

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DANNY ABRAHAMS, ANTHONY CELARDO,
KEVIN CHRISTMAN, LAUREN EPSTEIN,
MERYL JACKELOW, EVAN SKIDMORE,
DAVID TINDAL and LEE WOLBROM,

Plaintiffs

DOCKET NO.
10-1535
(SJF) (AJL)

-against-

MTA LONG ISLAND BUS,

Defendant

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION TO VACATE PREVIOUS ORDER OF THIS COURT.

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INTRODUCTORY STATEMENT

This application is made seeking to vacate the order of this Court dated May 25, 2010 and entered on May 26, 2010 that dismissed this complaint and denied plaintiffs' motion for a preliminary injunction. The application is made because the Court overlooked some of the language of the relevant regulations pertaining to this case. Had the Court not overlooked that language, it would have found that the regulations were applicable to the circumstances presented here.

ARGUMENT

THIS COURT OVERLOOKED THE LANGUAGE OF THE PARATRANSIT REGULATIONS IN REACHING ITS DECISION.

The dispute in this action centers around the question of whether a particular regulation promulgated under the paratransit section of the ADA applies to the circumstances involved here. Defendant argued, and this Court held, that the regulation is inapplicable because the defendant's paratransit services are otherwise purportedly compliant with the ADA. However, both the defendant and this Court overlooked key language of the regulation which indicates that it is clearly applicable to the facts here regardless of whether the defendant's paratransit services are otherwise purportedly compliant with the ADA.

The two relevant regulations are as follows: 49 C.F.R. §37.135(c)(1) states as follows:

(1) If an entity has met and is continuing to meet all requirements for complementary paratransit in §§37.121-37.133 of this part, the entity may submit to FTA an annual certification of continued compliance in lieu of a plan update. Entities that have submitted a joint plan under §37.141 may submit a joint certification under this paragraph. The requirements of §§37.137(a) and (b), 37.138 and 37.139 do not apply when a certification is submitted under this paragraph. (Emphasis Added)

49 C.F.R. §37.137(c) states as follows:

(c) Ongoing requirement. The entity shall create an ongoing mechanism for the participation of individuals with disabilities in the continued development and assessment of services to persons with disabilities. This includes, but is not limited to, the development of the initial plan, any request for an undue financial burden waiver, and each annual submission.

As there is no dispute that since defendant-appellee appears to be in compliance with the requirements for complementary paratransit of §§37.121-37.133, 49 C.F.R. §37.137(a) and (b) are clearly not applicable here based upon 49 C.F.R. §37.135(c)(1).

However, 49 C.F.R. §37.135(c)(1) clearly omits reference to the next subsection of the regulation, 49 C.F.R. §37.137(c) which requires that the defendant-appellee “create an ongoing mechanism for the participation of individuals with disabilities in the continued development and assessment of services to persons with disabilities.” That regulation by its terms not only includes the development of the initial plan and each annual submission, it also covers “assessment of services” and “requests for undue financial burden waivers” and “is not limited to” the above-mentioned areas.

Therefore, 49 C.F.R. §37.135(c)(1) only gives the defendant an exemption from 49 C.F.R. §§37.137(a) and (b) and does not give the defendant an exemption from 49 C.F.R. §37.137(c). Both this Court and the defendant overlooked the clear language of 49 C.F.R. §37.135(c)(1) stating that the exemption only covered 37.137(a) and (b) and not (c).

The elimination of paratransit services in an entire area of Nassau County certainly implicates the requirement for the participation of individuals with disabilities in the continued development and assessment of services under 49 C.F.R. §37.137(c). Since that participation was not sought by the defendant and since such participation was not exempted by the regulations merely because the defendant may be otherwise in compliance with the ADA, this

Court should reconsider its order and decision and hold that the relevant regulation is applicable here.

Finally, the statement of the Department of Transportation cited at pages 9-10 of this Court's order is not contrary to plaintiffs' arguments and indeed supports plaintiffs' arguments. That statement appears only to pertain to 37.137(a) and (b) and specifically notes that "Because the regulation already requires a mechanism for continuing public participation (see §37.137(c)), the Department is not persuaded that the public participation process accompanying plan updates is essential to provide public input to providers about paratransit service."

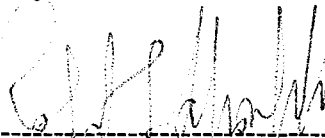
CONCLUSION

It is respectfully requested that this Court vacate its previous order and grant a preliminary injunction, and deny the defendant's motion to dismiss.

Dated: Garden City, New York
May 28, 2010

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