

U.S. Department of Justice

Civil Rights Division

*Appellate Section - PHB
950 Pennsylvania Avenue, N.W.
Washington, DC 20530*

October 25, 2002

Roseann B. MacKechnie
Clerk
United States Court of Appeals
for the Second Circuit
U.S. Courthouse, 40 Foley Square
New York, New York 10007

Re: *Anderson, et al. v. Rochester-Genesee Regional Transp. Auth., et al.*,
No. 01-9105 (2d Cir.)

Dear Ms. MacKechnie:

The United States, on behalf of the Department of Transportation (“DOT” or “Department”), respectfully submits this letter brief in response to the Court’s July 26, 2002, Order requesting the Department’s views on the meaning of its regulatory provisions governing complementary paratransit services required by Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12132 and 12143. Specifically, the Court requested the Department’s views on three issues:

1. Whether 49 C.F.R. 37.131(b) obligates public transit authorities to provide paratransit service to all eligible persons requesting next-day rides;
2. How 49 C.F.R. 37.131(b) interacts with the “capacity constraints” provision of 49 C.F.R. 37.131(f); and
3. How a paratransit provider should determine if it has denied a “substantial number” of trips in violation of 49 C.F.R. 37.131(f)(3)(i)(B).

The Department’s response to each of these issues is set forth below.

BACKGROUND

The ADA prohibits discrimination against individuals with disabilities in the provision of public services, and specifically provides that

[i]t shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system (other than a system which provides solely commuter bus service) to fail to provide with respect to the operations of its fixed route system, in accordance with this section, paratransit and other special transportation services to individuals with disabilities, including individuals who use wheelchairs, that are sufficient to provide to such individuals a level of service (1) which is comparable to the level of designated public transportation services provided to individuals without disabilities using such system; or (2) in the case of response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities using such system.

42 U.S.C. 12143(a).

Section 12143 also required DOT to adopt regulations implementing these and other requirements relating to paratransit services. Accordingly, DOT's regulations, set forth in Subpart F of Part 37 in Title 49 of the Code of Federal Regulations, specifically require that "each public entity operating a fixed route system shall provide paratransit or other special service to individuals with disabilities that is comparable to the level of service provided to individuals without disabilities." 49 C.F.R. 37.121(a).

Section 37.121(b) provides that "[t]o be deemed comparable to a fixed route service, a complementary paratransit system shall meet the requirements of §§ 37.123-37.133 of this subpart." Within that subpart, section 37.131 sets further "[s]ervice criteria for complementary paratransit" that must be addressed in all paratransit plans. Paragraph 37.131(a) addresses the geographic area to be served; (b) addresses service reservation criteria; (c) addresses the fares to be charged; and (d), (e), and (f) address limitations on service. Paragraph (g) addresses additional service that also may be provided. Compliance with paragraphs (a) through (f) is required for every paratransit plan.

As noted, the ADA in 42 U.S.C. 12143(a), states that, "in the case of response time [paratransit service must be] comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities using the [fixed route transit] system." In response to this statutory directive, DOT adopted the next-day response time requirement in 49 C.F.R. 37.131(b). DOT considered requiring transit providers to respond to calls for paratransit service on the same day they were received, or to schedule service within the same intervals at which fixed route service is available. See 56 Fed. Reg. 13,869 (1991).

However, the Department determined that the best method of implementing the comparability

requirement in Section 12143(a)(2) was to require transit authorities to comply with the rule on a next-day service basis. 56 Fed. Reg. 45,606 (1991). In promulgating the response time regulation, the Department therefore made a clear, firm determination that next-day service was the level of service that would be both “comparable” to the service provided to individuals without disabilities using fixed-route systems, and “practicable” for the transit authorities required to provide that service.¹

DOT’s regulations, in pertinent part, thus address the “next-day” service requirement as follows:

(b) *Response time.* The entity shall schedule and provide paratransit service to any ADA paratransit eligible person at any requested time on a particular day in response to a request for service made the previous day. * * *

49 C.F.R. 37.131(b). DOT regulations also specifically prohibit the transit authority from denying service based on “capacity constraints,” stating, in pertinent part, as follows:

(f) *Capacity constraints.* The entity shall not limit the availability of complementary paratransit service to ADA paratransit eligible individuals by any of the following:

- (1) Restrictions on the number of trips an individual will be provided;
- (2) Waiting lists for access to the service; or
- (3) Any operational pattern or practice that significantly limits the availability of service to ADA paratransit eligible persons.

(i) Such patterns or practices include, but are not limited to, the following:

- (A) Substantial numbers of significantly untimely pickups for initial or return trips;
- (B) Substantial numbers of trip denials or missed trips;

¹ The statute required the Department to determine the type of service that would be both “comparable” and “practicable.” The statutory “to the extent practicable” provision was never intended to give a transit authority the discretion to adhere to the Department’s requirement only to the extent that it believes practicable.

(C) Substantial numbers of trips with excessive trip lengths.

(ii) Operational problems attributable to causes beyond the control of the entity (including, but not limited to, weather or traffic conditions affecting all vehicular traffic that were not anticipated at the time a trip was scheduled) shall not be a basis for determining that such a pattern or practice exists.

49 C.F.R. 37.131(f).

RESPONSES TO THE COURT'S QUESTIONS

1. Does 49 C.F.R. 37.131(b) obligate public transit authorities to provide paratransit service to *all* eligible persons requesting next-day rides?

Section 37.131(b) states that a transit provider is obligated to “schedule and provide paratransit service to any ADA paratransit eligible person at any requested time on a particular day in response to a request for service made the previous day.” By its terms, Section 37.131(b) imposes an affirmative obligation on transit agencies to design, fund, and implement a next-day service to meet the foreseeable needs of all ADA-eligible individuals. Like 49 C.F.R. 37.131(a), which imposes obligations respecting area coverage, Section 37.131(b) prescribes the obligation in unqualified terms. The regulation accordingly forecloses any planned non-coverage. A transit provider cannot, for example, plan to deny next-day service to some “insubstantial” number of eligible individuals or plan to deny next-day service to a particular, remote neighborhood. The DOT has consistently advised transit providers that they must design, fund, and implement their programs to meet 100% of the anticipated demand for next-day paratransit service from eligible individuals. See, *e.g.*, Letter from William P. Sears, Chief Counsel of DOT’s Federal Transit Administration (FTA), to Richard DeRock, Executive Director of Access Services, Inc. (Jan. 9, 2002) (reprinted in Addendum A to Appellant’s Opening Brief); Letter from Patrick W. Reilly, then-Chief Counsel of the FTA, to Cheryl Y. Spicer, Chief Operating Officer of the Southeastern Pennsylvania Transportation Authority (Dec. 28, 1999) (reprinted at Joint Appendix A-468 to A-470); Letter from Patrick W. Reilly, then-Chief Counsel of the FTA, to Stephen F. Gold, Esq. (March 23, 1999) (reprinted at Joint Appendix A-474 to A-476).

2. How does 49 C.F.R. 37.131(b) interact with the “capacity constraints” provision of 49 C.F.R. 37.131(f)?

Sections 37.131(b) and 37.131(f) are complementary. Nevertheless, they address different aspects of administering a paratransit service. As explained above, Section 37.131(b) addresses a transit provider’s responsibilities from a conceptual perspective and imposes an affirmative obligation on transit authorities to design, fund, and implement a paratransit program that will fully meet the anticipated needs of ADA-eligible individuals for next-day paratransit service. Section 37.131(f), by contrast, addresses the transit provider’s responsibilities from the

practical perspective of “capacity constraints” and specifically imposes a prohibition on “[a]ny operational pattern or practice that significantly limits the availability of service to ADA paratransit eligible persons.” 49 C.F.R. 37.131(f)(3).

Section 37.131(f)(3) recognizes that a paratransit program which theoretically satisfies 100% of anticipated demand may suffer from inadequacies in actual operation that result in a denial of service. That provision explicitly states a prohibited pattern or practice can be established through a “substantial” number of trip denials. 49 C.F.R. 37.131(f)(3)(i)(B). Section 37.131(f)’s “substantial numbers” requirement embodies the common-sense notion that a “pattern or practice” of trip denials cannot be predicated on isolated instances, but instead involves repeated failures. See 49 C.F.R. Pt. 37, App. D, § 37.131, at 528 (2001). Even a well conceived paratransit service, designed, funded, and implemented to meet 100% of projected need, may occasionally experience trip denials. Section 37.131(f) accordingly recognizes that an “insubstantial” number of trip denials does not establish an “operational pattern or practice that significantly limits the availability of service to ADA paratransit eligible persons.” 49 C.F.R. 37.131(f)(3). Section 37.131(f) also recognizes, however, that “substantial numbers” of trip denials can establish that a paratransit service – no matter how well-designed, funded, or implemented in theory – is inadequate as a matter of actual operation.

Section 37.131(f)(3)(ii) makes clear that the cause of operational problems, as well as their frequency, is relevant in assessing the adequacy of a paratransit program. Operational problems that are attributable to causes beyond the transit agency’s control do not provide a basis for finding an impermissible pattern or practice. 49 C.F.R. 37.131(f)(3)(ii). Nevertheless, an excusable cause must truly be beyond the control of the transit provider. A transit agency is expected to anticipate recurrent traffic congestion, seasonal variations in weather, and the need to maintain vehicles. See 49 C.F.R. Pt. 37, App. D, § 37.131, at 528 (2001). As Section 37.131(f)(3)(ii) expressly indicates, the transit authority cannot disclaim responsibility for all traffic conditions, as distinguished from more specific problems, such as “traffic conditions affecting all vehicular traffic that were not anticipated at the time a trip was scheduled.” 49 C.F.R. 37.131(f)(3)(ii). Indeed, once a seemingly unforeseeable pattern develops, such as a recurring traffic jam at a particular location, the recurring event becomes foreseeable, and the transit authority can no longer claim the matter is beyond its ability to address.

3. How should a paratransit provider determine if it has denied a “substantial number” of trips in violation of 49 C.F.R. 37.131(f)(3)(i)(B)?

DOT has consistently taken the position that the determination of whether there is a substantial number of trip denials or missed trips requires a flexible approach. Generally speaking, there is no “magic number,” whether expressed in absolute terms or as a percentage, that can be used to determine whether a transit authority has denied or missed a substantial

number of trips.² Rather, DOT’s regulation is designed to allow flexibility so that individual

² In DOT’s ADA rulemaking proceeding, a few commenters suggested that the

transit authorities can account for the wide variety and nature of service required.³ Given this variety, the absolute number of trip denials, or even the percentage of denials, experienced on a given system may be more meaningful in some cases than in others. As the FTA Chief Counsel has written, “[a] determination of whether denials or missed trips are ‘substantial’ necessarily involves a factual case-by-case determination.” Letter from FTA Chief Counsel William P. Sears to Richard DeRock, Executive Director of Access Services, Inc. (Jan. 9, 2002) (reprinted in Addendum A to Appellant’s Opening Brief). The demographics, geography, type of service, and economic base of a large city’s multi-million-passenger-per-day system obviously differ from those of a small city’s thousand-passenger-per-day system. Under the regulation, DOT views paratransit trip denials within the context of each agency’s service profile.

Depending on the nature of a particular system, the following non-exhaustive list of considerations may be relevant in determining whether there has been a substantial number of trip denials: Has there been a time period sufficient to establish the existence of a pattern or practice, considering advance, next-day and total paratransit reservations? What changes has the transit authority instituted in the short term in order to address trip denial problems? Is the provider’s service improving or not, *i.e.*, is the provider attempting to address and correct prior denials of service? To what extent could the denials have been planned for or foreseen? Was the frequency and consistency of denials due to factors outside of the provider’s control? Moreover, the transit agency must determine whether it engaged in a good faith effort in its planning process to

estimate future demand, whether its resulting demand forecasts were reasonably based on the appropriate data, and whether those forecasts include a reasonable margin for circumstances in which actual demand may exceed demand forecasts.

Department should articulate an established performance standard, such as a requirement to meet 98 percent of trip requests per day. The Department declined to adopt such a bright line test. 56 Fed. Reg. 45,608 (1991).

³ For example, factors that DOT officials might bring to the attention of a transit provider seeking guidance about reducing its trip denials include the following: Is the transit operator making good faith efforts to ensure sufficient capacity for all eligible riders, *e.g.*, does it re-certify riders periodically to determine whether the conditions that made them eligible still exist? Has the transit authority taken steps to ensure that its fixed-route services are accessible to individuals with disabilities so as to reduce the need for paratransit services? Did the transit authority grandfather existing elderly and handicapped paratransit riders who are not eligible under the ADA’s more stringent criteria? Does it provide ADA paratransit service in excess of its fixed route service area? Is its reservation system designed to encourage reservations so far in advance as to constrain the availability of subsequent reservations or to result in rising numbers of no-shows and last-minute cancellations? Does its reservation system prevent a rider from booking the same trip twice? Has it established, and does it enforce, policies regarding riders who are chronic no-shows? Does it charge the maximum allowable fare in order to optimize revenue? Does it maintain vehicles and equipment in operable condition? Does it operate the system as a shared-ride system in order to maximize vehicle capacity?

Nevertheless, in some cases, it may be obvious from empirical data that a transit authority has denied a substantial number of trips. If, as alleged by appellees in this case, the Rochester-Genesee Regional Transit Authority failed to provide 57 percent of next-day reservation requests, if that denial rate pertains to ADA-eligible individuals, and if the denials are attributable to factors within the transit provider's control, then there can be no serious disagreement that the provider has engaged in an "operational pattern or practice that significantly limits the availability of service to ADA paratransit eligible persons." 49 C.F.R. 37.131(f)(3).

We hope that the foregoing information is helpful to the Court.

Sincerely,

Kirk K. Van Tine
General Counsel
Department of Transportation

Ralph F. Boyd, Jr.
Assistant Attorney General

William P. Sears
Chief Counsel
Federal Transit Administration

Jessica Dunsay Silver
Gregory B. Friel
Attorneys
Department of Justice
Civil Rights Division
Appellate Section

(Counsel for Department of Transportation)

CERTIFICATE OF SERVICE

(page 1 of 2)

I hereby certify that on October 25, 2002, two copies of the foregoing letter brief of the United States Department of Transportation were served by Federal Express, next business day delivery, on each of the following counsel for the parties:

David L. Cook, Esq.
Nixon, Peabody LLP
1300 Clinton Square
P.O. Box 31051
Rochester, New York 14603-1051
(counsel for appellees)

Bryan D. Hetherington, Esq.
Public Interest Law Office of Rochester
Suite 701
80 St. Paul St.
Rochester, NY 14604
(counsel for appellees)

Paul J. Yesawich, III, Esq.
Harris, Beach LLP
99 Garnsey Road
Pittsford, New York 14534
(counsel for appellants)

I further certify that on October 25, 2002, two copies of the same letter brief were served by first-class mail, postage prepaid, on each of the following counsel for the *amici curiae*:

Stephen F. Gold, Esq.
125 South 9th Street, Suite 700
Philadelphia, Pennsylvania 19130
(counsel for Eastern Paralyzed Veterans Ass'n)

Mary McCorry, Esq.
Martin B. Schnabel, Esq.
NYC Transit Authority Office of the General Counsel
130 Livingston Street, Room 1244
Brooklyn, New York 11201
(counsel for New York City Transit Authority)

CERTIFICATE OF SERVICE

(page 2 of 2)

I further certify that the same letter brief was filed in accordance with Fed. R. App. P. 25(a)(2)(B) by sending it to the Clerk of the United States Court of Appeals for the Second Circuit by Federal Express, next business day delivery, on October 25, 2002.

GREGORY B. FRIEL

Attorney