

2018

The Development of Emergency Planning for People With Disabilities Through ADA Litigation, 51 J. Marshall L. Rev. 819 (2018)

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THE DEVELOPMENT OF EMERGENCY PLANNING FOR PEOPLE WITH DISABILITIES THROUGH ADA LITIGATION¹

BARRY TAYLOR

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I. INTRODUCTION

Since the Americans with Disabilities Act (“ADA”)² was passed in 1990, our country has experienced the terrorist attack of September 11th, numerous natural disasters from Hurricane Andrew in 1992 to Hurricane Florence in 2017, and far too many tragic school shootings from Columbine to Parkland.

In the wake of these events, many state and local governments developed emergency preparedness plans to ensure the safety of their citizens. Unfortunately, these plans frequently ignored the needs and rights of people with disabilities.³ This neglect is likely

1. This article was written by Barry C. Taylor, Vice President of Systemic Litigation and Civil Rights at Equip for Equality, the Illinois Protection and Advocacy System. Funding was generously provided by the Pacific ADA Center and the National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR).

2. 42 U.S.C. § 12101 (1994).

3. See, e.g., Lex Frieden, *The Impact of Hurricanes Katrina and Rita on People with Disabilities: A Look Back and Remaining Challenges*, NATIONAL

because, in part, the ADA contains no requirements specific to emergency planning. While Title II of the ADA and its implementing regulations clearly prohibit discrimination against people with disabilities and mandate that accommodations be provided,⁴ there are no explicit references to the obligations of governmental entities to integrate disability issues and concerns into emergency planning. This lack of guidance has meant that the ADA's application to emergency preparedness has largely been developed through litigation.

This article will review the recognition and development of the rights of people with disabilities in emergency planning through the courts. First, this article will review litigation brought against state and local governments for failing to adequately protect and accommodate people with disabilities. Next, it will discuss how the ADA has been applied to the specific setting of emergencies arising in schools. Then, it will review an early ADA decision in which the defense of direct threat was used in the context of emergency evacuation. Finally, the article will look at guidance and resources from the federal government to ensure that people with disabilities are fully incorporated into emergency planning.

II. EMERGENCY PREPAREDNESS LITIGATION AGAINST STATE AND LOCAL GOVERNMENTS

A. *California Foundation for Independent Living Centers v. City of Oakland (2007)*

The first major ADA case brought by people with disabilities against state and local governments for failing to include them in emergency planning was *California Foundation for Independent Living Centers v. City of Oakland*.⁵ The plaintiffs in this case were two disability rights advocacy organizations and a woman with a mobility disability, who was concerned that the City of Oakland was not prepared to meet her specific needs in the event of an emergency.

The suit alleged that the City of Oakland was discriminating against more than 84,000 residents with disabilities by failing to develop an emergency preparedness plan that sufficiently

COUNCIL ON DISABILITY (Aug. 3, 2006), https://ncd.gov/rawmedia_repository/e89f084e_e132_496c_a5b8_56351dfb3f10.pdf (providing a comprehensive report by the National Council on Disability finding that people with disabilities were disproportionately affected by Hurricanes Katrina and Rita because their needs were often overlooked or completely disregarded, and their evacuation, shelter and recovery experiences differed vastly from the experiences of people without disabilities).

4. 42 U.S.C. § 12101(b)(1) (1994).

5. *Cal. Found. for Indep. Living Ctrs. v. City of Oakland*, RG07339865 (Cal. Super. Ct. Aug. 9, 2007).

addressed the unique needs of people with disabilities. Claims were brought under the ADA, Section 504 of the Rehabilitation Act,⁶ and California state law.⁷ Oakland had a Mass Care and Shelter Plan to provide for immediate shelter, feeding centers, first aid, bulk distribution of needed items, and other related services for people affected by a large-scale incident. However, the complaint alleged that this Plan failed to address the needs of people with disabilities and highlighted the inaccessibility of many of the potential emergency shelters.⁸ Specifically, many of the shelters lacked accessible entrances, parking, paths of travel, signage, toilets, and showers.⁹

Shortly after the suit was filed, the parties negotiated a settlement. As a result, there was no determination by the court as to whether the City of Oakland violated the ADA, or even whether Title II of the ADA applied to emergency planning. Under the settlement, the parties developed a Mass Care and Shelter Plan Annex to be incorporated into Oakland's broader emergency preparedness plan. Through the Mass Care and Shelter Plan Annex, the City of Oakland agreed to:

1. provide voice/text emergency notifications through public access television network, including an accessibility statement in emergency notifications;
2. identify vendors for durable medical equipment for emergencies;
3. establish "functional needs coordinators" at shelters to identify and assist people with disabilities;
4. make available American Sign Language interpreters or remote video interpreters for deaf and hard of hearing individuals in emergency shelters;
5. evaluate all emergency shelters for physical and programmatic accessibility;
6. adopt accessible transportation procedures for the evacuation of people with disabilities;

6. 29 U.S.C. § 794 (1973).

7. Cal. Civ. Code §§ 54.1, 54.3 (West 1997); Cal. Gov. Code § 11135 (West 2017).

8. Complaint at 14-16, Cal. Found. for Indep. Living Ctrs. v. City of Oakland, RG07339865 (Cal. Super. Ct. Aug. 9, 2007).

9. *Id.*

7. update and improve Oakland's Geographic Information System for identifying and locating people with disabilities during emergencies; and
8. establish a medical shelter for people with disabilities who cannot be adequately served in other emergency shelters.¹⁰

B. Communities Actively Living Independent and Free v. City of Los Angeles (2009)

The next major emergency preparedness case was also brought in California, *Communities Actively Living Independent and Free v. City of Los Angeles*.¹¹ The named plaintiffs in this class action were a disability rights advocacy organization and a woman with a mobility disability. As in the Oakland litigation, claims were brought under the ADA, Section 504 of the Rehabilitation Act and California state law.¹² The defendants were the City and the County of Los Angeles. The plaintiffs reached a settlement with the County, but not the City. Accordingly, the plaintiffs filed a motion for summary judgment arguing that there were no issues of material fact and that judgment should be entered in their favor.

The City claimed that it could meet the needs of people with disabilities by providing them with ad hoc accommodations upon request.¹³ The City argued that its position was consistent with other aspects of the ADA, such as the provision requiring reasonable accommodations in the workplace. Similar to how employees must generally make the initial request to trigger the reasonable accommodation process, the City argued that people with disabilities must make requests for emergency assistance to trigger the City's responsibilities under the ADA.¹⁴ Accordingly, the City took the position that it was not required to be proactive in planning for the needs of people with disabilities.

The U.S. Department of Justice ("DOJ") was active in this case and filed a Statement of Interest in support of the plaintiffs.¹⁵ In its

10. *Mass Care and Shelter Plan Functional Needs Annex* 20-22, 36-37, 40-42 (Public Version 1.5, 2010) www.dralegal.org/case/california-foundation-for-independent-living-centers-cfilc-et-al-v-city-of-oakland-et-al/ (scroll to case files and click on "Mass Care and Shelter Plan Functional Needs Annex").

11. Complaint at 20-24, *Cmtys. Actively Living Indep. and Free v. City of L.A.*, 2:09-cv-00287-CBM-RZ (Jan. 14, 2009).

12. *Id.*

13. *Cmtys. Actively Living Indep. and Free v. City of L.A.*, 2011 WL 4595993, at *14 (C.D. Cal. Feb. 10, 2011).

14. *Id.* at *14-15.

15. Statement of Interest of the United States, *Cmtys. Actively Living Indep. and Free v. City of L.A.*, 2:09-cv-00287-CBM-RZ (Oct. 7, 2010), www.ada.gov/briefs/calif_interest_br.pdf (last visited Nov. 6, 2018).

brief, DOJ argued that the ADA requires state and local governments to plan and prepare for the needs of people with disabilities in advance, and that an ad hoc response is insufficient.¹⁶ DOJ also emphasized that the City had received \$50 million in federal funds from the Federal Emergency Management Agency, and it failed to use those funds to include the needs of people with disabilities in its emergency planning.¹⁷ Finally, DOJ emphasized that Title II's integration requirement, which states that people with disabilities should be as integrated as much as possible in state and local government programs, applies to emergency preparedness.¹⁸

The court rejected the City's arguments and ruled in favor of the plaintiffs.¹⁹ First, the court held that emergency planning is a program under Title II of the ADA benefitting the citizens of Los Angeles.²⁰ This finding was significant because it was the first time that a court had held that the ADA applies to a government's emergency planning process. The court then held that the City's emergency planning violated the ADA by effectively excluding people with disabilities from the plan's benefits.²¹ Specifically, the court found that the City's emergency preparedness plan had no provisions for evacuating or temporarily housing people with disabilities, nor did it have any provisions for alerting people with auditory or cognitive disabilities in the event of an emergency.²²

The court found an internal report from the City's Department on Disability ("DOD") to be compelling evidence that the City had failed to address the needs of people with disabilities.²³ The report said that the City's emergency preparedness program "is seriously out of compliance" with the ADA and Section 504, and the City's residents with disabilities "will continue to be at-risk for suffering and death in disproportionate numbers unless the City drastically enhances the existing disability-related emergency management and disaster planning process and readiness as required by the ADA and other statutes."²⁴ The court found that the City did not take DOD's concerns seriously and failed to implement nearly all of DOD's recommendations.²⁵

Furthermore, the court was not persuaded by the City's arguments that responding to the needs of people with disabilities

16. *Id.* at 11-13.

17. *Id.* at 9-10.

18. *Id.* at 12-14.

19. *Cmtys. Actively Living Indep. and Free*, 2011 WL 4595993, at *14-15.

20. *Id.* at *13.

21. *Id.* at *13-14.

22. *Id.*

23. *Id.* at *14.

24. *Id.* at *13.

25. *Cmtys. Actively Living Indep. and Free v. City of L.A.*, 2011 WL 4595993, at *13 (C.D. Cal. Feb. 10, 2011).

on an ad hoc basis is all that is required by the ADA, finding those arguments to be “both legally inadequate and practically unrealistic.”²⁶ Rather, the court held that the “purpose of the City’s emergency preparedness program is to anticipate the needs of its residents in the event of an emergency and to minimize the very type of last-minute, individualized requests for assistance described by the City, particularly when the City’s infrastructure may be substantially compromised or strained by an imminent or ongoing emergency or disaster.”²⁷ Accordingly, the court entered an Order requiring the City to hire an expert and revise the City’s emergency preparedness program.²⁸

C. *Brooklyn Center for Independence of the Disabled v. Bloomberg (2011)*

The next major disability emergency planning case following the Los Angeles litigation was brought in New York, in *Brooklyn Center for Independence of the Disabled v. Bloomberg*.²⁹ The named plaintiffs in this class action were two disability rights advocacy organizations and a woman with a mobility disability. Similar to the Oakland and Los Angeles cases, legal claims were brought under Title II of the ADA, Section 504 of the Rehabilitation Act and New York City law.³⁰

The suit laid out New York’s history of multiple emergencies including terrorist attacks, hurricanes, fires and winter storms. The suit alleged that although New York had created impressive plans for the general population to deal with these emergencies, it had failed to plan appropriately for the nearly 900,000 people with disabilities within New York City, who are especially vulnerable during disasters.³¹

Unlike the Oakland and Los Angeles cases, the New York case went to trial, where a judge found in favor of the plaintiffs and held that the City had violated the ADA, Section 504 of the Rehabilitation Act and city law.³² The court found that the City’s

26. *Id.* at *14.

27. *Id.*

28. Order Granting Plaintiffs’ Motion for Summary Adjudication on Liability, *Cmtys. Actively Living Indep. and Free v. City of L.A.*, 2:09-cv-00287-CBM-RZ (Feb. 10, 2011); Injunctive Order re: Injunctive Relief, *Comm. Actively Living Ind. and Free v. City of L.A.*, 2:09-cv-00287-CBM-RZ (Nov. 9, 2011); [Proposed] Class Settlement Agreement, *Cmtys. Actively Living Indep. and Free v. City of L.A.*, 2:09-cv-00287-CBM-RZ (Oct. 15, 2012).

29. Complaint, *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 11 CIV 6690 JMF (S.D.N.Y. Sept. 26, 2011).

30. *Id.* at 17-23; *see also* N.Y.C. Admin. Code §§ 8-101-104 (2016) (referring to New York City Human Rights Law).

31. Complaint, *supra* note 29, at 17-23.

32. *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 980 F.Supp.2d 588 (S.D.N.Y. 2013).

emergency preparedness program failed to:

1. sufficiently accommodate people with disabilities in evacuating buildings;³³
2. provide people with disabilities with meaningful access to the City's emergency shelter system;³⁴
3. account for people with disabilities during power outages;³⁵
4. provide outreach and personal emergency planning for people with disabilities;³⁶
5. adequately communicate with people with disabilities;³⁷ and
6. develop a meaningful plan to ensure sufficient accessible transportation to evacuate people with disabilities during an emergency.³⁸

The court emphasized that the systems the City had in place to ensure that the voices of people with disabilities were heard had been insufficient. The City argued that it had a Special Needs Coordinator within the Office of Emergency Management ("OEM") whose role was to provide guidance on incorporating the needs of people with disabilities into the City's emergency plans. However, the court found that the Special Needs Coordinator position was on the lowest rung of OEM's organizational chart and had no involvement in the development of the City's emergency plan, including its sheltering and evacuation plans.³⁹

Similarly, the City touted that it had a Special Needs Advisory Committee to discuss emergency planning and provide input and suggestions to the City. However, the court found that the Committee was inadequate to address the needs of people with disabilities since its role was only advisory, it had no decision-making authority, and it had not reviewed the City's emergency plans in their entirety.⁴⁰

33. *Id.* at 644-46.

34. *Id.* at 646-50.

35. *Id.* at 652.

36. *Id.* at 654-55.

37. *Id.* at 655-56.

38. *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 980 F.Supp.2d 606 (S.D.N.Y. 2013).

39. *Id.* at 599.

40. *Id.* at 600-01.

Finally, the court found it problematic that no one at the New York Police Department or Fire Department was designated to focus on the needs of people with disabilities.⁴¹ The testimony by New York Fire Department personnel made clear that they believed there was “no need to plan specifically for the evacuation of people with disabilities” as they treat everyone the same by conducting an on the scene case-by-case assessment of individual needs and that no pre-planning is done or needed.⁴²

As result of these findings, the court ordered the plaintiffs and the City, along with the Department of Justice (which had submitted a Statement of Interest⁴³ similar to the one in the Los Angeles case) to develop a plan to remedy the legal violations. Ultimately, a Settlement Agreement was reached and approved by the court in 2015.⁴⁴ Key components of the Settlement Agreement require the City to:

1. hire a Disability Access and Functional Needs Coordinator who would have more authority and prominence than the previous Special Needs Coordinator;
2. establish a Disability Community Advisory Panel to provide feedback on a regular basis regarding the City’s emergency plans and proposed revisions that would have more active involvement than the previous Special Needs Advisory Committee;
3. ensure at least 60 shelters are physically and programmatically accessible;
4. create a Post-Emergency Canvassing Operation to survey households after a disaster to identify and assess the needs of people with disabilities by going door-to-door and responding to resource requests, including food, water, electricity, medical care and equipment;
5. develop accessible transportation plans for use during emergencies that would ensure coordination by the

41. *Id.* at 600.

42. *Id.* at 603.

43. Statement of Interest of the United States, Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg, 11 CIV 6690 JMF, www.ada.gov/brooklyn-cil-brief.doc (last visited Dec. 13, 2018).

44. Stipulation of Settlement and [Proposed] Remedial Order, Brooklyn Ctr. for Indep. of the Disabled v. de Blasio 11 CIV 6690 JMF (Sept. 30, 2014); Complaint, Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg, 11 CIV 6690 JMF (Sept. 26, 2011); Opinion, and Order, Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg, 11 CIV 6690 JMF (Nov. 7, 2013).

Metropolitan Transit Authority, the Taxi and Limousine Commission and the New York Housing Authority; and

6. convene an ADA High Rise Building Evacuation Task Force to create a comprehensive evacuation work plan.

*D. United Spinal Association v. District of Columbia
(2014)*

The most recent ADA case filed against a municipality for failing to adequately address the needs of people with disabilities in emergency planning is *United Spinal Association v. District of Columbia*.⁴⁵ The named plaintiffs in this class action are two disability rights advocacy organizations, a woman who is blind, a woman who is hard of hearing, and a woman with a mobility disability. Suit was brought under the ADA, Section 504 of the Rehabilitation Act and the D.C. Human Rights Act.

Like the New York City case, the complaint alleges that D.C. has engaged in extensive emergency planning, but the needs of people with disabilities have not been adequately addressed. Specifically, the complaint alleges that D.C. has failed to:

1. publicize information about accessible emergency shelters;
2. plan for emergency communications for people who are deaf or blind;
3. put emergency evacuation options in place; and
4. plan for supply chain disruptions for medication and replacement of durable medical equipment.⁴⁶

Soon after the case was filed, the parties agreed to mediation to attempt to resolve the dispute. At the time of the writing of this article, the parties have reached a settlement agreement in principle on all substantive issues, but are finalizing the relevant timeframes for implementation and other particulars.⁴⁷

45. Complaint for Discrimination; Injunctive and Declaratory Relief, *United Spinal Ass'n v. Dist. of Columbia*, 1:14-cv-01528-CKK (Sept. 9, 2014).

46. *Id.* at 19-22.

47. Joint Status Report, *United Spinal Ass'n v. Dist. of Columbia*, 1:14-cv-01528-CKK (June 5, 2018).

E. California Foundation for Independent Living Centers v. County of Sacramento (2012)

All of the cases discussed thus far have alleged that a governmental entity has failed to meet the needs of people with disabilities in all aspects of emergency planning. Recently, cases have been filed that focus on a specific location, issue, or incident.

In *California Foundation for Independent Living Centers v. County of Sacramento*, the focus was on emergency preparedness at a specific location, the Sacramento International Airport. The named plaintiffs in this class action are a disability rights advocacy organization and a woman with a mobility disability. The suit alleges that the County of Sacramento discriminates against people with mobility disabilities under Title II of the ADA, Section 504 of the Rehabilitation Act and California state law.⁴⁸

Prior to the suit being filed, the County of Sacramento spent \$1 billion to build a new airport terminal building. The plaintiffs allege that the terminal fails to comply with the ADA's new construction standards.⁴⁹ In addition to numerous physical ADA violations, the plaintiffs also allege that the new terminal does not have adequate emergency evacuation procedures for travelers with disabilities.

The parties filed cross motions for summary judgment and the court granted partial summary judgment to the plaintiffs. With respect to the emergency planning issues, the court found that the County had:

1. no plan for evacuating people with disabilities from the People Mover;
2. failed to train personnel on needs of people with disabilities;
3. failed to reserve personnel to assist people with disabilities;
4. inadequate communication about accessible evacuation assistance within the airport; and
5. inadequately incorporated the needs of people with disabilities into the airport's recovery plan.⁵⁰

48. *Cal. Found. for Indep. Living Ctrs. v. City. of Sacramento*, 142 F.Supp.3d 1035 (E.D. Cal. Dec. 20, 2012).

49. *Id.*

50. *Id.* at 1062-64.

This was the first time that the ADA had been applied to an airport's emergency evacuation plan. Following the court's ruling, the parties agreed to discuss a possible settlement. At the time of the writing of this brief, settlement negotiations were ongoing.⁵¹

F. Enos v. State of Arizona (2016)

While the previous case focused on the adequacy of emergency planning for a particular place, the next case focuses on the adequacy of emergency planning for a particular service, 911 emergency services. The case is *Enos v. State of Arizona*,⁵² and was brought by the National Association of the Deaf ("NAD") and three individuals who are deaf or hard of hearing. The suit was filed under Title II of the ADA and Section 504 of the Rehabilitation Act. Defendants are the State of Arizona and various local governmental entities that play some role in providing 911 emergency services.

The complaint alleges that Arizona's 911 emergency services are discriminatory because they are inaccessible to people who are deaf and hard of hearing.⁵³ Currently, people in Arizona who are deaf and hard of hearing can only access 911 emergency services by using a TTY machine⁵⁴ or the Telecommunications Relay Service ("TRS").⁵⁵ Plaintiffs contend that neither of these options is adequate and fails to provide deaf and hard of hearing people with meaningful access to Public Safety Access Points ("PSAPs"), which

51. Emergency planning litigation based on a particular location was also brought in the prison context in *Holmes v. Godinez*, 11 C 2961 (N.D. Ill. May 4, 2011). In that case, prisoners who are deaf and hard of hearing alleged that warnings about emergencies were not provided in an accessible manner. A federal judge recently approved a settlement in that case which, among other things, requires that deaf and hard of hearing prisoners receive accessible notifications about fires, emergencies and evacuations. The Settlement Agreement can be found at: www.equipforequality.org/wp-content/uploads/2018/07/Holmes-Stipulation-of-Settlement.pdf.

52. Complaint, *Enos v. State of Ariz.*, 2:16-cv-00384-JJT (Feb. 11, 2016) [hereinafter *Enos Complaint*].

53. *Id.* at 23-28.

54. A TTY is a device that allows people who are deaf, hard of hearing, or speech-impaired to use the telephone to communicate, by allowing them to type messages back and forth to one another instead of talking and listening. A TTY is required at both ends of the conversation to communicate.

55. TRS uses operators, called communications assistants (CAs), to facilitate telephone calls between people with hearing and speech disabilities and other individuals. A TRS call may be initiated by either a person with a hearing or speech disability, or a person without such disability. When a person with a hearing or speech disability initiates a TRS call, the person uses a TTY to call the TRS relay center, and gives a CA the number of the party that he or she wants to call. The CA places an outbound traditional voice call to that person, then serves as a link for the call, relaying the text of the calling party in voice to the called party, and converting to text what the called party voices back to the calling party.

handle 911 calls.⁵⁶ While TTYs were for many years a primary way for deaf and hard of hearing people to communicate over the phone, they have become obsolete as technology has advanced. Similarly, TRS is deemed an inadequate solution because it requires access to a high-speed internet connection, which is often not available. Plaintiffs also allege that people with other communication disabilities, such as cerebral palsy, Parkinson's Disease, and non-verbal autism are denied meaningful access to 911 emergency services.⁵⁷

As an alternative to the current 911 options, plaintiffs requested that Arizona implement a system that would provide access to 911 emergency services by sending text messages via cell phones.⁵⁸ Plaintiffs alleged that defendants refused to implement a text-to-911 option despite the fact that 599 municipalities in 32 other states have adopted such systems.

In response to the complaint, defendants filed a motion to dismiss.⁵⁹ Defendants argued that Title II of the ADA requires only meaningful access and not equal access to state and local government services.⁶⁰ Because there already is a reasonable process for plaintiffs to access 911 emergency services, defendants claimed they have met their obligations under the ADA.

The court denied the motion to dismiss and allowed the plaintiffs' case to proceed.⁶¹ Specifically, the court found that plaintiffs had made sufficient allegations that not being able to use text messaging to access 911 emergency services is a denial of the ADA's requirement to provide people with disabilities with meaningful access to a government program. "By alleging that deaf and hard of hearing persons cannot access PSAPs when outside their homes and beyond access to high-speed internet, Plaintiffs have stated a meaningful access claim."⁶²

The court also held that the individual plaintiffs have legal standing to bring this case. The court found the plaintiffs alleged past difficulties accessing 911 emergency services and sufficiently alleged a "real likelihood" that they will need to contact 911 in the future and there is a real and immediate threat of repeated injury due to the defendants' failure to provide text-to-911 service.⁶³

Similarly, the court held that NAD has legal standing as an organizational plaintiff. The court found that the complaint sufficiently alleges that many NAD members do not have TTY

56. Enos Complaint, *supra* note 52, at 29-30.

57. *Id.* at 9, 16.

58. *Id.* at 29-30.

59. Motion to Dismiss on Behalf of Defendant City of Surprise, *Enos v. State of Ariz.*, No. 2:16-cv-00384-JJT (July 29, 2016).

60. *Id.* at 5-11.

61. Order, *Enos v. State of Ariz.*, No. 2:16-cv-00384-JJT (Feb. 10, 2017).

62. *Id.* at 3.

63. *Id.* at 4-5.

equipment or high-speed internet access and thus, cannot access 911 emergency services. Since NAD members would have standing to sue in their own right, NAD has standing as an organization. Moreover, NAD alleged sufficient facts that its claims are germane to NAD's purpose and the lawsuit is widely applicable to all of its members, and thus, NAD has associational standing.⁶⁴

Following the court's ruling, plaintiffs reached a settlement with the State and several of the defendant counties.⁶⁵ The settlement agreement with the State includes the following provisions:

1. The State created a Text-to-911 Services Fund and must make \$1,362,964.85 available for Emergency Communication Service Providers around the state in order to implement Text-to-911 services;
2. The State must publish a Text-to-911 Implementation Plan that sets forth how the State will implement its new Text-to-911 service; and
3. The agreement will not be terminated sooner than three years after the effective date of the agreement, and after that period has run, if no reasonable, unresolved disputes are outstanding, Plaintiffs will provide the State with a release of all claims.⁶⁶

G. *Loye v. County of Dakota (2009)*

The final case for this section addresses the adequacy of a governmental entity's response to people with disabilities following a particular emergency incident. In *Loye v. County of Dakota*, four deaf individuals filed suit under the ADA, Section 504 of the Rehabilitation Act and Minnesota state law alleging that the County failed to provide them with adequate communication after a hazardous substance was released on a playground.⁶⁷ Police officers and other governmental workers canvassed the area to determine who might have been exposed. It was determined that 49 people had been exposed, including the four plaintiffs. The plaintiffs alleged that the defendants failed to provide American Sign Language interpreters during the decontamination process and follow up services for people who had been exposed. The district court granted the defendants' motion for summary judgment and

64. *Id.* at 5.

65. Case Resolution Stipulation (Re: State of Arizona), *Enos v. State of Ariz.*, No. 2:16-cv-00384-JJT (July 3, 2018).

66. *Id.* at 5-8.

67. *Love v. City of Dakota*, 625 F.3d 494, 496 (8th Cir. 2010).

the plaintiffs appealed to the Eighth Circuit Court of Appeals.⁶⁸

The Eighth Circuit found in favor of the defendants.⁶⁹ With respect to the initial decontamination process, the court held that it was not reasonable to require the emergency responders to come equipped with a full-time interpreter. The court found that plaintiffs were able to follow directions and successfully complete the decontamination process using alternate communication efforts (writing notes, gesturing, lip reading and limited sign language). Because waiting for an interpreter was deemed unreasonable under the exigent circumstances, and because plaintiffs were found to have meaningful access to the emergency decontamination services, the court held there was no ADA violation.⁷⁰ The court further found that there were no ADA violations during follow up large-group meetings and in-person meetings, as either ASL interpreters were provided or other means of communication were effective.⁷¹

III. EMERGENCY PREPAREDNESS LITIGATION AGAINST SCHOOLS

Since the passage of the ADA, there has been a dramatic increase in mass shootings in the United States.⁷² Many of these shootings have taken place at educational institutions, including prominent mass shootings at Columbine High School, Virginia Tech University, Sandy Hook Elementary School and Stoneman Douglas High School.

The ADA requires that public schools (Title II) and private schools (Title III) make reasonable modifications to their programs to meet the needs of students with disabilities. Subsequent litigation confirms that these obligations to students with disabilities extend to emergency planning.

A. *Shirey v. City of Alexandria School Board (1998)*

The first reported case on emergency preparedness under the ADA was *Shirey v. City of Alexandria School Board*, which was filed in 1998.⁷³ Unlike all of the other litigation discussed thus far, the

68. *Id.*

69. *Id.* at 501.

70. *Id.* at 498.

71. *Id.* at 498-501.

72. See, e.g., Michael S. Schmidt, *F.B.I. Confirms a Sharp Rise in Mass Shootings Since 2000*, N.Y. TIMES (Sept. 24, 2014), www.nytimes.com/2014/09/25/us/25shooters.html (indicating that there were, on average, 16.4 school shootings per year from 2007 to 2013, compared with an average of 6.4 shootings annually from 2000 to 2006. In the past 13 years, 486 people have been killed in such shootings, with 366 of the deaths in the past seven years).

73. Complaint, *Shirey v. City of Alexandria Sch. Bd.*, 1:98-cv-00313-JCC (Mar. 6, 1998).

Shirey case was brought on behalf of one person with a disability who experienced problems during school emergency evacuations.

Cady Shirey attended G.W. Middle School in Alexandria Virginia. Her disability required the use of a motorized wheelchair. By all accounts, the school provided the accommodations and services Cady needed to be fully included in school.

In 1996, the school was evacuated because of a bomb threat. While all of the non-disabled students were evacuated, Cady and another student with a disability remained in the school for seventy minutes with one of the teachers. Although no bomb was discovered in the school, Cady's parents were upset that their daughter was not evacuated. Accordingly, Cady's parents filed a Complaint with the Office for Civil Rights ("OCR") of the U.S. Department of Education. The Complaint alleged that the School Board discriminated against Cady by failing to evacuate her during the bomb threat incident because of her disability. The parties agreed to mediation through OCR's Early Complaint Resolution procedure. As a result, an agreement was reached and Cady's parents agreed to drop their pending OCR Complaint against the School Board.

Under the OCR Agreement, the School Board committed to develop a new Emergency Preparedness Plan to address the needs of students with disabilities with input from Cady's parents. Under the new plan, students with disabilities would be sent to a designated safe room in the event of an emergency with a responsible adult where a special flag and cell phone would be placed to facilitate communication with school and emergency responders. If an actual evacuation were necessary, emergency personnel would evacuate the students with disabilities from the identified safe room. Training was provided on the new plan and practice drills were conducted to ensure that it worked smoothly.

In 1997, an unscheduled fire alarm went off. Cady went to the designated safe room while other students evacuated the building. However, contrary to the plan, the faculty member designated to stay with Cady in the safe room evacuated with the non-disabled students. Cady was left alone until her math teacher found her and stayed with her for the duration of the incident.

Following this incident, Cady's parents filed suit under Title II of the ADA and Section 504 of the Rehabilitation Act based on both incidents in which Cady had not been evacuated and based on alleged defects in the revised emergency plan. The trial court entered summary judgment in favor of the School Board with respect to both incidents, and the plaintiffs appealed to the Fourth Circuit Court of Appeals.

The Fourth Circuit ruled for the plaintiffs with respect to the first incident and ruled for the defendants with respect to the second incident.⁷⁴ For the first incident, the court found that undisputed

74. *Shirey ex rel. Kyger v. City of Alexandria Sch. Bd.*, 229 F.3d 1143 (4th

facts demonstrated that the School Board had no reasonable plan in place to evacuate students with disabilities during an emergency.⁷⁵ Accordingly, the School Board was liable under the ADA and the Rehabilitation Act. However, the court held that the remedy for that violation would be for the School Board to develop and implement a reasonable evacuation plan for students with disabilities. Since the School Board developed and implemented such a plan after the first incident, the court held that no further relief was warranted.⁷⁶

With respect to the second incident, the court found that Cady was not excluded from safe evacuation procedures. The School Board had developed and implemented a revised emergency preparedness plan to safely evacuate students with disabilities with the advice of local fire and police officials and with input from Cady's parents. The court held that imperfect execution of the plan was not an ADA violation, as long as the plan itself conformed to the ADA and that reasonable implementation efforts, such as training and practice drills, had been made.⁷⁷ Because the School Board's plan and its subsequent implementation efforts were deemed reasonable, the court held there was no ADA violation.

B. Jagielski-Bazzell v. Los Angeles Unified School District (2015)

More recently, another school district was sued for an inadequate emergency evacuation plan. In *Jagielski-Bazzell v. Los Angeles Unified School District*,⁷⁸ the school at issue was Marlton School, a public school for students who are deaf or hard of hearing. The plaintiffs in this case were not students with disabilities, but instead were five deaf or hard of hearing faculty. They brought their claim under Title I of the ADA for employment discrimination, as well as under Section 504 of the Rehabilitation Act and California state law.⁷⁹ Specifically, they alleged that the emergency evacuation plan was discriminatory because it did not allow them to safely evacuate themselves and their students. The complaint alleged Marlton has historically broadcast emergency information over loudspeakers, which was not accessible to the plaintiffs, and that after plaintiffs complained, the school had not made meaningful changes to its emergency procedures. Plaintiffs further alleged that when an emergency arises, they cannot determine whether they should evacuate themselves and their students or

Cir. 2000).

75. *Id.* at *4-5.

76. *Id.* at *5-6.

77. *Id.*

78. Complaint, *Jagielski-Bazzell v. L.A. Unified Sch. Dist.*, No. 2:15-cv-02921-BRO-GJS (Apr. 20, 2015).

79. *Id.*

whether they should shelter in place because it is not safe to evacuate.

Following the filing of the complaint, the parties entered into a settlement agreement.⁸⁰ Highlights of the settlement include:

1. installation in classrooms and common areas of a new visual PA system with large HD screens, scrolling LCD display, and video phones to communicate emergency messages and allow two-way communication with the front office;
2. installation of flashing doorbells and peepholes or windows on classroom doors;
3. an ASL interpreter in the command center during emergencies;
4. addition of ASL to the video describing emergency procedures at the school;
5. a meeting with first responders regarding the new procedures and equipment;
6. installation of a two-way video camera at the entrance gate to the school facilitating better communication for staff who are deaf; and
7. monetary relief of \$30,000 per plaintiff – for a total of \$150,000.

IV. USE OF DIRECT THREAT DEFENSE IN THE CONTEXT OF EMERGENCY EVACUATION

All the previous cases discussed in this brief arose from concerns that the safety of people with disabilities is at risk in emergency evacuations. However, there is one early ADA case in which the safety of non-disabled people was raised as a defense in the context of a person with a disability seeking an accommodation. The case is *Fielder v. American Multi-Cinema*⁸¹ (“AMC”) and was filed by a wheelchair user who alleged that accessible seating was

80. Settlement Agreement and Release, *Jagielski-Bazzell v. L.A. Unified Sch. Dist.*, No. 2:15-cv-02921-BRO-GJS (Sept. 29, 2016), www.equipforequality.org/news-item/settlement-agreement-addresses-emergency-preparedness-people-disabilities-school-setting/ (last visited Dec. 13, 2018).

81. Complaint, *Fielder v. Am. Multi-Cinema*, No. 1:92-cv-00486-TPJ (Feb. 26, 1992).

not fully integrated in a movie theater. Instead, accessible seating was relegated to the last row of the theater. He sued for public accommodation discrimination under Title III of the ADA and state common law.

AMC filed a motion for summary judgment arguing, among other things, that the presence of a wheelchair in the midst of non-disabled patrons could impede evacuation in the event of an emergency. AMC argued that by accommodating the plaintiff with integrated seating, he would pose a direct threat to the health and safety of others theater patrons, and thus, AMC's disparate treatment was justified.⁸²

The court denied AMC's motion for summary judgment, but expressed some sympathy to AMC's argument.⁸³ The court said that while the plaintiff himself was "agile" and able to move quickly in his wheelchair, other people using wheelchairs may not be, making the threat to non-disabled theater patrons more acute. The court ruled that under the ADA there needed to be an "individualized assessment" as to whether plaintiff and other wheelchair users would pose a significant risk to the emergency evacuation of non-disabled theater patrons, and if so, whether AMC could readily achieve an accommodation that would ameliorate the potential dangers.⁸⁴

This case was decided shortly after the implementation of the ADA and is not a typical scenario of the intersection between emergency preparedness and the ADA. However, ADA stakeholders should be aware of this potential argument when working on emergency preparedness issues.

V. EMERGENCY PREPAREDNESS GUIDANCE AND RESOURCES FROM FEDERAL AGENCIES

As noted previously, neither the ADA nor its implementing regulations specifically reference emergency preparedness. However, several federal agencies have developed guidance and resources to help stakeholders incorporate disability-related issues into emergency planning.

The U.S. Department of Justice has two main resources on emergency preparedness and people with disabilities. The "Title II Checklist: Emergency Management"⁸⁵ is a very practical tool for Title II entities to use to ensure that they focus on critical emergency planning issues for people with disabilities.

82. *Fiedler v. Am. Multi-Cinema, Inc.*, 871 F. Supp. 35, 36-37 (D.D.C. 1994).

83. *Id.* at 39-40.

84. *Id.* at 40.

85. ADA Best Practices Tool Kit for State and Local Governments, *Chapter 7 Addendum 1: Title II Checklist: (Emergency Management)* (July 26, 2007), <https://www.ada.gov/pca toolkit/toolkitmain.htm> (scroll to Chapter 7 Addendum 1: Title II Checklist: (Emergency Management)).

Additionally, DOJ has issued guidance called “Making Community Emergency Preparedness and Response Programs Accessible to People with Disabilities: An ADA Guide for Local Governments.”⁸⁶ This guide identifies and discusses the primary areas of concern for emergency preparedness and ADA compliance including:

notification

evacuation

emergency transportation

sheltering

access to medications, refrigeration and back-up power

access to mobility devices or service animals

access to information

The guide also a) highlights the importance of using multiple methods of communication; b) promotes the use of confidential and optional registries to identify people with disabilities who need assistance; c) reviews all aspects of shelter accessibility; and d) emphasizes that including people with disabilities in the planning process is critical.

Additionally, the U.S. Department of Health and Human Services has developed a publication on emergency planning and people with disabilities called “Avoiding Disasters for the Special Needs Population: Effective Planning, Response, and Recovery for the Special Needs Population, Consistent with Federal Civil Rights Laws.”⁸⁷ In addition to reiterating the issues raised in the DOJ documents referenced above, this guide has two additional recommendations:

1. Have readily available or contract out for quick access to durable medical equipment, medications, and other

86. *An ADA Guide for Local Governments, Making Community Emergency Preparedness and Response Programs Accessible to People with Disabilities*, DEP’T OF J. DISABILITY RIGHTS SECTION, www.ada.gov/emerepreguideprt.pdf (last visited Oct. 1, 2018).

87. *Avoiding Disasters for the Special Needs Population: Effective Planning, Response, and Recovery for the Special Needs Population, Consistent with Federal Civil Rights Laws*, U.S. DEP’T OF HEALTH & HUMAN SERVS., www.hhs.gov/sites/default/files/ocr/civilrights/resources/specialtopics/emergencypre/eptrainingppt.pdf (last visited Oct. 1, 2018).

supplies potentially necessary for individuals with disabilities; and

2. Secure necessary personnel, vehicles, and tools for accessible evacuation and transportation.

The U.S. Department of Education has developed extensive materials that cover a range of emergency planning to assist with K-12 and higher education entities to meet the needs of students with disabilities and comply with the ADA.⁸⁸ Topics include: active shooters, biological hazards, and family reunification.

Finally, the U.S. Department of Homeland Security has developed a series of guides on emergency planning for a variety of stakeholders. The series includes a guide specifically for people with disabilities that has step-by-step instructions on developing a personal emergency preparedness plan, as well as many practical tips.⁸⁹

VI. CONCLUSION

Although the ADA and its implementing regulations do not specifically address emergency preparedness, courts have been unanimous in finding that the ADA applies to emergency preparedness planning. The court decisions, settlement agreements and subsequent federal guides provide a clear road map on how the needs of people with disabilities can be effectively incorporated into emergency preparedness plans.

88. *Ensuring Access and Functional Needs are Met Before, During, and After Emergency Incidents*, U.S. DEP'T OF EDUC., www.rems.ed.gov/Resource_Plan_Basic_AFN_For_IT.aspx (last visited Oct. 1, 2018).

89. *Plan Ahead for Disasters: Individuals with Disabilities*, U.S. DEP'T OF HOMELAND SEC., www.ready.gov/individuals-access-functional-needs (last visited Oct. 1, 2018).