

## Universities Can Be Sued by Students for Violations of the ADA.

In a somewhat surprising decision, the Eleventh Circuit Court of Appeals has recently held that suits brought against public universities claiming violations of Title II of the Americans with Disabilities Act (ADA) are not barred by Eleventh Amendment immunity. *Association for Disabled Americans, Inc. v. Florida International University*, 405 F.3d 954 (11th Cir. 2005). The ADA was passed as a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978 (2004). It is organized into several "titles" or subdivisions. Title I prohibits discrimination in employment; Title II prohibits discrimination in public services, programs, and activities; and Title III prohibits discrimination in public accommodations. More specifically with respect to Title II, public entities are prohibited from discriminating against "qualified" persons with disabilities in the provision of a public service, program, or activity. Title II would apply, for example, to a public university in terms of its educational programs that are available to students. Persons with disabilities are "qualified" if, "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services," they meet the essential requirements for the services, programs, or activities. The ADA permits private citizens to sue for money damages for violations of the Act, although the Eleventh Amendment to the United States Constitution grants States immunity from such suits.

In considering the Eleventh Amendment, the United States Supreme Court has long held that Congress may waive the immunity granted to the States by that amendment. In order for Congress to waive Eleventh Amendment immunity, Congress must (1) unequivocally express its intent to abrogate the immunity, and (2) act pursuant to a valid grant of constitutional authority. *See Tennessee v. Lane, supra*. With respect to the ADA, the first prong of this test is simple and straightforward. Congress very clearly stated in the Act that Eleventh Amendment immunity would not apply to suits brought under the ADA. 42 U.S.C. § 12202. However, the second prong of the test has proven to be more difficult. For example, in *Board of Trustees of The University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955 (2001), the Supreme Court held that Congress had not validly waived Eleventh Amendment immunity with regard to suits brought under Title I of the ADA by private citizens claiming money damages from *public employers*, such as the University of Alabama. On the other hand, in *Tennessee v. Lane*, the Supreme Court allowed suits brought under Title II of the ADA by private disabled citizens claiming money damages as a result of being denied access to state court proceedings.

In the *Florida International University* case, the Eleventh Circuit Court of Appeals was faced with the question of whether or not Congress had validly waived Eleventh Amendment immunity with regard to a suit brought under Title II of the ADA by a private citizen, a student in this instance, against a public university. The case involved a claim that Florida International University failed to provide adequate auxiliary aids and services, such as effective note takers, qualified sign language interpreters, etc., to disabled students. The Court of Appeals noted that when Congress seeks to remedy or prevent unconstitutional discrimination, Section 5 of the Fourteenth Amendment authorizes it to enact "prophylactic" legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal

Protection Clause. The Supreme Court has held that so-called "Section 5" legislation is valid if there is a "congruence and proportionality" between the injury to be prevented and the legislative means adopted to that end. The Court of Appeals noted that "education is perhaps the most important function of state and local governments." Following the Supreme Court precedents, the Court of Appeals held that Title II of the ADA was "congruent and proportional" when applied to state supported higher education.

The effect of the Eleventh Circuit's decision in the *Florida International University* case is unclear. Procedurally, the case came to the appellate court after the trial court granted a dismissal in favor of the defendants based on their sovereign immunity. The case will now either be appealed to the Supreme Court or be sent back to the trial court for further evidentiary hearings. If the case is sent back to the trial court, the plaintiffs will contend that the university failed to provide adequate auxiliary aids and services to assist disabled students. Of course, the trial court would have to address the issue of whether or not the provision of these services would be a "reasonable accommodation" by the university. The Supreme Court has held that ADA compliance does not require public entities to undertake accommodation measures that would impose an undue financial or administrative burden or effect a fundamental alteration in the nature of the service. *See Tennessee v. Lane, supra*. If the case is appealed to the Supreme Court, however, it is not certain that the Supreme Court would agree with the Court of Appeals. The *Tennessee v. Lane* case was expressly limited to the right of physical access to court facilities. This issue may be viewed by the Supreme Court as different from issues involving the right of access to education at a public university.

The higher education community will have to await further developments in this case before its full impact on an institution's vulnerability to suit under the ADA by disabled students becomes known. Notwithstanding the final outcome of this case, however, UAH officials should continue their efforts to comply with the ADA by making accommodations where reasonable to disabled students so as to assure their access to the University's educational programs and benefits.