The Court Interpreters Act does not require the federal court to provide an interpreter. For this reason, the Administrative Office of the United States Courts addressed this shortcoming in a 1996 memorandum to all Chief Judges of the United States Courts entitled "Services to Persons with Communication Disabilities." The guide to the federal judiciary states in pertinent part:

> 1. General Policy
>
> As adopted in September 1995, it is the policy of the Judicial Conference that all federal courts provide reasonable accommodations to persons with communication disabilities.
>
> 2. Sign Language Interpreters and Other Auxiliary Aids and Services
>
> Each federal court is required to provide, at judiciary expense, sign language interpreters or other appropriate auxiliary aids and services to participants in federal court proceedings who are deaf, hearing-impaired, or have other communication disabilities. The court shall give primary consideration to a participant's choice of auxiliary aid or service.
>
> "Auxiliary aids and services" include qualified interpreters, assistive listening devices or systems, or other effective methods of making aurally delivered materials available to individuals with hearing impairments. . . ."Participants" in court proceedings include parties, attorneys, and witnesses. . . ."Court Proceedings" include trials, hearings, ceremonies and other public programs or activities conducted by a court. "Primary consideration" means that the court is to honor a participant's choice of auxiliary aid or service, unless it can show that another equally effective means of communication is available, or that the use of the means chosen would result in a fundamental alteration in the

"multidefendant criminal actions and multidefendant civil actions" instituted by the United States).

> nature of the court proceeding or in undue financial or administrative burden.[96]

Notably, the right to access, as stated by this memorandum policy, is not absolute. The policy tracks the language of Title II and the Title II Regulations by requiring that primary consideration be given to an individual's preference.[97] The same "undue financial and administrative burdens" and "fundamental alteration" defenses under the Title II Regulations[98] are also covered in this policy. Further, while the policy includes jurors in its definition of "participants," it intentionally omits spectators. The policy permits the federal courts to ensure effective communication for spectators in situations where they determine it to be appropriate, for example, "providing an interpreter to the deaf spouse of a criminal defendant so that the spouse may follow the course of the trial."[99] The parallels between state and local courts and federal courts provide an interesting paradox for individuals with disabilities dealing with court access issues. Plaintiffs routinely ask federal judges to declare that state and local judiciaries are not accessible at a time when, the federal courts themselves, at least in theory, have limited access rights.

III. ACCESS TO THE COURTS AS A FUNDAMENTAL DUE PROCESS RIGHT

The combined use of Title II, section 504 and constitutional principles to establish a fundamental due process right in "access to the courts" cases makes a powerful argument that state and local courthouses need to be architecturally and structurally accessible, and that court personnel must establish effective means to communicate with individuals who are deaf,[100] or blind.[101] The Due Process Clause[102]

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96. JUDICIAL CONFERENCE, GUIDE TO JUDICIAL POLICY AND PROCEDURES, GUIDELINES FOR PROVIDING SERVICES TO THE HEARING IMPAIRED AND OTHER PERSONS WITH COMMUNICATION DISABILITIES Chapter 3, Part H (on file with author).

97. *See* discussion *supra* Part II.B.1-2; *see also* 28 C.F.R. § 35.160(b)(2) (2003).

98. 28 C.F.R. § 35.150(a)(3) (2003).

99. *See supra* note 96.

100. *See, e.g.*, Chisolm v. McManimon, 275 F.3d 315 (3d Cir. 2001) (reversing grant of summary judgment to defendant, allowing hearing impaired plaintiff to proceed with a claim under the ADA, Rehabilitation Act, § 1983, and a state statute); Duvall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001) (reversing grant of summary judgment to defendants, allowing hearing impaired litigant to proceed with discrimination claims under the ADA, Rehabilitation Act, § 1983, and a state statute).

101. *See, e.g.*, Galloway v. Superior Court, 816 F. Supp. 12 (D.D.C. 1993) (granting blind plaintiff's motion for summary judgment under the ADA and Rehabilitation Act).

102. U.S. CONST. amend. XIV § 1.

provides the basic constitutional underpinning for the requirements of both Title II and section 504 that state and local courts need to be fully accessible in order to allow individuals with disabilities to participate in and benefit from court programs. Courts would be hard-pressed to make the argument that providing reasonable modifications and/or auxiliary aids and services would somehow amount to a fundamental alteration or an undue burden in light of the Due Process Clause, which guarantees liberty to all. The significant liberty and property interests at stake for parties in a court case make access imperative as both a constitutional and statutory right. These constitutional implications are seen in two cases,[103] one of which is presently pending before United States Supreme Court.[104]

A. Access to the Courts –Effective Communication

For some, access to the courts means being able to understand and be understood when communicating in a courtroom. In *Popovich v. Cuyahoga County Court of Common Pleas*,[105] Mr. Popovich, an individual with a hearing disability, brought an action in federal court under Title II against a state court for allegedly failing to provide him with adequate hearing assistance in a child custody case.[106] The complaint claimed that the state court violated 42 U.S.C. §12203[107] by excluding Mr. Popovich from participation in the custody case because of his disability.[108] Mr. Popovich also alleged that court discriminated against him by denying him "an equal opportunity . . . to enjoy the benefits of a service conducted by the public entity [the state court]," and "the opportunity to participate equally in the proceeding pending before the court."[109] In addition, he alleged that the state domestic relations court retaliated against him for requesting hearing assistance and filing an administrative complaint against the court with the Department of Justice.[110] Mr. Popovich obtained a jury verdict in an Ohio federal court against the state court for "$400,000 in compensatory damages based on

103. Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808 (6th Cir. 2002); Lane v. Tennessee, 315 F.3d 680 (6th Cir. 2003), *cert. granted*, 123 S. Ct. 2622 (2003).

104. Lane v. Tennessee, 123 S. Ct. 2622 (2003).

105. 276 F.3d 808 (6th Cir. 2002).

106. *Id.* at 811.

107. This section, outside of Title II of the ADA, prohibits retaliation and coercion. *See* 42 U.S.C. §12203(a), (b).

108. *Popovich*, 276 F.3d at 816.

109. *Id.* (quoting Tr. at 770, Popovich v. Cuyahoga County Court of Common Pleas, (D. Ohio 1998) (No. 98-4100)).

110. *Id.* at 811.

an equal protection...claim of discrimination, a due process...claim of unreasonable exclusion from participation in the custody proceeding, and a claim of retaliation for filing an administrative complaint for failing to accommodate his disability."[111]

The United States Court of Appeals for the Sixth Circuit set aside the verdict and remanded the case for a new trial under Title II.[112] The court held that Mr. Popovich's claim was barred by the Eleventh Amendment[113] insofar as it relied on congressional enforcement of the Equal Protection Clause,[114] but that the claim was not barred for relying on congressional enforcement of the Due Process Clause of the Fourteenth Amendment[115] because Title II was "appropriate" legislation under Section 5 of the Fourteenth Amendment.[116] The court noted that Mr. Popovich claimed that he had been denied "a reasonable way to participate meaningfully in the proceeding."[117] In sum, the court dismissed Mr. Popovich's Title II claim based on equal protection principles and remanded his ADA claim based on due process principles for consideration. The court recognized that Mr. Popovich had significant due process interests in a child custody proceeding. The court bundled two Title II bedrock principles – a public entity's failure to accommodate a hearing disability and meaningful participation – and addressed them in the context of a fundamental right – access to the court. The court recognized the stark reality of Mr. Popovich's plight, both from a constitutional and statutory perspective:

> If he cannot understand what is happening during the custody hearing, it will be impossible for him to refute clams made against him, or to offer evidence on his own behalf. Consequently, a state's failure to accommodate plaintiff's deafness may greatly increase the risk of error in the proceeding, precluding one side from responding to

111. *Id.*.

112. *Id.*

113. The Eleventh Amendment states that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity . . . against one of the United States." U.S. CONST. amend. XI.

114. "No State shall... deny to any person...the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

115. "No State shall... deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

116. *Popovich*, 276 F.3d at 815-16. "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV § 5.

117. *Popovich*, 276 F.3d at 813.

> charges made by the opposing party, an essential element in our adversary system.[118]

The court implicitly recognized that no Title II fundamental alteration or undue burden was at stake here from the Ohio state court's perspective. The "paramount governmental interest" for Ohio was "to insure that the State's most vulnerable citizens are placed with the parent best suited for providing for their welfare."[119] This interest could only be achieved if Mr. Popovich was able "to understand and to respond to the arguments," so that the judge could make a reasoned decision about Mr. Popovich's ability to care for his child.[120]

The court also applied Title II principles in recognizing that Ohio had "an obvious need to administer its decisions in a cost-conscious and time-effective manner."[121] Even in court-access cases under Title II, a requested accommodation "may become so expensive or onerous as to outweigh their usefulness in reaching a decision."[122] However, in light of the Due Process Clause, the bar is set very high in Title II cases as to what would constitute a fundamental alteration or an undue burden. That is, it would be difficult in a courtroom access case for a state or local court to argue that providing reasonable modifications for individuals with disabilities is not required because of the burden that the modification would place on the court.[123] The court also recognized that, in most instances, the costs for "supplying the requested accommodations are fairly low."[124] This is so because Title II permits a trial to be moved from an inaccessible courthouse to another building that is accessible.[125] Finally, the court balanced the minimal harm to state and local courts that provided reasonable modification and auxiliary aids and services with the real harm to parties with disabilities who "may be virtually 'excluded from participation in' the state proceeding unless adjustments are made to accommodate the party's disability"[126] and found for Mr. Popovich.[127]

Mr. Popovich's case presents a compelling factual example that raises due process concerns. A father sought to force the state to provide

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118. *Id.* at 815.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 815.
125. *See* 28 C.F.R. § 35.150(b) (2003).
126. *Popovich*, 276 F.3d at 815.
127. *Id.* at 816.

him with hearing assistance for a state judicial proceeding to determine his custody rights. The "reasonable modifications" and "auxiliary aids and services" provisions are meant only to affect the means in which the case is tried—and not to give an "advantage" to a party with a disability. After all, no litigant with a hearing impairment wins his/her case by having the court provide interpreter services or assistive listening devices — only the fair and equal opportunity to prevail. As the court in *Popovich* aptly concluded: "the 'participation' requirement of Title II serves to protect Popovich's due process right to a meaningful hearing."[128] In civil cases involving parties with disabilities, this is all that Title II requires, but it is a significant requirement.[129]

B. Access to the Courts - Mobility

More recently, the issue of citizens with disabilities "seeking to vindicate their right of access to the courts in Tennessee"[130] was analyzed in *Lane v. Tennessee*.[131] In affirming a denial of the state's motion to dismiss and remanding for trial, the United States Court of Appeals for the Sixth Circuit reiterated that "among the rights protected by the Due Process Clause of the Fourteenth Amendment is the right of access to the courts."[132]

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128. *Id.* at 815.

129. *See also* Armstrong v. Davis, 275 F.3d 849 (9th Cir. 2001) (holding that a class of prisoners with disabilities were denied meaningful opportunity to participate in parole hearings), *cert. denied*, 537 U.S. 812 (2002).

130. Lane v. Tennessee, 315 F.3d 680, 683 (6th Cir. 2003), *cert. granted in part*, 123 S. Ct. 2622 (2003). The United States Supreme Court decision in *Lane* will have profound implications for Title II of the ADA and the rights of individuals with disabilities in general. The issue for review in *Lane* is whether Congress validly abrogated states' Eleventh Amendment immunity to enable private individuals to bring damages suits to protect the exercise of fundamental constitutional rights by individuals with disabilities and to ensure to these individuals the equal protection of the law under Title II of the ADA. Yet, aside from the core constitutional principles to be decided in *Lane*, the fact remains that *Lane* deals with but one Title II ADA remedy, monetary damages. Whatever the outcome, state and local courts after *Lane* will be hard pressed to defend Title II ADA lawsuits alleging that courthouses and courtrooms are not accessible, because the state and local governments in defending the claims for monetary damages will undoubtedly have the burden of proof that they have achieved accessibility.

131. 315 F.3d 680 (6th Cir. 2003), *cert. granted*, 123 S. Ct. 2622 (2003).

132. *Id.* Lane alleged that he was "denied the benefit of access to the courts," while Jones, a co-plaintiff, claimed that she suffered exclusion resulting from "an inability to access the physical facilities." *Id.* at 683. The specific factual details of their claims, however, remain unclear because no factual record was developed when the district court rendered its decision. *Id.* Mr. Lane "could not appear at his own trial without having to crawl up two flights of steps, and was arrested when he refused to crawl further or be carried. Eventually the problem was 'solved' by having Mr. Lane's lawyer run back and forth between his client and the second floor courtroom, denying Mr. Lane the ability to be present at proceedings critical to his case." Brief of The

In *Lane*, the court applied Title II in the context of a criminal case. Relying on United States Supreme Court precedent, the court recognized that for criminal defendants "the Due Process Clause has been interpreted to provide that 'an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings.'"[133] The court saw no need to distinguish between criminal and civil cases in so far as the parties in both instances had a "due process right to be present in the courtroom and to meaningfully participate in the process unless their exclusion furthers important governmental interests."[134] The tie between the constitutional rights and the statutory rights of individuals with disabilities is clear. The United States Supreme Court purposely uses the terms "meaningful[] access" and "meaningfully participate" interchangeably in analyzing both due process rights and rights under Title II and section 504.[135] The Sixth Circuit endorsed the connection of constitutional rights and civil rights in court access cases: "Based on the record before Congress in considering the Americans with Disabilities legislation, it was reasonable for Congress to conclude that it needed to enact legislation to prevent states from unduly burdening constitutional rights, including the right of access to the courts."[136] In *Lane,* the court recognized the leeway given to states to ensure that constitutional rights are protected.[137] The flexibility in Title II enhances and enforces the due process precepts upon which the federal statute is based. State and local courts can meet their constitutional and statutory obligation by taking the "major step of renovating facilities to the relatively minor step of assigning aides to assist in access to the facilities."[138]

Finally, *Lane* discounted some of the "reasons" for a public entity's failure to make its courthouses accessible. "The record demonstrated that public entities' failure to accommodate the needs of qualified persons with disabilities may result directly from unconstitutional animus and impermissible stereotypes."[139] The court found neither of these to be permissible defenses. Only Title II's bedrock

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Honorable Dick Thornburgh and The National Organization on Disability, The American Association of People With Disabilities, and ADA Watch as *Amici Curiae* in Support of Respondents, 2003 WL 22733908, *8 (Nov. 11, 2003).

133. *Id.* at 682 (quoting Faretta v. California, 422 U.S. 806, 819 n. 15 (1975)).

134. *Id.* (citing Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808, 813-14 (6th Cir. 2002); Helminski v. Ayerst Labs., 766 F.2d 208, 213 (6th Cir. 1985).

135. *See* Alexander v. Choate, 469 U.S. 287 (1985).

136. *Lane*, 315 F.3d at 682-83.

137. *Id.* at 683.

138. *Id.* at 683.

139. *Id.*

defenses—unreasonable costs or an inability to accommodate—fit within United States Supreme Court jurisprudence and congressional intent.[140]

The United States Supreme Court's constitutional precedents, as applied in *Popovich* and *Lane,* combined with the statutory and regulatory language of Title II and section 504, provide the necessary "one-two punch" in ensuring that individuals with disabilities are provided with meaningful access to the courts. These constitutional and statutory predicates form the basis for the many successful claims against state and local courts.

IV. PROTECTION OF ACCESS TO STATE AND LOCAL COURTHOUSES UNDER THE ADA AND SECTION 504

There have been several court decisions in which state and local governments were held in violation of the ADA and section 504 because courthouses were inaccessible to people with disabilities. These cases have created strong precedent in favor of disabled plaintiffs where court access is at issue, paving the way for victories to come. The cases below stand for the following propositions: (1) in the context of "access to the courts," advocates have not been faced with the dilemma of the "disability defined" issue because plaintiffs barred from the courthouses are individuals who are deaf, blind, or have mobility impairments[141] and (2) the defenses of fundamental alteration and undue burden, available to all public entities, including state and local courts, are not as effective as in other ADA cases such as, employment cases. When an employer successfully argues that an accommodation costs too much, the employer demonstrates harm to the business. However, courts are designed to adjudicate disputes, and it is difficult to imagine judges suffering harm for simply assuring that their courtroom is accessible. In fact, judges who preside in a courtroom that is not accessible run the real risk of having to defend their discriminatory actions in a Title II and section 504 case.

140. *Id.* at 681.

141. *See* discussion *infra*, Part IV.A.

A. Access to State Courts for Deaf and Hard of Hearing Individuals

In addition to *Popovich*, other deaf and hard of hearing individuals have had great success in litigating court access cases. In *Duvall v. County of Kitsap,*[142] the United States Court of Appeals for the Ninth Circuit ruled in favor of a hearing-impaired person who was denied videotext transcription services. The plaintiff, Mr. Duvall, was a party to a divorce proceeding.[143] He argued that he could not meaningfully participate in the proceeding without the accommodation of videotext.[144] Videotext, or real-time captioning, is the spoken word typed by a court reporter or other professional captioner that is displayed on a screen to be read by an individual with a hearing disability.[145] Although government officials had offered an assistive listening device and the option of sitting anywhere in the courtroom, the court found that the government did not reasonably accommodate Mr. Duvall.[146] The court noted that there is a governmental duty "to investigate whether a requested accommodation is reasonable"[147] because "'mere speculation that a suggested accommodation is not feasible falls short of the reasonable accommodation requirement [of the ADA].'"[148] Therefore, *Duvall* represented a double victory in terms of access to the court. First, an individual with a disability was recognized as deserving the ability to meaningfully participate in judicial proceedings. Second, access must now be provided in a way that meets every disabled individual's needs, and not simply the needs of the courts and government administrators.

In *Chisolm v. McManimon,*[149] the plaintiff, Mr. Ronald Chisolm, a deaf man, was arrested in Mercer County, N.J. for allegedly failing to attend driving classes that were required as a result of a 1987 conviction for driving while under the influence, on an arrest warrant issued by a judge in Bucks County, Pennsylvania.[150] After being incarcerated for five days in a county detention center, Mr. Chisolm was taken to the

142. 260 F.3d 1124 (9th Cir. 2001).

143. *Id.* at 1129.

144. *Id.*

145. *Id.* at n.1.

146. *Id.* at 1140. Whether a specific auxiliary aid or service is appropriate depends on the particular needs of an individual with a disability. For example, an assistive listening device that works to enhance sound may not be sufficient given the level of an individual's hearing loss. Instead, for some deaf individuals, whose primary means of communication is in written English, the ability to read text is necessary auxiliary aid and service.

147. *See id.* at 1136.

148. *Id.* (quoting Wong v. Regents of the Univ. of Cal., 192 F.3d 807, 818 (9th Cir. 1999)).

149. 275 F.3d 315 (3d Cir. 2001).

150. *Id.* at 318.

Mercer County Court, where he remained for fifteen minutes until the judge realized that Mr. Chisolm was deaf and that an interpreter was required to ensure effective communication.[151] Mr. Chisolm returned to the detention center where a friend told him that he would remain incarcerated for an additional week, at which time an interpreter would become available. However, no hearing occurred and the matter was adjourned.[152] Following his counsel's intervention, Mr. Chisolm was released from the detention center.[153] He then sued both the detention center and the court for violations of Title II and section 504.[154] Mr. Chisolm alleged that he was discriminated against because the court failed to make attempts to obtain "a certified interpreter immediately, instead scheduling the next hearing for six days after the first hearing...thereby forcing plaintiff to remain incarcerated if plaintiff's attorney had not intervened."[155]

The United States District Court for the District of New Jersey concluded that Mr. Chisolm's claims against the court system failed because he was never excluded from a program–the extradition hearing–because of his disability.[156] The court granted summary judgment for the court defendant on grounds that a hearing had not occurred, the matter was adjourned for lack of an interpreter, Mr. Chisolm was released, and that he never reappeared in court.[157]

The United States Court of Appeals for the Third Circuit reversed and remanded the district court's grant of summary judgment, concluding that a reasonable trier of fact could conclude that the county's attempt to use lip reading and note writing in lieu of an interpreter was inadequate.[158] Referencing the Title II Regulations, the court noted that "a public entity must give preference to a disabled person's choice of auxiliary aid."[159] As in *Duvall*, there is the presumption that courts should defer to an individual's preferred method of achieving "access" to

151. Chisolm v. Manimon, Civ. No. 95-0991, 1997 U.S. Dist. LEXIS 24063, at *3 (D. N.J. June 11, 1997).

152. *Chisolm*, 275 F.3d at 320.

153. *Id.*

154. *Id.* at 320-21.

155. Chisolm v. Manimon, Civ. No. 95-0991, 1997 U.S. Dist. LEXIS 24063, at **3-4 (D. N.J. June 11, 1997) (quoting Pl.'s Br. at 1-2).

156. *See* 97 F. Supp. 2d 615 (2000).

157. In a separate opinion, the district court granted summary judgment with respect to Mr. Chisolm's claims against the detention center. The Third Circuit reversed and remanded this claim. *See Chisolm*, 275 F.3d at 332.

158. *Id.* at 328.

159. *Id.* at 326 n.10.

the courts.[160] The *Chisolm* court also stated that the effectiveness of auxiliary aids is a factual issue,[161] indicating that disabled plaintiffs are generally able to reach the jury in access to court cases.

In the case of *Soto v. City of Newark,*[162] access rights for disabled individuals who were not parties to a case, but used a local courthouse for their wedding ceremony, were at issue.[163] The Sotos, two deaf individuals who communicated primarily in American Sign Language, decided to get married.[164] On three occasions, they asked the City of Newark Municipal Court to accommodate their disability by providing a sign language interpreter for their wedding ceremony.[165] The Municipal Court rejected their requests.[166]

In granting summary judgment to the Sotos under the ADA, section 504, and state law, the United States District Court for the District of New Jersey wrote that "as a result of their disability, they did not fully understand their vows or the words spoken by the presiding judge."[167] The court cited Congress' finding that "discrimination against individuals with disabilities persists in such critical areas as . . . access to public services."[168] The district court rejected the municipal court's argument that a wedding was not a "service"[169] under the ADA, stating that the Title II Regulations mandate that the ADA's coverage extends to "all services . . . made available by public entities,"[170] i.e., "*anything* a public entity does."[171] After finding that the municipal court wedding was a "service" under the ADA, the district court ruled that the Sotos were denied the benefit of the "service" in a manner "equal to that afforded to others" because they could not understand or effectively communicate with each other or the judge during their wedding.[172] The district court also found that providing interpreters for the municipal court wedding was a "'reasonable accommodation'" and would impose no "'undue burden'" on the defendant.[173] In fact, the municipal court provided

160. *See* Duvall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001).
161. *See Chisolm*, 275 F.3d at 327.
162. 72 F. Supp. 2d 489 (D.N.J. 1999).
163. *Id.*
164. *Id.* at 490-91 (citation omitted).
165. *Id.* at 491 (citation omitted).
166. *Id.* (citation omitted)
167. *Id.* at 491 (citation omitted).
168. *Id.* at 492 (quoting 42 U.S.C. § 12101(a)(4)).
169. *Id.* at 493-94.
170. *Id.* at 493 (quoting 28 C.F.R. § 35.102(a) (1999)).
171. *Id.* at 493-94 (quoting Yeskey v. Pa. Dep't of Corrections, 118 F.3d 168, 171 (3d Cir. 1997)) (alteration in the original) (citation omitted).
172. *Id.* at 494 (quoting 28 C.F.R. § 35.130(b)(ii) (1999)).
173. *Id.* at 496.

interpreters for court cases involving hearing-impaired parties or witnesses.[174] The district court's reasoning in *Soto* re-enforces the principle that merely requiring access for individuals who wish to participate in judicial proceedings is not enough – the access must be meaningful.[175]

In sum, the above-referenced cases demonstrate principles recognized by The United States Supreme Court over a decade ago in Alexander v. Choate.[176] These principles are now engrained in federal law: state and local courts must provide qualified individuals with disabilities "with meaningful access to benefits that a federal fund grantee offers"[177] and these courts are "required to make reasonable modifications to accommodate the disabled."[178]

The United States District Court for the District of Maryland has also addressed refusals by Maryland state courts to provide sign language interpreters and assessment of interpreter fees as court costs.[179] In

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174. *Id.* at n.11. In another case, the State of New Jersey and the Administrative Director of the Courts agreed to require municipal courts to post a sign with the hearing impaired logo in their courtrooms and to "include reference to auxiliary aids and services as well as the hearing impaired logo." Derosa v. Boro of South Plainfield, C.A. No. 99-2531 (JCL) (D. N.J. July 31, 2001) (Memorandum of Understanding Accomplishing Stipulation of Dismissal with Prejudice, at 4). The Logo reads:

> Notice to the Deaf & Hard of Hearing:
>
> > You have the right to a sign language interpreter or other reasonable accommodation if one is required for you to effectively communicate in Court. If you require a sign language interpreter or other accommodation to communicate, please let us know.

Id. (Memorandum of Understanding Accomplishing Stipulation of Dismissal with Prejudice, Exhibit C). The settlement with municipal defendants provided that each municipal court would designate an " 'ADA Coordinator' to accept and process requests for auxiliary aids or services to accommodate persons who are deaf or hard of hearing." *Id.* (Memorandum of Understanding, at 3). The municipal court ADA Coordinator would receive a loose leaf binder that contained directives and materials of the Administrative Office of the Courts on the issue of access of deaf and hard of hearing individuals to the courts. *Id.* (Memorandum of Understanding, at 4). The settlement also called for appropriate training to municipal court judges and staff to ensure their familiarity with and understanding of the requirements of federal and state law barring discrimination on the basis of hearing disability; and signage. *Id.* The plaintiffs also reached a separate settlement with eight municipal courts which agreed to pay $157,000 to the plaintiffs. Press Release, Nat'l Ass'n of the Deaf Law Center, *Muncipal Courts Pay $157,000 in Landmark Settlement with Deaf Citizens* (Aug. 31, 2001) (on file with author).

175. *See* Soto v. City of Newark, 72 F. Supp. 2d 489, 494 (D. N.J. 1999) ("Where a governmental entity coordinates, schedules and conducts proceedings on its own premises to benefit the public, such conduct is necessarily a 'service' to the public.").

176. *See* Kroll v. St. Charles County, 766 F. Supp. 744 (D. Mo. 1991).

177. Americans Disabled for Accessible Pub. Transp. v. Skinner, 881 F.2d 1184, 1191-92 (3d Cir. 1989).

178. *Id.* at 1192.

179. In *Cutshaw v. Kratovil*, the State of Maryland and two judges agreed "to provide and pay for qualified sign language interpreter services for a deaf defendant at any stage of a criminal

Herrold v. Duckett,[180] Mr. Herrold sought declaratory, injunctive, and monetary relief against Judge Warren B. Duckett, Jr. of the Circuit Court for Anne Arundel County, the State of Maryland, and Anne Arundel County. In this case, Judge Duckett signed an order appointing a sign language interpreter at Mr. Herrold's expense.[181] Mr. Herrold alleged that the defendants' assessment of and refusal to pay for the interpreter services violated Title II, section 504, and the U.S. Constitution.[182] Mr. Herrold sought a declaratory judgment stating that Maryland Courts & Judicial Proceedings section 9-114 ("section 9-114") violated federal law insofar as it permitted a state court to allow interpreter fees to be assessed as part of court costs.[183] Mr. Herrold also sought an injunction ordering Judge Duckett to rescind his order and requiring the defendants to pay for interpreter services.[184]

Subsequent to the filing of the complaint, the Office of the Attorney General for the State of Maryland issued a memorandum dated July 17, 1992 to state trial court judges.[185] The memorandum admitted

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proceeding in a State of Maryland District Court throughout the State." Civ. Action No. JFM-3209 (D. Md. June 8, 1992) (Consent Decree, at 3 (Item 1)). The defendants also agreed to pay $2,000 to a deaf individual who was initially denied interpreter services in a criminal hearing. *Id.* at 4 (Item 10).

180. Civil Action No. B92-1698 (D. Md. 1992).

181. Anne Arundel County v. Herrold, No. 3115760 (Circuit Court for Anne Arundel County, Oct. 30, 1991).

182. Herrold v. Duckett, Civ. Action No. JFM-3209 (D. Md. June 8, 1992) (Complaint, at 2).

183. *Id.*

184. *Id.* Similarly, in Indiana, a deaf individual filed a small claims action in a state court. Clark v. Bridges, No. IP 93 877-C (D. Ind. Sept. 23, 1994) (Consent Decree, at 2). She asked a county judge to appoint a qualified interpreter at no cost to her. Id. The judge refused, stating that "'the court will hear evidence by way of written documents rather than verbal communication or signing.'" The deaf individual sued the State of Indiana and the county court judge in federal court, claiming discrimination under the ADA and section 504. Id. The case settled when the Indiana Supreme Court agreed to amend its trial rules in order to comply with the ADA. Id. at 4. The county court agreed to provide an interpreter in the small claims court proceeding and further agreed that the fee would not be assessed against the deaf individual, regardless of the outcome of the case. Id. In Ohio, a deaf man was a defendant in a criminal proceeding in a county court. Shafer v. Judkins, No. C-193-887 (D. Ohio Aug. 16, 1994) (Consent Decree, at 1). A county judge ordered him to pay more than $200 in interpreter costs during his hearings. Id. at 2-3. The deaf man filed a complaint in an Ohio federal court, claiming violations of the ADA and section 504. Id. at 2. In response to the lawsuit, the county judge entered an order relieving the deaf man of the obligation to pay for interpreter fees. Id. at 3. The county court also adopted a new local rule providing that "[a]ll parties and witnesses who appear before the court, who are deaf, shall be afforded a properly certified and trained interpreter at County expense. . . . No Interpreter's fee shall be taxe[d] as court costs against any deaf party or witness." *Id.*

185. Memorandum from Alexander Wright, Jr. and Alexander H. Baida, Ass't Attorney Generals, Office of the Attorney General, Civil Litigation Division, Baltimore, MD to "All state district and circuit court judges." (July 17, 1992) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class) [hereinafter Memorandum to Maryland Judges]. The memorandum was sent with the subject heading "The assessment of interpreter fees against

that the Maryland law[186] allowing "state courts in their discretion to tax as part of the costs of a case amounts paid to sign language interpreters assigned to deaf parties" was in conflict with the ADA.[187] The memorandum noted that the ADA prohibited the imposition of such fees against deaf individuals because there was no such fee imposed on non-disabled individuals.[188] The memorandum further stated that "[r]equiring deaf parties to pay such fees also interferes with their right of access to the courts."[189]

Unfortunately, the policy implicitly allows a court to assess a hearing litigant for interpreter fees when a hearing litigant loses a case to a deaf litigant. Also, the policy seemingly permits assessment of interpreter fees against a hearing litigant if a deaf witness is called to testify. Nevertheless, following the implementation of the policy, Mr. Herrold was no longer required to reimbursement the state for the interpreter costs.

Further, the Maryland General Assembly amended section 9-114 in an attempt to conform to Title II. Rather than eliminating the provision that allows courts to assess interpreter fees as costs, the state legislature simply added the words "in accordance with the provisions of the federal Americans with Disabilities Act."[190] Instead, the General Assembly should have rewritten the statute to prohibit the assessment of interpreter costs and ensure that interpreters were provided by the state and local court.

The access to the court cases involving individuals with hearing disabilities are broadly applicable to all litigants with disabilities. While the issue of who is disabled under Title II and section 504 needs to be resolved on a case-by-case basis – parties, witnesses, judges, jurors, and spectators are all qualified.[191] Factual issues exist as to what is a reasonable modification or an appropriate auxiliary aid or service, but it should be relatively easy to substitute the auxiliary aids and services utilized by deaf and hard of hearing individuals (videotext, interpreter services, and assistive listening devices), with a variety of auxiliary aids and services utilized by other individuals with disabilities. The success

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deaf parties." *Id.*

186. MD. CODE ANN., CTS. & JUD. PROC. § 9-114(b) (2003).

187. Memorandum to Maryland Judges, *supra* note 205.

188. *Id.*

189. *Id.*

190. 1993 Md. Laws 600 (codified at MD. CODE ANN., CTS. & JUD. PROC. § 9-114(b) (2003)).

191. *See* discussion *supra* Part IV.

of individuals with hearing disabilities is the result of fitting the right "accommodation" with the appropriate "need" of the specific person. This is the linchpin of Title II – making an individualized assessment.

B. Physical Entry and Exit from the Courtroom

Individuals with mobility impairments have also successfully challenged state courts that have denied them access because they are physically unable to enter and exit a courtroom. In the 1995 case of *Livingston v. Guice,*[192] the United States Court of Appeals for the Fourth Circuit decided that a judge was not immune from suit in the area of disabled individuals' access to the court.[193] *Livingston* involved a wheelchair-bound individual with multiple sclerosis who wanted to attend a trial in which her nephew was a criminal defendant.[194] After the judge prohibited Ms. Livingston from entering and exiting the courtroom through the door adjacent to his bench, the only handicap-accessible door, Ms. Livingston sued the judge and the state of North Carolina under Title II.[195] The district court never reached the merits of Ms. Livingston's claims and dismissed the suit on immunity grounds.[196] However, the Fourth Circuit reversed this decision, holding that immunity did not lie when a plaintiff sought injunctive relief.[197] The Fourth Circuit noted that absolute immunity applies only to civil damages and "does not immunize judges from claims for equitable relief."[198] Judges, who may often be the defendants in access to court cases, would not completely escape liability under the holding in *Livingston*. As seen in *Livingston*, there is a strong argument that a judge cannot limit or deny access to an individual with a disability.

Individuals with mobility impairments in Maryland have also had great success in litigating "access to court" issues. In *Reid v. Glendening,*[199] the United States District Court for the District of Maryland granted plaintiffs' motion for summary judgment on the issue of liability, finding that the State of Maryland was in violation of Title II and section 504. In an unpublished decision, the court found that state

192. 68 F.3d 460 (4th Cir. 1995) (Table). The full decision is available on Westlaw. Livingston v. Guice, No. CA-92-131-5-C-MU, 1995 WL 610355 (4th Cir. Oct. 18, 1995).

193. *Livingston*, 1995 WL 610355, at *1.

194. *Id.* at *1.

195. *Id.* at *1-2.

196. *Id.* at *2.

197. *Id.* at *4.

198. *Id.* at *3.

199. Civ. No. AMD 96-2337 (D. Md. Sept. 23, 1998) (Order granting summary judgment).

courthouse buildings contained "major barriers" that denied "ready and meaningful access" to individuals with disabilities.[200] Among these barriers were an "undignified entrance," a "noncompliant entrance . . . [with] insufficient maneuvering space," "noncompliant room identification signs," "inaccessible toilet rooms," and "inaccessible jury rooms and jury toilet rooms."[201] Finally, the court stressed that "[t]here are serious ramifications when the very institution designed to ensure the delivery of equal justice under law to all individuals perpetuates such discrimination."[202] Although unreported, *Reid*, provides necessary support for advocates challenging courthouses and courtrooms that are not accessible.[203]

C. Juror Access

Jurors, like parties, can encounter barriers to courtroom access as well.[204] In *Galloway v. Superior Court,*[205] the United States District Court for the District of Columbia held that the D.C. Superior Court violated section 504 by categorically excluding blind individuals from jury service, stating :

> Defendants' policy [of excluding blind individuals from jury service] is based on the assumption that visual observation is an essential function or attribute of a juror's duties. In reaching this conclusion, however, defendants failed to examine any studies or review any

200. Reid v. Glendening, Civ. No. AMD 96-2337 (D. Md. Sept. 23, 1998) (Memorandum accompanying Order granting summary judgment, at 3).

201. *Id.* (quoting testimony of report of Mark Mazz, defense expert) (internal quotations omitted).

202. *Id.* at 4.

203. Following summary judgment, the parties entered into a comprehensive remedial plan. Reid v. Glendening, Civ. No. AMD 96-2337 (D. Md. Jan. 14, 2000) (Order approving remedial plan). The plan included renovations for entrances and hallways in the courthouse, installation of a new microphone system with assisted listening devices, and architectural and carpentry renovations in courtrooms and jury rooms throughout the courthouse. *Id.* at Attachment B. The estimated cost of the renovations was $1 million. *Id.* at Attachment B.

204. *See, e.g.*, DeLong v. Brumbaugh, 703 F. Supp. 399 (D. Pa. 1989) (holding that deaf woman could not be barred from jury service); People v. Caldwell, 603 N.Y.S.2d 713 (1993) (accommodating visually impaired juror by providing enlarged print versions of tape transcripts and reading documents into the record). *But see* Eckstein v. Kirby, 452 F. Supp. 1235 (D. Ark. 1978) (holding that deaf and vision impaired jurors were unfit to serve).

205. 816 F. Supp. 12 (D.D.C. 1993).

> literature on the ability of blind individuals to serve on juries or the ability of these individuals to assess credibility.[206]

The district court disapproved of the superior court's stereotypical rationale for excluding blind jurors, but it did not impose a *per se* rule of inclusion, reasoning that "the decision . . . should be left to the Judge, the attorneys, and the *voir dire* process"[207] Again, the court favored an individualized approach in dealing with a "court access" issue by making a specific assessment of the qualifications of a particular person in light of the case to be presented at trial even when the plaintiff was not a party to the suit.[208] Constitutional rights are implicated whether one is denied the right to serve on a jury or denied the right to participate in his or her own case.[209]

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206. *Id.* at 16 (footnotes omitted).

207. *Id.* at 18.

208. In a footnote, the court explained:

> Whether a blind juror can serve competently can be addressed on a case-by-case basis. During *voir dire*, jurors routinely inform the court of physical ailments or disabilities, temporary or otherwise, which could impede their ability to serve during that trial. In these instances, the judge determines, on an individual basis after inquiry, whether that juror can serve on that particular case. This routine process occurs every day in every court. Members of the *venire* often advance a variety reasons which may impact their ability to serve, including . . .needing to take medication at regular hours, taking medication which induces drowsiness, requiring frequent and regular recesses, having dietary requirements which cannot be satisfied by food available in the court cafeteria. . . .These needs and constraints are addressed in the regular course of choosing a jury and may in some instances result in a determination that a juror cannot be accepted because either the flow of trial would be irreparably injured or a fair trial might not result. It is no different if there is a blind person in the *venire*. That person can be individually questioned to ascertain his or her abilities *vis-a-vis* that particular trial.

Id. at 18.

209. Courts have also held that deaf individuals cannot be disqualified from jury service solely because of their disability. *See, e.g.*, DeLong v. Brumbaugh, 703 F. Supp. 399 (D. Pa. 1988); People v. Guzman, 555 N.E.2d 259 (N.Y. 1990); United States v. Dempsey, 830 F.2d 1084 (10th Cir. 1987). *See also* Harold Craig Mason, *Jury Selection: the Courts, the Constitution, and the Deaf*, 11 PAC. L.J. 967 (1980), Michael B. Goldbas, *Due Process, the Deaf, and the Blind as Jurors*, 17 NEW ENG. L. REV. 135 (1981); Randy Lee, *Equal Protection and a Deaf Person's Right to Serve as a Juror*, 17 N.Y.U. REV. & SOC. CHANGE 81 (1989-1990). *But see* Eckstein v. Kirby, 452 F. Supp. 1235 (D. Ark. 1978) (upholding a state law disqualifying persons unable to speak or understand English and persons with substantially impaired hearing or seeing as grant jury or petit jurors); Commonwealth v. Susi, 477 N.E.2d 995 (Mass. 1985) (reversing and remanding a criminal conviction because the trial judge refused the defendant's challenge for cause of a blind juror).

D. Access Denied

Despite the successes of access to court cases nationally, the right to access is limited in Maryland.[210] The Court of Appeals of Maryland recently held that a trial court may exclude a disabled plaintiff from the liability phase of a medical malpractice action under certain circumstances.[211] The court affirmed the granting of defendant's motion *in limine* to exclude the plaintiff, a severely brain-damaged adult who "required continuing nursing care and extensive medical equipment,"[212] from the courtroom.[213] The court apparently agreed with the trial court's conclusion that the plaintiff was "'reduced to a vegetable state'" and could serve "'no purpose'" in court but to prejudice the defendant.[214] In an effort to rationalize its decision, the trial court suggested that the plaintiff's inability to communicate rendered him valueless in aiding his attorneys.[215] This inability to communicate was allegedly caused by the defendants' negligence, and thus was related to the case.[216]

Although *Green* was not an ADA case, an underlying ADA claim arguably existed because access to the courtroom was denied.[217] In relying on Mr. Green's inability to communicate and his vegetative condition,[218] the court practically admits that he was excluded from the courtroom, in the words of the ADA, "by reason of such disability."[219] While seemingly limited to medical malpractice actions, the court's decision in *Green* could be used to frame arguments favoring the exclusion of individuals with disabilities from courtrooms in other contexts as well.

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210. *See* Green v. North Arundel Hosp. Ass'n, 785 A.2d 361 (Md. 2001).
211. *Id.*
212. *Id.* at 370.
213. *Id.* at 364.
214. *Id.* at 371 (quoting the trial court decision).
215. *Id.*
216. *Id.* at 364-65.
217. *Id.* at 364. The plaintiff based a portion of his appeal on the ADA, but the court failed to resolve the issue. *Id.* at 371-72.
218. *Id.* at 371.
219. *Id.*; 42 U.S.C § 12132 (2000).

V. CONCLUSION

Two sitting United States Supreme Court Justices have spoken on the issue of "access to the court," albeit under different circumstances than as a civil right issue affecting millions of Americans with disabilities. In *Talamini v. Allstate Ins. Co.*, Justice Stevens stated in a concurring opinion that:

> Freedom of access to the courts is a cherished value in our democratic society . . . . The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help. There is, and should be, the strongest presumption of open access to all levels of the judicial system. . . . This Court, above all, should uphold the principle of open access.[220]

More recently, Justice Breyer stated: "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."[221]

These words have special meaning in the context of "access to the court" cases – a fundamental right of citizenship for all individuals. Mr. Lane should not have been required to crawl up steps, even one time, or risk being found in contempt. Mr. Popovich should not have had to undergo a civil trial where child custody issues were at stake when he could not fully hear — or fully comprehend—what the judge, lawyers, and witnesses were saying. Mr. Galloway should not have been required to file suit to challenge a "blanket" policy prohibiting all blind individuals from serving as jurors. In Maryland, Mr. Reid and his fellow plaintiffs should not have had to sue the State to be able to enter and exit a courthouse or courtroom. Equally important, the defendants—state and local governments—in the cases cited herein should have heeded the words of Justices Stevens and Breyer. Instead of "fighting" to defend their discriminatory policies, practices, and procedures, the state and local governments should have worked to ensure the principles of "open access." and "open on impartial terms." Equally important are the words of Emeka Nwojke, the Assistant Director of the Northeast Independent Living Program, during a Congressional hearing:

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220. Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1070-71 (1985).
221. Romer v. Evans, 517 U.S. 620, 633 (1996).

> I went to the courtroom one day and . . . . I could not get into the building because there were about 500 steps to get in there. Then I called for the security guard to help me, who . . . . told me there was an entrance at the back door for the handicapped people.
>
> . . . . I went to the back door and there were three more stairs for me to get over to be able to ring a bell to announce my arrival so that somebody would come and open the door any maybe let me in . . . . This is the court system that is supposed to give me a fair hearing. It took me 2 hours to get in . . . . And when [the judge] finally saw me in the courtroom, he could not look at me because of my wheelchair.
>
> . . . .
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> . . . .The employees of the courtroom came back to me and told me, "you are not the norm. You are not the normal person we see every day."[222]

The United States Supreme Court has recognized that the in addition to barring intentional discrimination, "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect."[223] Therefore, individuals with disabilities have confronted, even in the "access to the court" setting, intentional discrimination, the denial of auxiliary aids and services, the failure to make modifications, and stereotypical assumptions. All forms of discrimination must come to an end.

Whatever the outcome in *Lane,* state and local governments are on notice that inaccessible courthouses and courtrooms will not be tolerated. Moreover, courts will not be able to ignore that access is a right in light of the attention that the *Lane* case has drawn, as evidenced by the various amicus briefs filed in support of the respondents in the case.[224] The statutory and regulatory basis for the notion that courtrooms

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222. *Oversight Hearing on H.R. 4498, Americans With Disabilities Act of 1988: Hearing on H.R. 4498 Before the House Subcomm. on Select Educ. of the House Comm. On Educ. and Labor,* 100th Cong. 41-42 (1989) (statement of Emeka Nwojke, Assistant Director, Northeast Independent Living Program).

223. Alexander v. Choate, 469 U.S. 287, 294 n.7.

224. *See, e.g.*, Brief for the American Bar Association as Amicus Curiae Supporting Respondents, 2003 WL 22733905 (Nov. 12, 2003).

should be accessible to all citizens is clear, and the result is that so many individuals with disabilities have prevailed—with a great deal of hard work by themselves and their advocates—when suing the states and counties over this fundamental principle.

Notwithstanding some disappointments, the obvious trend in litigation involving "access to the courts" for individuals with disabilities indicates that future plaintiffs in these cases will be successful. Further, the lessons learned in "access to the court" cases serve the disability community well in other instances, such as reasonable accommodations in employment, auxiliary aids and services in education, challenging stereotypical notions about the abilities of individuals with disabilities in both employment and education contexts.

Hopefully, plaintiffs in courthouse and courtroom access cases will continue to prevail against state and local governments. Even better, perhaps litigation of these cases will cease as courts begin to provide meaningful access to all who are entitled to it. When that happens, we can finally get on to the business of why the individuals with disabilities are in court in the first place.