

## **ADA UPDATE**

George H.W. Bush signed the American with Disabilities Act (ADA) in 1990. This law requires that all new structures be built to be accessible by people with disabilities, and that no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity. Twenty years later, EISD has been sued in a class action lawsuit to require it to bring its campuses into compliance with ADA. The filing plaintiff, C.F., is a child who has been in the district for over 8 years, during which time her parents repeatedly sought to have her included in school activities in which she could not participate because she could not access the school facilities. Each year, C.F. was promised that changes were coming. After 8 years of broken promises, of bonds issued and ADA issues ignored, a lawsuit was filed on behalf of all people with disabilities—permanent, like C.F.'s or temporary, such as a teacher or student in a wheelchair following an accident—so that all people in EISD can have equal access to the district's facilities.

Immediately after filing the ADA lawsuit, the plaintiff's lawyers contacted EISD School Board Trustees and the Superintendent to inform the district that the plaintiffs would settle the lawsuit in exchange for EISD agreeing to work with parents of disabled children on a to-do list and timeline to come into compliance with ADA. This offer was refused and the lawsuit proceeded.

At a hearing January 26, EISD's attorneys asked the federal judge to dismiss the lawsuit, citing, among other things, that C.F. had graduated from elementary school and no longer had standing to sue and that there was no evidence that supported the Plaintiff's contention of discrimination based on disability.

On February 18, EISD's request for summary judgment was denied and the judge issued a written ruling that the case will go forward based on evidence that provides "proof that...disabled children have been unable to attend...programs including participation in fire drills and accessing emergency gathering places... [and] denied the benefits of services,

programs or activities...and that such discrimination is by reason of...disability. The Court finds that [plaintiff] has presented evidence for each element of her *prima facie* case of discrimination under the Disabilities Act and that a rational tier of fact could find for (plaintiff) based on the record of evidence before the Court."

A hearing March 5 will determine class action certification for the case.

There has been much miss-information circulated by opponents to this lawsuit. Here are some answers to the most frequently asked questions based on misunderstanding of the ADA law or this lawsuit.

Q: Isn't the district "grandfathered" due to the age of its buildings?

A: "There is no such thing as a 'grandfather' clause in the ADA." ([www.ada.gov](http://www.ada.gov)). Any public building, but particularly a school, must provide access for people with disabilities to the whole range of its services and programs. If a public entity can't fix its facilities, they can choose to move the programs. If they can't afford to fix the facilities or move the programs, they must prove it. EISD has made no effort to do either.

Q: The district says that this is a frivolous lawsuit and it does not discriminate against the disabled.

A: In his written opinion, the judge found there was sufficient evidence of discrimination that a reasonable person would find for the plaintiff.

Q: Wouldn't making district facilities accessible be prohibitively expensive?

A: No. For example, the district could have repaired the worst accessibility problems at Eanes Elementary School for close to the same amount it spent on a batting cage. Additionally, the repairs

become more expensive over time due to inflation. Because many of these ADA issues have been known for over 15 years, they have become more expensive to address due to the passage of time alone.

Q: Isn't this only a problem at one of our schools?

A: No. Every EISD facility has problems. A parent task force organized by the district last fall provided a list of problems on all campuses. This list closely mirrors lists made by independent consultants in 2001 and 2003.

Q: Doesn't the ADA apply only to new construction?

A: No, but there is a distinction between new construction and an "existing facility" built before the ADA was passed. New construction requires strict compliance with the ADA's accessibility requirements. But regardless, a public entity cannot deny the benefits of its programs, services, or activities because its facilities are inaccessible to or unusable by individuals with disabilities. That means all programs, not some.

Q: If that is so, how can these projects pass building inspections?

A: Many times, they don't "pass." But the agency set up to enforce new construction accessibility requirements is extremely overburdened. And if a building project is failed, it can take years before it is even looked at. So a builder can fail to meet ADA, and if the customer doesn't require that builder to meet ADA requirements, the builder can earn his fee and avoid ADA. It is the public's responsibility to insure that ADA is followed. Too often, as in this case, the only avenue left is to pursue a lawsuit to enforce compliance.

Q: Isn't a school accessibility inspection tied to a certificate of occupancy?

A: No. If a school fails inspection, nothing will ever be done about it unless someone files a complaint.

Q: I feel sorry for these kids but can't they just go to another school?

A: People with disabilities don't want anyone to feel sorry for them. Children simply want to enjoy school with their friends. But to make that perfectly clear, federal law requires that a public school provide each child who lives in a school district with access to their local school. Children with disabilities can't be sent to "another school" for the same reason that kids of color can't just "go to another school"; that is segregation. Segregation is discrimination. Discrimination is prohibited by federal law.

Q: Hasn't the district made it clear that it cannot afford to fix these problems?

A: There is a defense called "undue financial burden," but EISD has not raised it. Probably because if they did all its funding decisions would be looked at. Since 1993 there have been at least 5 bond programs, and incredible growth in EISD facilities. ADA simply has never been a priority of the Trustees or the current or past Administrations of EISD. The problem has been ignored since the first George Bush signed the law.

Q: The district says it has a plan for compliance that it will address in the upcoming bond. Why can't the plaintiffs wait?

A: The district said the same thing in 2001, in 2003, and in 2006. During the last two bond issues, they passed over compliance in favor of other priorities. There is a history of inaction that, absent a clear and complete plan with timelines and allocated funds, leads one to conclude that ADA issues in existing construction will never be addressed by our current Trustees and Administration.

Q: But didn't the superintendent say that much of the 2006 bond went to ADA requirements?

A: Yes, that has been said. However she was talking about ADA line items in new construction. In the case of new construction, there is no choice – the law requires strict compliance. And the real fact is compliance in new construction costs very little. So while ADA issues may have been addressed in new buildings, existing structures have been largely ignored since 1993.

Q: There are many wish lists for the district's limited funds. Why should the needs of just a few kids come first?

A: When the District accepts federal financial assistance it promises to spend it in a non-discriminatory manner. That means that its programs have to be accessible to all the children in the district. During all the time C.F. attended Eanes Elementary, she could never play with others on the playground. As this case illustrates, there will always be a reason not to build a ramp, or make a door open for a person in a wheelchair, or lead a blind person to an exit. There has been for over 20 years now.

Q: Why aren't parents working with the district instead of suing them?

A: Parents tried for years to work with the district, only to be dismissed by the superintendent when it came time for follow-through.

Q: Isn't this parent really just trying to get money?

A: No. This lawsuit will not carry any damages award to the plaintiffs. This case is about program access for all the kids in the District.

Q: What happens if the district loses this lawsuit?

A: In addition to its own legal fees, it is common for the Defendant to pay the attorney's fees of the plaintiff. A federal judge may order compliance, and that may take the process out of the hands of the Administration and the Trustees. Right now, the District controls the course of litigation. They can move to settle this case, or continue to fight. They just lost the first round. What would be better, fixing the problems they know exist or continuing to fight and paying lawyers?