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## **Exclusion from Services and the Americans with Disabilities Act: Defining Program Goals Is Key**

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### **I. Introduction**

The Americans with Disabilities Act (ADA) prohibits discrimination against any individual on the basis of disability. Advocates are beginning to utilize Title II of the ADA to challenge exclusions of particular groups of persons with disabilities from the receipt of state services. In these times of budgetary restraint program eligibility lines are being drawn ever more tightly. Title II litigation is about examining whether those lines are being drawn legitimately or, at least legally, according to the dictates of the ADA. The bottom line is that states can provide services, programs, or activities to some persons and not to others as long as the exclusion of persons is not based on their disability and the state can justify that exclusion. Defining the goal of the program or services at issue is key to determining whether an exclusion amounts to discrimination.

### **II. Litigating an Americans with Disabilities Act Title II Case**

Title II of the ADA prohibits states from discriminating on the basis of disability: [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or subjected to discrimination by any such entity. /1/

A qualified individual is one who "with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services." /2/ Specifically,

[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, unless such criteria can be shown to be necessary for the provision of the service, program or activity being offered. /3/

This is known as the "essential eligibility requirement." In challenging exclusions from programs, plaintiffs first must prove they are qualified for the services being denied. Whether they are qualified in turn depends on the "essential nature" of the program. /4/ To determine the essential

nature, the court looks to the services provided as well as to the benefits the state has targeted. /5/ An ability-based standard may be part of the essential nature if that ability is integral to participating in and benefiting from the program. /6/ Critical to plaintiff's case is articulating and offering evidence regarding the goal of a particular program.

Even if a requirement is deemed essential, the state still must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." /7/

Once plaintiffs prove they are otherwise qualified to participate in the program, the burden shifts to the state to prove that such discrimination is justified and that the excluded group cannot be accommodated. /8/ The ADA permits three defenses against disability-based discrimination: (1) fundamental alteration, (2) undue burden, /9/ or (3) genuine safety or health concerns. /10/

Even if the state proves that a seemingly discriminatory requirement is defensible, the ADA requires the state to make an individualized assessment of each applicant for services, provide a reasonable accommodation, or show why it cannot. The state may not rely merely on stereotyped generalizations about the class or group of persons with a particular diagnosis or condition. /11/

A defense of fundamental alteration rests on whether the modification "alters the essential nature of the program or imposes an undue burden or hardship in light of the overall program." /12/ The fundamental nature of a program is defined by the goal of the program. /13/ Again, how the goal of the program is defined becomes critical to the outcome of the case.

To determine whether plaintiffs' participation in a program constitutes an undue burden, a number of factors are considered, including the size and budget of the program. /14/

Health and safety concerns can be a legitimate basis for denying applicants access to a particular program. /15/ However, these concerns must be based in fact, not on generalizations or stereotypes about the effects of a particular disability. /16/ To prevail, the state must prove that all persons being excluded (based on their diagnoses or conditions) could not safely or adequately be served in the program at issue because, for example, they have service needs so different from those with other conditions.

### **III. Defining the Goal of the Program at Issue Can Be Critical to Outcome of a Case**

Recent cases illustrate that how the court ultimately interprets the goal of a program can be important to the outcome of a case. The seminal case involving discrimination under Title II of the ADA, *Easley v. Snider*, and a recent case in Colorado, *King v. Weil*, /17/ are instructive.

In *Easley*, plaintiffs with severe physical disabilities were denied services by the Pennsylvania Attendant Care Program, designed to allow persons with disabilities to live in the community rather than being forced into nursing facilities. /18/ Plaintiffs could not meet the state's eligibility requirement that they be mentally alert and capable of hiring, supervising, or firing an attendant and

personally controlling their own legal and financial affairs. /19/ As a result, they were denied services and sued the state; they argued that the requirement discriminates against them because of their mental disabilities in violation of Section 504 of the Rehabilitation Act of 1973 and Title II of the ADA. /20/

Easley established that the state must demonstrate that the exclusion was necessary given the services provided and the benefits targeted. /21/ The state could prove the exclusion to be necessary if allowing the excluded group to participate would constitute a fundamental alteration of the program, an undue burden, /22/ or legitimate health and safety risks. /23/ The court specifically held that plaintiffs could not participate effectively in the program and that accommodating their mental disabilities would result in a fundamental alteration of the program. Therefore, the state's discrimination was justified. /24/

The decisions of the district and appeals courts in *Easley v. Snider* illustrate the importance of how the goal(s) of the program at issue in a case are defined. Both courts used the same analytical framework (outlined above) but reached contrary results that turned on each court's definition of the "goal" of Pennsylvania's program.

The lower court viewed the goal of the program -- "independence" -- as a means of keeping persons with physical disabilities out of institutions. /25/ With this articulation, the consumer-control requirement becomes irrelevant, particularly since an individual can waive control and permit another to give direction to providers. /26/ Based on its reading of the goal of the program, the district court held that the mental-alertness requirement was not essential to receipt of attendant care services. /27/

In contrast, the Third Circuit found the goals of the program to be (1) to live as independently as possible, (2) to prevent inappropriate institutionalization, and (3) to help seek employment. /28/ On that basis, the court decided that the state intended "independence" to mean that which allowed an individual to become an active contributing member of society, not merely to avoid institutionalization. /29/ Therefore accommodating the plaintiffs would fundamentally alter the program by opening up the program to many more recipients whom the state did not envision to be participating. /30/

*King v. Weil*, in which plaintiffs challenged Colorado's eligibility requirements for its Medicaid home- and community-based services waiver program for the elderly, blind, and disabled ("HCBS-EBD"), further illustrates the importance to ADA litigation of defining a program goal. In *King*, plaintiffs /31/ claimed that Colorado's categorical exclusion of persons who are both physically disabled and developmentally disabled from receiving services offered through its Medicaid HCBS-EBD program solely on the basis of their diagnoses (i.e., developmental disabilities) violated the ADA and section 504 of the Rehabilitation Act of 1973. /32/

Medicaid is a federal program jointly funded by state and federal governments and administered by the states. /33/ Medicaid helps pay for medical assistance for needy persons. A state's Medicaid plan is authorized to cover (i.e., pay for) institutional services, such as those provided by a nursing facility or intermediate care facility for the mentally retarded; /34/ however, the Secretary of Health and Human Services by "waiver" may permit a state, upon request, to provide home- and

community-based services -- homemaker services, personal care services, or habilitation services -- to eligible individuals outside of an institutional setting. /35/

HCBS waivers were created to help eliminate unnecessary institutionalization /36/ while simultaneously reducing or maintaining state and federal expenditures. /37/ Eligibility is limited to persons who, "but for the provision of such services," would require the level of care provided in more expensive and often less desirable hospital or nursing home settings. /38/ HCBS waivers offer states more flexibility in providing long-term care services to Medicaid recipients.

Waiver programs may be targeted to individuals who have a particular illness or condition /39/ but must be limited to the following: (1) aged or disabled; (2) mentally retarded or developmentally disabled; or (3) mentally ill. /40/ States often have several HCBS waiver programs, each targeted to a particular population and each offering a different array of services. While federal regulations permit waivers to target certain populations, they do not require that persons who fall in more than one target group be excluded from participation in any other waiver program for which they are otherwise eligible. /41/ In fact, to limit persons with disabilities to their "special" targeted waiver program likely violates the ADA. /42/ Persons who are dually eligible are allowed to choose to participate in either program. /43/

The requirement at issue in Colorado stated: "A person eligible for Home and Community Based Services for the Developmentally Disabled [HCBS-DD] . . . shall not be eligible for HCBS-EBD services. . . ." /44/ The state did not dispute that plaintiffs met all other eligibility requirements to receive HCBS-EBD services as persons with physical disabilities, thus being eligible for both waiver programs or "dually eligible."

Instead, Colorado contended that [t]he goal of the HCBS-EBD program was to divert or deinstitutionalize individuals from nursing homes, and this goal required HCBS recipients to be "at risk" of imminent placement in a nursing facility. Persons with developmental disabilities were excluded not because of their diagnosis per se but because they did not meet this "essential eligibility requirement" (i.e., they were not "at risk" for nursing home placement). /45/ Because they did not meet an essential eligibility requirement, they were not "otherwise qualified." Colorado also argued that accommodating plaintiffs by admitting them into the HCBS-EBD program would fundamentally alter that program because the goals of the program were to prevent placement in nursing homes and to save the state costs of nursing home care. Because plaintiffs were not "at risk" for nursing home placement, serving the plaintiffs did not meet either of the goals of the HCBS-EBD program; therefore, accommodating them into the HCBS-EBD program would fundamentally alter it.

The goals of all HCBS waiver programs are to prevent institutionalization (e.g., in a nursing home) and reduce or maintain federal and state expenditures. /46/ As stated in Colorado's enabling statute, the goal of HCBS-EBD is to "provide . . . for an array of home and community-based services to eligible elderly, blind and disabled individuals as an alternative to nursing home placement" (emphasis added). /47/ Plaintiffs alleged that the state of Colorado incorrectly interpreted this language. Plaintiffs argued that many people needed the level of care found in a nursing home but for various reasons preferred to remain at home. /48/ Since these people were eligible for HCBS-EBD services, plaintiffs contended, serving them did further the goal of the program. /49/ That is

why both state and federal requirements provide HCBS services to persons who need a nursing home level of care, not persons who would otherwise actually go into a nursing home. /50/ The King court decided against the state's position and concluded that "[w]hat that law requires is that the [HCBS] applicant be in need of the level of care provided in nursing homes." /51/

King "followed the guidance of the Third Circuit Court" in *Easley v. Snider* and *Wagner v. Fair Acres Geriatric Center* in determining that the state had to prove that (1) excluding plaintiffs from the HCBS-EBD program was essential to the program and to providing services and (2) it was unable to accommodate plaintiffs without "fundamental changes" in the program and its services. /52/ After trial, /53/ the King court found that Colorado could not justify the exclusion and held that exclusions of persons with developmental disabilities, who also had physical disabilities, from receiving services through the HCBS-EBD program violated both the ADA and the Rehabilitation Act. /54/

## IV. Conclusion

As illustrated in *Easley* and *King*, defining the goal of a program can be critical in determining whether the exclusion of an individual or group of individuals amounts to discrimination under the ADA. Advocates representing an excluded individual or group should thoroughly research and effectively present the goal(s) of the program or services at issue.

### Footnotes

/1/ 42 U.S.C. Sec. 12132.

/2/ *Id.* Sec. 12131(2); 28 C.F.R. Sec. 35.104; 45 C.F.R. Sec. 84.3(k)(4). 28 C.F.R. Sec. 35.104 defines a "qualified individual with a disability" as "[an] individual with a disability who with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

/3/ 28 C.F.R. Sec. 35.130(b)(8) (emphasis added).

/4/ *Easley v. Snider*, 36 F.3d at 297, 302 (3d Cir. 1994). See also *Alexander v. Choate*, 469 U.S. 287, 299 n.19 (1985). An essential eligibility requirement is not merely the statement of the governmental entity. "[I]n determining whether an individual meets the 'otherwise qualified' requirement of section 504 [of the Rehabilitation Act], it is necessary to look at more than the individual's ability to meet the program's present [or stated] requirements." *Wynne v. Tufts Univ. Sch. of Medicine*, 932 F.2d 19, 24 (1st Cir. 1991) (emphasis added). The court must "look behind the [written] qualifications invoked by [the state]. To do otherwise reduces the term 'otherwise qualified' to a tautology." *Pandazides v. Virginia Bd. of Educ.*, 946 F.2d 345, 349 (4th Cir. 1991). Instead the court must determine the true essential nature of the program by examining the services provided as well as the intended benefits. *Easley*, 36 F.3d at 303.

/5/ Alexander, 469 U.S. at 303.

/6/ E.g., the Easley court found the requirement that a participant had to be mentally alert in order to exert consumer control over the provider to be an essential component of Pennsylvania's home care program and necessary to benefiting from it. 36 F.3d at 303.

/7/ 28 C.F.R. Sec. 35.130(B)(7); See also School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n. 17 (1987); Alexander, 469 U.S. at 300; Nathanson v. Medical College of Pa., 926 F.2d 1368, 1384 -- 86 (3d Cir. 1991); Strathie v. Department of Transp., 716 F.2d 227, 230 -- 31 (3d Cir. 1983); Nelson v. Thornburgh, 567 F. Supp. 369, 379 (E.D. Pa. 1983) (Clearinghouse No. 31,881).

/8/ King v. Weil, No. 92-M-2409, mem. op. and order (D. Colo. June 15, 1996).

/9/ Easley, 36 F.3d at 302. A requested modification is reasonable if (1) it would not necessitate a fundamental change in the essential nature of the program and (2) it would not impose an undue burden or undue hardship in light of the overall size of the program, the type of operation, and the nature and cost of the modification needed.

/10/ See Arline, 480 U.S. at 287, n.17.

/11/ Equal Employment Opportunity Comm'n & Department of Justice, Americans with Disabilities Handbook II-37 (Oct. 1991).

/12/ Easley, 36 F.3d at 305.

/13/ Id. at 302. After defining the goals of the program, the court in Easley concluded that accommodating plaintiffs would "at the very least, change the entire focus of the program." Id. at 305.

The focus fundamentally would shift from the provision of attendant care and its societal objectives for the physically disabled to personal care services to the many thousands of physically disabled [who are not mentally alert and] who are often served by other specially designed state programs. The proposed alteration would create a program that the State never envisioned when it enacted the Care Act.

Id.

/14/ Title II incorporates the regulations applicable to federally conducted activities under Section 504 with respect to program accessibility, existing facilities, and communications [28 C.F.R. part 39], which require defendants to demonstrate that access cannot be accomplished without imposing an undue burden after considering all available resources. See also H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 15 (1990), reprinted in 1990 U.S.C.C.A.N. 445.

/15/ See Arline, 480 U.S. at 287 n. 17.

/16/ The determination that a person poses a direct threat to the health and safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be

based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modification of policies, practices, or procedure will mitigate the risk. Equal Employment Opportunity Comm'n & Department of Justice, *supra* note 11, at 27.

/17/ King, *supra* note 8.

/18/ Easley, 36 F.3d at 298.

/19/ *Id.* at 299.

/20/ *Id.* at 298 -- 99.

/21/ *Id.* at 301.

/22/ *Id.* at 302.

/23/ Arline, 480 U.S. at 287 n.17.

/24/ Easley, 36 F.3d at 305 -- 6.

/25/ *Id.* at 301.

/26/ *Id.*

/27/ *Id.* at 302.

/28/ *Id.* at 303 -- 4.

/29/ *Id.* at 304.

/30/ *Id.* at 305.

/31/ These claims of the dually eligible (the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794(a)) are only part of the lawsuit brought on behalf of a larger class of plaintiffs who are developmentally disabled. King, *supra* note 8, at 2. Additional claims were brought under the Constitution and the Medicaid Act. The Court ruled against plaintiffs on the Constitutional claims; however the claims under the Medicaid Act are still pending. *Id.* at 11-12.

/32/ King, *supra* note 8, Findings of Fact and Conclusions of Law (D. Colo. June 15, 1996) at 8.

/33/ 42 U.S.C. Secs. 1396 et seq.; 42 C.F.R. Secs. 430 et seq.

/34/ 42 U.S.C. Sec. 1396d(a)(4)(A), (a)(15).

/35/ Id. Sec. 1396n(c). With the exception of home health care, which is a mandated service under federal Medicaid law, states may not receive federal reimbursement for home and community services without waiver permission.

/36/ 42 C.F.R. Sec. 441.300

/37/ See 42 U.S.C. Sec. 1396n(c)(2)(D).

/38/ Id. Sec. 1396n(c)(1). The specific terms of a state's waiver program, the services to be provided, and eligibility criteria are detailed in the state's request for waiver and supporting documents as approved by the Secretary of Health and Human Services. 42 C.F.R, Sec. 441.301, 441.303. Services which are available under Medicaid home- and community-based services waiver program for the elderly, blind, and disabled (HCBS-EBD) may include adult day care, alternative care services (in an alternative care facility), electronic monitoring, home modification, homemaker services, transportation, personal care, and respite care. See id. Sec.1396(n)(c)(4)(B); 42 C.F.R. Sec.440.180.

/39/ 42 U.S.C. Sec. 1396n(c)(7).

/40/ 42 C.F.R. Sec. 441.301(b)(6).

/41/ There is a strong incentive in both public and private programs to avoid serving difficult populations for financial and practical reasons. To do so, states sometimes establish eligibility requirements which screen out individuals with certain conditions.

/42/ King, *supra* note 8, Findings of Fact and Conclusions (D. Colo. June 15, 1996) at 7.

/43/ 28 C.F.R. Sec. 35.130(b)(2).

/44/ Colo. Rev. Stat. Sec. 26-4-6-6(3) (Supp. 1994). While the King case was pending, Colorado used three different definitions to determine eligibility for the HCBS-EBD waiver program. All three definitions excluded most or all individuals with developmental disabilities. E.g., when this case was initially filed, Colorado excluded from the HCBS-EBD waiver program "all individuals who meet the level of care screening guidelines for SNF [skilled nursing facility] or ICF [intermediate care facility] care, and are not developmentally disabled or mentally disabled. 10 C.C.R. 2505 -- 10, 8.400.16(E). This definition was slightly modified twice but continued to exclude most developmentally disabled applicants. However, Colorado did not defend the categorical exclusion but instead asserted that developmentally disabled individuals could not meet an essential eligibility requirement: that HCBS-EBD recipients be "at risk" of imminent placement in a nursing facility.

/45/ Colorado asserted several other reasons why plaintiffs were not candidates for nursing home placement; however, these are not relevant to the current discussion.

/46/ See 42 U.S.C. Sec. 1396(n)(c).

/47/ Colo. Rev. Stat. Sec. 26-4-6-6(3) (Supp. 1994). Federal law describes the eligibility for HCBS-EBD in terms of the need for the level of care provided in institutions. 42 U.S.C. Sec. 1396n(c)(1).

/48/ By requiring that plaintiffs be "at risk of nursing home placement," defendants were imposing on them an eligibility criterion that defendants did not impose on any other applicants for HCBS-EBD services and that, in fact, was prohibited from being applied to any HCBS applicants.

/49/ *Martinez v. Ibarra*, 759 F. Supp. 664, 668 (D. Colo. 1991) (Clearinghouse No. 45,276). *Martinez* holds that Colorado may screen HCBS applicants only for the need for institutional level care. The state specifically may not screen for likelihood of actually going into a nursing home. *Martinez*, 759 F. Supp. at 667. Just as Colorado may not require any other HCBS applicants to be at risk of nursing home placement, they may not impose this requirement on developmentally disabled applicants.

/50/ 42 U.S.C. Sec. 1396n(c)(1). By defining eligibility for HCBS in terms of a need for the level of care provided in institutions, Congress and the state recognized the needs of this population and made serving this population one of the purposes of the waiver program. "The proper inquiry under Sec. 1396n(c)(1) is, does the applicant require institutional level care?" Thus, all plaintiffs need to demonstrate is that they require nursing facility level of care. Colo. Rev. Stat. Sec. 24-6-606 (b). See, e.g., *Martinez*, 759 F. Supp. at 664. Presumably plaintiffs will have been assessed by the state agency charged with this determination before applying for HCBS services. See Kimberly Irvin Snow, *How States Determine Nursing Facility Eligibility for the Elderly: A National Survey* (National Academy for State Health Policy, American Ass'n of Retired Persons, Nov. 1995), for a comparison of criteria.

/51/ *King*, supra note 8, at 4.

/52/ *King*, supra note 8, Findings of Fact and Conclusions of Law (D. Colo. June 15, 1996) at 2. In *Wagner v. Fair Acres Geriatric Center*, 49 F.3d 1002 (3d Cir. 1995), Fair Acres, a county-operated intermediate care nursing facility, denied admission to a 65-year-old woman with Alzheimer's disease because it allegedly could not accommodate her particular manifestations of the disease. *Id.* at 1004 -- 5. A jury found that, despite her disabling disease, plaintiff was "otherwise qualified" for admission to Fair Acres under Section 504 of the Rehabilitation Act. *Id.* at 1005. The district court then granted Fair Acres' motion for judgment notwithstanding the verdict. *Id.* However, on appeal the circuit court vacated the district court order because it found the evidence to be legally sufficient to support the jury verdict. *Id.* Fair Acres offered no evidence that admitting plaintiff would either change "the essential nature of the facility as a nursing home or impose an undue burden on the facility, economically or otherwise." *Id.* at 1016.

/53/ First the court found that  
there is a discrimination against [plaintiff class] because of their developmental disability in apparent violation of the prohibitions in both the ADA and the Rehabilitation Act, . . . [but] there remains a question of fact not capable of determination on the stipulated facts . . . [specifically] whether the exclusion of the developmentally disabled is an 'essential eligibility requirement' for the receipt of

HCBS-EBD services in Colorado. Stated differently, is the exclusion of dually disabled persons from the HCBS-EBD program necessary for the provision of HCBS-EBD services?

King, *supra* note 8, at 9. The judge held a brief trial to hear the state's arguments on why the exclusion was justified. Colorado was unable to present adequate justification, and plaintiffs prevailed.

/54/ King, *supra* note 8, Findings of Fact and Conclusions of Law (D. Colo. June 15, 1996) at 7.