

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DISABLED IN ACTION OF	:	
PENNSYLVANIA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY,	:	
	:	
Defendant	:	03-CV-1577

Gene E.K. Pratter	MEMORANDUM AND ORDER	November 17, 2006
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Plaintiff Disabled in Action (“DIA”) and Defendant Southeastern Pennsylvania Transportation Association (“SEPTA”) each move for summary judgment in this non-jury case that concerns the parties’ respective positions under the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. §§ 12101 et seq., and the Rehabilitation Act of 1973 (“RHA”), 29 U.S.C. §§ 701 et seq. For the reasons discussed below, summary judgment will granted in favor of SEPTA with respect to both counts of DIA’s Fourth Amended Complaint.

FACTUAL AND PROCEDURAL BACKGROUND

DIA is a non-profit corporation which acts as an advocate for the civil rights of, and services for, persons with disabilities. DIA Statement of Facts ¶ 1. DIA has approximately 450 active members. Id. ¶ 2. SEPTA is “a body corporate and politic which exercises the public powers of the Commonwealth of Pennsylvania as an agency and instrumentality thereof and which provides public transportation in various Southeastern Pennsylvania locales.” SEPTA Resp. to DIA Statement of Facts ¶ 8. SEPTA operates a “vast network of fixed-route services

including bus, subway, subway-elevated, regional rail, light rail, and trackless trolley, as well as customized community service.” DIA Statement of Facts ¶ 9 (quoting DIA Mot. Summ. J. Ex. 3, SEPTA Fiscal Year 2006 Capital Budget 5). Many of DIA’s members use SEPTA for public transportation. Id. ¶ 2. Other persons with disabilities use SEPTA facilities as well.

In this litigation, DIA seeks declarative and injunctive relief which would, ultimately, require SEPTA to modify the 15th and Market Street subway station on the Market-Frankford Elevated Subway Line and the City Hall subway station on the Broad Street Subway Line to provide access to individuals with disabilities, including individuals who use wheelchairs.¹ The facts and the procedural history of this case, beginning with a virtual verbal travelog, are quite lengthy and warrant considerable and careful attention. The following facts are either undisputed or viewed in the light most favorable to DIA.

A. Facts Relevant to Alterations/Modifications of Facilities

The Market-Frankford Elevated Subway Line and the Broad Street Subway Line are high speed rapid rail lines that run through the City of Philadelphia. DIA Mot. Summ. J. Ex. 14 at C-7, C-8; SEPTA Resp. ¶ 12. Both stations at issue in this case – the 15th and Market Street station on the Market-Frankford Line and the City Hall station on the Broad Street Line– are close to one another in a geographically central location² and have a higher ridership than many,

¹ The City of Philadelphia owns some of the property upon which this dispute is centered. In earlier versions of DIA’s Complaint, the City was named as a defendant. DIA and the City subsequently settled their dispute and, upon this Court’s approval of their settlement agreement over the objection of SEPTA, the City was dismissed from the litigation.

² Both of these transit stations are located in the central part of Philadelphia’s Center City business district, close to City Hall, various government buildings, and many high-rise office buildings.

if not most, other stations on either line.³ The 15th and Market Street station is located underground in the vicinity of 15th Street and Market Street. DIA Statement of Facts, SEPTA Resp. ¶¶ 15. The City Hall station is located underground in the vicinity of Broad Street and Market Street. DIA Statement of Facts, SEPTA Resp. ¶¶ 56. A retail concourse area is located beneath Market Street and includes an entrance to the Suburban Regional Rail Line Station, a railway station for SEPTA's commuter rail lines.⁴

There are two primary means of ingress by which a pedestrian can descend from 15th Street and Market Street to the concourse and subway entrances below. From the southwest side of Market Street at 15th Street, a pedestrian may utilize a stairway which leads directly to a concourse area and the Market-Frankford Line cashier booths.⁵ From the northwest side of Market Street at 15th Street, another stairway descends to the 15th Street Courtyard which, if one turns northward, leads to Suburban Station and, if one turns southward, leads up a stairway to the

³ Although the parties disagree as to whether the 15th and Market Street station is the "busiest" station on the Market-Frankford Line, they do agree that this station has the highest ridership on that line. See DIA Statement of Facts, SEPTA Resp. ¶¶ 20. The parties also dispute whether the City Hall station is the "heaviest patronized" station on the Broad Street Line. See DIA Statement of Facts, SEPTA Resp. ¶¶ 61. While DIA argues that 57,000 passengers are served from the City Hall station daily, SEPTA counters by asserting that only 2,763 individuals access that station from street level on a daily basis. DIA Statement of Facts, SEPTA Resp. ¶¶ 61. The parties appear to agree that City Hall Station is a location from which patrons may interchange from another line without paying an additional fare. DIA Statement of Facts, SEPTA Resp. ¶¶ 62.

⁴ The Court notes that the parties even dispute the parameters of Suburban Station. DIA asserts that Suburban Station is located at 16th Street and John F. Kennedy Boulevard, while SEPTA contends that the station is part of an integrated facility that extends from 15th Street to 18th Street and Market Street to Cuthbert Street. DIA Statement of Facts, SEPTA Resp. ¶¶ 19.

⁵ See SEPTA Resp. ¶ 32 ("15th Street Market-Frankford Station has its own street level open-air entrance located at the southwest corner of 15th & Market Streets in an area commonly known as "the Clothespin.")

cashier booths for the Market-Frankford Line.⁶ The parties dispute whether the stairway located on the northwest side of Market Street is considered an entrance to the Market-Frankford Line or, rather, is an entrance to the Suburban Station transit facility. DIA Statement of Facts, SEPTA Resp. ¶¶ 32.

There are several entrances to and exits from the City Hall Station on the Broad Street Subway Line. There are two stairway entrances, one at Dilworth Plaza at street level, on the west side of City Hall, which leads to the lower north concourse, and another at street level at the City Hall Courtyard, which leads to the lower south concourse. DIA Statement of Facts ¶ 57. There is also a single escalator that runs from the lower south concourse to the street level, southeast portion of the City Hall Courtyard. DIA Statement of Facts, SEPTA Resp. ¶¶ 57. The escalator serves as an exit from the lower south concourse to the City Hall Courtyard. DIA Statement of Facts, SEPTA Resp. ¶¶ 57. From the lower south concourse under the City Hall Courtyard, a pedestrian can travel east, without using any stairs, to reach the 13th Street and 11th Street stations on the Market-Frankford Line, DIA Statement of Facts, SEPTA Resp. ¶¶ 59, and can travel east and then south, without using any stairs, to reach the South Broad Street concourse, the Walnut-Locust Broad Street Subway Station and the Port Authority Transit Corporation (PATCO) station located at 15th Street and Locust Street. DIA Statement of Facts, SEPTA Resp. ¶¶ 60.

B. Renovations of the Stairway in the 15th Street Courtyard

⁶ See SEPTA Resp. ¶ 32 (“[I]n order to reach the 15th Street Market-Frankford Station, an individual who enters the Suburban Station Transit Facility at the 15th Street Courtyard must travel south in the 15th Street corridor, exit Suburban Station, and travel over underground transit lines before entering 15th Street Market-Frankford Station.”).

On or about September 27, 1999, the United States Department of Commerce notified SEPTA that SEPTA and the City of Philadelphia were the recipients of an Economic Development Administration Award to partially fund a proposed project entitled “Renovation of 15th and Market Streets Headhouse at Suburban Station.” SEPTA Mot. Summ. J. Ex. 54 at COP-247. The Award letter included a “project definition” stating that the project “would involve various renovations to the 15th and Market Streets entrances and related areas serving the renovation of entrances to the underground train station concourse; demolition of existing facilities; the construction/installation of new stairs, landscaping, lighting, signage, finishes, canopies; and all appurtenances.” Id. at COP-251. The terms of the Award required that construction commence within 18 months after receipt of the Award and that the construction period would be 29 months. Id. at COP-250. Prior to the commencement of the construction project prompted by the Award, the entrance at the northwest corner of 15th and Market Streets consisted of a stairway that descended into the center of a courtyard and two escalators enclosed within a headhouse. DIA Statement of Facts, SEPTA Resp. ¶¶ 42.

On August 3, 2000, Stephen F. Gold, Esquire, then and now counsel to DIA, sent a letter to Edward McLaughlin, the City Commissioner for the Department of Licenses and Inspections. SEPTA Mot. Summ. J. Ex. 25. In this letter, Mr. Gold expressed his understanding that SEPTA had applied for a variance from the accessibility requirements of the Philadelphia Building Code, to waive the requirement to provide a vertical accessible route, i.e., an elevator, “for such a major public access point,” related to a planned replacement of the stairway at the northwest corner of 15th and Market Streets. Id. Mr. Gold also expressed his concern that SEPTA’s planned renovation would not comply with the ADA. Id.

On September 28, 2000, Mr. Gold wrote a letter to Pete Winebrake, an attorney in the City Solicitor's Office, to which he attached a copy of his earlier August 3, 2000 letter to Commissioner McLaughlin. SEPTA Mot. Summ. J. Ex. 26. Mr. Gold reiterated to Mr. Winebrake that the "problem [of the requested variance and non-compliance with the ADA] should be resolved *before* construction commences, or you leave me with very few options." Id.

On November 14, 2000, Frederick Pasour, an attorney for the City of Philadelphia, wrote to Mr. Gold regarding the replacement of the stairway. SEPTA Mot. Summ. J. Ex. 27. In that letter, Mr. Pasour stated:

I understand that you believe that the ADA, its regulations and the Accessibility Guidelines require an elevator in the 15th Street courtyard. I also understand that you are considering bringing a lawsuit to enjoin the 15th Street courtyard portion of the project if the City issues a building permit based on plans that do not include an elevator in the 15th Street courtyard.

This letter is to advise you that the City doe [sic] not share your view that an elevator is required in the 15th Street courtyard and has issued a building permit for the project. Please remember that the 15th Street courtyard will be readily accessible to and usable by individuals with disabilities. As you are aware, elevators are planned for other locations near to the 15th Street courtyard.

The current bids for the portion of the project that includes the 15th Street courtyard renovations are only good through December 30, 2000. If, therefore, you plan to bring an action challenging the 15th Street courtyard portion of the project, please do so in an expeditious manner.

Id. at P-390.

DIA did not bring any legal action with respect to the replacement of the stairway and the City's determination that installation of an elevator was not required. The City issued a building permit to SEPTA for this project on February 9, 2001, which included the following description of the planned construction:

Demolition incorporates head house, stair, railings, limited wall, veneer, pavement, and lighting systems. Also to be removed are planters, fountain and ceilings. Construction scope consists of glass head house, stair, (2) retail spaces, railings, storefront sys., planters, lighting and paving installed, as well as new ceiling.

DIA Mot. Summ. J. Ex. 26. In February of 2001, SEPTA began construction to replace the concrete stairway. DIA Statement of Facts ¶ 43; SEPTA Resp. ¶ 44. When the project was concluded, the stairway was replaced and situated along the southeastern wall of the entrance. DIA Statement of Facts, SEPTA Resp. ¶¶ 44. The parties agree that the stairs were replaced because the old staircase was beyond repair due to deterioration of the concrete. DIA Statement of Facts ¶ 47; SEPTA Resp. ¶ 44. The replacement stairway brings an ambulatory person from street level to the same point within the courtyard as had the old stairway. SEPTA Resp. ¶ 44. The new stairway was reopened to the public on August 8, 2002. DIA Statement of Facts, SEPTA Resp. ¶¶ 50.

C. Replacement of the Escalator in the Southeast Portion of City Hall Courtyard

In August of 2003, SEPTA completed the replacement of an escalator in the southeast corner of the City Hall Courtyard. DIA Statement of Facts, SEPTA Resp. ¶¶ 77. The parties agree that the escalator that was replaced had deteriorated and was inoperable, and SEPTA asserts that it reasonably opted to replace the escalator rather than to try to repair it. DIA Statement of Facts, SEPTA Resp. ¶¶ 78. The escalator ascended from the City Hall mezzanine, one level above the City Hall station boarding area, to the City Hall Courtyard. SEPTA Resp. ¶ 79.

The replacement of this escalator was part of an Escalator Replacement Program that

SEPTA initiated in 1999. DIA Statement of Facts, SEPTA Resp. ¶¶ 79.⁷ SEPTA included funding for the Escalator Replacement Program in its Capital Budget for Fiscal Year 2001 as a project that was slated to occur between 2001 and 2004. SEPTA Mot. Summ. J. Ex. 16 at SEPTA-1992, SEPTA-2047. The Escalator Replacement Program (along with SEPTA's proposed budget for 2001 and capital plan for 2001-2012) was discussed at a public hearing on May 22, 2000, for which public notice was given. SEPTA Mot. Summ. J. Ex. 33 at SEPTA-9069 to SEPTA-9070. Although no one disclosed as being from DIA was listed as an attendee at that hearing, the Executive Director of DIA stated that she and other people from DIA reviewed SEPTA's capital budget every year from 1996 to 2002. SEPTA Mot. Summ. J. Ex. 28, N. Salandra Dep. 30:16-23, Nov. 4, 2005.

As of at least August 17, 2001, SEPTA placed barricades around the construction area in the southeast quadrant of the City Hall Courtyard and posted a sign that read "Project of the Pennsylvania Public Transportation Assistance Fund; Escalator Replacement at Erie, Spring Garden, City Hall & 30th Street Stations; Southeastern Pennsylvania Transportation Authority." SEPTA Mot. Summ. J. Ex. 36. Although the parties dispute the reasons for doing so, SEPTA relocated the truss in the wellway for the new escalator.⁸ DIA Statement of Facts, SEPTA Resp.

⁷ According to DIA, future phases of the Escalator Replacement Program will include replacement of a similar escalator located in the northwest corner of the City Hall Courtyard. See DIA Statement of Facts ¶ 79 n.4. Although DIA purports to base a portion of its claim here on the planned replacement of this escalator, one footnote in DIA's Statement of Facts constitutes DIA's only reference to this escalator in its motion papers. Id. In addition, counsel for DIA made only one minor reference to the northwest escalator during oral argument on these motions. See June 29, 2006 Tr. 50:14-16 ("And we are now thinking they're doing another escalator on the northwest side of City Hall, and it's also going to be inaccessible.").

⁸ The truss is the structural piece that physically supports the escalator along its length. DIA Statement of Facts ¶ 82. The parties dispute the reason why the truss for the new escalator

¶¶ 81-82. The new escalator was installed in the same wellway that the old escalator had occupied. SEPTA Resp. ¶¶ 81-82.

D. Designating “Key Stations”

The parties’ dispute regarding the designation of certain stations on SEPTA’s system as “key stations” under the ADA has a lengthy history which began two decades ago.⁹ In 1986, Eastern Paralyzed Veterans Association of Pennsylvania (“EPVA”) commenced a class action lawsuit¹⁰ against the City of Philadelphia, in which EPVA, on behalf of the designated class, sought declaratory and injunctive relief and compensatory damages on the grounds that disabled individuals were being denied access to “altered, renovated, reconstructed and redesigned subway transportation facilities which are part of the federally assisted transit system in Philadelphia” in violation of the RHA. SEPTA Mot. Summ. J. Ex. 1 ¶ 1. SEPTA was subsequently named as a defendant in that case. Id. ¶ 4(c). EPVA’s Amended Complaint alleged that the defendants had “renovated, substantially altered, constructed and redesigned” numerous stations on the Broad Street Subway and Market-Frankford Elevated Subway lines, using federal financial assistance, without making the stations accessible to individuals with disabilities,

needed to be relocated. DIA contends that the prior escalator had inadequate vertical clearance for the new escalator, while SEPTA contends a contractor’s mistake resulted in the replacement escalator lacking the necessary vertical clearance. DIA Statement of Facts, SEPTA Resp. ¶¶ 81.

⁹ As discussed below, DIA argues that SEPTA has failed to designate the City Hall and 15th and Market Street subway stations as “key stations” under the ADA, which would require SEPTA to make such stations accessible to individuals with disabilities, including individuals who use wheelchairs.

¹⁰ Eastern Paralyzed Veterans Association of Pennsylvania, Inc. v. Sykes, No. 86-6797, was filed on November 20, 1986, in the United States District Court for the Eastern District of Pennsylvania.

including individuals who use wheelchairs. Id. ¶ 38. The EPVA plaintiffs alleged that these actions and omissions constituted discrimination against individuals with disabilities in violation of the RHA and numerous other federal statutes and regulations. See id. ¶¶ 47, 49, 51, 53, 56, 58, 60, 62, 64.

On June 28, 1989 – one year before the ADA was enacted¹¹ – EPVA, the City and SEPTA negotiated a settlement of EPVA’s claims to resolve that lawsuit (the “EPVA Settlement Agreement”).¹² The stated purpose of the EPVA Settlement Agreement was:

to further the process of making the mass transportation system in Philadelphia, and in the area serviced by SEPTA, accessible to the mobility-handicapped, by providing for the renovation on the timetable established herein of *certain key stations* on SEPTA’s High Speed System, and on SEPTA’s Regional Rail System, to make *those certain key stations* accessible to the mobility-handicapped . . . in order to provide the preliminary framework for a fully accessible, integrated mass transportation system.

SEPTA Mot. Summ. J. Ex. 2 § 1 (emphasis added). In the EPVA Settlement Agreement, the parties designated “certain key stations”¹³ that would be renovated and made accessible to

¹¹ The ADA took effect on July 26, 1990.

¹² The parties to the EPVA Settlement Agreement were the Eastern Paralyzed Veterans Association of Pennsylvania, Inc. and James J. Peters (as plaintiffs) and Dudley R. Sykes, as Commissioner of the Philadelphia Department of Public Property, the City of Philadelphia and SEPTA (as defendants). SEPTA Mot. Summ. J. Ex. 2 at SEPTA-3369.

¹³ The parties dispute the origin and definition of the term “key station.” SEPTA contends that the United States Department of Transportation outlined the “characteristics and accessibility attendant to a rail system’s ‘key stations’” in 1979 in the regulations DOT promulgated to implement Section 504 of the RHA. SEPTA Statement of Facts ¶ 8 n.1. DIA objects to relying on the Department of Transportation’s use of the term “key station” as a basis for the use of the same term in the EPVA Settlement Agreement inasmuch as the DOT rescinded the 1979 regulations in the early 1980s, well before the EPVA Settlement Agreement was negotiated and finalized in 1989. DIA Resp. ¶ 8. The Court notes parenthetically, however, that the Department of Transportation’s April 4, 1991 Notice of Proposed Rulemaking with respect to the proposed regulations to implement the ADA, stated that “[t]he key station criteria in the

disabled individuals in accordance with a timetable set forth in the Agreement. SEPTA Mot. Summ. J. Ex. 2 at SEPTA-3372 to SEPTA-3376. The list of “certain key stations” designated in the EPVA Settlement Agreement did not include either the 15th and Market Street or the City Hall stations. Id. Notice of the proposed settlement agreement was given to members of the plaintiff class, which included persons with membership in DIA.¹⁴ SEPTA Statement of Facts, DIA Resp. ¶¶ 9-11. Following a hearing on the fairness, adequacy and reasonableness of the EPVA Settlement Agreement, the EPVA Settlement Agreement was approved on July 28, 1989. SEPTA Statement of Facts ¶ 12.

The ADA, a violation of which is alleged in the action now pending here, took effect on July 26, 1990. Section 12147 of the ADA stated that

it shall be considered discrimination for a public entity that provides designated public transportation to fail . . . to make key stations (as determined under criteria established by the Secretary [of the Department of Transportation] by regulation) in rapid rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

42 U.S.C. § 12147(b)(1). The United States Department of Transportation (or “DOT”) engaged

proposed rule closely follow the [Department of Transportation’s] 1979 criteria [implementing Section 504 of the RHA] and the discussions in the committee reports. The basic responsibility for determining which stations are key is assigned to the public entity, taking these criteria into account.” Transportation for Individuals With Disabilities, 56 Fed. Reg. 13,856, 13,862 (proposed Apr. 4, 1991) (to be codified at 49 C.F.R. pts. 27, 37).

¹⁴ DIA, as an organization, was not a party to the EPVA v. Sykes litigation and was not directly involved with the EPVA v. Sykes lawsuit. According to DIA and Mr. Gold, counsel for DIA, DIA and Mr. Gold were aware of the EPVA litigation only to the extent that DIA and Mr. Gold monitored the case to ensure that DIA’s interests in a separate lawsuit, Disabled in Action v. Sykes, were not adversely affected by the EPVA v. Sykes litigation. See SEPTA Mot. Summ. J. Ex. 3, DIA’s Am. Resp. and Objections to SEPTA’s Req. for Admis 1.

in a rulemaking process to promulgate regulations to implement this portion of the ADA.¹⁵ On April 4, 1991, the Office of the Secretary of the Department of Transportation issued a Notice of Proposed Rulemaking in which it proposed “to amend its rule implementing the Americans with Disabilities Act by adding sections concerning complementary paratransit, transportation facilities, and other matters not covered in its initial ADA final rule.” Transportation for Individuals with Disabilities, 56 Fed. Reg. at 13,856. The Notice set forth a preliminary schedule of public hearings to take place in April and May of 1991 in several cities, including New York City and Washington, D.C.¹⁶ Id.

The Notice stated that “[o]ne of the most important provisions of the ADA with respect to rail systems calls for ‘key’ stations to be made accessible.” Id. at 13,862. A “point of interest” set forth in the Notice, originating from a Senate Report regarding the key station issue, was that “[e]xactly what stations will be determined ‘key’ is a decision best left to the local community.” Id. (quoting S. Rep. No. 101-116, at 56 (1989)). The Notice also quoted the Senate Report stating that “[t]he [Senate] Committee does not intend to mandate a process to identify ‘key’ stations except that – in developing the criteria that will be used to determine which stations will be ‘key’ – it is important to significantly involve organizations representing people with disabilities and individual consumers with disabilities.” Id. The Department of Transportation

¹⁵ Congress authorized the Department of Transportation to issue regulations “necessary for carrying out” Title II of the ADA. 42 U.S.C. § 12149.

¹⁶ No hearing was scheduled to take place in Philadelphia. However, the Court takes judicial notice of the fact that New York City and Washington, D.C. are geographically close enough to Philadelphia, and accessible by train service, for persons from Philadelphia to avail themselves of opportunities to attend hearings in either location without the necessity of an overnight stay.

also took note of settlement agreements recently negotiated in New York and Philadelphia (i.e., the EPVA Settlement Agreement), and stated that reports from both the Senate and the House of Representatives suggested that “these agreements should be viewed as in compliance with ADA Regulations.”¹⁷ Id. (citing S. Rep. No. 101-116, at 56 (1989); H.R. Rep. No. 101-485, pt. 1, at 34 (1990)). The Notice further stated that “[t]he proposed rule is not intended to require a public entity to nominate as a key station every station that may meet one of the criteria,” but rather that provision was aimed at ensuring “that the system, when viewed as a whole, becomes accessible to and usable by individuals with disabilities.” Id. The Department of Transportation sought comment “on the appropriateness of [the key station] criteria and suggestions for modification.” Id.

On September 6, 1991, the Department of Transportation issued its Final Rule implementing the transportation segments of the ADA, containing elements for “. . . provision of nondiscriminatory accessible transportation service.” Transportation for Individuals with Disabilities, 56 Fed. Reg. 45,584, 45,584 (Sept. 6, 1991) (to be codified at 49 C.F.R. pts. 27, 37, 38). While the Final Rule acknowledged comments the DOT received in response to the April 4, 1991 Notice of Proposed Rulemaking, no comment with respect to the propriety of the key

¹⁷ The DOT’s Notice of Proposed Rulemaking further stated that “[i]n looking at plans from New York and Philadelphia, the [Department of Transportation] would be mindful of the Congressional reports’ endorsement of them.” Transportation for Individuals with Disabilities, 56 Fed. Reg. at 13,862. Further, with respect to the provision in the proposed rule that would require the public entity to submit a plan to the DOT for complying with the rule, the Notice stated parenthetically that “With respect to those cities in which agreements mentioned by the [Senate and House of Representatives] Committee reports have already been worked out (i.e., New York and Philadelphia), submission of the plans developed under the agreements would satisfy the requirement.” Id.

stations listed in the EPVA Settlement Agreement was noted.¹⁸ *Id.* at 45,594 to 45,596.

The final regulations promulgated by the DOT state, in pertinent part, that “[e]ach public entity that provides designated public transportation by means of a light or rapid rail system¹⁹ shall make key stations on its systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.” 49 C.F.R. § 37.47(a) (emphasis added). The regulations instruct each public entity to determine which stations on its system are “key stations,” using a particular planning and public participation process, and taking into consideration various factors such as volume of ridership,²⁰ whether the station functions as a transfer station, an interchange point or an end station, and whether a station serves “major activity centers.” 49 C.F.R. § 37.47(b). The regulations further instruct the public entity to consult with individuals with disabilities affected by the plan “to develop a plan for compliance with” such regulations. 49 C.F.R. § 37.47(d). However, in another regulation which ties the EPVA Settlement Agreement to the present dispute, the Department of Transportation declared

¹⁸ The Final Rule acknowledged that comments were received from one of the transit providers involved in the New York agreement. See Transportation for Individuals with Disabilities, 56 Fed. Reg. at 45,596.

¹⁹ The regulations define a “rapid rail” as “a subway-type transit vehicle railway operated on exclusive private rights of way with high level platform stations.” 49 C.F.R. § 37.3.

²⁰ The Department of Transportation’s Notice of Proposed Rulemaking stated that while high ridership is one of several criteria to be considered, “the criteria would note that where such a station is in close proximity to another accessible station, it is not necessary to designate both as key stations.” Transportation for Individuals with Disabilities, 56 Fed. Reg. at 13,862. Thus, in their final form, the two paragraphs in 49 C.F.R. § 37.47 that contain the “key station” criteria, including the high ridership element, contain the caveat “unless such a station is close to another accessible station.” See 49 C.F.R. § 37.47(b)(1), (b)(4). The list of stations in the EPVA Settlement Agreement includes the transit station at 13th Street on the Market-Frankford Elevated line, which is one block away from City Hall. See SEPTA Mot. Summ. J. Ex. 17, C. Lister Aff. ¶ 4.

that “the identification of key stations under [the EPVA Settlement Agreement] is deemed to be in compliance with the requirements” set forth in the regulations. 49 C.F.R. § 37.53(a).²¹

On July 7, 1992, SEPTA held a public hearing to address (1) a proposed tariff increase for the Paratransit program and (2) “a plan to make ‘key’ stations of the Subway-Elevated Lines, the Norristown High Speed Line and the Regional Rail Division accessible for the transportation disabled.” SEPTA Mot. Summ. J. Ex. 10. According to the public notice for the hearing,²² a copy of the proposed Key Station Plan was available for public inspection beginning June 17,

²¹ The Final Rule acknowledged that Section 37.53 (codified at 49 C.F.R. § 37.53) “formally recognizes that agreements concerning key station accessibility in New York City and Philadelphia have identified key stations, which designations were intended to be recognized as complying with ADA key station selection requirements.” Transportation for Individuals with Disabilities, 56 Fed. Reg. at 45,596.

As discussed below, 49 C.F.R. § 37.53(a) is the source of significant dispute between the parties. SEPTA argues that the key stations identified in the EPVA Settlement Agreement meet the requirements of the ADA and that no further inclusion of additional key stations is required under the rules. SEPTA Br. Supp. Mot. Summ. J. 10-14. DIA strongly disagrees, arguing that the list of key stations designated in the EPVA Settlement Agreement did not purport to include all qualifying key stations on SEPTA’s system but that it merely established a “floor” to which additional key stations would be added. DIA Resp. ¶ 18; DIA Mem. Opp’n 6, 24.

²² The parties dispute whether notice of the July 7, 1992 hearing was provided. SEPTA asserts that it published notice of this hearing in the Philadelphia Inquirer and Tribune and that it distributed notice of this hearing on board SEPTA ParaTransit vehicles, commuter rail cars and at all key stations. SEPTA Mot. Summ. J. Ex. 11 at SEPTA-3689. DIA asserts that there was no public notice of the July 7, 1992 hearing, that only the timing of key station accessibility was discussed at the hearing, and that DIA and other disabled advocacy groups were not given an opportunity to address the topic of the identification of key stations. DIA Resp. ¶¶ 39-45. At oral argument here, counsel for DIA further argued that although there was a public hearing with the proposed list of key stations on the agenda, the transcript of that hearing confirms that at no time did SEPTA seek to confirm that there were no objections to the list of key stations. June 29, 2006 Tr. 38:18-24, 39:1-2. SEPTA acknowledges, however, that the July 7, 1992 hearing was held “[i]n order to comply with the 49 C.F.R. § 37.53(b) obligation to use its public participation and planning process solely to develop and submit plans for timely completion of key station accessibility to the Federal Transit Administration” SEPTA Mot. Summ. J. ¶ 39.

1992 “or shortly thereafter.” Id.

On July 23, 1992, the SEPTA Board held a meeting in which these two issues comprised the agenda.²³ SEPTA Mot. Summ. J. Ex. 13. Dr. Erik von Schmetterling, then the President of DIA, was present at this Board meeting. Id. at SEPTA-6806. Although the minutes indicate that the meeting included much discussion and debate about the proposed fare increase, it appears that only minimal discussion ensued with respect to approval of SEPTA’s Key Station Plan. See generally id. at SEPTA-6809 to SEPTA-6810. The minutes from the July 23 meeting with respect to the Key Station Plan state:

Mr. Undercofler [the Chairman of the Board of SEPTA] stated that [the Key Station Plan] resolution had been reviewed and concurred in by the appropriate Board committee in public session.²⁴ He then entertained a motion with respect to this resolution.

Id. at SEPTA-6809. The Key Station Plan resolution²⁵ was then moved, seconded and

²³ The Board minutes from the July 23, 1992 meeting indicate that the proposed fare increase and the “SEPTA Key Station Plan pursuant to the Americans with Disabilities Act” were the only two items discussed. SEPTA Mot. Summ. J. Ex. 13.

²⁴ It appears that the “public session” mentioned in the minutes from the Board meeting is a reference to the July 7, 1992 hearing. See SEPTA Mot. Summ. J. Ex. 13 at SEPTA-6810 (“WHEREAS, after appropriate publications and postings, Mr. Huss held a public hearing on July 7, 1992, at a convenient, accessible location . . .”).

²⁵ The Key Station Plan resolution states:

WHEREAS, Federal regulations implementing the Americans with Disabilities Act . . . require the development and submittal [sic] of a plan to make “key” stations accessible in accordance with Federal regulations; and

WHEREAS, SEPTA developed a plan and schedule to make “key” stations accessible in conjunction with the SEPTA Advisory Committee on Services on the Elderly and Disabled; and

WHEREAS, the identification of “key” stations is part of the agreement between

unanimously adopted.²⁶ Id. at SEPTA-6809 to SEPTA-6810.

the Eastern Paralyzed Veterans Association and the City of Philadelphia and SEPTA; and

WHEREAS, the Code of Federal Regulations Part 27, Subpart C, Section 37.53(2) provides that this type of agreement would be in compliance with the regulation identifying “key” stations; and

...

WHEREAS, after appropriate publications and postings, Mr. Huss held a public hearing on July 7, 1992, at a convenient, accessible location; and

WHEREAS, persons desiring to do so were given the opportunity to appear at this public hearing and to present testimony, to introduce exhibits and other evidence, and to ask relevant questions of the Authority’s representatives; and

...

WHEREAS, persons desiring to do so have had the opportunity to appear before the SEPTA Board at this public meeting for the purpose of presenting argument and/or other material concerning the proposed ADA Key Station Plan.

NOW, THEREFORE, BE IT RESOLVED, that upon consideration of the testimony taken and evidence presented at the public hearing held on July 7, 1992, or otherwise entered into the record, together with any arguments and/or other materials presented at this Board meeting, along with the recommendation of the Hearing Examiner, the SEPTA ADA Key Station Plan, be, and the same is hereby adopted.

SEPTA Mot. Summ. J. Ex. 13 at SEPTA-6809 to SEPTA-6810.

²⁶ Although the minutes of the July 23, 1992 SEPTA Board meeting indicate that the proposed Key Station Plan was discussed, they also indicate that the manner in which the Key Station Plan was treated was different than the manner in which the proposed fare increase was addressed. With respect to the fare increase, the Chairman of the Board called the Board’s attention to a revised resolution before them. SEPTA Mot. Summ. J. Ex. 13 at SEPTA-6802. The Chairman then called on an officer of SEPTA, Carol Lavoritano, to provide a brief presentation concerning the revised resolution, which presentation occupied slightly more than one page of the minutes. Id. at SEPTA-6802 to SEPTA-6803. At least nine named speakers, including Dr. von Schmetterling and other speakers who represented individuals with disabilities, then presented their concurrence with or objections to the revised proposal. Id. at SEPTA-6804 to SEPTA-6806. Ms. Lavoritano then responded to several of the speakers’ concerns. Id. at SEPTA-6806 to SEPTA-6807. Finally, a motion to adopt the resolution was entertained,

On May 28, 1996, notice concerning a proposed amendment to the EPVA Settlement Agreement was published.²⁷ A hearing to discuss the amendment, which allowed for the replacement of two previously designated regional rail stations with two other regional rail stations, was held on July 9, 1996. SEPTA Mot. Summ. J. Exs. 18-19. That same day an order was entered approving the amendment. SEPTA Mot. Summ. J. Ex. 19. The EPVA Settlement Agreement has not been amended in the decade since 1996.²⁸

seconded and the resolution was adopted. Id. at SEPTA-6807 to SEPTA-6809. The Board's proceedings concerning the fare increase, including the text of the resolution, occupied approximately seven of the nine total pages of minutes. See id. at SEPTA-6802 to SEPTA-6809.

In contrast, the minutes indicate that there was no reported discussion concerning the proposed Key Station Plan except one statement by the Chairman of SEPTA's Board that the Key Station Plan resolution had been "reviewed and concurred in by the appropriate Board committee in public session." The Chairman then entertained a motion with respect to this resolution. Id. at SEPTA-6809. As far as the minutes indicate, the Key Station Plan resolution involved little or no discussion by the SEPTA Board, was not presented to the Board by way of a descriptive presentation by a SEPTA officer, included no speakers on record as publicly commenting either for or against the resolution, and included no question and answer session. The entire proceedings concerning the Key Station Plan were memorialized in less than one and one-half pages of the minutes, including the text of the resolution. See id. at SEPTA-6809 to SEPTA-6810.

²⁷ The notice was published in the Philadelphia Inquirer and the Philadelphia Daily News. See SEPTA Mot. Summ. J. Ex. 18.

²⁸ DIA argues that it remained silent about the list of key stations in the EPVA Settlement Agreement, even as the Department of Transportation was adopting the agreement as SEPTA's compliance with the ADA, because it believed at that time that the list of "certain" key stations in the EPVA Settlement Agreement was still evolving. June 29, 2006 Tr. 39:2-4. DIA points to the 1996 amendment to the EPVA Settlement Agreement, in which the parties altered the list of key stations, to argue that the parties were still discussing which stations constitute "key stations." Id.; see also SEPTA Mot. Summ. J. Exs. 18-19 (orders approving 1996 amendment to the EPVA Settlement Agreement).

DIA finally asserts that when the EPVA Settlement Agreement was negotiated and agreed upon, no one involved understood that the agreement would designate a final list of *all* key stations, but rather that the agreement constituted a preliminary list of *certain* key stations that

E. Procedural History of the Present Case

Despite the apparent simplicity of DIA's general demand for SEPTA, a public body that arguably should be sensitive to the needs of all persons who turn to public transportation for matters of necessity and pleasure alike, to make certain stations accessible to individuals with disabilities in compliance with the ADA and the RHA, this case has followed a circuitous and, at times, trying, procedural route to arrive in its present posture. DIA filed its initial complaint in this case on March 14, 2003 against SEPTA as the sole defendant. DIA alleged that under the ADA, certain alterations to an entrance to the Market-Frankford Elevated Line at 15th and Market Streets triggered an obligation to make the 15th and Market Street transit station accessible to disabled individuals. That complaint was dismissed on May 15, 2003, after SEPTA argued that because the City of Philadelphia owned the real property upon which the alleged alterations had been made, the Complaint was deficient for not having named the City as a defendant.

DIA subsequently moved for and was granted relief from the dismissal, and DIA filed its first Amended Complaint on June 12, 2003, adding the City of Philadelphia as a defendant. DIA filed its Second Amended Complaint on October 10, 2003 for the purpose of adding an

SEPTA would begin to make accessible to disabled individuals. June 29, 2006 Tr. 36:7-10; DIA Mem. Opp'n 6, 20-26. At oral argument, counsel for DIA asserted that the deposition testimony of James J. Weisman, Esquire supports this contention. June 29, 2006 Tr. 37:14-18. Mr. Weisman was one of the lead counsel for EPVA during the settlement process and was involved in negotiating the EPVA Settlement Agreement. See SEPTA Mot. Summ. J. Ex. 62, Weisman Decl. ¶ 1. In his declaration, Mr. Weisman stated that during the negotiations, EPVA sought to have the City Hall Station declared a key station but that SEPTA was reluctant to do so because of cost constraints. Id. ¶ 6. Mr. Weisman stated that the list of stations identified in the EPVA Settlement Agreement was meant to be a "floor" and that the DOT did not intend that those stations identified would be the only stations designated as "key." Id. ¶¶ 9, 12.

attachment which, DIA believed, would facilitate a resolution of the matter.²⁹ On December 15, 2003, after an attempt to resolve the claim failed, DIA sought leave to file a Third Amended Complaint to add an additional count asserting DIA's alternative theory that both the City Hall and 15th and Market Street stations are "key stations" under the ADA. DIA's motion was granted over SEPTA's objection, and DIA filed its Third Amended Complaint on January 7, 2004.

While SEPTA filed an answer to the original complaint and the First and Second Amended Complaints, it did not file an answer to the Third Amended Complaint. Rather, on July 1, 2004, SEPTA moved to dismiss and to strike portions of that complaint. SEPTA specifically argued that the key station portion of the Third Amended Complaint must be dismissed because DIA failed to state a claim upon which relief could be granted. See Docket No. 32, SEPTA Br. Supp. 3. SEPTA further argued that the allegations set forth in the Third Amended Complaint relating to a purported agreement between DIA and SEPTA, in which SEPTA allegedly promised to move forward with the installation of elevators at the City Hall "key station" in lieu of constructing an elevator at the northwest corner of 15th and Market Streets, should be stricken from the pleading.³⁰ Id. at 7. On July 20, 2004, DIA and SEPTA entered into the following stipulation:

²⁹ According to the motion, DIA believed that certain alleged plans of SEPTA to incorporate an elevator which would facilitate access for the disabled to the subway lines through the City Hall Courtyard might assist the parties to settle the claim. The Second Amended Complaint included an attached diagram of the purported proposed elevator. See Docket No. 13, Second Am. Compl.

³⁰ SEPTA alleged that at a conference before the Court on June 16, 2004, DIA had agreed not to pursue this claim and that DIA stated that its case would turn on the sole legal question of whether SEPTA had violated the ADA or the RHA. See Docket No. 32, SEPTA Br. Supp. 7.

It is hereby stipulated and agreed, by and between the undersigned counsel, with the full authority of their clients, that Plaintiff does not oppose Defendant SEPTA's Motion to Strike the allegations in Plaintiff's Third Amended Complaint related to the alleged agreement to construct elevators at City Hall in lieu of construction of an elevator at the northwest corner of 15th and Market Streets. It is further stipulated and agreed that Plaintiff is hereby precluded from presenting any claim that Defendant SEPTA allegedly agreed to construct elevators at City Hall in lieu of construction of an elevator at the northwest corner of 15th and Market Streets or that SEPTA is liable for failing to abide by any such alleged agreement at trial or in any hearing or in any other proceeding; said claims are hereby dismissed without prejudice.

Docket No. 36, Stipulation.

On August 16, 2004, DIA and the City of Philadelphia presented for Court approval a settlement agreement. As part of that settlement agreement, it was stipulated that

It is the City's legal opinion that SEPTA is legally obligated under the ADA and accompanying Regulations to construct an elevator at the 15th and Market Street Courtyard entrance, which SEPTA renovated. The City only granted permits for that renovation because the City believed SEPTA had agreed to construct elevators in the City Hall Courtyard in lieu of the required elevator at 15th and Market.

Docket No. 49, Settlement Agreement between DIA and City of Philadelphia § 4(a).³¹ The settlement agreement between DIA and the City resolved all claims that DIA had brought against the City. It was approved by this Court on November 30, 2004, and the City of Philadelphia was dismissed as a defendant in this case. See Docket No. 68.

On December 27, 2004, in light of the aforementioned stipulation between SEPTA and

³¹ Federal Rule of Evidence 201, governing judicial notice of adjudicative facts, provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). In this case, the settlement agreement between DIA and the City is a publicly available document that is part of the docket in this case, and the Court therefore may look to the settlement agreement for certain facts. See Docket No. 49.

DIA, SEPTA's motion was granted with respect to the removal of any allegations respecting an alleged agreement to construct elevators at City Hall in lieu of constructing an elevator on the northwest corner of 15th and Market Streets. The remaining aspect of the motion was denied with respect to the requested dismissal of the alternative theory that the transit stations in question were, in fact, key stations. See Docket No. 70.

On January 14, 2005, DIA moved to file a Fourth Amended Complaint, ostensibly in order to comply with the Court's Order directing the removal from the pleadings of the alleged compromise agreement between DIA and SEPTA. See Docket No. 74. DIA also asserted that during the course of discovery in the case it had learned of an additional alteration by SEPTA to the southeast entrance to the City Hall Subway Station on the Broad Street Subway Line, located in the City Hall Courtyard. DIA argued that this alteration would also trigger obligations under the ADA, and, therefore, that DIA wished to add allegations premised upon these allegedly newly discovered facts to its complaint. Over SEPTA's opposition, the Court granted the motion to amend, and DIA filed its Fourth Amended Complaint on February 15, 2005. See Docket No. 80.

In its Fourth Amended Complaint, DIA argues that the construction of a new stairway at the northwest entrance to the concourse located at 15th and Market Streets, as well as the replacement of a non-working escalator in the southeast portion of the courtyard running from the mezzanine below the City Hall Courtyard to the Courtyard, each constitute an alteration which required SEPTA to make the respective entrances accessible to individuals with disabilities under the ADA, the regulations promulgated to implement the ADA, and the RHA. Docket No. 80, Fourth Am. Compl. ¶ 60. DIA further alleges that SEPTA's plans to construct a

new escalator at the northwest entrance of the City Hall Station in the City Hall Courtyard, which would provide access to the Broad Street Subway Lines, also triggers such an obligation. Id. In the second count of the Fourth Amended Complaint, DIA alleges that the City Hall and 15th and Market Street subway stations are, in fact, “key stations,” and as such, SEPTA is required to make them accessible to individuals with disabilities under the ADA and the RHA. Id. ¶¶ 61-62. Throughout this arduous procedural history DIA and SEPTA aggressively pursued and completed discovery, culminating in the pending cross motions for summary judgment.

DISCUSSION

A. Standard of Review

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id. The standards by which a court decides a summary judgment motion do not change when the parties file cross-motions. SEPTA v. Pa. Pub. Util. Comm’n, 826 F. Supp. 1506, 1512 (E.D. Pa. 1993).

SEPTA initially argues that DIA’s claims that the renovation to the stairway in the Market Street Courtyard at the northwest corner of 15th and Market Streets and the replacement of an escalator in the southeast portion of City Hall Courtyard triggered the alteration requirements of the ADA, are both barred by the statute of limitations. SEPTA further argues

that DIA's claim that either the 15th and Market Street or City Hall transit stations are "key stations" under the ADA is not a valid claim under the ADA, and further, that such a claim is untimely and invalid, because the Department of Transportation's approval of SEPTA's "key station plan" suffices to make SEPTA compliant with those obligations.

B. Count I: Renovations to the 15th and Market Street Stairway and Replacement of the Escalator in the City Hall Courtyard

Section 12147 of the ADA, in pertinent part, provides that:

With respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of section 202 of this Act [42 U.S.C. § 12132] and section 504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794], for a public entity to fail to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations.

42 U.S.C. § 12147(a).

In enacting the ADA, Congress did not include an express period of limitations for bringing claims. Where there is no governing federal statute of limitations, a federal court is to measure the timeliness of a federal civil suit by referring to analogous state law. Hardin v. Straub, 490 U.S. 536, 538 (1989) ("This tradition . . . is based on a congressional decision to defer to 'the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action.'" (quoting Wilson v. Garcia, 471 U.S. 261, 271 (1985))). For claims in which individuals seek to vindicate civil rights or rights conferred by federal statute, courts have concluded that the statute of limitations for personal injury claims controls, including any relevant state tolling rules. See, e.g., Lake v.

Arnold, 232 F.3d 360, 368 (3d Cir. 2000); Estrada v. Trager, No. 01-4669, 2002 WL 31053819 at* 3 (E.D. Pa. Sept. 10, 2002). Pennsylvania has a two-year limitation period for personal injury claims. 42 Pa. C.S.A. § 5524(7). The timing of the accrual of a federal cause of action, however, is a federal question to be determined by reference to federal law. Antonioli v. Lehigh Coal & Navigation Co., 451 F.2d 1171, 1175 (3d Cir. 1972).

The dispute regarding the timeliness of DIA's claims emanates from the difference in how the parties interpret the ADA as to when the alleged discrimination occurs. SEPTA argues that under the case law interpreting the ADA, a claim respecting the replacement of the stairway or the replacement of the escalator would have accrued as soon as the DIA knew, or had reason to know, of the injury which forms the basis of its claim. SEPTA Br. Supp. 27. SEPTA contends that DIA knew that SEPTA would not be installing an elevator at the 15th Street Courtyard as early as August 3, 2000.³² Id. at 26-30. Because DIA filed its initial complaint on March 14, 2003, SEPTA claims that Pennsylvania's two-year statute of limitations already had expired by that time and, thus, that DIA's claim on this point is time barred. In addition, SEPTA contends that DIA was aware that SEPTA would be replacing the escalator in the City Hall courtyard as early as June 1, 2001. SEPTA Br. Supp. 37. Because DIA filed its Fourth Amended Complaint on February 15, 2005, SEPTA argues that DIA's claim on this point is also time barred.

³² SEPTA points to letters sent by Mr. Gold, counsel to DIA, to the Commissioner of the Philadelphia Department of License & Inspection and the City of Philadelphia Solicitor's Office, dated August 3, 2000 and September 28, 2000, respectively. SEPTA Br. Supp. 26; SEPTA Mot. Summ. J. Exs. 25-26. In his initial letter, Mr. Gold expressed his concern that the City would allow SEPTA to apply for a variance to waive the requirement to provide a "vertical accessible route" at the 15th and Market Street location. SEPTA Mot. Summ. J. Ex. 25.

Conversely, DIA argues that the ADA must be read to mean that alterations which do not include accommodations for individuals with disabilities are not considered to be discriminatory until the alterations are completed. DIA Mem. Opp'n 27. DIA asserts that its claim with respect to the 15th Street Courtyard accrued on August 8, 2002 when the construction was completed, and that its claim with respect to the alterations of the City Hall Station accrued on August 24, 2003 when construction to replace the escalator was completed. Id. Thus, DIA argues that its claim with respect to the 15th Street Courtyard, which was filed on March 14, 2003, and its claim with respect to alterations of the City Hall Station, which was filed on February 15, 2005, each fall well within the two-year statute of limitations. DIA further argues that the notification it had regarding both projects was insufficient to support an assertion that an inevitable “future” discriminatory act would occur, thereby suggesting that the claims would not have been ripe for judicial review – and the limitation periods would not even begin to run – until the construction was completed. DIA Resp. to SEPTA Supp'l Letter. Therefore, DIA asserts that this interpretation of the ADA is key to determining the timeliness of its claim, and that notification of SEPTA’s *planned* renovations to the 15th Street Courtyard and the City Hall Courtyard could not have given rise to a cause of action because no discriminatory act and, therefore, no legal injury, had then occurred. DIA Mem. Opp'n 27.

The Court of Appeals for the Third Circuit has not addressed the precise issue as to when, in a suit under the ADA, a discriminatory action is deemed to have occurred, where the alleged discriminatory action is the violation of a statutory obligation to include an accommodation for disabled individuals in planning and completing a construction project. Neither party has cited

any case which directly addresses the issue.³³ Thus, the Court must conduct a singular analysis and interpretation of the language of the ADA in order to evaluate this fundamental issue. In conducting such an analysis, DIA suggests that the Court consider the language of the Fair Housing Act and the Fair Housing Amendments Act of 1988, which DIA asserts is analogous to the ADA and has been scrutinized by other courts.³⁴

³³ While much of the Third Circuit case law cited by SEPTA involves other types of discriminatory behavior (e.g., employment actions), DIA primarily cites cases where courts interpreted the Fair Housing Amendments Act.

³⁴ DIA relies on several cases in which, DIA asserts, courts have concluded that a discriminatory act can occur only when alterations have been completed. These cases include several in which courts have considered claims under the Fair Housing Amendments Act (and, in some cases, the ADA). For example, in Fair Housing Council, Inc. v. Village of Olde St. Andrews, Inc., 250 F. Supp. 2d 706, 719 (W.D. Ky. 2003), the court concluded that a plaintiff's claims under the Fair Housing Amendments Act fell within a two-year statutory period because the "last asserted occurrence of the practice in the [housing development] occurred when the last unit was sold"

Likewise, in United States v. Taigen & Sons, Inc., 303 F. Supp. 2d 1129, 1139-40 (D. Idaho 2003), the court considered a plaintiff's claims brought pursuant to the Fair Housing Amendments Act and the ADA with respect to the design and construction of homes. However, the Taigen court appears to have considered only the statutory limitation with respect to whether construction that allegedly violated the Fair Housing Amendment Act could be considered a continuing violation and whether the plaintiff's claims for civil penalties and compensatory damages were timely filed. Id. at 1143-48. The court in Taigen first concluded that the continuing violation theory did not apply to the Fair Housing Amendment Act claims, but later concluded that the claim for injunctive relief which plaintiff had requested pursuant to the ADA and the Fair Housing Act could proceed because the alleged "failure" to design and construct an accessible facility did not occur until construction was completed. Id. at 1150 n.16.

In each of the cases relied upon by DIA and discussed herein, the presiding court considered and rejected an argument that the "continuing violation" theory would serve to toll the statutory period with respect to the Fair Housing Amendments Act claim. See, e.g., id. at 1141 (noting that the alleged failure to design and construct housing in compliance with the Fair Housing Act "has a continuing *effect* rather than constituting a continuing *violation*" of the Act). One court did, however, acknowledge that the continuing violation doctrine might, in some circumstances, be applicable under the ADA. Id. at 1140 n.6. DIA asserts that it does not argue that its alteration claims are part of a continuing violation theory "but rather argues that the date

Where alleged discrimination involves a violation of the Fair Housing Act, the “discriminatory act” in question must amount to “a failure to design and construct [the designated dwellings] in such a manner that [would accommodate the needs of individuals in wheelchairs].” 42 U.S.C. § 3604. Thus, courts finding that a claim does not accrue until construction on a facility is completed do not appear to consider the possibility that a plaintiff might have knowledge at an earlier point that a facility, once completed as designed, will not meet the obligations under the statute.

The ADA provides that “[w]ith respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services,” it is discrimination “for a public entity to fail to make such alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, *upon the completion of such alterations.*” 42 U.S.C. §12147(a) (emphasis added). Therefore, in order to apply the interpretation of the Fair Housing Act to determine when a cause of action arises under the ADA, the Court would need to first accept the proposition that the phrase “upon the completion of such alterations” modifies the language beginning “for a public entity to fail to make such alterations” rather than the preceding phrase “the altered portions of the facility are readily accessible to and usable by individuals with disabilities.” That is, in order to read the ADA in the manner that DIA suggests, the Court would have to assume that the phrase “upon the completion of such alterations” modifies the entire definition of what constitutes “discrimination,” and does not

of the running of the statute of limitations is the date of completion of the alterations to the facilities.” DIA Mem. Opp’n 32. Thus, accepting DIA’s own characterization of its claim, the “continuing violation” theory need not be addressed.

merely suggest that accessibility for disabled individuals must be in place at the time the alterations are completed. The Court declines to adopt such an interpretation as proposed by DIA.

By closely examining the language of the Fair Housing Act, the Court notes that the conjunctive nature of the discriminatory act under that legislation, i.e., to design *and* construct the dwellings without appropriate accessibility, differs from the linguistic analysis presented here. While this language clearly suggests that actual construction must be completed before a discriminatory act under the FHA is deemed to have occurred, the ADA's language is far less clear.

Additionally, logic and prudence suggest that it would be impractical to impose upon a defendant the requirement that it fully complete a facility modification before having to address any assertion that modifications that can be clearly understood from design drawings and specifications amount to alterations triggering an obligation under the ADA that might require significant and material modifications that surely would have been more easily, efficiently and economically incorporated well prior to completion of the work.³⁵ It makes no practical or logical sense to wait until the last nail is hammered into place to evaluate the ADA-compliance of a construction project that would necessarily have had to have been carefully designed, specified and engineered for the needs of the disabled long before excavation commences or framing proceeds. Stated differently, to hold that the limitations period begins to run only when

³⁵ This proposition is further supported by the fact that DIA actually did contact SEPTA and the City of Philadelphia during the early planning and design phases of the project to express its concern on the very points now in dispute, and the ultimate response from the City was that DIA should be expeditious in pursuit of its concerns, as the completion of the project was scheduled to proceed relatively quickly. See SEPTA Mot. Summ. J. Exs. 24-27.

the hammer falls for the last time or only when the paint has dried would imply that up until that time major design and construction feats could still be planned and executed to entirely re-engineer the project to add the ADA-compliant features. No real world construction project follows such a course. Moreover, it would be undesirable to permit a potential defendant to perpetually forestall a claim by arguing that, notwithstanding the design and substantial completion of all material elements of a project, no claim could be ripe for presentation to a court simply because finishing touches had not been applied or because an as-yet unfinished project could always be redesigned or otherwise modified to include the sought-after component. See note 37, infra. These considerations, along with the absence of any explicit statutory limitation period in the ADA, lead to the conclusion that it is implausible that the phrase “upon the completion of such alterations” implies a limitation period that could not begin to run until alterations were physically actually completed. Thus, the Court must look elsewhere for guidance as to when a cause of action such as this one accrues.

Under federal law, a claim accrues on the date “when the plaintiff knows or has reason to know of the injury that is the basis of the action.” Smith v. City of Phila., 345 F. Supp. 2d 482, 485 (E.D. Pa. 2004); Toney v. U.S. Healthcare, Inc., 840 F. Supp. 357, 358 (E.D. Pa. 1993), aff’d, 37 F.3d 1489 (3d Cir. 1994). To determine the accrual date of a discrimination claim, a court must focus on when the discriminatory act occurred, not when the effect of that act became painful. See Chardon v. Fernandez, 454 U.S. 6, 8 (1981) (finding that claim for discrimination began upon notification of intent to terminate an employment contract because “the proper focus is on the time of the discriminatory act and not the point at which the consequences of the act became painful”); see also Saylor v. Ridge, 989 F. Supp. 680, 686 (E.D.

Pa. 1998) (finding that discrete acts of discrimination alleged against employer accrued when plaintiff gained insight as to the discriminatory nature of the acts).³⁶

1. **15th and Market Street Courtyard**

a. **Statutory Period**

DIA had notice that SEPTA did not plan to install an elevator as part of the 15th and Market Street Courtyard renovations, and DIA also knew that SEPTA believed that SEPTA did not need to construct an elevator because it was told so by a representative of the City of Philadelphia Law Department. See SEPTA Mot. Summ. J. Exs. 25-27. DIA argues that the November 14, 2000 letter it received from Mr. Pasour of the City of Philadelphia Law Department, in which Mr. Pasour acknowledges that DIA threatened to litigate the issue and suggests that any such litigation be commenced promptly, cannot reasonably be regarded as a final decision regarding the scope or specifics of the construction.³⁷ As indicated supra, the

³⁶ The “discrimination” in Chardon was in the employment context. Chardon, 454 U.S. at 6. However, the general principle applies in analogous cases of discrimination, as is demonstrated by Saylor, 989 F. Supp. at 685-86, where the plaintiff alleged discrimination with respect to a denial of accommodations under Title II of the ADA.

³⁷ During the oral argument on these Motions and in the subsequent supplemental letter memoranda, the parties shift the focus of when the claim accrued to whether a claim asserted in November of 2000 or during the two years thereafter would have been ripe for adjudication.

Of the several cases cited by both parties in support of their positions relating to ripeness, DIA relies on Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), for the proposition that “when a Defendant has a viable opportunity to take further administrative action which will work to obviate a potential claim, the Plaintiff may not bring a claim until the Defendant has entirely relinquished that opportunity.” DIA Supplemental Letter Mem. 2. DIA then argues that because SEPTA could have modified the building permit after construction began, the notification it received via Mr. Pasour’s letter was not final, and DIA had no basis to bring a claim then. Id.

Williamson, however, presents a factually different scenario than this one and is not

Court disagrees.

The record reveals that the process leading up to the beginning of construction at the 15th and Market Street Courtyard involved considerable analysis by both SEPTA and the City of Philadelphia. See SEPTA Mot. Summ. J. Exs. 25-27, 56. This analysis included a consideration of provisions of the Philadelphia Building Code, the timeliness requirements for use of federal funding, and compliance with the ADA. SEPTA Mot. Summ. J. Exs. 27, 54, 56. The context and circumstances of this analysis undeniably included Mr. Gold, as counsel for DIA, having threatened to file suit to establish that the construction project triggered an obligation under the

dispositive here. In Williamson, the Supreme Court addressed a claim that a township had, by virtue of its zoning decision, taken the property of the plaintiff, a real estate developer, without just compensation. 473 U.S. at 175. In that context, the Court found that the claim was not ripe for adjudication because the plaintiff developer had not yet obtained a final decision regarding how it would be allowed to develop its property. Id. at 194-95.

Here, after attempting to obtain variances from the City of Philadelphia Building Code, SEPTA was informed on October 17, 2000 that no such variance would be necessary. See SEPTA Mot. Summ. J. Ex. 56 at COP-171. Subsequently, on November 14, 2000, counsel for the City, after stating that the City understood DIA to believe that the project did not conform with the ADA, informed Mr. Gold, counsel for DIA, that “the City doe[s] not share your view that an elevator is required in the 15th Street Courtyard. . . .” SEPTA Mot. Summ. J. Ex. 27. Under these circumstances, it is difficult to imagine that SEPTA would, absent some external force, simply modify the plans for a construction project which had been funded and was time sensitive. In addition, it is also difficult to imagine why DIA, upon receipt of the November 14, 2000 letter from the City, would reason that the appropriate course of action would be to sit back and wait until SEPTA completed its planned construction, which it knew would not include an elevator, and then bring suit two and a half years later, in March of 2003.

Moreover, this case is not about an allegedly unconstitutional taking of property. Rather, the parties here differ as to the interpretation of a federal statute and the regulations that were promulgated to implement it. Thus, this matter could properly have been presented to a district court for a ruling as to the correctness of one party’s position that a federal statute was being violated through the implementation of a certain construction project. Therefore, in this case, the Court must reject any finding that litigation brought at the time SEPTA began in material respects the planned construction would not have been ripe for adjudication.

ADA for SEPTA to install an elevator. SEPTA Mot. Summ. J. Exs. 25-27. Moreover, at his deposition in this case,³⁸ Mr. Gold admitted that, after DIA had been notified that there was no elevator in the construction plan, and none added later once construction began, DIA had considered obtaining an injunction that would stop the project from proceeding until the appropriate changes were made. SEPTA Mot. Summ. J. Ex. 24, S. Gold Dep. 36:17-25; 37:11-13, Nov. 4, 2005. In fact, counsel for DIA confirmed that DIA made a deliberate, presumably strategic, decision at that time not to pursue having the elevator installed at 15th and Market Streets. Id. 38:1-25; 39:1-16. For all of these reasons, the Court concludes that DIA's cause of action with respect to the 15th and Market Street Courtyard accrued no later than November 1, 2000, when DIA was informed that SEPTA would proceed with the planned construction at the 15th and Market Street Courtyard without installing an elevator. This conclusion is, however, subject to being tempered by certain facts that suggest that tolling the statutory period may be appropriate in this case.

b. Potential for Equitable Tolling

At oral argument, DIA set forth as a third and, presumably, alternative argument. DIA suggests that its failure to file suit with respect to the demolition and replacement of the stairway at 15th and Market Streets was the result of DIA's reliance on an assurance by SEPTA executives that although no elevator was planned for that location, SEPTA did plan to install an elevator that would descend to the City Hall Station of the Broad Street Subway Line. June 29,

³⁸ Stephen F. Gold, Esquire, counsel for DIA, was deposed as a witness to some of the facts underlying this case.

2006 Tr. 31:23-25, 32:1-14, 34:13-17, 49:13-24, 50:1-9.³⁹

Specifically, DIA argues that despite the urging from the City of Philadelphia Law Department to file a lawsuit quickly (if DIA intended to do so at all), DIA decided not to file the suit as a result of a political compromise with Jack Leary, then-managing director of SEPTA. June 29, 2006 Tr. 31:23-25, 32:1-14. Counsel for DIA asserted that this arrangement was brokered by Frances Egan, who was Mr. Leary's chief assistant. SEPTA Mot. Summ. J. Ex. 24, S. Gold Dep. 24:19-25. Counsel also asserted that DIA expected that installation of the elevator at City Hall Station would have at least commenced in or before 2002 and, when SEPTA continued to delay and put other projects ahead of making the City Hall station accessible, DIA then decided to pursue a legal, rather than a political, solution. June 29, 2006 Tr. 49:13-24, 50:1-9. Thus, DIA argues that the statutory period should be tolled.

In response, SEPTA notes that any claim related to such a proposed agreement was dismissed by stipulation of the parties, and that if Ms. Egan had brokered the purported deal, she lacked the authority to do so on behalf of SEPTA. June 29, 2006 Tr. 55:13-25 to 56:1-10.

The doctrine of equitable tolling serves to stop the running of the statute of limitations where the claim's accrual date has already passed. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994). In Oshiver, the Court of Appeals for the Third Circuit outlines three principal, though not exclusive, situations in which equitable tolling may be appropriate. Id. These include: (1) where the defendant has actively misled the plaintiff

³⁹ Interestingly, and of some significance to the consideration of whether the dispute was earlier ripe for adjudication, counsel for DIA stated at oral argument that a purported deal at the time was a political compromise because "everyone knew that . . . I could have won that one [a suit relating to the 15th and Market Street stairway] hands down." June 29, 2006 Tr. 50:5-6.

respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum. Id. (citations omitted). To the extent that DIA is attempting to make a tolling argument, it is the first of these three situations that might apply here.

In his deposition for this case, Mr. Gold, counsel for DIA, testified that during the planning stages of the renovations to the 15th and Market Street Courtyard, he believed that the City and SEPTA were concerned that DIA would seek an injunction to halt the project or at least delay its progress. SEPTA Mot. Summ. J. Ex. 24, S. Gold Dep. 14:14-20, 15:21-24. As a result, Mr. Gold attests that he negotiated with Ms. Egan, in her capacity as chief assistant to the managing director for SEPTA, throughout the early stages of the construction until SEPTA and DIA came to an oral agreement that in exchange for DIA not filing a suit, SEPTA would install an elevator in the City Hall Station that would be accessible to wheelchair users. Id. 20:1-7, 21:3-7.

This project was allegedly set to begin in the end of 2002 and be completed in 2004. Id. 17:8-20. Mr. Gold testified that the substance of this agreement evolved over the course of three meetings, after which Mr. Gold placed telephone calls to Ms. Egan and a City representative to inform them that DIA accepted the offer. Id. 19:10-25 to 20:1-7. Aside from the alleged conversations, there was no formalization of the agreement in writing, nor were there ever any plans drawn with specifications for the planned project as described by Mr. Gold. Id. 21:3-7; see also June 29, 2006 Tr. 34:14-17. Mr. Gold further testified that some time either in late 2002 or early 2003, which "might have even been after the '02 deadline," he noted during a personal visit

with Ms. Egan⁴⁰ that construction on the project had yet to begin. SEPTA Mot. Summ. J. Ex. 24, S. Gold Dep. 21:11-13, 22:12-17, 23:11-13.

Before proceeding any further with this analysis, the Court notes that pursuant to the July 20, 2004 stipulation between the parties, DIA agreed that it would not present any *claim* that SEPTA allegedly committed to such an agreement, or any *claim* that SEPTA is liable for failing to abide by such an agreement. See Docket No. 36. The Court further notes that SEPTA included portions of Mr. Gold's deposition transcript relating to the purported agreement in its summary judgment submissions, thereby including this material in the record before the Court. See SEPTA Mot. Summ. J. Ex. 24. These materials, along with DIA's tolling argument, are only considered here to determine whether there is a question of fact as to whether DIA was "actively misled" into not pursuing its claim against SEPTA, and not as a claim by DIA that such an agreement existed. With that qualification and after considering the information outlined above, but quite apart from the issue of Ms. Egan's authority, the Court concludes that DIA was not actively misled into not more timely pursuing its claim against SEPTA.

When DIA began negotiating its purported deal with SEPTA regarding renovations to the 15th and Market Street Courtyard, DIA was already aware that SEPTA had no plans to install an elevator at that site. In fact, this absence was the stated reason for the negotiations. Yet, as time wore on and the 2002 deadline, acknowledged by Mr. Gold himself, grew closer, DIA took no action either to formalize its agreement with SEPTA or to ask SEPTA for the physical plans and specifications for the project.

⁴⁰At the time of this visit, Ms. Egan was reportedly gravely ill and was no longer working for SEPTA. Ms. Egan has subsequently passed away.

The facts presented here are not similar to those in which courts have found that plaintiffs have been actively misled or lulled into non-pursuit of legal rights.⁴¹ To the contrary, DIA knew its opponent very well through prior negotiations and litigations. Under such circumstances, it is not reasonable to suggest that DIA would have been lulled by an oral promise made early in the process of construction, particularly where it knew even then that SEPTA and the City were actively trying to avoid a lawsuit regarding the project. From its lengthy history of interacting with SEPTA and the City, DIA surely appreciated the necessarily bureaucratic character of both and knew that neither could be described as engaging in undocumented undertakings that were not embraced at each level up the appropriate chain of command.

Because the facts do not support a finding that DIA was actively misled with respect to the 15th and Market Street Courtyard project, there is no basis to apply the doctrine of equitable tolling here. Moreover, because DIA's claim with respect to the 15th and Market Street Courtyard project accrued in November of 2000 and equitable tolling does not apply, the Court finds that DIA's claim, having been filed on March 14, 2003, is tardy. Therefore, summary judgment will be granted in favor of SEPTA with respect to this claim.

2. City Hall Courtyard Escalator

In light of the case law discussed above, the Court must next consider whether DIA's

⁴¹ As an example, the Oshiver court explained that active misleading may occur in an employment discrimination case where a defendant employer actively misled the plaintiff as to the reason for the plaintiff's discharge. See Oshiver, 38 F.3d at 1387. In this case, DIA was fully aware that SEPTA did not plan to install an elevator at the 15th Street Courtyard site and that DIA could seek an injunction to stop the project while a court decided whether the renovation of that site amounted to an alteration that triggered an obligation under the ADA. See SEPTA Mot. Summ. J. Ex. 24, S. Gold Dep. 15:22-24. Thus, it would require an impermissible stretching of the facts to conclude that DIA was lulled into prejudicial complacency by SEPTA.

claim with respect to the replacement of the escalator in the City Hall Courtyard is also barred by the statute of limitations. DIA sought leave to file its claim with respect to City Hall Courtyard escalator on January 14, 2005, and filed its Fourth Amended Complaint on February 15, 2005. See Docket Nos. 74 and 80. In its motion for leave to file a Fourth Amended Complaint, DIA asserted that it learned of the planned escalator replacement through the discovery process in this case. Docket No. 74, DIA's Mot. For Leave to File Fourth Am. Compl. ¶ 7. However, the record reflects that information pertaining to SEPTA's Escalator Replacement Project, which specified that the escalator in the southeast portion of the City Hall Courtyard would be replaced, was publicly available since early 2001. Absent from the record, however, is any indication that prior to January 14, 2005, when DIA sought leave to file its Fourth Amended Complaint, DIA voiced any concern or otherwise argued that the escalator replacement in the southwest corner of the City Hall Courtyard was an alteration that triggered an accessibility requirement under the ADA.

The record shows that SEPTA's Escalator Replacement Program was listed in SEPTA's publicly available capital budget in early 2001.⁴² See SEPTA Mot. Summ. J. Ex. 16 at SEPTA-1992, SEPTA-2047. Nancy Salandra, the Executive Director of DIA, testified that she and other people at DIA regularly reviewed SEPTA's capital budget when it was published each year.⁴³

⁴² SEPTA's capital budget for 2001 included a description of the "Escalator Replacement Program," which stated that the escalator in the "City Hall Station (Southeast entrance)" would be replaced, and that construction was scheduled to start in the third quarter of 2000. SEPTA Mot. Summ. J. Ex. 16 at SEPTA-2047.

⁴³ In her deposition, Ms. Salandra testified that she and "probably a couple of other people" at DIA reviewed SEPTA's capital budget each year from 1996 through 2002. See SEPTA Mot. Summ. J. Ex. 28, N. Salandra Dep. 30:6 to 31:6. The transcript of Ms. Salandra's deposition reads as follows:

SEPTA Mot. Summ. J. Ex. 28, N. Salandra Dep. 30:16-23. Further, at least as early as August 17, 2001, a sign stating “Project of the Pennsylvania Public Transportation Assistance Fund; Escalator Replacement at Erie, Spring Garden, City Hall & 30th Street Stations; Southeastern Pennsylvania Transportation Authority” was posted in the City Hall Courtyard on the outside of the boarded-off construction area where the escalator was being replaced.⁴⁴ SEPTA Mot. Summ. J. Ex. 36. Thus, as of August 17, 2001, DIA would have been aware not only that SEPTA had budgeted and planned to replace the escalator in the southeast quadrant of the City Hall Courtyard, but also that the project was underway.

The parties’ respective statements of facts in support of their respective motions and/or

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- Q: [Mr. Woehrle] When you say ‘96 to 2002, are you telling me that DIA each time each year a new capital budget came out that someone from DIA would review that capital budget?
- A: [Ms. Salandra] Correct.
- Q: [Mr. Woehrle] Who would do that for DIA?
- A: [Ms. Salandra] It would be me and probably a couple of other people.

Id. 30:16-23.

⁴⁴ The record contains some evidence that the signs were posted around the construction site in the City Hall Courtyard as early as June 2001. In its Motion for Summary Judgment, SEPTA stated that on or about June 1, 2001, SEPTA contractors posted the aforementioned sign on the barriers that were erected around the southeast escalators. SEPTA Mot. Summ. J. ¶ 86. SEPTA cited to the testimony of, and a written affidavit from, Skip Brook, the Director of Engineering in the Bridges & Buildings section of the Infrastructure Department in the Operations Division of SEPTA. Id. Mr. Brook testified that barricades were erected around the escalator in the southeast corner of the City Hall Courtyard on or about June 1, 2001; Mr. Brook estimated that signs were posted on the barricades and that the construction project to replace the escalator began around that time. SEPTA Mot. Summ. J. Ex. 34, S. Brook Dep. 17:16-25, Sept. 1, 2005; SEPTA Mot. Summ. J. Ex. 35, S. Brook Aff. ¶¶ 11-13. SEPTA also presented a photograph of the southeast corner of the City Hall Courtyard during the construction project, which displays the sign noted above. SEPTA Mot. Summ. J. Ex. 36. The photograph is dated August 17, 2001. Id. Mr. Brook stated that the sign was displayed until the construction project was completed. SEPTA Mot. Summ. J. Ex. 35, S. Brook Aff. ¶ 13. This construction project was completed in August 2003. DIA Statement of Facts, SEPTA Resp. ¶¶ 77.

their oppositions to each others' do not address the issue of when DIA actually knew about SEPTA's plan to replace the escalator in the southeast quadrant of the City Hall Courtyard. However, the Court notes that even if DIA had failed to notice the references to the planned escalator replacement in SEPTA's Fiscal Year 2001 Capital Budget, which the Executive Director of DIA claims to have read, or for some reason believed that the project might not occur, DIA and the public in general certainly had notice of the project beginning in June 2001, or at least by August 17, 2001, when physical barricades were placed around the escalator with a sign indicating that the work was part of the Escalator Replacement Project. Yet DIA did not file a claim regarding this escalator replacement until January of 2005, approximately three and one-half years later. Because this time frame exceeds the two years within which DIA had to file a claim under the ADA, the Court concludes that this claim is also barred by the statute of limitations and summary judgment will be entered in favor of SEPTA on that basis with respect to this claim.

C. Count II: Key Station Designation

In the second count of its Fourth Amended Complaint, DIA asserts that SEPTA has not complied with the ADA and the RHA because the City Hall and 15th Street transit stations for the Broad Street Subway and Market-Frankford Elevated Subway lines are subject to the "key station" requirements of the ADA, and are not accessible to individuals in wheelchairs. The root of the parties' dispute relating to the designation of certain stations as "key stations" lies in the EPVA Settlement Agreement, which was executed on June 28, 1989⁴⁵ – one year before the

⁴⁵ The suit which gave rise to the EVPA Settlement Agreement was brought pursuant to the RHA. The RHA precludes discrimination against disabled individuals. 29 U.S.C. § 794.

enactment of the ADA. As discussed above, the EPVA Settlement Agreement resolved a lawsuit between EPVA, as representatives for a class of disabled individuals, and SEPTA and the City of Philadelphia. As part of the EPVA Settlement Agreement, the parties designated “certain key stations” that would be renovated and made accessible to individuals with disabilities. See SEPTA Mot. Summ. J. Ex. 2 at SEPTA-3372 to SEPTA-3375. This list of stations did not include the City Hall or 15th and Market Street transit stations. Id. Congress enacted the ADA in 1990. The ADA and regulations promulgated to implement the ADA required that each “public entity”⁴⁶ make key stations accessible to individuals with disabilities according to a time frame specified therein. 42 U.S.C. § 12147; 29 C.F.R. § 37.47. An additional regulation provided that the list of key stations in EPVA Settlement Agreement was “deemed to be in compliance with” the ADA’s key station requirements. 29 C.F.R. § 37.53(a). Since the time the EPVA Settlement Agreement was executed in 1989, and the regulations pursuant to the ADA were promulgated in 1991, SEPTA has made 31 of the 35 key stations listed in the EPVA Settlement Agreement accessible to individuals with disabilities, including individuals who use wheelchairs. SEPTA Mot. Summ. J. Ex. 17, C. Lister Aff. ¶ 3. SEPTA has not made the City Hall or the 15th and Market Street stations accessible to individuals with disabilities, including individuals who use wheelchairs.

Both parties now before the Court present a multi-pronged argument with respect to the key station issue. SEPTA first claims that the ADA does not provide a private cause of action to enforce the specific regulations at issue in this case. Thus, SEPTA argues, summary judgment

⁴⁶ The term “public entity” includes “any State or local government” as well as any “department, agency, special purpose district, or other instrumentality of a State or States or local government.” 42 U.S.C. § 12131(1)(A)-(B). SEPTA does not dispute that it is a public entity.

should be granted in its favor with respect to Count II of DIA's Fourth Amended Complaint.

1. Private Cause of Action Regarding Key Station Designation

SEPTA argues that summary judgment in its favor is appropriate with respect to Count II of DIA's Fourth Amended Complaint because the ADA⁴⁷ does not confer a right to bring a private cause of action with respect to the *designation* of key stations or with respect to requiring completion of any station by a specific date. SEPTA Br. Supp. 14 (emphasis added). That is, although SEPTA acknowledges that an individual has a right to sue under the ADA to redress discrimination, SEPTA argues that there is no private right of action to force a transit agency to designate a certain transit station as a "key station." That decision, SEPTA argues, lies "*solely*" within the discretion of the transit agency. SEPTA Br. Supp. 15; see also June 29, 2006 Tr. 58:12-22.

In support of this argument, SEPTA relies on the standard set forth by the Supreme Court in Alexander v. Sandoval, 532 U.S. 275 (2001). In Sandoval, a non-English speaking citizen of Alabama asserted that the state's official policy of administering its driver's license examination only in English violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq. Sandoval, 532 U.S. at 279. Sections 601 and 602 were considered to be the relevant portions of

⁴⁷ SEPTA argues that there is no private cause of action with respect to the designation of key stations because "the relevant statute and regulations do not provide a private cause of action with respect to key station designations." SEPTA Br. Supp. 14. While SEPTA does not expressly state that the ADA is the "relevant statute" with respect to this claim, all statutory references within this portion of SEPTA's Brief in Support of its Motion for Summary Judgment refer to the ADA. Thus, the Court assumes that this argument attacks DIA's right to pursue a personal cause of action under the ADA. However, since DIA's Fourth Amended Complaint alleges that SEPTA's failure to make these transit stations accessible violates both the ADA and the RHA, the Court will consider whether a private right of action exists under either of these statutes. See Docket No. 80.

the statute. Id. at 278. Section 601 provides that “[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity” covered by Title VI. 42 U.S.C. § 2000d. Section 602 authorizes federal agencies to effectuate the provisions of Section 601 by “issuing rules, regulations, or orders of general applicability.” 42 U.S.C. § 2000d-1.

In Sandoval, the Supreme Court noted that only Congress may create a private right to enforce a federal statute and that “[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.” Sandoval, 532 U.S. at 286. The Supreme Court acknowledged that Section 601 of Title VI contained “rights creating” language—“[n]o person . . . shall . . . be subjected to discrimination”—that provided a private cause of action. Id. at 288 (citing Cannon v. Univ. of Chicago, 441 U.S. 677, 690 (1979)). In doing so, the Supreme Court noted that Section 601 prohibits only intentional discrimination.⁴⁸ Id. at 280. Thus, any regulations that prohibit disparate-impact discrimination must have been enacted pursuant to Section 602. Id. at 281-82. The Supreme Court concluded that such “rights creating” language was absent from Section 602. Id. at 289. The Supreme Court noted that Section 602 was phrased as a “directive” to the

⁴⁸ In framing its opinion in Sandoval, the Supreme Court identified three aspects of the case that “must be taken as given.” Sandoval, 532 U.S. at 279. First, private individuals may sue to enforce Section 601 of Title VI. Id. Second, Section 601 prohibits only intentional discrimination. Id. at 280. Third, the Court assumed of purposes of deciding the case that regulations promulgated under Section 602 may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under Section 601. Id. at 281. Respondents in Sandoval asserted that there is a private right of action to enforce the disparate-impact regulations promulgated under Section 602. The Supreme Court noted that no case that it has considered has held that a private right of action to enforce disparate-impact regulations exists. Id. at 284.

government agency implementing the statute, and limits those agencies to effectuating rights already created by Section 601. Id. Further, the Supreme Court found that Section 602 was even further removed from creating a right as it “focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating.” Id. Thus, Section 602 did not confer a private right to sue for claims of discrimination alleging a disparate impact. Id.

Since Sandoval, the Court of Appeals for the Third Circuit has concluded that where a statute does not expressly confer an individual right, “the statutory creation of a personal right⁴⁹ is a predicate to finding an implied right of action in a statute.” Three Rivers Ctr. for Indep. Living, Inc. v. Hous. Auth. of Pittsburgh, 382 F.3d 412, 424 (3d Cir. 2004). There are no post-Sandoval cases within or outside the Third Circuit addressing whether the particular language of 42 U.S.C. § 12147 and 49 C.F.R. § 34.47 may be construed to confer a personal right allowing an individual to bring a private suit to enforce the identification of a particular key station under the ADA. Thus, under the guidance of Sandoval and its progeny, the Court must consider whether Congress intended to establish such a personal right in enacting the “key station” provisions of the ADA.

Most recently, in Sabree v. Richman, 367 F.3d 180 (3d Cir. 2004), as well as in Three Rivers Center, our Court of Appeals considered whether statutory language imposed a personal right. In Sabree the court considered whether the federal Medicaid statute that requires states to

⁴⁹ In Three Rivers Center the court noted that “personal right” is a precise term, defined as rights that “inhere in the individual,” are “individually focused” and create “individual entitlements.” 382 F.3d at 419. Use of the term “personal rights,” “maintain[s] the demarcation between ‘personal rights’ and ‘private rights of action.’” Id. at 419 n.9.

provide medical assistance (including intermediate care facility services) to persons with mental retardation with “reasonable promptness,” unambiguously conferred a private right upon mentally retarded recipients of such services to enforce the statute by means of Section 1983.⁵⁰ Id. at 189. In examining the issue, the Sabree court set forth a three-part analysis which included considering (1) the essential characteristics of “an unambiguously conferred right,” (2) whether the statutory language imparts such a right; and (3) whether Congress has precluded individual enforcement of the right, if the court concludes that such a right exists.⁵¹ Sabree, 367 F.3d at 183.

To determine the characteristics of an “unambiguously conferred right,” the Sabree court examined the Supreme Court’s previously issued opinions assessing the existence of such a right, which opinions emphasized that to confer a private right, a statute must include “rights-creating language.” Id. at 187 (quoting Gonzaga, 536 U.S. at 287). Such language must clearly impart an “individual entitlement” with an “unmistakable focus on the benefitted class.” Id. (quoting

⁵⁰ Section 1983 imposes liability on anyone who, under color of state law, deprives a person “of any rights, privileges, or immunities secured by the Constitution and laws.” 42 U.S.C. § 1983. The Court notes at the outset of this inquiry, that the inquiry in Sabree was whether the plaintiff had a private right of action to enforce a claim under Section 1983. As our Court of Appeals in Three Rivers Center noted, a court may recognize a private right of action in one or both of two ways: first, a court may interpret the statute to provide for an implied right of action; second, Section 1983 may provide a private right of action. 382 F.3d at 421. As the Court of Appeals explained, these are “separate yet overlapping inquiries.” Id. DIA’s Fourth Amended Complaint contains the phrase “Plaintiff’s claims are authorized under 42 U.S.C. § 1983.” Docket No. 80 at ¶ 4. DIA argues that under Gonzaga University v. Doe, 536 U.S. 273 (2002), if persons with disabilities suffer from discrimination in violation of the ADA and Section 504, they have a private right to enforce a constitutional violation under Section 1983. DIA Mem. Opp’n 8.

⁵¹ The third part of the analysis enunciated in Sabree only applies to claims alleged under Section 1983.

Blessing v. Freestone, 520 U.S. 329, 343 (1997); Cannon v. Univ. of Chicago, 441 U.S. 677, 690-93 (1979)). The court then looked to the text and structure of the Medicaid Act to discern whether such a right was unambiguously created. The Medicaid Act stated that “[a] State plan for medical assistance *must . . . provide* for making medical assistance available ... to all [eligible] individuals” and that “such assistance shall be furnished with reasonable promptness to all eligible individuals” 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10) (emphasis added); see also Sabree, 367 F.3d at 182 n.4, 189. The Sabree court applied the three-pronged Blessing test⁵² and concluded that the statutory requirement that a state “must provide” medical assistance services with reasonable promptness met all three prongs of the test because (1) the plaintiffs were the intended beneficiaries of the statute, (2) the rights the plaintiffs sought to enforce were specific and enumerated and (3) the obligation imposed upon the states was unambiguous and binding. Sabree, 367 F.3d at 189.

⁵² The plaintiffs in Blessing were five mothers in Arizona whose children were eligible to receive child support services from the state pursuant to Title IV-D of the Social Security Act. Blessing, 520 U.S. at 332. The mothers filed suit pursuant to 42 U.S.C. § 1983 claiming that they had an enforceable individual right to have the state’s program achieve “substantial compliance” with the requirements of the statute, which provided that in order to qualify for funds under the Aid to Families with Dependent Children Act, a state must certify that it would operate a child support enforcement program that conforms with the requirements set forth in the Social Security Act. Id. at 333.

The Blessing Court set forth the three-pronged test to determine whether a statute confers a federal right upon an individual, including whether (1) Congress intended that the provision in question benefit the plaintiff; (2) the right asserted to be protected is so “vague and amorphous” that its enforcement would strain judicial competence; and (3) the statute unambiguously imposes a binding obligation on the states. Id. at 340-41. Where a plaintiff successfully establishes these requirements, a rebuttable presumption of the existence of a right is established; however, such a claim could still be dismissed if, after inquiry with respect to congressional intent, a court concluded that Congress “specifically foreclosed a remedy under § 1983.” Id. at 341 (quoting Smith v. Robinson, 468 U.S. 992, 1005 n.9 (1984)).

Having satisfied the Blessing elements, the court then added that under Gonzaga⁵³ a further examination was required to ensure that the unambiguous rights asserted were conferred upon the plaintiffs, and not that plaintiffs merely fell within a “general zone of interest that the statute is intended to protect.” Sabree, 367 F.2d at 189-90. Noting that the statutory requirement that a state plan “must provide” services exemplified “rights-creating” language, the court found that the statutory language was “mandatory rather than precatory.” Id. at 190. Furthermore, the court noted, the relevant provisions enumerated that such entitlements be made available to “all eligible individuals,” and, therefore, did not focus on the “entity regulated rather than the individuals protected.” Id. The Sabree court then concluded that the plain meaning of the statutory text clearly delineated rights that were both unambiguous and personal in nature, such that personal rights were indeed intended and that plaintiffs had stated valid and enforceable claims.⁵⁴ Id. at 194.

⁵³ The plaintiff in Gonzaga was a former university student who claimed, pursuant to 42 U.S.C. § 1983, that his individual rights conferred by the Family Educational Rights and Privacy Act (“FERPA”) were violated when a university official disclosed the plaintiff’s name to a state teaching certification agency regarding unverified allegations of sexual misconduct that were made against the student. Gonzaga, 536 U.S. at 278. FERPA is a statute that was enacted pursuant to the spending power of Congress and conditioned the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records. Id. The text of FERPA provided that “[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein) of students without the written consent of their parents to any individual, agency or organization.” Id. In finding that the statute did not confer an individual right, the Supreme Court clarified the test set forth in Blessing, stating that “we now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action under § 1983.” Gonzaga, 536 U.S. at 283.

⁵⁴ The Sabree court finally considered whether the presumption of the availability of Section 1983 as a vehicle for suit was rebutted either expressly or by the existence of a comprehensive remedial scheme that was designed to preclude individual suits. 367 F.2d at 193.

In Three Rivers Center, by contrast, the Court of Appeals considered whether Section 504 of the RHA provided a private right of action to enforce regulations promulgated by the Department of Housing and Urban Development (“HUD”) to implement the RHA, and held that no private right exists. 382 F.3d at 431. Plaintiffs in Three Rivers Center sought relief in district court to force the Housing Authority of Pittsburgh to comply with HUD regulations to effect certain reforms to provide accessible public housing to individuals with disabilities. Id. at 415.

The court began its inquiry by stating three general propositions. Id. at 419. First, “Congress may effect its legislative goals by various means.” Id. Second, “Congress can create various types of rights and obligations,” which include personal rights and non-personal rights. Personal rights, the court explained, “inhere in the individual,” are “individually focused,” and “create ‘individual entitlements.’”⁵⁵ Id. (citations omitted). Non-personal rights, on the other hand, may have a “‘systemwide’ or ‘aggregate’ focus,” and are “defined in terms of obligations of the person or entity regulated rather than in terms of entitlements of the individual protected.” Id. (citations omitted). Third, the court stated, “even when Congress creates rights or obligations (including personal rights), it does not necessarily follow that private parties can enforce them or obtain a direct remedy through the judicial process.” Id. at 420.

After noting that there was no explicit provision excluding individual actions, the court noted that the state faced a “substantial burden” to demonstrate that there was a “comprehensive remedial scheme” which would supplant any remedies provided under Section 1983. Finding that the remedial scheme associated with the Medicaid Act “clearly falls short” of being sufficiently comprehensive, the Sabree court concluded that the plaintiffs had stated valid and enforceable claims. Id. at 194.

⁵⁵ The court noted that “[p]ersonal rights are those intentionally and ‘unambiguously conferred’ through ‘rights-creating’ language.” Three Rivers Ctr., 382 F.3d at 419-20 (quoting Gonzaga, 536 U.S. at 283-84).

If a statute does not contain provisions addressing either whether private parties may maintain a right of action or the scope of such right of action, a court may recognize a private right of action by finding that an implied right of action exists and/or that Section 1983 provides a private right of action. Id. at 421. The court noted that Congressional intent in enacting a statute is the “focal point” in determining whether an implied right of action exists, and that Cort v. Ash, 422 U.S. 66 (1975), guides a court’s review in discerning that intent.⁵⁶ Id. (citations omitted).

The court noted that to determine whether the plaintiffs had a private right of action under the RHA to enforce the HUD regulations at issue, the court must first “examine the scope of the private right of action that exists to enforce *Section 504*” of the RHA and second, “examine *Section 504* and the pertinent HUD regulations to determine whether the HUD regulations construe any personal right that *Section 504* creates.” Id. at 425. The court found

⁵⁶ In Cort v. Ash, the Supreme Court identified four factors that should be considered in discerning Congress’s intent in enacting a statute, which are:

First, is the plaintiff “one of the class for whose *especial* benefit the statute was enacted,”--that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? [Fourth,] is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Three Rivers Ctr., 382 F.3d at 421 (quoting Cort, 422 U.S. at 78). For an implied right of action to exist, “a statute must manifest Congress’s intent to create (1) a personal right, and (2) a private remedy.” Id.

that plaintiffs could bring suit to enforce only personal rights that Section 504 creates,⁵⁷ and that while the HUD regulations at issue may construe rights that Section 504 creates, the HUD regulations “do not construe *personal rights* that *Section 504* creates.” Id. Therefore, the court held that Section 504 of the RHA does not provide a private right of action to enforce the particular HUD regulations at issue in that case. Id.

SEPTA argues that applying the reasoning set forth in Sandoval, the ADA does not confer a private right of action because the statute contains no “rights creating” language with respect to the identification or designation of key stations. SEPTA Br. Supp. 15, SEPTA Reply Br. 5. More specifically, SEPTA asserts that the regulations promulgated to enforce the key station portion of the ADA confer “sole discretion for the designation of key stations” upon transit operators. SEPTA Reply Br. 5; see also SEPTA Br. Supp. 15.

In response, DIA argues that Congress intended a private cause of action to arise from the ADA, and that the identification of a key station, which requires involvement of the affected community, supports such an assertion. DIA Mem. Opp’n 6-9. DIA calls to the Court’s attention two cases cited by the Supreme Court in Sandoval in which Section 504 of the RHA, one of the statutes implicated in this action, was found to confer a private right of action. See School Bd. of

⁵⁷ The court noted that Section 504’s right of action derives from the *implied* right of action that exists to enforce Title VI of the Civil Rights Act of 1964. Three Rivers Ctr., 382 F.3d at 426. Further, the remedies available to redress violations of Section 504 are coextensive with the remedies available under Title VI. Id. (citing Barnes v. Gorman, 536 U.S. 181, 185(2002)). Because Sandoval “mandates that an implied right of action can exist only where Congress creates a personal right, a plaintiff can enforce only personal rights through an implied right of action.” Id. Since the remedies (including the scope the any implied right of action) available under Section 504 are coextensive with those available under Title VI, the court held that plaintiffs can only bring suit to enforce personal rights that Section 504 creates and further, that plaintiffs may enforce the HUD regulations only if the regulations construe and define a personal right that Section 504 creates. Id.

Nassau Cty v. Arline, 480 U.S. 273 (1987) (presenting implicit assumption that cause of action brought by individual pursuant to Section 504 was valid); Alexander v. Choate, 469 U.S. 287 (1985) (allowing cause of action asserting disparate impact under Section 504). Because the Supreme Court has found disparate impact claims brought under the RHA to be privately enforceable, DIA argues that the claims here, brought pursuant to Sections 12132 and 12147 of the ADA, 42 U.S.C. §§ 12132, 12147 and Section 504 of the RHA., 29 U.S.C. § 794, are valid.⁵⁸ Because DIA argues that a personal right to enforce key station identification arises under both the RHA and the ADA, the Court must consider each statute separately.

a. Section 504 of the RHA

Section 504 of the RHA, 29 U.S.C. § 794, is “commonly referred to as the ‘civil rights bill of the disabled.’” Three Rivers Ctr., 382 F.3d at 416 (quoting Ams. Disabled for Accessible Pub. Transp. v. Skinner, 881 F.2d 1184, 1187 (3d Cir. 1989) (en banc)). Section 504 provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance” Section 504 does not, by its terms, explicitly provide for a private right of action. However, the Supreme Court has acknowledged that a private right to enforce Section 504 of the RHA exists. Barnes v. Gorman, 536 U.S. at 185-86.⁵⁹ Furthermore, numerous courts within the Third Circuit, including

⁵⁸ DIA also argues that under Gonzaga, if persons with disabilities suffer from discrimination in violation of the ADA and Section 504, they have a private right to enforce a constitutional violation under Section 1983. DIA Mem. Opp’n 8.

⁵⁹ In Barnes, a paraplegic man suffered serious injuries when he was arrested and subsequently brought suit against various police officials and personnel for discrimination on the basis of his disability in violation of Section 202 of the ADA, 42 U.S.C. § 12132, and Section

the Court of Appeals, have consistently held that Section 504 of the RHA implicitly provides a private right of action.”⁶⁰

504 of the RHA, 29 U.S.C. § 794. In this case, the Supreme Court did not dispute whether a private right of action existed to enforce both statutes; rather, the majority’s opinion acknowledged that such private right exists. Barnes, 536 U.S. at 185-86. The Supreme Court addressed the issue of whether punitive damages were available under each statute, and held that punitive damages may not be awarded in private actions against municipalities under Section 202 of the ADA and Section 504 of the RHA. Id. at 189.

⁶⁰ See, e.g. Three Rivers Ctr., 382 F.3d at 425 (holding that, although section 504 of the RHA provides a private right of action, it did not provide a private right of action to enforce the particular HUD regulations at issue); Bowers v. NCAA, 346 F.3d 402, 433 (3d Cir. 2003) (acknowledging that an implied right of action exists under Section 504 of the RHA and Section 12132 of the ADA but holding that no implied right of contribution exists under either statute); NAACP v. Medical Center, Inc., 599 F.2d 1247, 1259 (3d Cir. 1979) (holding that a private cause of action is implicit in Section 504 of the RHA for plaintiffs who seek declaratory and injunctive relief); Doe v. Colautti, 454 F. Supp. 621, 626 (E.D. Pa. 1978) (“It is now well-settled that a handicapped individual has an implied private right of action under [Section 504 of the RHA].”), aff’d, 592 F.2d 704 (3d Cir. 1979); Davis v. Bucher, 451 F. Supp. 791, 798 (E.D. Pa. 1978) (holding that Section 504 of the RHA implicitly provides a private cause of action); Di Medio v. Girard Bank, 1987 U.S. Dist. LEXIS 2941 at *5 (E.D. Pa. 1987) (noting that a claimant under Section 504 of the RHA has a private cause of action against a recipient of federal financial assistance).

In Three Rivers Center, the Court of Appeals concluded that an implied right to enforce Section 504 of the RHA exists. 382 F.3d at 425. The Court of Appeals noted that amendments to the RHA compel the conclusion that a private right of action exists. Id. In 1978, Congress added Section 505(a)(2), which states that

The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act [29 U.S.C. § 794].

29 U.S.C. § 794a(a)(2). By incorporating Title VI’s “remedies, procedures and rights” into the RHA, the Court of Appeals noted that Congress essentially provided a private right of action under Section 504. Three Rivers Ctr., 382 F.3d at 425-26. Second, the Court of Appeals noted that Congress confirmed that a private right of action exists to enforce Section 504 when it ratified the Supreme Court’s decision in Cannon v. University of Chicago. Id. at 426. In Cannon, the Supreme Court held that a private right of action exists to enforce Title IX of the Education Amendments of 1972 because Title IX was modeled after Title VI, and when Title IX was enacted, Title VI had already been construed as creating a private right of action. Id. Since

Applying the Supreme Court’s analysis from Alexander v. Sandoval, it is clear that Section 504 contains the “rights-creating” language— “[n]o otherwise qualified individual with a disability . . . shall . . . be subjected to discrimination”—that the Supreme Court held was paramount to finding (or not finding) a private right of action. See, e.g. Gonzaga, 536 U.S. at 287 (finding that provisions of the Family Educational Rights and Privacy Act of 1974 speak only to the Secretary of Education, directing that “no funds shall be made available” to any “educational agency or institution” which has a prohibited “policy or practice,” and lack “right-creating” language); Sandoval, 532 U.S. at 288 (finding that the language of Section 601 of Title VI stating that “each Federal department and agency . . . is authorized and directed to effectuate the provisions of [§ 601],” did not constitute “right-creating” language); see also Cannon, 442 U.S. at 690 n.13 (noting that the “right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action”).

b. Section 12132 of the ADA

Section 12132 of the ADA provides that “no 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 be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. This provision was modeled after Section 504 of the RHA and, like Section 504, clearly includes the requisite “rights-creating” language.⁶¹ The Supreme Court has

Section 504 was also patterned on Title VI, Section 504 may also be construed as implying a private remedy. Congress subsequently enacted Section 1003 of the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7, which the Supreme Court has interpreted as validating the holding in Canon. Id. (citations omitted).

⁶¹ Section 12133 of the ADA states: “The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 [29 U.S.C. 794a] shall be the remedies, procedures,

acknowledged that a private right of action exists under Section 12132 of the ADA. Barnes, 536 U.S. at 185-86. The Court of Appeals for the Third Circuit has also acknowledged that a private that a private right of action exists under Section 12132 of the ADA. Bowers v. NCAA, 346 F.3d 402, 433 (3d Cir. 2003) (acknowledging that an implied right of action exists under Section 12132 of the ADA and Section 504 of the RHA but that no implied right of contribution exists under either statute).

c. Section 12147 of the ADA

Section 12147(b) is the main “key station” provision of the ADA that applies to rapid rail and light rail transit systems.⁶² This section states that

For purposes of section 12132 of this title [42 U.S.C. § 12132] and section 794 of Title 29 [29 U.S.C. § 794], it shall be considered discrimination for a public entity that provides designated public transportation to fail, in accordance with the provisions of this subsection, to make key stations (as determined under criteria established by the Secretary [of the Department of Transportation] by regulation) in rapid rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

42 U.S.C. § 12147(b). By making specific references to Section 12132 of the ADA and Section 794 of the RHA, Section 12147 encompasses the anti-discrimination provisions of both statutes and provides that a violation of Section 12147– the “fail[ure] . . . to make key stations . . . accessible to and usable by individuals with disabilities”– “shall be considered discrimination” under both Section 12132 of the ADA and Section 504 of the RHA. The Court of Appeals for the Third Circuit has not determined whether Section 12147 itself implies a private cause of

and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [42 U.S.C. § 12132].” 42 U.S.C. § 12133.

⁶² See also 42 U.S.C. § 12162(e)(A)(i) (containing similar “key station” requirements for intercity and commuter rail transportation systems).

action.⁶³

While Section 12147 provides that failure of the public entity to make key stations accessible constitutes discrimination, this provision on its own, does not specify which stations on a transit system are considered to be “key stations.” It only provides that key stations are those “determined under criteria established by the Secretary [of the Department of Transportation] by regulation.” 42 U.S.C. § 12147(b). The regulations promulgated to implement the ADA, and not the ADA itself, define the process for identifying key stations.

⁶³ Few courts have considered whether a cause of action brought under Section 12147 of the ADA may proceed. In Cupolo v. Bay Area Rapid Transit (BART), 5 F. Supp. 2d 1078 (N.D.C.A. 1997), the District Court for the Northern District of California considered whether BART’s failure to adequately maintain elevators at “key stations” on BART’s system violated Sections 12132 and 12147 of the ADA. Although the court did not specifically address the issue of whether Sections 12132 and 12147 of the ADA confer a private right of action, the court preliminarily enjoined BART to improve maintenance of elevators at its key stations because failure to make key stations in rapid rail and light rail systems readily accessible to individuals with disabilities, including individuals who use wheelchairs, constitutes discrimination under 42 U.S.C. §§ 12132 and 12147(b)(1). Id. at 1086.

In Hassan v. Slater, 41 F. Supp. 2d 343, 351 (E.D.N.Y. 1999), the District Court for the Eastern District of New York considered whether the Metropolitan Transportation Administration’s (“MTA”) decision to close a certain station on its system constituted discrimination against an individual on the basis of his disability. Although not addressing the issue of whether a private cause of action exists under Section 12147, as part of its decision, the court briefly considered whether the failure to designate a certain station as a “key station” violated the ADA. The court stated that

[B]ased on the record currently before it, the Court cannot conclude that the selection of the key stations, or the exclusion of Center Moriches from designation as a key station, was violative of the ADA. It does not appear that the ADA requires the MTA defendants to keep all of its stations open, or even to make all of its stations fully accessible to people with disabilities. Rather, the ADA only requires that they make new stations and its designated key stations readily accessible to and usable by people with disabilities.

Id. (citing 42 U.S.C. § 12162(e)(2)). In Hassan, the court determined that the plaintiff had not met the burden required for the court to grant a preliminary injunction, in that he could not prove that defendants discriminated against him on the basis of his disability. Id.

Specifically, 49 C.F.R. § 37.47, provides that “[E]ach public entity shall determine which stations on its system are key stations.” 49 C.F.R. § 37.47(b). Thus, for the Court to hold that a private cause of action exists in this case, the Court must find that not only that Section 12147 of the ADA confers a private right of action, but also that it specifically confers a private right of action to enforce the particular regulation at issue, namely, 49 C.F.R. § 37.47.

Following the Court of Appeal’s Sabree analysis, the Court must assess whether the statutory language of Section 12147 of the ADA imparts an “unambiguously conferred right.” 367 F.3d at 183. The Court’s inquiry into the statutory construction of Section 12147 begins by examining the statute itself. Sabree, 367 F.3d at 189 (quoting Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). Section 12147 states that

For purposes of section 12132 of this title [42 U.S.C. § 12132] and section 794 of Title 29 [29 U.S.C. § 794], it shall be considered discrimination for a public entity that provides designated public transportation to fail, in accordance with the provisions of this subsection, to make key stations (as determined under criteria established by the Secretary [of the Department of Transportation] by regulation) in rapid rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The text of this statute clearly provides that a public entity’s failure to make key stations accessible to individuals with disabilities constitutes discrimination. Thus, Section 12147 creates law, binding on the public entity charged with carrying out such laws—in this case, SEPTA—to make key stations accessible to individuals with disabilities.⁶⁴ Neither DIA nor SEPTA disputes this contention.⁶⁵ However, the pertinent question is whether this provision creates an

⁶⁴ See Sabree, 367 F.3d at 189.

⁶⁵ Rather, DIA and SEPTA dispute the meaning of the phrase “key station (as determined under criteria established by the Secretary by regulation),” contained in Section 12147, and whether the designation of certain stations as “key stations” applies to only those stations

unambiguously conferred right. Sabree, 367 F.3d at 189.

First, the Court must determine that Section 12147 passes the “Blessing” test. Sabree, 367 F.3d at 189; Blessing, 520 U.S. at 340-41. The Court concludes that Section 12147 passes the Blessing test: first, because DIA, which represents a class of individuals with disabilities, including individuals who use wheelchairs, is among the intended beneficiaries of Section 12147; second, the rights DIA seeks to enforce – the right to compel SEPTA to make “key stations” accessible – are specific and enumerated; and third, the obligations imposed on the public entity – the obligation to make “key stations” accessible to individuals with disabilities, including individuals who use wheelchairs – are unambiguous and binding. See Sabree, 367 F.3d at 189 (quoting Blessing, 520 U.S. at 340-41).

Next, the Court must determine whether Congress used “rights-creating” language. Sabree, 367 F.3d at 189. To confer rights, Congress must use “rights-creating” language that is “individually focused,” and that imparts an individual entitlement. Sabree, 367 F.3d at 187 (quoting Gonzaga, 536 U.S. at 287). As noted above, Section 12147(b) of the ADA states that, for purposes of Section 12132 of the ADA and Section 504 of the RHA, “*it shall be considered discrimination for a public entity that provides designated public transportation to fail . . . to make key stations . . . readily accessible to and usable by individuals with disabilities, including*

designated as such in the EPVA Settlement Agreement or whether additional stations must be designated as “key stations” (and thus, made accessible) if they fit the criteria prescribed in 49 C.F.R. § 37.47(b). As discussed here, the Court believes that this dispute is grounded in the interaction between two separate regulations promulgated pursuant to the ADA, specifically 49 C.F.R. § 37.47 (which contains the criteria for determining which stations are “key”) and 49 C.F.R. § 37.53 (which exempts SEPTA from the requirements of 49 C.F.R. § 37.47 by virtue of its participation in the EPVA Settlement Agreement). As such, that this point is disputed has no bearing on whether Section 12147 of the ADA is “clear and unambiguous.” Sabree, 367 F.3d at 189.

individuals who use wheelchairs.” 42 U.S.C. § 12147(b) (emphasis added). The language of Section 12147 differs slightly from the language of certain other statutes that courts have found to imply a private right of action in that it does not include the more familiar “no person shall” language.⁶⁶ Section 12147 is framed in terms of a specific action that the public entity must not fail to do – i.e., make key stations accessible – lest such action constitute discrimination against certain individuals. As in Sabree, this Court finds that, as a linguistic matter, it is difficult to distinguish the “no person shall” language from the “it shall be considered discrimination” language of Section 12147. Sabree, 367 F.3d at 190. Both of these linguistic formulations constitute “rights-creating” language. Next, it is clear that the “rights-creating” language of Section 12147 is “individually focused.” Although it may seem that Section 12147 focuses on “the [entity] . . . regulated rather than the individuals protected,” Sandoval, 532 U.S. at 289, in that Section 12147 is framed in terms of what actions a *public entity* must not fail to do, the Court finds that this linguistic difference is not determinative in this case. In Sabree, the relevant Title XIX language was framed in terms of what a state *must* do— “A State plan must provide”—and our Court of Appeals held that this language was individually focused because the relevant Title XIX provisions enumerated certain entitlements available to “all eligible individuals.” Sabree, 367 F.3d at 190 (quoting 42 U.S.C. § 1396a(a)(8)). Section 12147 clearly

⁶⁶ See, e.g., 42 U.S.C. § 2000d (“No person in the United States shall . . . be subjected to discrimination under any program or activity receiving Federal financial assistance” on the basis of race, color, or national origin.); 20 U.S.C. § 1681(a) (“No person in the United State shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance.”); 29 U.S.C. § 794 (“No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .”).

“confers rights on a particular class of persons,” California v. Sierra Club, 451 U.S. 287, 294 (1981), and specifically states *which* class of persons: “individuals with disabilities, including individuals who use wheelchairs.”⁶⁷ For the reasons stated above, the Court finds that Section 12147 contains the requisite “rights-creating” language.

The court in Sabree then followed the Gonzaga analysis in examining the structure of the statute.⁶⁸ The structure of the ADA clearly supports the existence of a private right. Beginning with Section 12101, Congress expressed its findings that, for example, “some 43,000 Americans have one or more physical or mental disabilities,” 42 U.S.C. § 12101(a)(1), and that “historically, society has tended to isolate and segregate individuals with disabilities,” 42 U.S.C. § 12101(a)(2). The stated congressional purpose in enacting the ADA was:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b).⁶⁹ Section 12132 of the ADA, discussed above, precludes discrimination

⁶⁷ See Sabree, 367 F.3d at 188 n.17 (noting that the express purpose of the inquiry whether a statute confers any right at all, is to “determine whether or not a statute ‘confers rights on a particular class of persons’” (quoting Gonzaga, 536 U.S. at 285 (quoting California v. Sierra Club, 451 U.S. at 294))).

⁶⁸ See Sabree, 367 F.3d at 191 (“Our judicial function is limited to recognizing those rights which Congress ‘unambiguously confers,’ and in doing so we would be remiss if we did not consider the whole of Congress’s voice on the matter—the statute in its entirety.”).

⁶⁹ See also Bowers v. NCAA, 346 F.3d 402, 433 (3d Cir. 2003) (quoting same). Our Court of Appeals in Bowers v. NCAA examined the structure of the ADA and explained that:

via exclusion of disabled individuals from participation in, or denial to such individuals the benefits of the services, programs, or activities of a public entity. 42 U.S.C. § 12132. As noted above, Section 12132 consistently has been held to provide an implied private right of action to enforce anti-discrimination provisions of the ADA. Section 12133 of the ADA provides the remedies, procedures and rights “to any *person* alleging discrimination on the basis of disability in violation of [42 U.S.C. § 12132].” 42 U.S.C. § 12133 (emphasis added). With respect to new transit facilities, Section 12146 provides that “it shall be discrimination for a public entity to construct a new facility to be used in the provision of designated public transportation services unless such facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.” 42 U.S.C. § 12146. Almost identical language defining action on the part of a public entity that constitutes discrimination is used in the first part of Section 12147, see 42 U.S.C. § 12147(a), the second part of Section 12147, which is the language at issue in this case pertaining to “key stations” in rapid or light rail systems, see 42 U.S.C. § 12147(b), Section 12148, which pertains to the failure to operate a transportation program, see 42 U.S.C. § 12148, and Section 12162, which pertains to intercity and commuter rail actions considered discriminatory, see 42 U.S.C. § 12162.

Title I of the ADA prohibits discrimination in employment and provides that rights and remedies available under Title VII of the Civil Rights Act of 1964 are available under Title I. 42 U.S.C. § 12117. Title II prohibits discrimination by a “public entity.” 42 U.S.C. § 12132. Rights and remedies available under section 504 of the Rehabilitation Act are available under Title II. 42 U.S.C. § 12133. Finally, Title III prohibits discrimination in public accommodations. 42 U.S.C. § 12182. Rights and remedies available under Title II of the Civil Rights Act of 1964 are available under Title III. 42 U.S.C. § 12188.

Bowers v. NCAA, 346 F.3d at 433.

Congress, in enacting the ADA, demonstrated great effort to define categories of action (or, more accurately, inaction) that constitute discrimination against individuals with disabilities. The Court notes the sections of the ADA above to point out that Section 12147(b), the main statutory provision at issue in this case, is not an isolated “individually-focused” provision in an otherwise “entity-focused” statute. While it is clear that Congress intended to enact a statutory scheme that binds various public entities, and contains directives to public entities to take certain action with a view towards the “elimination of discrimination against individuals with disabilities,” it is clear that Congress directed public entities to take such action expressly for the benefit of individuals with disabilities. Therefore, the Court rejects SEPTA’s argument that there is no private, or individual, cause of action under the ADA available with respect to enforcing the “key station” provisions of Section 12147.

That the Court finds an private right of action to enforce Section 12147 of the ADA does not end the inquiry, however, because the Court finds that DIA is not actually bringing an action to enforce Section 12147 of the ADA. Rather, it is clear from the pleadings and the arguments that DIA challenges SEPTA’s failure to designate certain stations as “key stations.” This requires a more thorny analysis of the criteria governing the determination of key stations that is found in 49 C.F.R. § 37.47. In order for DIA to prevail here on its claim as articulated, the Court would have to find that DIA has a private right of action under Section 12147 of the ADA to enforce 49 C.F.R. § 37.47.

Again, the analysis needs to start with our Court of Appeals’ decision in Three Rivers Center. In Three Rivers Center the court considered whether plaintiffs had a private right of action under the RHA to enforce regulations promulgated by HUD. The analysis must begin

with an examination of the scope of the private right of action that exists to enforce Section 12147 of the ADA. Three Rivers Center, 382 F.3d at 425. Then, the Court must examine Section 12147 and the pertinent regulations promulgated by the Department of Transportation to determine whether the regulations construe any personal right that Section 12147 creates.

Our Court of Appeals in Three Rivers Center found that the particular HUD regulations there at issue did not articulate a personal right. 382 F.3d at 429. In examining whether Section 504 of the RHA created a private right of action to enforce those particular regulations, the Court of Appeals looked to the scope of the private right of action that Section 504 provides. The Court relied heavily on the close, evolutionary relationship between Section 504 of the RHA and Title VI of the Civil Rights Act of 1964. As noted above, Section 504 of the RHA was patterned after Title VI, and in turn, Section 12132 of the ADA was patterned after Section 504 of the RHA. The evolutionary link between these statutes guides the Court's determination as to whether the DOT regulations at issue in this case "articulate *personal* rights." Three Rivers Ctr., 382 F.3d at 429.

As noted above, the ADA does not explicitly provide a private right of action, yet numerous courts (including, most notably, the Supreme Court) have found that an implied right of action exists to enforce Section 12132. The remedies to enforce Section 12132, which are provided in Section 12133, are coexistent with the remedies available for violations of Section 504 of the RHA, which are found in Section 505(a)(2) of the RHA. See 42 U.S.C. § 12133; 29 U.S.C. § 794a(a)(2). In turn, the remedies in Section 505 of the RHA are coextensive with the remedies available for a private cause of action brought under Title VI. See Barnes, 536 U.S. at 185; Three Rivers Ctr., 382 F.3d at 426. Actions under Title VI, Section 504 of the RHA and

Section 12132 are all implied rights of action. Because “Sandoval mandates that an implied right of action can exist only where Congress creates a personal right, a plaintiff can enforce only personal rights through an implied right of action.” Three Rivers Ctr., 382 F.3d at 426. Further, because Section 12132’s remedies, including the scope of its private right of action, are coextensive with Section 504, and Section 504’s remedies are, in turn, coextensive with Title VI’s remedies, DIA “can only bring suit to enforce personal rights” that Sections 12132 or 12147 of the ADA create. See id.

The next step is to examine the relationship between the statutory provisions of the ADA and the pertinent regulations at issue in this case. Section 12149 of the ADA specifically vests responsibility for issuing regulations to implement Title II of the ADA with the Secretary of the Department of Transportation. 42 U.S.C. § 12149. While Section 12147 provides that “it shall be considered discrimination for a public entity . . . to fail . . . to make *key stations* . . . accessible,” it only provides parenthetically that key stations are those “as determined under criteria established by the Secretary by regulation.” 42 U.S.C. § 12147(b) (emphasis added). Section 37.47(a) of the DOT regulations directs that each public entity “shall make key stations on its system readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.” 49 C.F.R. § 37.47(a). Further, Section 37.47(b) provides that “[e]ach public entity shall determine which stations on its system are key stations. The entity shall identify key stations, using the planning and public participation process set forth in paragraph (d) of this section, and taking into consideration” certain enumerated criteria. 49 C.F.R. § 37.47(b).

The Three Rivers Center court considered three possibilities in determining the precise

relationship between the right of action under a statute and a subsequent regulation:

First, the regulations may do no more than construe personal rights that [the statute] creates. Second, the regulations may (instead or additionally) construe non-personal rights or obligations that [the statute] creates. Third, the regulations may also create distinct rights or obligations—either personal or non-personal—in addition to those that [the statute] creates.

Three Rivers Ctr., 382 F.3d at 429. As the court stated, “only in the first instance would plaintiffs have a private right of action to enforce the regulations.”⁷⁰ Id.

An analysis of the DOT regulations at issue here reveals that they do not “construe personal rights” that the ADA creates.

The first DOT regulation at issue—49 C.F.R. § 37.47(a)—as noted above, directs each public entity to make key stations accessible to individuals with disabilities. This regulation is the “flip-side” of Section 12147 of the ADA, which states that “it shall be considered discrimination for a public entity . . . to fail . . . to make key stations . . . accessible.” That is, the statute clearly dictates that certain inaction, i.e., the failure to make key stations accessible, constitutes discrimination, and the regulation fills the gap by explicitly requiring certain action, namely, that each public entity shall make key stations accessible.⁷¹

The DOT regulations are directed at the public entity, i.e., SEPTA, and do not focus on

⁷⁰ See also Iverson v. City of Boston, 452 F.3d 94, 101 (1st Cir. 2006) (“[A] regulation that announces an obligation or a prohibition not imposed by the organic statute may not be enforced under the aegis of a statutory right of action.”).

⁷¹ The first part of the pertinent regulation, 49 C.F.R. § 37.47(a), is very similar to one of the regulations at issue in Three Rivers Center that the Court of Appeals found to be “not couched in terms of any beneficiary’s entitlement,” but aimed at the entity’s conduct. 382 F.3d at 429. In that case, one of the pertinent regulations stated that new housing projects “shall be designed and constructed to be readily accessible to and usable by individuals with handicaps.” 24 C.F.R. § 8.22(a).

the individual beneficiary. See Sandoval, 532 U.S. at 289 (noting that words “that focus on the person regulated rather than individuals protected create ‘no implication of an intent to confer rights on a particular class of persons’” (quoting California v. Sierra Club, 451 U.S. at 294)); Three Rivers Ctr., 382 F.3d at 429. Further, the next clause of this regulation reinforces its “entity-based” focus by explicitly stating that “[e]ach public entity shall determine which stations on its system are key stations.” 49 C.F.R. § 37.47(b). The Court acknowledges that in the very next sentence, the DOT provided that the process of identifying key stations shall include a certain “planning and public participation process” that includes consultation with individuals with disabilities. 49 C.F.R. § 37.47(b).⁷² However, that the Department of Transportation sought to include individuals with disabilities in the “identification” process does not detract from the clear language of the first sentence of subparagraph (b), which clearly provides that “each public entity shall determine which stations on its system are key stations.” 49 C.F.R. § 37.47(b).

⁷² Section 37.47(b) of the regulations implementing the ADA provides the criteria to be applied in identifying a “key station” under the ADA. That section states that:

Each public entity shall determine which stations on its system are key stations. The entity shall identify key stations, using the planning and public participation process set forth in paragraph (d) of this section, and taking into consideration the following criteria: (1) Stations where passenger boardings exceed average station passenger boardings on the rail system by at least fifteen percent, unless such a station is close to another accessible station; (2) Transfer stations on a rail line or between rail lines; (3) Major interchange points with other transportation modes, including stations connecting with major parking facilities, bus terminals, intercity or commuter rail stations, passenger vessel terminals, or airports; (4) End stations, unless an end station is close to another accessible station; and (5) Stations serving major activity centers, such as employment or government centers, institutions of higher education, hospitals or other major health care facilities, or other facilities that are major trip generators for individuals with disabilities.

49 C.F.R. § 37.47(b).

Moreover, the remaining two paragraphs in this regulation are both framed in terms of what actions the required entity is required to complete. See 49 C.F.R. § 37.47(c) (requiring that the public entity “shall achieve accessibility of key stations” by a date certain); 49 C.F.R. § 37.47(d) (requiring that the “public entity shall develop a plan for compliance” with this regulation, albeit while including the participation of individuals with disabilities).⁷³ Given the clear “entity-based” focus of 49 C.F.R. § 37.47, the Court cannot conclude that this regulation merely “construes” personal rights that the ADA creates.” On the contrary, the Court concludes that 49 C.F.R. § 37.47 construes and creates distinct non-personal obligations that the ADA creates.

An additional regulation, however, further complicates the Court’s inquiry. Section 37.53(a) of the DOT regulations states that the identification of key stations under the June 1989 EPVA Settlement Agreement is “deemed to be in compliance with the requirements of this Subpart.” 49 C.F.R. § 37.53(a). This regulation further states that:

To comply with [Sections 37.47(b) and (d)], the entities named in the [EPVA Settlement Agreement] are required to use their public participation and planning processes *only to develop and submit to the FTA Administrator plans for timely completion of key station accessibility*, as provided in this subpart.

49 C.F.R. § 37.53(b) (emphasis added). Thus, the regulations promulgated to implement the “key station” provisions of the ADA include a specific exception with respect to the identification of key stations in Philadelphia.⁷⁴

⁷³ Section 37.47(d) requires the public entity to “develop a plan for compliance for this section” to be submitted to the Federal Transit Administration and, in doing so, to “consult with individuals with disabilities affected by the plan.” 49 C.F.R. § 37.47(d), (d)(1).

⁷⁴ This particular regulation is entitled, “Exception for New York and Philadelphia.” 49 C.F.R. § 37.53(b). In addition to the EPVA Settlement Agreement, Section 37.53 of the DOT regulations granted an exception for a settlement agreement reached in New York City, in which EPVA was also the lead party. See 49 C.F.R. § 37.53.

DIA argues that the exemption set forth in Section 37.53 of the regulations only serves to exempt SEPTA from Section 37.47(b) and (d), but that the requirements of Section 37.47(a) and (c) must be separately applied. June 29, 2006 Tr. 45:1-25, 46:1-15. DIA specifically argues that Section 37.47(a), which requires that each public entity “shall make key stations on its system readily accessible to and usable by individuals with disabilities,” contains an overarching requirement that all stations that meet the “key station” *criteria* set forth in Section 37.47(b) must be made accessible. 49 C.F.R. § 37.47(a). Thus, DIA argues that regardless of SEPTA’s deemed compliance with Section 37.47(b) as set forth in Section 37.53, SEPTA is required to make any station that meets the criteria for a key station accessible to disabled individuals. DIA contends that both the City Hall station and the 15th and Market Street station meet the criteria.⁷⁵ For this reason, DIA argues, SEPTA’s consistent and continuous refusal to make the City Hall and 15th and Market Street stations accessible to individuals with disabilities amounts to discrimination that is actionable under Section 12132 of the ADA and Section 504 of the RHA. June 29, 2006 Tr. 44:10-13.

Notwithstanding the fact that the Court would expect that DIA could make compelling public, political and social arguments as to why SEPTA, in order to fulfill its public mission to all persons, should dedicate resources to make one or both of these stations accessible to individuals with disabilities, the Court cannot embrace DIA’s interpretation of Sections 37.47

⁷⁵ Laypersons—especially those who regularly use SEPTA facilities—likely would assume that these two stations would be considered as “key” by virtue of their undisputable central location in Center City Philadelphia and consistently high ridership. In that regard, the activity in those locations may be roughly equivalent to the level of use of those stations in 1989 when, for whatever reason, neither was designated as a key station in the EPVA Settlement Agreement. In this litigation neither party has presented the Court with any explanation of this fact.

and 37.53 of the Department of Transportation's regulations to compel SEPTA to do so as a legal matter.

Section 37.53 unambiguously provides an exception for the transit agencies in Philadelphia and New York City. The fact that one subparagraph of the exception (Section 37.53(b)) directly addresses Sections 37.47(b) and (d), does not imply that Section 37.47(a) requires the transit agency to identify and designate key stations in addition to the "list of key stations" already identified in the EPVA Settlement Agreement simply because such additional stations may at some unspecified time, then or in the future, meet the requirements set forth in Section 37.47(b). Rather, the Court reads Section 37.47 as a whole as a sequential instruction in which the various subparagraphs depend upon each other for clarity. That is, subparagraph (a) requires the public entity to make all key stations readily accessible, subparagraph (b) provides for the identification of key stations by the public entity, using certain planning and public participation processes, subparagraph (c) allows for the timing for the public entity to make key stations accessible, and subparagraph (d) requires the public entity to consult with affected individuals with disabilities to develop a plan for compliance with Section 37.47 and to submit the plan to the FTA for approval. Subparagraph (b) of Section 37.53 specifically addresses only subparagraphs (b) and (d) of Section 37.47 because that particular paragraph of the overall exception addresses only those two "public participation" portions of the sequence, namely, the portions that involve identifying key stations through the public participation process and consultation with individuals with disabilities to develop a plan for compliance.⁷⁶ Read together,

⁷⁶ Section 37.53(b) provides a clear exception to the public participation and planning process that is typically required under paragraphs (b) and (d) of Section 37.47. Section 37.53(b) states that in order to comply with Section 37.47(b) (the requirement that SEPTA determine

Section 37.47 and Section 37.53 merely impose the requirement that SEPTA make certain key stations – the key stations identified in the EPVA Settlement Agreement – accessible.⁷⁷

Thus, the Court finds that the ADA does not include a private right of action to enforce 49 C.F.R. § 37.47 with respect to SEPTA’s determination of which stations on its transit systems are “key stations” under the ADA. For the same reasons, the Court also concludes that DIA cannot sue to enforce 49 C.F.R. § 37.47 under Section 1983 because plaintiffs can only invoke Section 1983 to enforce personal rights that Congress creates. Three Rivers Ctr., 382 F.3d at 431. Because the rights that the DOT regulations at issue here articulate are not personal rights, DIA cannot enforce those rights under Section 1983. Id.

Consequently, summary judgment will be granted in favor of SEPTA with respect to Count II of DIA’s Fourth Amended Complaint.⁷⁸

which stations on its system are “key stations”) and 37.47(d) (the requirement that SEPTA develop a plan for compliance) SEPTA need only use the public participation process to develop and submit to the FTA Administrator plans for timely completion of key station accessibility. 49 C.F.R. § 37.53(b). In other words, this exception means that SEPTA is not required to “determine which stations on its system are key stations” or to “identify key stations[] using the planning and public participation process set forth in [Section 37.47(d)], and taking into consideration” the stated criteria, 49 C.F.R § 37.47(b), given that SEPTA was viewed as already having made the determination via the EPVA Settlement Agreement.

⁷⁷ According to SEPTA, as of March, 2006, there are two key stations on the rapid rail system, which were identified in the EPVA Settlement Agreement, for which accessibility remains to be completed. SEPTA Mot. Summ. J. Ex. 17, C. Lister Aff. ¶ 4. These remaining stations are located at 8th Street and 13th Street on the Market-Frankford Elevated Line. Id.

⁷⁸ SEPTA has argued summary judgment should be granted in its favor for a number of other reasons.

First, SEPTA argues that DIA, by arguing that the City Hall and 15th and Market Street transit stations should be considered key stations for the purposes of the ADA, DIA is, effectively, asserting a challenge under 49 C.F.R. § 37.47(b), which addresses SEPTA’s responsibility for determining which stations are “key,” but also challenging Section 37.53(a)

itself—the regulation which states that the key stations identified in the EPVA Settlement Agreement “are deemed to be in compliance” with the requirement that SEPTA identify key stations on its system. 49 C.F.R. § 37.53(a). SEPTA argues that DIA has waived its right to object to the exclusion of the City Hall and 15th and Market Street transit stations as “key stations” under the EPVA Settlement Agreement. SEPTA Br. in Supp. of Mot. for Summ. J. at 2-5. At oral argument, SEPTA explained that Congress delegated the role of establishing the criteria to implement the key station portion of the ADA to the Department of Transportation. June 29, 2006 Tr. at 61:14-19. SEPTA further argued that the identification of key stations fell within the scope of the Department of Transportation’s regulatory responsibility. Id. SEPTA argued that any challenge as to the identification of key stations amounted to a direct challenge to the regulation, 49 C.F.R. § 37.53, which specifically stated that the list of key stations reflected in the EPVA Settlement Agreement met the criteria set forth in the ADA. June 29, 2006 Tr. at 61:14-19; SEPTA Br. in Supp. of Mot. for Summ. J. at 2. Therefore, SEPTA argues, that by foregoing its opportunity to object to the list of key stations during negotiations over the EPVA Settlement Agreement, during the Department of Transportation’s rulemaking process, and during the process when SEPTA conducted a public hearing to discuss and approve its key station listing, DIA has waived its right to challenge that regulation. SEPTA Br. in Supp. of Mot. for Summ. J. at 3.

In response, DIA argues that it is neither challenging the federal regulation nor the rulemaking process and, thus, it cannot be “barred by waiver” from objecting to SEPTA’s designation of “key stations.” DIA Mem. Opp’n 3-4. DIA further argues that it is challenging the way in which SEPTA has interpreted the DOT regulations. Id. 5. DIA specifically argues that, properly applied, the criteria set forth in 49 C.F.R. § 37.47 leads to the inescapable conclusion that both the City Hall and 15th and Market Street transit stations are “key stations” and, therefore, that SEPTA must acknowledge and treat them as such. June 29, 2006 Tr. 34:1-2; DIA Mem. Opp’n 5-6, 20-26. However, since the Court holds that no private right of action exists under the ADA to challenge SEPTA’s determination of certain stations as “key stations,” the Court need not consider SEPTA’s waiver argument.

SEPTA also argues that summary judgment should be granted in its favor because the Department of Transportation has, under the authority granted through the ADA, determined that SEPTA is in compliance with the key station regulations. SEPTA Br. Supp. 10-14. This argument would require the Court to review, under Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), whether the Department of Transportation acted appropriately in promulgating and enforcing the regulations. Because the Court concludes that there are not exceptional circumstances allowing for consideration of the present challenge to such regulations, it is not necessary to conduct this review.

In addition, SEPTA argues that the doctrine of laches prevents DIA from bringing this challenge because the delay in bringing suit is not excusable and because SEPTA, due to its reliance on the presumption that the EPVA Settlement Agreement defined its key stations, would

The Court is not unsympathetic to DIA's frustrations over the apparently perpetual refusal to consider at least the City Hall station a "key station" considering its central location in Center City, its high ridership, and its service as an interchange point between several subway and rail lines. DIA is also incredulous that SEPTA should not be periodically required to re-evaluate the public transit system to see if additional "key stations" must be addressed. However, the regulations promulgated by the Department of Transportation do not permit the Court, 17 years after the EPVA Settlement Agreement was negotiated and 15 years after the DOT regulations took effect, to judge the practical wisdom of selecting certain stations as "key" while not designating other, potentially or possibly more appropriate stations. Congress divided the "key station" provisions of ADA according to facilities that existed at the time the ADA was enacted and facilities that had not yet been built. Compare 42 U.S.C. § 12146 (providing that it will be considered discrimination for a public entity to construct new public transportation facilities without making such facilities accessible) with 42 U.S.C. § 12147(a) (providing that it will be considered discrimination for a public entity to make alterations to existing public transportation facilities without making such facilities accessible) and 42 U.S.C. § 12147(b)(1) (providing that

suffer extreme prejudice. However, because the Court holds that no private right of action exists under the ADA to challenge SEPTA's determination of certain stations as "key stations," the Court will not address this argument.

Finally, SEPTA argues that the doctrines of res judicata and collateral estoppel bar DIA's claim because the issues and claims involved here were essentially the same as those decided in EPVA v. Sykes. SEPTA argues that because the issues in this case are identical to those addressed in EPVA v. Sykes, the parties (which includes DIA by virtue of its members' class status in EPVA v. Sykes) have already litigated and resolved this issue. DIA disagrees, arguing that SEPTA's assertion of these arguments misstates DIA's position with respect to this case. In view of the Court's resolution of this case as described above, it is likewise not necessary to consider these issues.

it will be considered discrimination for a public entity to fail to make existing key stations accessible). With respect to existing facilities, i.e., key stations, the ADA expressly provides a finite time frame within which a public entity must make key stations accessible. See 42 U.S.C. § 12147(b)(2)(A) (requiring key stations to be made accessible by July 26, 1993); 29 C.F.R. § 37.47(c)(1) (same); 42 U.S.C. § 12147(b)(2)(B) (providing extensions to the time line for accessibility under certain circumstances); 29 C.F.R. § 37.47(c)(2) (same). Further, the portion of the regulations addressing the public participation process reinforces that the regulations are temporal, and as drafted, do not require a public entity to re-evaluate its choice of “key stations” once it initially determines which stations are “key.” For example, the public entity is required to develop a single “plan” for compliance with the regulations, which shall have been submitted to the FTA by July 26, 1992. See 29 C.F.R. § 37.47(d). These regulations do not require SEPTA, despite DIA’s protestations to the contrary, to designate all stations that met certain criteria as “key stations” or to periodically re-evaluate its choice of “key stations” to see whether additional stations could possibly be considered “key.” Of course, the unavailability of a judicial means to accomplish its goals does not mean that DIA cannot or should not marshal its powers of political persuasion to pursue the Department of Transportation and SEPTA for either direct attention to the two stations DIA wants modified or modification of the regulatory schemes that control the issues at hand.

CONCLUSION

For the reasons discussed above, summary judgment with respect to both Counts I and II of the Fourth Amended Complaint will be entered in favor of defendant SEPTA. An appropriate Order follows.

S/Gene E.K. Pratter
Gene E.K. Pratter
United States District Judge

November 17, 2006

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DISABLED IN ACTION OF	:	
PENNSYLVANIA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY	:	
and	:	
THE CITY OF PHILADELPHIA,	:	
	:	
Defendants	:	03-CV-1577

O R D E R

AND NOW, this 17th day of November, 2006, upon consideration of the Motions for Summary Judgment filed by Southeastern Pennsylvania Transportation Authority (Docket No. 130) and by Disabled in Action (Docket Nos. 129, 131), the responses and replies thereto (Docket Nos. 133, 134, 135, 136, 137, 138), the subsequent letter briefs and after oral argument on the Motions, it is **ORDERED** that the Motion for Summary Judgment filed by Southeastern Pennsylvania Transportation Authority is **GRANTED** and the Motion for Summary Judgment filed by Disabled in Action is **DENIED**. The Clerk of Court is instructed to enter judgment in favor of Southeastern Pennsylvania Transportation Authority, and to mark this case as closed.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
United States District Judge