IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CAMERON MCCADDEN, a minor, by his next friend, CHRYSTAL MCCADDEN,

Plaintiff,

v.

CITY OF FLINT, et al.,

Defendants.
_____/

Hon. Denise Page Hood

Case No. 2:18-cv-12377-DPH-MKM

SURREPLY ON DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

In their reply brief, Defendants City of Flint and Chief Timothy Johnson argued for the first time that they should not be liable under disability nondiscrimination laws because, they contend, Defendant Terrance Walker did not know that Plaintiff Cameron McCadden has a disability. (ECF 23 at 12.) And at oral argument, Defendants Flint and Johnson raised for the first time the argument that their policy on juveniles complies with disability nondiscrimination laws because it is consistent with the direct threat defense. With the Court's leave, Plaintiff McCadden submits this short surreply.

ARGUMENT

I. The ADA and the Rehabilitation Act Require that Public Entities Take Affirmative Steps to Prevent Disability Discrimination – Without Regard to Knowledge of Any Particular Individual's Disability or Need for Reasonable Modification.

Title II of the ADA and the Rehabilitation Act require that covered entities take affirmative steps to prevent disability discrimination. As the Fifth Circuit stated in *Delano-Pyle*:

> The ADA expressly provides that a disabled person is discriminated against when an entity fails to "*take such steps as may be necessary* to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services." *Id.* at § 12182(b)(2)(A)(iii) (emphasis added). A plain reading of the ADA evidences that Congress intended to impose an affirmative duty on public entities to create policies or procedures to prevent discrimination based on disability.

Delano-Pyle v. Victoria Cty., Tex., 302 F.3d 567, 575 (5th Cir. 2002) (citations omitted, emphasis in original); *see also* 28 C.F.R. § 35.130(b)(3)(i) ("A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability[.]"), (b)(7)(i) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability[.]"), (b)(8) ("A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with

disabilities from fully and equally enjoying any service, program, or activity[.]"); 28 C.F.R. pt. 42, subpart G.[1] Nowhere are these duties dependent upon having particularized knowledge or actual notice of an individual's disability or need for reasonable modification.[2]

Accordingly, a public entity may not bury its head in the sand as to the existence and needs of the disabled individuals it serves, but must take affirmative steps to ensure disability nondiscrimination. Thus, in *Pierce v. District of Columbia*, the district court rejected the defendant's argument that it need only provide accommodations when explicitly asked, stating:

> Significantly for present purposes, because Congress was concerned that "[d]iscrimination against the handicapped was ... most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect[,]" *Alexander v. Choate*, 469 U.S. 287, 295, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), the express prohibitions against disability-based discrimination in Section 504 and Title II include an affirmative obligation to make benefits, services, and programs accessible to disabled people. That is, an entity that provides services to the public cannot stand idly by while people with disabilities attempt to utilize programs and services designed for the able-bodied; instead, to satisfy Section 504 and Title II, such entities may very well need to act affirmatively to modify, supplement, or tailor their programs and services to make them accessible to persons with disabilities. *See* 42 U.S.C. § 12131(2) (requiring entities that provide services to the public to (1) make "reasonable modifications to rules, policies, or practices"; (2) "remov[e] ... architectural, communication, or transportation barriers"; and (3) "provi[de] auxiliary aids and services" so as to enable disabled persons to participate in programs or activities). Moreover, these modifications—called "accommodations" in Section 504 and Title II parlance—must be sufficient to provide a disabled person with an "equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement" as a person who is not disabled. *Alexander*, 469 U.S. at 305, 105 S.Ct. 712 (quoting regulations implementing Section 504 (internal quotation marks omitted)); *see also* 28 C.F.R. § 35.130(b)(1)(ii) (2014) (stating that a public entity discriminates in violation of Title II if qualified individuals with disabilities are given an "opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others"). …

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[1] *Accord* 28 C.F.R. §§ 35.105(a) ("A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications."), 35.160(a)(1) ("A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions 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 qualified individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.").

[2] While in the employment context, Title I prohibits "not making reasonable accommodations to the ***known*** physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee," 42 U.S.C. § 12112(b)(5)(A) (emphasis added), the regulations implementing Title II of the ADA include no such requirement, 28 C.F.R. § 35.130(b)(7)(i).

> Given Congress's unmistakable intent to create "clear, strong, consistent, [and] enforceable standards addressing discrimination against individuals with disabilities" in various aspects of life, 42 U.S.C. § 12101(b)(2), and also its recognition that "benign neglect" is a particularly pernicious form of disability discrimination, *Alexander*, 469 U.S. at 295, 105 S.Ct. 712, the District's insistence here that prison officials have no legal obligation to provide accommodations for disabled inmates unless the inmate specifically requests such aid—and even then, only if it actually turns out that the inmate really needs the requested accommodation—is untenable and cannot be countenanced. First of all, nothing in the disability discrimination statutes even remotely suggests that covered entities have the option of being passive in their approach to disabled individuals as far as the provision of accommodations is concerned. Quite to the contrary, as explained above, Section 504 and Title II mandate that entities act affirmatively to evaluate the programs and services they offer and to ensure that people with disabilities will have meaningful access to those services. *See*, *e.g.*, 42 U.S.C. § 12131(2); 28 C.F.R. § 35.150(a); 28 C.F.R. § 35.150.

Pierce v. D.C., 128 F. Supp. 3d 250, 266, 269 (D.D.C. 2015); *see also id.* at 279 ("This willful blindness to Pierce's hearing disability and his need for accommodation plainly amounts to deliberate indifference, and Pierce is therefore entitled to compensatory damages on Claims I and II of his complaint.").

Here, too, based on all of the circumstances – including the high rates of identified disabilities at the Flint Public Schools, the effects of the water crisis, the role of the school resource officer, the overwhelming likelihood that a seven-year-old child in Flint referred to an SRO has a disability, the non-criminal conduct at issue, and the implausibility that a small child is in a position to disclose his disability or assert his rights under the ADA while interacting with an SRO – Defendants violated state and federal disability nondiscrimination laws when they failed to take affirmative steps to ensure that the needs of children such as Cameron would be accommodated, and when Defendant Walker instead handcuffed Cameron for an hour. And as Defendants have not altered their policies and practices, they continue to violate these laws.

II. The Direct Threat Defense Does Not Immunize Defendants.

At oral argument, counsel for Defendants Flint and Johnson contended that the City's policy on juveniles was consistent with the "direct threat" defense of the ADA. But by its express terms, the "direct threat" defense requires that a significant risk exists, and that modifications be attempted to minimize such risk. 28 C.F.R. § 35.104 ("Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of

policies, practices or procedures, or by the provision of auxiliary aids or services[.]"). Further, "[i]n determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk." 28 C.F.R. § 35.139(b). Not only would Cameron not have met any prong of this definition of direct threat, but the police department's juvenile policy does not contain any of these protections for individuals with disabilities.

Respectfully submitted,

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