

Author's Acknowledgments

I wish to acknowledge the other ACLU attorneys who worked on the Lewis case: Mike Steinberg, legal director, ACLU of Michigan, and Emily Martin, deputy director, and Lenora Lapidus, director, ACLU Women's Rights Project.

Sandra S. Park
Staff Attorney

ACLU Women's Rights Project
125 Broad St. 18th Floor
New York, NY 10004
212.519.7871
spark@aclu.org

In from the Cold: Making Homeless Shelters Accessible to People with Disabilities in the Nation's Capital

In the dead of winter in our nation's capital, a woman huddles in blankets with her service animal on the steps of a church because the Washington, D.C., government does not allow her into an emergency shelter unless she relinquishes her "pet." Elsewhere a mother of two small children is told that she cannot be transferred to her shelter's first floor despite her heart condition and her being unable to walk up or down stairs. The mother later passes away from complications resulting from putting too much weight on her badly swollen legs as she pulled herself up the stairs.

For years, violations of disability rights in emergency homeless shelters in the District of Columbia were rampant. When homeless shelters violate disability rights laws, they quite literally leave people with disabilities out in the cold. Both shelter providers and the government agency in charge of homeless services refused to acknowledge the gravity of the problem for a long time. The D.C. government had no measures in place to prevent violations from occurring—no disability rights policy, no clear mechanism for processing requests or resolving complaints, no training for providers, and no plan for removing architectural barriers. The system was slow and reluctant to meet even the needs of individuals who asserted legal claims, much less to enact the large-scale reform to prevent discrimination.

After receiving numerous complaints about D.C.'s widespread violations of Title II of the Americans with Disabilities Act (ADA) (42 U.S.C. §§ 12131 *et seq.* (1990)) and undertaking a two-year compliance review, the U.S. Department of Justice entered into a settlement agreement in late 2008 with D.C. to improve the accessibility of homeless shelters for people with disabilities. The Justice Department found that not even the shelters identified by the D.C. government as accessible met ADA standards for accessible design and that the D.C. government needed to implement significant policy, procedural, and architectural reforms to bring the system into compliance. The settlement represents the first major federal enforcement action taken to enforce the civil rights of those experiencing homelessness.

The Shelter Access Project

In 2003 the Washington Legal Clinic for the Homeless began its Shelter Access Project to reduce the barriers—both programmatic and physical—to equal access to emergency homeless shelters for D.C. residents with disabilities. D.C. emergency shelters are subject to Title II (42 U.S.C. §§ 12131 *et seq.* (public entities)) and Title III (42 U.S.C. §§ 12181 *et seq.* (public accommodations)) of the ADA; the Fair Housing Act (42 U.S.C. §§ 3601 *et seq.*); and Section 504 of the Rehabilitation Act (29 U.S.C. §§ 794 *et seq.*). The programmatic accessibility requirements of the federal laws are quite similar: shelters may not apply eligibility criteria that would screen out people with disabilities (such as stating that the shelter does not serve people with mental illness); shelters may not terminate or exclude residents because of a disability or disability-related behavior (with some exceptions); and shelters have to provide reasonable modifications or accommodations of their rules, policies, procedures, or practices when necessary to allow a person with a disability equal access to the shelter or its services.

The physical accessibility requirements (including removing architectural barriers) are far more complicated and vary with, among other factors, the year the building was built or renovated and the source of funding for the program. In D.C. the majority of emergency homeless shelters are funded by the local government, which contracts with a nonprofit organization to administer the shelter program; the nonprofit organization in turn contracts with other nonprofit organizations to operate each shelter. Some shelters are located in D.C.-owned or -leased buildings, primarily in old schools, warehouses, trailers, and hospitals. Other shelters are located in buildings owned or leased by the nonprofit service provider. Although each individual provider may have slightly different legal obligations, for the purposes of our Shelter Access Project's systemic work, we focused on D.C.'s ADA Title II obligations to ensure that residents with physical disabilities could access homeless shelters on an equal basis with those without such disabilities.

Strategies

Our Shelter Access Project worked to improve disability rights compliance systemically while advocating on behalf of individual complainants. The project trained hundreds of shelter residents on their disability rights and gave out brochures and forms to explain those rights (since the D.C. government made no such information available). In the first few years we tried to provide technical assistance at the agency and provider level, but we experienced strong resistance to changing the status quo and disbelief on the part of shelter providers that federal disability rights laws applied to their programs. We drafted sample disability rights policies and procedures for the D.C. government agency responsible for homeless services, but the agency refused to adopt them.

Alongside our clients, we testified before the D.C. Council at agency oversight hearings. We repeatedly spoke of the unlawful policies (including some blatantly discriminatory admission policies that excluded people with HIV/AIDS (human immunodeficiency virus/acquired immune deficiency syndrome) or mental illness), the physically inaccessible buildings, and the lack of response to requests for reasonable accommodation. Even when the agency staff members eventually agreed there

was a problem, they disagreed about their role in the solution and preferred pointing fingers at contractors and subcontractors to leading in enacting change. When the agency did agree that changes were indeed required, sometimes its efforts were darkly comical. When the agency designated the first ADA coordinator to resolve complaints, she had no idea that she had been so designated. When the D.C. government renovated one shelter, it put the only wheelchair-accessible bathroom on the second floor, despite the lack of an elevator.

As our Shelter Access Project quickly learned that systemic reform was not just a matter of pointing out the legal violations, we began to turn to the D.C. Council for legislative solutions. We successfully advocated language in the Homeless Services Reform Act (the local law that governs emergency shelters) to mimic federal disability rights requirements and to require that all shelters develop and post disability rights policies and procedures (D.C. CODE §§ 4-751.01 *et seq.*, 4-753.02(c)(5), 4-754.11(2)-(3), 4-754.21(11), 4-754.32(a)(4), 4-755.02(a)). Along with a group of disability advocates, we worked closely with several then-members of the council (in particular our current council chairman, Vincent Gray, and our current mayor, Adrian Fenty) to ensure passage of the Disability Rights Protection Act of 2006 (D.C. CODE §§ 2-1431.01 *et seq.*). Because we felt that agencies would be more receptive to technical assistance if it emanated from a fellow agency director, the statute created a cabinet-level Office of Disability Rights to increase and coordinate ADA compliance in D.C. agencies (D.C. CODE § 2-1431.03).

Justice Department Compliance Review

In early 2004 the Shelter Access Project began referring complaints regarding ADA violations to the Civil Rights Division of the Justice Department. We did not know whether there would be a widespread investigation or enforcement action. We thought that a Justice Department investigation of individual cases would expedite the resolution of our clients' cases, and we hoped that the Justice Department, seeing the injustices that our clients lived, would pursue reform zealously. But referring complainants and sharing our knowledge of violations certainly did not constitute our strategy to the exclusion of other strategies.

In December 2006 we learned that the Justice Department had initiated a compliance review of D.C. for ADA violations in the shelters. We had no idea how long the review would take, what the Justice Department thought of what it was seeing, or whether any of its observations would culminate in reform that would be positive for our clients. Having no control over the outcome, we tried to keep our expectations low. We were not privy to anything that the Justice Department was observing, much less its conclusions or tactical decisions. We knew that only a small percentage of our clients would ever file official complaints with the Justice Department, but we knew that the discrimination was far-reaching. We submitted to the Justice Department a report summarizing major violations and recommending what the D.C. government needed to do to reform.

The D.C. government's reaction to the compliance review was by turns retaliatory and well intended but ineffectual. One government official threatened to shut down shelters rather than comply, and others intimated that the Washington Le-

gal Clinic for the Homeless would no longer be invited to the policymaking table. At the same time the homeless services agency instructed its primary contractor to develop ADA policies and procedures and started speaking more seriously about assessing and modifying shelters. However, the policies and procedures were inadequate (primarily because they did not contemplate government engagement or responsibility), and the talk turned out to be just that.

Litigation

When our project began, our individual representation focused on appeals of agency decisions to deny, terminate, or otherwise limit access to shelter based on a client's disability or disability-related behavior. Because the relief offered in the administrative forum was solely injunctive and most cases were settled before a hearing occurred, the cases had little precedential value and did not incentivize agency reform. To increase the impact and allow for the possibility of compensation for our clients, we filed a handful of cases in the D.C. Office of Human Rights, the local fair housing enforcement agency. If the Office of Human Rights finds probable cause for discrimination, D.C.'s lawyer, the Office of Attorney General, is supposed to prosecute the case and pursue injunctive and compensatory relief as well as civil fines. Since the D.C. government was a respondent in our cases, the Office of Attorney General refused to prosecute the cases. We also discovered that the Office of Human Rights did not have a good understanding of D.C.'s obligations under Title II of the ADA.

When both administrative appeals and the administrative complaint process failed to further our clients' goals, we, along with pro bono counsel, prepared federal lawsuits on behalf of four families. Summaries of the cases, with aliases, are below:

1. Despite Ms. Jones's inability to climb up or down stairs, she and her sons were placed on a shelter's fourth floor. Her repeated requests to move to a first floor unit and to use the elevator were ignored or denied for almost ten months. She was never placed in a shelter that fully met her disability-related needs. D.C. and its contractors' failure to provide accessible shelter and to maintain the shelter in a safe condition resulted in her repeated falls and injuries.
2. While living in an emergency apartment-style shelter, Ms. Frank and her daughters were harassed and threatened with eviction for having a small cat that served as a therapy animal. D.C. and its contractors refused to waive its "no pets" rule. The shelter provider repeatedly and continually threatened to remove the therapy animal forcibly and to evict the Frank family.
3. Mrs. Sanders had difficulty following certain shelter rules such as curfew and meeting requirements because of her psychiatric disability and her medication. She submitted a request to the shelter provider for an accommodation, but no one responded. Instead the shelter provider attempted several times over the next few years to expel the Sanders family for violations of the same shelter rules. Eventually the Sanders family was wrongfully evicted, lost almost all of its belongings, and was without shelter for days. Even after the Sanders family returned, staff members harassed and threatened the family with expulsion until the family moved out.

4. During the approximately ten months that Ms. Hancock and her family resided in an emergency shelter with shared living and bathing facilities, she used a wheelchair. Despite her repeated requests to be transferred to an apartment-style family shelter, D.C. and its contractors denied her requests because there were no wheelchair-accessible, apartment-style shelters. The communal nature of the shelter placement only exacerbated her lupus and related health conditions, and she was hospitalized on numerous occasions. Moreover, the unit was too small to accommodate her wheelchair, forcing her to climb over furniture to reach equally inaccessible bathroom facilities.

In December 2007 we sent draft complaints to the mayor with copies to the Justice Department. In January 2008 we met with the D.C. attorney general, who invited Justice Department attorneys and representatives from the relevant D.C. agencies. Each of the draft complaints named not only D.C. but also the primary contractor and the subcontractor nonprofit entities as defendants. Although we thought that the purpose of the meeting was to resolve the four cases, we spoke extensively of the major areas of concern in the shelters and what the D.C. government needed to do to comply with disability rights laws. The meeting exposed that D.C. failed to appreciate fully its ongoing obligations under the ADA and which steps to take to fulfill such obligations. D.C., however, did consider the lawsuits more seriously than it had in the past—all four cases settled with D.C. within the next few months. (Later the Shelter Access Project filed three out of four of the lawsuits against the main contractor and its subcontractors in federal court. As of February 2009, all of the lawsuits had reached final settlements, with only Ms. Jones's settlement agreement, in the form of a consent order, requiring continuing oversight by the court.)

Settlement Between the Justice Department and the D.C. Government

On December 10, 2008, the Justice Department entered into a settlement agreement with the D.C. government to improve the accessibility of homeless shelters for people with disabilities. The full settlement can be found at www.ada.gov/dc_shelter.htm#settlement.

Major findings and requirements contained within the settlement are the following:

1. D.C. must change its policies and procedures to allow for greater programmatic accessibility, such as (a) notifying clients of the right to request reasonable modifications, (b) removing any requirements to use specific forms or procedures to make requests, (c) limiting verification requests to what is necessary and tailored to the request, and (d) requiring prompt responses to requests and immediately granting requests "where the denial of the request is reasonably likely to cause serious harm to an individual with a disability."
2. The Justice Department surveyed fifteen shelters for physical accessibility. D.C. claimed that ten of them met ADA standards. The Justice Department found that none of the shelters complied with the law.
3. D.C. must draft and implement an interim and comprehensive physical accessibility plan to bring the shelter system into compliance with the ADA, with public comment. The shelters must be brought into compliance within two years of the completion of the comprehensive plan.
4. If the comprehensive physical accessibility plan does not require that every shelter be accessible, it must ensure that locations and service levels of accessible shelters are equal to inaccessible shelters.
5. D.C. must develop the means to communicate with shelter applicants and residents with speech, vision, or hearing-related disabilities; for example, D.C. may have to acquire necessary equipment, alternative formats, and oral and sign language interpretation services.
6. D.C. must draft and implement a plan for accessible transportation among shelters and services.
7. D.C. must have at least one ADA coordinator to oversee ADA compliance in the shelter system.

Commentary

When the work of the Shelter Access Project began, the prevailing wisdom was that clients experiencing homelessness would not be considered deserving plaintiffs and that sympathies would lie with the nonprofit defendants whose missions were often faith-based or charity-oriented. Not only could that bias affect liability determinations, but also we were cautioned that judges and juries would ascribe lesser value to damages claims. Similarly we found it difficult to find law firms willing to litigate against nonprofit entities. We at the Washington Legal Clinic for the Homeless also wished that we were not in the position of having to sue nonprofit homeless service providers, but, where such providers were harming our clients, we were not willing to let them hide behind their tax status or unfulfilled mission.

To maximize our chances of success, we tried to choose the cases in which the liability was very clear or the harm was substantial, preferably both. To maximize impact we included the D.C. government as a defendant in all of our cases because we believed that it had the responsibility and ability to prevent harm from occurring. We included the nonprofit providers as defendants, but only in cases where the facts indicated that the providers' actions were either malicious or grossly negligent.

Multiple defendants, however, complicated litigation. The D.C. government initially claimed that its contractors had sole liability for violations because the main contractor had agreed to indemnify D.C. Even when all defendants indicated their willingness to settle, they disagreed as to which defendant should be writing the check. The D.C. government and its main contractor were virtually paralyzed by their fear that they would have to pay twice—once to the client and a second time to reimburse the other defendant's payment. While ultimately resolved, these complications delayed the settlements.

We encountered some procedural hurdles with our litigation strategy. Before cases could reach trial, our clients likely would have either been accommodated or moved out of shelter,

thereby mooted claims for injunctive relief. (The Washington Legal Clinic for the Homeless does not have organizational standing, and the local civil rights membership organization chose not to pursue shelter cases.) We ruled out a class action lawsuit due to the length of time for resolution and the difficulty we anticipated in finding representative plaintiffs. We decided that pursuing damages claims on behalf of individual plaintiffs would be the best mechanism both to provide relief to our clients and to increase economic pressure on the D.C. government.

We believe that economic pressure, along with the federal investigation, was key in convincing the government that the time had come to enact systemic reform. We also believe that the years spent building political support through mobilizing the client community and advocating with political leaders were invaluable in achieving desirable outcomes for our individual plaintiffs and for our broader client community, particularly in preventing D.C. government officials from carrying out threats to close down shelters rather than comply.



In the last few years D.C. has begun a culture shift in the direction of understanding and respecting the civil rights of those experiencing both homelessness and a disability. In most jurisdictions people experiencing homelessness have few tools to advocate fair treatment in shelters. Federal disability rights laws provide levers for people with disabilities to raise their power and to be treated as individuals. We believe that the

Justice Department settlement provides a road map for compliance to guide D.C. in developing a just and inclusive homeless shelter system.

Author's Acknowledgments

I would like to acknowledge the pro bono assistance of the George Washington University Law School Clinical Program and the law firms of Gilbert Oshinsky LLP, Steptoe & Johnson LLP, and Relman & Dane PLLC. I would also like to thank Equal Justice Works and Steptoe & Johnson LLP for the fellowship that initiated the Shelter Access Project.

Amber W. Harding
Staff Attorney

Washington Legal Clinic for the Homeless
1200 U St. NW #3
Washington, DC 20009
202.328.5503
amber@legalclinic.org

COMMENTS?

We invite you to fill out the comment form at <http://tinyurl.com/MayJuneSurvey>. Thank you.

—The Editors