UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

LINDA McCOLLUM, Plaintiff, v. OWENSBORO COMMUNITY AND TECHNICAL COLLEGE, Defendant.	)	Civil Action No. 4:09-cv-121-M

INTERVENOR UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

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The relevant factual and procedural history in this case is presented in the plaintiff's and defendant's papers regarding the defendant's motion to dismiss on sovereign immunity grounds. The United States intervenes in this case pursuant to 28 U.S.C. 2403(a) for the limited purpose of defending the constitutionality of the abrogation of the States' sovereign immunity effected by the retaliation provision of the Americans with Disabilities Act (ADA), 42 U.S.C. 12203. This brief is filed in response to defendant's motion to dismiss, Docket No. 5, as well as defendant's supplemental brief on Eleventh Amendment immunity, Docket No. 10.

ARGUMENT

THE ADA'S RETALIATION PROVISION VALIDLY ABROGATES THE STATES' SOVEREIGN IMMUNITY WHERE THE RETALIATION IS FOR EFFORTS TO ENFORCE TITLE II RIGHTS IN THE EDUCATION CONTEXT

The ADA's retaliation provision, 42 U.S.C. 12203, is a proper exercise of Congress's Fourteenth Amendment power, and thus validly abrogates the States' sovereign immunity, where (as in this case) the retaliation is against someone who helps a student enforce his right to accessible public education under Title II of the ADA. The defendant's argument to the contrary is built on the erroneous premise that plaintiff suffered retaliation for complaining about violations of Title I of the ADA (the title pertaining to employment discrimination). The defendant does not contend that it has sovereign immunity against claims that it retaliated against someone for complaining about violations of Title II (the title pertaining to the provision of public services, such as public education), and so this Court need not consider the question further.

In any event, the ADA's retaliation provision validly abrogates the States' sovereign immunity with respect to the claim at issue here. This is so for two reasons. First, prohibiting retaliation for the support of Title II rights helps to enforce the substantive requirements of Title II, which in turn validly enforces the protections of the Fourteenth Amendment in the education context. Second, Congress had the Fourteenth Amendment authority to prohibit public institutions from retaliating against those who oppose discrimination on the basis of disability – regardless of whether it had the authority to prohibit the discrimination itself – because such retaliatory conduct independently violates the First Amendment.

Congress may abrogate the States' immunity if it (1) "unequivocally expresse[s] its intent" to do so, *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 73 (2000), and (2) acts "pursuant

to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment," *Tennessee* v. *Lane*, 541 U.S. 509, 518 (2004). There can be no question that Congress expressed a clear intent to abrogate the States' sovereign immunity for any violation of the ADA, which provides: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. 12202. And for the reasons that follow, Congress did so validly with respect to the ADA's retaliation provision.

A. Prohibiting Retaliation Against Those Who Support The Exercise Of Title II Rights Helps Enforce The Substantive Requirements Of Title II, Which In Turn Validly Enforces The Protections Of The Fourteenth Amendment

1. The ADA's Retaliation Provision Validly Abrogates The States' Sovereign Immunity Where The Underlying ADA Provision Does So

The ADA, like other civil rights laws, prohibits retaliation to ensure that the rights it promises are realized in practice. As the Supreme Court has recognized, without a ban on retaliation, a civil rights law's "enforcement scheme would unravel * * * and the underlying discrimination would go unremedied." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 180-181 (2005); accord *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997) (the "primary purpose of antiretaliation provisions" is ensuring "unfettered access to statutory remedial mechanisms"). Indeed, so close is the connection between discrimination itself and retaliating against someone who complains about discrimination that the Supreme Court has consistently read civil rights statutes that explicitly bar only the former to ban the latter as well. See, *e.g.*, *Gomez-Perez* v. *Potter*, 553 U.S. 474, 128 S. Ct. 1931, 1943 (2008).

Accordingly, in drafting the ADA, Congress reasonably determined that, in order to ensure the effectiveness of its prohibitions against disability discrimination, it must also prohibit

retaliation that interferes with the enforcement of those rights. To the extent that Congress had the Fourteenth Amendment power to prohibit discrimination on the basis of disability in various ways, it necessarily also had the power to make that prohibition meaningful by prohibiting retaliation that interferes with those rights. Cf. *Maher* v. *Gagne*, 448 U.S. 122, 133 (1980) (providing for attorney's fees for successful civil rights plaintiffs is "an appropriate means of enforcing substantive rights under the Fourteenth Amendment").

The defendant appears to concede that this is so. It observes that courts consistently uphold the validity of the ADA's retaliation provision where the underlying ADA provision that the retaliation provision helps to enforce is itself valid Fourteenth Amendment legislation. See Def.'s Supp. Br. 4 (Docket No. 10). In particular, the defendant concedes that courts "have generally held that where the underlying claim alleges ADA Title II discrimination, then the Title II abrogation of immunity is extended to ADA Title V retaliation claims." *Ibid.*

2. In This Case, The Retaliation Provision Helps To Enforce Title II, Which Is Valid Fourteenth Amendment Legislation In The Education Context

In this case, the retaliation provision helps to enforce the rights secured by Title II of the ADA, which itself is valid Fourteenth Amendment legislation in the education context.

The defendant's argument to the contrary is built on a false premise: that the retaliation at issue here is "premised on employment discrimination under ADA Title I." See Def.'s Supp. Br. 5 (Docket No. 10). In fact, plaintiff does not allege that she suffered retaliation because she complained about employment discrimination on the basis of disability, which is the subject of Title I. See 42 U.S.C. 12112. Rather, she alleges that she suffered retaliation as a result of her efforts to assist K.A., a student at the college, in enforcing his right to reasonable accommodations in the provision of public services under Title II of the ADA. See Verified

Complaint ¶¶ 1, 30 (Docket No. 1). "In the context of public higher education, Title II requires state colleges and universities to make reasonable accommodations for disabled students to ensure that they are able to participate in the educational program." *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 488 (4th Cir. 2005).

Plaintiff thus alleges that defendant retaliated against her for challenging her employer's failure to comply with Title II of the ADA. Accordingly, this case is nothing like those cited by defendant, see Def.'s Supp. Br. 2-3 (Docket No. 10), each of which concerned retaliation over complaints about Title I employment discrimination. The defendant does not contend that Title II is invalid Fourteenth Amendment legislation as applied to these circumstances, or that Congress lacked Fourteenth Amendment authority to ban retaliation against those who support the enforcement of Title II rights. Quite to the contrary, it acknowledges that courts "have generally held that where the underlying claim alleges ADA Title II discrimination, then the Title II abrogation of immunity is extended to ADA Title V retaliation claims." See *id.* at 4. Because the defendant makes no argument that it is entitled to sovereign immunity for the sort of claim actually pleaded here, it has not satisfied its burden of demonstrating that it is entitled to sovereign immunity, and this Court need not consider the question further. See *Gragg* v. *Kentucky Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir. 2002) ("[T]he entity asserting Eleventh Amendment immunity has the burden to show that it is entitled to immunity."); accord *Nair* v. *Oakland County Cmty. Mental Health Auth.*, 443 F.3d 469, 474 (6th Cir. 2006).

But in any event, Title II is proper Fourteenth Amendment legislation that validly abrogates the States' sovereign immunity in the context of public higher education, as those appellate courts to consider the question uniformly have found. See *Bowers* v. *NCAA*, 475 F.3d 524, 555-556 (3d Cir. 2007); *Toledo* v. *Sanchez*, 454 F.3d 24, 40 (1st Cir. 2006); *Constantine*,

411 F.3d at 490; *Association for Disabled Ams.* v. *Florida Int'l Univ.*, 405 F.3d 954, 959 (11th Cir. 2005); see also *Goonewardena* v. *New York*, 475 F. Supp. 2d 310, 324 (S.D.N.Y. 2007).

Before enacting Title II, Congress compiled an extensive record of "pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Tennessee* v. *Lane*, 541 U.S. at 524. Among the public services in which such discrimination had manifested was public education. See *id.* at 525 n.12 (listing four instances of such discrimination that resulted in judicial decisions). Congress confronted sufficient discrimination in the "provision of public services and access to public facilities" to empower it to enact "prophylactic legislation" to combat such discrimination pursuant to its Fourteenth Amendment authority. *Id.* at 529. In *Tennessee* v. *Lane*, the Supreme Court went on to hold that, to the extent that Title II ensures the fundamental right of access to the courts, it was a "congruent and proportional" response to such discrimination, and so is valid Fourteenth Amendment legislation. *Id.* at 531.

For many of the same reasons, Title II similarly is a "congruent and proportional" response to the long history of discrimination in public education. Like access to the courts, access to a public education is at "the very foundation of good citizenship." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). Such education "provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982); accord *Wisconsin* v. *Yoder*, 406 U.S. 205, 221 (1972) ("[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society."). Accordingly, there are "significant social costs borne by our nation when select groups are denied the means to absorb the values and skills upon which our social order rests." *Plyler*, 457 U.S. at 221. Moreover, denying certain groups equal access to education "poses an affront to one of the goals of the

Equal Protection Clause: the abolition of government barriers presenting unreasonable obstacles to advancement on the basis of individual merit." *Id.* at 221-222. In modern society, access to education includes access to higher education. See, *e.g.*, *Grutter* v. *Bollinger*, 539 U.S. 306, 331-332 (2003).

Not only is public education among the most critical of public services, but Congress enacted the ADA against the backdrop of a long history of individuals with disabilities being systematically excluded from full access to such education. As late as 1975, Congress found that more than half of the nation's disabled children did not receive "appropriate educational services." See Education for All Handicapped Children of 1975, Pub. L. No. 94-142, § 3(b), 89 Stat. 774. Congress at that time found that about a million of those children were "excluded from the public school system altogether," while others "were simply 'warehoused' in special classes or were neglectfully shepherded through the system until they were old enough to drop out." *Honig* v. *Doe*, 484 U.S. 305, 309 (1988) (citing 20 U.S.C. 1400(b)(4) (1988)). More than a decade later, a dramatic education gap persisted between individuals with disabilities and the community at large. Forty percent of persons with disabilities did not finish high school (triple the rate for the general population), while only twenty-nine percent aged sixteen or older had any college education (compared with forty-eight percent for the population at large). National Council on the Handicapped, *On the Threshold of Independence* 14 (1988).[1] This lack of educational attainment contributed to an "alarming rate of poverty" and a "Great Divide" in employment for persons with individuals. See *ibid.* (stating that two-thirds of all working-age persons with disabilities were unemployed, with only one in four working full-time).

[1] This report, prepared at Congress's instruction, see *id.* at 7, and part of the ADA's official legislative history, is available at http://www.law.georgetown.edu/archiveada/documents/threshold_000.pdf.

Congress was also given first-hand accounts illustrating these statistics, through testimony that often made clear the invidious basis of the exclusionary practices. For example, one witness testified: "When I was 5 my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard." S. Rep. No. 116, 101st Cong., 1st Sess. 7 (1989). And a blind witness testified that, at a state university, she was forced to drop a required class in her major because her professor would not accommodate her blindness. 2 Staff of the House Comm. on Education and Labor, 101st Cong., 2d Sess., *Legislative History of Public Law 101-336: The Americans with Disabilities Act* 1224 (Comm. Print 1990). These were just two of the many stories Congress heard before enacting the ADA. Accordingly, Congress specifically found that education was one of the "critical areas" in which "discrimination against individuals with disabilities persists." 42 U.S.C. 12101(a)(3).

In response to this history of states and municipalities systematically failing to provide individuals with disabilities with access to public education – one of the most important of public services – Congress acted in a manner that was "congruent and proportional to its object of enforcing the right." *Tennessee* v. *Lane*, 541 U.S. at 531. Although the ADA requires States to take some affirmative steps to avoid discrimination and ensure access to public education, it requires them to do so only insofar as such steps are reasonable. It "does not require States to compromise their essential eligibility criteria," requires only "'reasonable modifications' that would not fundamentally alter the nature of the service provided," and does not require States to "undertake measures that would impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service." *Id.* at 532. "Insofar as Title II requires States to make 'reasonable' modifications to their educational programs in order to

ensure that disabled citizens have access to those programs, this requirement is congruent with the constitutional imperative that States avoid *irrational* discrimination." *Constantine*, 411 F.3d at 489.

Moreover, in requiring such reasonable steps to be taken – and requiring that school officials keep the needs of individuals with disabilities in mind – Title II reasonably and appropriately responds to the lingering effects of a long history of exclusion of people with disabilities from educational services. "A proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) (citation and internal quotation marks omitted). A simple ban on overt discrimination would have frozen in place the effects of States' prior official exclusion and isolation of individuals with disabilities, which had the effect of rendering the disabled invisible to government officials and planners. Congress was entitled to go further and require States to make reasonable affirmative efforts to make public education accessible to individuals with disabilities.

For these reasons, Title II validly abrogates the States' sovereign immunity in the education context. Where the ADA's retaliation provision protects those who support the enforcement of Title II, the abrogation of sovereign immunity that it effects similarly is valid.

B. The ADA's Retaliation Provision Is Valid Fourteenth Amendment Legislation Because It Protects First Amendment Rights

In any event, regardless of whether it had the Fourteenth Amendment authority to prohibit discrimination on the basis of disability by passing Title II, Congress had the authority to prohibit public entities from retaliating against those who oppose such discrimination. Such retaliation for complaints about the functioning of a state educational institution independently

violates the First Amendment, regardless of whether the behavior complained about itself violates the Constitution. Congress may, pursuant to its Fourteenth Amendment authority, prohibit conduct that violates the First Amendment. *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997). Accordingly, to the extent that the ADA remedies constitutional violations by banning unconstitutional retaliation, as it does here, it necessarily is valid Fourteenth Amendment legislation that properly abrogates the States' sovereign immunity. See *United States* v. *Georgia*, 546 U.S. 151, 158-159 (2006) (ADA is valid Fourteenth Amendment legislation where it remedies violations of prisoners' Eighth Amendment rights); *Alaska* v. *EEOC*, 564 F.3d 1062, 1069-1071 (9th Cir. 2008) (en banc) (the Government Employees Rights Act validly abrogates sovereign immunity where it remedies government employers' retaliation that violates the First Amendment).

The First Amendment forbids government officials from retaliating against public employees for speaking out as to a matter of public concern. See, *e.g.*, *Cockrel* v. *Shelby County Sch. Dist.*, 270 F.3d 1036, 1048 (6th Cir. 2001). Here, plaintiff alleges that she was retaliated against because she spoke out against the defendant's failure to make its services accessible to blind individuals, in violation of its obligations under the ADA. It is well established that a state institution's failure to comply with anti-discrimination law is a matter of public concern, such that complaints of such failure are speech protected by the First Amendment. See, *e.g.*, *Bonnell* v. *Lorenzo*, 241 F.3d 800, 812-813 (6th Cir. 2001) (allegations of sexual harassment); *Perry* v. *McGinnis*, 209 F.3d 597, 608 (6th Cir. 2000) (allegations of race discrimination). A complaint that a public college does not provide accessible services similarly is protected speech. See *Matulin* v. *Lodi*, 862 F.2d 609, 613 (6th Cir. 1988) (First Amendment protects speech complaining about a public entity's "handicap discrimination"); *Settlegood* v. *Portland Pub.*

Schs., 371 F.3d 503, 514 (9th Cir. 2004) (teacher's complaints that students with disabilities were not receiving adequate services were of "public importance" and protected by First Amendment); *Echtenkamp* v. *Loudon County Pub. Schs.*, 263 F. Supp. 2d 1043, 1058 (E.D. Va. 2003) (teacher's complaint that school failed to comply with ADA is protected speech).

Plaintiff could readily bring a First Amendment retaliation claim, which would require proving essentially the same elements. Plaintiff's ADA retaliation claim requires a showing that (1) plaintiff engaged in protected activity; (2) plaintiff suffered an adverse action; and (3) a causal connection exists between those two events. *Penny* v. *UPS*, 128 F.3d 408, 417 (6th Cir. 1997). A First Amendment retaliation claim would require the same proof. See *Scarbrough* v. *Morgan County Bd. of Educ.*, 470 F.3d 250, 255 (6th Cir. 2006).

Thus, where a plaintiff's complaining of ADA violations is activity protected by both the First Amendment and the ADA (as is the case here), the ADA retaliation provision does little more than provide a statutory remedy – one that includes abrogation of the States' sovereign immunity – for violations of the First Amendment. "Because retaliation for this kind of speech violates the First Amendment as incorporated into the Due Process Clause, Congress has the power to provide a private remedy for it." *Alaska*, 564 F.3d at 1071 (citing *Georgia*, 546 U.S. at 158). It is immaterial that Congress did not cite the First Amendment as a source of authority for the retaliation provision, so long as it had the authority to enact such overlapping protection "as an objective matter." *Franks* v. *Kentucky Sch. For the Deaf*, 142 F.3d 360, 363 (6th Cir. 1997). Accordingly, to the extent that it prohibits the same conduct as does the First Amendment, the ADA's retaliation provision is valid Fourteenth Amendment legislation that abrogates a State's sovereign immunity. *Roberts* v. *Pennsylvania Dep't of Pub. Welfare*, 199 F. Supp. 2d 249, 254

(E.D. Pa. 2002).[2]

Moreover, even if the retaliation provision banned additional conduct not otherwise forbidden by the First Amendment, it would still be permissible Fourteenth Amendment legislation. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Tennessee* v. *Lane*, 541 U.S. at 520 n.4 (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976)). Such legislation is a valid exercise of Fourteenth Amendment authority so long as it "exhibits 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* at 520 (quoting *City of Boerne*, 521 U.S. at 520). In the context of public education, the rights protected by the ADA's retaliation provision closely track those protected by the First Amendment, and so the retaliation provision is congruent and proportional to the constitutional injuries it remedies and prevents.

[2] In a pre-*Georgia* case, the Ninth Circuit found that the ADA's retaliation provision failed to abrogate the States' sovereign immunity because Congress had failed to compile a record of such retaliation. *Demshki* v. *Monteith*, 255 F.3d 986, 988-989 (9th Cir. 2001). *Georgia*, however, has made clear that the ADA validly abrogates sovereign immunity to redress actual constitutional violations, without regard to legislative findings. See *Georgia*, 546 U.S. at 158. Such legislative findings only are material to the extent that Congress attempts to pass "prophylactic" legislation that goes beyond the requirements of the Fourteenth Amendment itself.

CONCLUSION

The defendant's motion to dismiss should be denied, because the ADA's retaliation provision validly abrogates the States' sovereign immunity under the circumstances alleged here.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 17, 2010, the foregoing "Intervenor United States' Response To Defendant's Motion to Dismiss" was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all counsel of record.

/s/ Sasha Samberg-Champion
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