N COLLETTE JOSEY COVINGTON AND JADE COVINGTON	**:**	**14TH JUDICIAL DISTRICT COURT**
VS. NO. 2001-2355	**:**	
MCNEESE STATE UNIVERSITY AND THE BOARD OF SUPERVISORS FOR THE UNIVERSITY OF LOUISIANA SYSTEM	**:**	**PARISH OF CALCASIEU**
	:	**STATE OF LOUISIANA**
FILED _____		**DIVISION "F" – JUDGE CARTER**

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF DISCRIMINATION, AND FOR INJUNCTIVE RELIEF AND ATTORNEY FEES

NOW INTO COURT, through undersigned counsel, come Plaintiffs COLLETTE JOSEY COVINGTON ("Covington") and JADE COVINGTON, who file this Memorandum in Support of the Plaintiffs' Motion for Summary Judgment on the Issue of Discrimination, Plaintiffs' Motion for Injunctive Relief, and Plaintiffs' Motion for Attorney Fees. There is no genuine issue of material fact, and Defendants McNeese State University and the Board of Supervisors for the University of Louisiana System ("Board", or collectively referred to as "McNeese") discriminated against Collette Covington under Title II of the Americans with Disabilities Act, the 1973 Rehabilitation Act, La. R.S. 49:148.1, La. R.S. 46:2254(A), (F), and (J), and La. R.S. 51:2231, the Louisiana Commission on Human Rights. As such, the Plaintiffs are entitled to injunctive relief and the Defendants are liable to the Plaintiffs for attorney fees and costs.

I. FACTS

Background Facts

In the Spring Semester of 2001, Collette Covington was an epileptic McNeese State University student with a bladder disorder[1] which required that she frequently and unexpectedly use the restroom. Covington was also in an electric wheelchair that semester because of her epilepsy and because of an injury sustained on campus nine years ago which had grown progressively over the years.[2] Because of her disabilities, Covington utilized a state-supplied wheelchair-compliant public transportation van to commute to McNeese. Covington's disabilities qualified her as disabled under the ADA and entitled her to the protections of federal and state laws mandating minimum

[1] Covington had sutures in her urethra at the time of the accident.
[2] Covington has been substantially limited in her ability to walk since injuring her knee at McNeese in 1996. By 2001, her condition had worsened to the point that she could no longer maneuver on campus

accessibility standards at McNeese and prohibiting discrimination against her by a public entity or state educational institution.

Accident Facts

On January 31, 2001, Covington was waiting for her state-supplied disabled public transportation van to arrive near the dumpster behind the Holbrook Student Union ("Old Ranch"). While waiting, she needed to utilize the restroom.[3] The Old Ranch was the nearest building to Covington's location,[4] and it is the only building nearby with a marked entrance for the disabled.[5] Covington entered the building[6] and proceeded to the women's restroom, which had no markings or warnings on the restroom door, either to indicate that it was inaccessible or to direct Covington to an alternate restroom.[7]

The Old Ranch women's restroom door opens inward, and Covington was able to enter the restroom with her wheelchair. But when she attempted to leave, she discovered that she could not readily pull the door open to escape the restroom. Covington attempted to but was unable to get sufficient leverage and clearance against the door, which wedged her into a position which caused her arm to pop so severely that she thought she had broken it.[8] The McNeese Police, namely Chief David Benada and Lt. Vickie Boudreaux, responded to the incident and recommended that Covington seek immediate medical attention. She complied, and it was discovered that she sustained serious bodily injury which required surgery.[9]

McNeese Police Lt. Vickie Boudreaux testified in her deposition that she received a call from Covington at 2:58 p.m. January 31, 2001. Boudreaux explained, "So I talked to her and she said that she needed some help, that she thinks she hit her arm. . . She told me she was in the bathroom at the old ranch."[10]

When Boudreaux found Covington, she was crying and looked like she was in

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without a wheelchair.

[3] Exhibit 1, Covington affidavit.

[4] Exhibit 1, Covington affidavit with attached photograph of dumpster and Old Ranch.

[5] Exhibit 1, Covington affidavit with attached photograph of disabled entrance to Old Ranch.

[6] Covington did not enter the Old Ranch at the disabled entrance because it was blocked by people, required a circuitous route through the middle of an active computer lab, and would have required that she open a second, interior, door, which is not ADA compliant. Instead, she entered the Old Ranch at the doors nearest the restroom. The point of entry has no bearing on Covington's ultimate accident, but the existence of two disabled entrances into the Old Ranch and the lack of any other directional signs created a false sense of security about the accessibility of the restroom facilities within the Old Ranch. *See* exhibit 1, Covington affidavit.

[7] The defendants have admitted that Covington used the most compliant restroom in the Old Ranch. *See* exhibit 2, Richard Rhoden deposition, 42:6-43:1 and Exhibit 1, Covington affidavit.

[8] Exhibit 1, Covington affidavit.

[9] These injuries will be proven at trial.

[10] Exhibit 3, Vicki Boudreaux deposition, 10:20-23.

pain.[11] An infirmary nurse was dispatched, and Covington was immediately transported to Dr. Lynn Foret's office.

Chief Benada supports this version of events in his deposition,[12] and McNeese's own police report of the incident further supports Covington's allegations. The police report, undisputed and supplied by the defendants in discovery, says:

> Time dispatched: 15:06 Time arrived: 15:07 Time cleared: 15:26
>
> ---
>
> COMPLAINANT -> COLLETTE COVINGTON
> Address: 1214 16th ST
> City: LAKE CHARLES State: LA Zip: 70601 Phone: (337) 439-5910
>
> ---
>
> TYPE OF COMPLAINT -> MEDICAL EMERGENCY
>
> COMPLAINANT CALLED TO REPORT THAT WHILE IN THE LADIES RESTROOM, IN THE OLD RANCH, THE BATHROOM DOOR CAUGHT HER ARM AND SHE BELIEVED IT TO BE BROKEN. LT. BOUDREAUX TOOK THE CALL, AND CALLED THE NURSE TO GO TO THE RANCH TO CHECK ON MS. COVINGTON. ALSO, LT. BOUDREAUX, CHIEF BENADA, AND OFFICER SOILEAU WENT TO THE RANCH TO ASSIST. MS. COVINGTON. MS. COVINGTON IS BELIEVED TO HAVE A BROKEN ARM AND IS BEING TRANSPORTED TO THE HOSPITAL. AT 1620 PD RECEIVED A CALL TO LET PD KNOW THAT MS. COVINGTON IS AT DR. LYNN FORET'S OFFICE IN SULPHUR AND MAY HAVE TO HAVE SURGERY ON HER HAND.[13]

The plaintiffs do not seek to prove all of Covington's damages at this time. Instead, they seek injunctive relief and attorney fees on the basis of acts of discrimination leading up to and extending beyond the accident which formed the original basis for this suit.

ADA Compliance Facts

It is undisputed that the Old Ranch women's restroom door failed to comply with the Accessibility Guidelines of the Americans with Disabilities Act and the requirements of La. R.S. 49:148.1. Specifically, the door was 29 5/8 inches wide instead of the required 32 inches wide.[14] The door also required 10 foot-pounds of pull to open rather than the required maximum of five foot-pounds.[15] The door and the building also

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[11] Exhibit 3, Vicki Boudreaux deposition, 12:2-3.
[12] Exhibit 4, Deposition of McNeese Police Chief David Benada, 9:3-8.
[13] Exhibit 3, McNeese Police Report, Exhibit 1 to Vicki Boudreaux deposition.
[14] Exhibit 2, Richard Rhoden deposition, 35:12-24. Rhoden testified, "I think it was 29 ½ or somewhere between 29 and 30 inches."
[15] Exhibit 2, deposition of Richard Rhoden, 37:11-18. Rhoden does not dispute the measurement because the defendants claim to have no tools with which to measure. He testified, "I really couldn't say, again, because I don't have anything to measure it with."

contained no directional signage as required by the ADA.[16] The Defendants admit that these defects in the Old Ranch are merely the tip of the iceberg, that the unlawful and inaccessible condition of the Old Ranch is common on the McNeese campus, and that no comprehensive plan exists to make campus facilities safe and accessible for the disabled.

Sadly, Covington was not the first disabled student hurt in a non-compliant McNeese restroom. Wheelchair-bound student Brenda Hunt sued the defendants for discrimination under the ADA in 1993 when she was injured in a restroom stall.[17] Immediately prior to Hunt's accident, the Defendants commissioned their own scathing report citing campus restrooms as the number one campus defect under the ADA and suggesting that restroom improvements be prioritized to protect the disabled.[18] Yet after more than a decade and at least one other ADA suit, the Defendants have still failed to act on their own recommendations.

Following her accident, Covington contacted Tim Delaney, McNeese's Director of Services for Students with Disabilities, to request that the Defendants investigate the door which injured her. Delaney admitted in his deposition that he has failed to follow-up with her complaint. After nearly five years, and even after the filing of this lawsuit, nothing has been done to make this door or any other part of the Old Ranch comply with the ADA.

In addition to providing inadequate facilities, the Defendants have engaged in numerous practices which are unlawful under the ADA. These include requiring that the disabled "register" in order to request accommodations on campus, failing to provide an adequate grievance process, failing to address legitimate complaints, failing to anticipate the needs of the disabled, and failing to draft a self-evaluation and transition plan as required by the ADA.

The facts undisputedly establish that the Defendants violated numerous statutes, including the ADA, which was passed 11 years prior to Covington's injury; La. R.S. 46:2254, which was made effective more than 20 years prior to Covington's injury; the Rehabilitation Act of 1973, which was passed nearly 30 years prior to Covington's injury; and La. R.S. 49:148, *et seq.*, which was passed nearly 35 years prior to

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[16] Exhibit 2, deposition of Rhoden, 49:8-19 and Exhibit 1, Covington affidavit with photos of restroom door.

[17] Exhibit 6, *Brenda McDonald Hunt vs. McNeese State University and Louisiana Board of Trustees for State Colleges and Universities*, 93-CV-1401, Western District of Louisiana.

Covington's injury.

Instead of responding to this urgent public health, safety, and legal crisis, the defendants have openly and habitually dismissed the needs and injuries of the disabled through a campaign of intimidation which includes willfully misstating the law,[19] blaming the disabled for their accidents on campus,[20] concealing complaints and lawsuits from the public, in discovery,[21] and from their own employees,[22] setting up a sham grievance process, ignoring the complaints of the disabled, and blaming budgetary problems for shoddy McNeese facilities, even as they spend millions of dollars on unnecessary and wasteful projects.

Even 15 year after the passage of the ADA, the defendants have not sought legal or engineering help,[23] though it is available for free from organizations such as the U.S. Department of Justice. The defendants have not taken the first step to evaluate their campus or draft a transition plan for its eventual compliance.[24] McNeese has not even bothered to supply its own facilities and planning director with the inexpensive tool he would have needed to determine that the restroom door did not comply with the ADA.[25]

Furthermore, the President of McNeese himself has declared under oath that he does not consider it "fundamentally important" for the disabled to have access to facilities such as the campus cafeteria, student union, student government, newspaper, yearbook, or debate team offices.[26] He even went so far as to say that he did not consider it to be the Defendants' responsibility to maintain the Old Ranch for the disabled to use, and, inexcusably, tried to blame the "students" for McNeese's failure to comply with the ADA.[27] All of these blatant acts of discrimination against the disabled will be fully discussed in this memorandum.

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[18] Exhibit 7, "Smith Report", produced by the Defendants in response to discovery requests.
[19] Discussed, *infra.*
[20] *See* Defendants' answer to Plaintiffs' petition, paragraph 20.
[21] Exhibit 8, deposition of Candace Townsend, pages 20-27 and attached exhibit P1. The Defendants submitted false discovery answers regarding the existence of numerous public media articles about the failure of McNeese to comply with the ADA. The McNeese public relations director, who supplied the answers, was confronted with her inaccurate statements in her deposition.
[22] Exhibit 2, deposition of Richard Rhoden, 19:1-21:11. Rhoden testified that as Assistant Director of Facilities and Planning, he had never been informed of an ADA lawsuit against McNeese in 1993. Rhoden was also not informed of the suit when he became Director in 1999, and he was even unaware of the instant lawsuit until the Plaintiffs noticed his deposition.
[23] Exhibit 2, deposition of Richard Rhoden, 26:17-28:3.
[24] The plaintiffs submitted a request for production for these documents in 2002. The only documents which have been produced that even resemble a self-evaluation or transition plan fail to satisfy the requirements of the Code of Federal Regulations. This topic is discussed, *infra.*
[25] Exhibit 2, deposition of Rhoden, 37:11-18.
[26] Exhibit 16, deposition of Robert Hebert, 43:13-17.
[27] Exhibit 16, deposition of Robert Hebert, 71:5-7.

The last time the defendants were sued for their failure to comply with the ADA, they quietly settled the suit and continued to discriminate as if nothing had happened. The Plaintiffs appeal to this Court to make things different this time.

II. SUMMARY JUDGMENT STANDARD

Louisiana Code of Civil Procedure Article 966 provides that summary judgment shall be granted in cases where there is no genuine issue of material fact and that the procedure shall be favored. Article 966 provides:

> A. (1) The plaintiff or defendant in the principal or any incidental action, with or without supporting affidavits, may move for a summary judgment in his favor for all or part of the relief for which he has prayed. The plaintiff's motion may be made at any time after the answer has been filed. The defendant's motion may be made at any time.
>
> (2) The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by Article 969. The procedure is favored and shall be construed to accomplish these ends.
>
> . . .
>
> C. (1) After adequate discovery or after a case is set for trial, a motion which shows that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law shall be granted.
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> (2) The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.
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> D. The court shall hear and render judgment on the motion for summary judgment within a reasonable time, but in any event judgment on the motion shall be rendered at least ten days prior to trial.
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> E. A summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case.

The Louisiana Supreme Court recently articulated the well-established standard when it ruled in *King v. Parish Nat'l Bank*, 885 So.2d 540, (La. 10/19/04):

> Favored in Louisiana, the summary judgment procedure "is designed to secure the just, speedy, and inexpensive determination of every action" and shall be construed to accomplish these ends. La. C.C.P. art. 966(A)(2). Summary judgment shall be granted "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 material fact, and the mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(B); *Jones v. Estate of Santiago*, 03-1424, p. 4 (La. 4/14/04), 870 So. 2d 1002, 1006.
>
> The parties have conducted nearly five years of extensive discovery on the issue

of discrimination under the Americans with Disabilities Act; this discovery is sufficient for the court to rule on the merits of this cause of action. As movers, the plaintiffs bear the burden of establishing all essential elements of their claim and of showing that there are no triable issue of material fact. For the reasons provided in this memorandum, there are no genuine issues of material fact, and the plaintiffs are entitled to summary judgment on the issues of discrimination and are entitled to a judgment in their favor and injunctive relief and attorney fees. Furthermore, the resolution of this matter by summary judgment is in the public interest and in the furtherance of the administration of justice.

III. COUNT I: DISCRIMINATION UNDER 42 U.S.C. SECTION 12132

A. ADA Background

Background. 42 U.S.C. S. 12132 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 such entity. A public entity sued under the ADA is liable for the vicarious acts of any of its employees, and the doctrine of *respondeat superior* applies. *Delano-Pyle vs. Victoria County*, 302 F.3d 567 (5th Cir. Sept. 3, 2002).

Standing and cause of action. Section 12133 provides for a private cause of action by any person alleging discrimination by a public entity on the basis of a disability. The person alleging the discrimination need not even be the person discriminated against as long as the plaintiff can show that he suffered some injury. *Raver vs. Capitol Area Transit* 887 F.Supp. 96 (M.D. Pa., 1995).

Furthermore, there is no need under the ADA for a person to make a formal request to utilize facilities and services. *Schonfeld vs. City of Carlsbad*, 978 F.Supp. 1329 (S.D. Cal. 1997), *affirmed*. The court notes in *Schonfeld* at 1132:

> Defendant explains that plaintiffs should have made formal requests to utilize the facilities and services that are the subject of the instant lawsuit before bringing suit. The Court finds this argument without merit. The ADA does not require plaintiffs bringing a claim alleging inadequate access to a facility to have "formally" requested to use the facility.

Thus, Covington had the right to expect accessible and non-discriminatory facilities and policies the moment that she stepped on campus. She was not required to contact the Defendants in advance of her decision to utilize the Old Ranch and its

restrooms; she was not required to "request" access to these facilities or to "register" to use these facilities; and she was certainly not expected to have brought these inadequate facilities to the Defendants' attention. McNeese was to have fully and independently complied with the ADA.

Discriminatory intent is not required. There is no required showing of discriminatory intent under Title II of the ADA. *Adelman vs. Dunmire*, 15 ADD 196 (E.D. Pa., 1996). Therefore, the plaintiffs are not required to show that the defendants acted in bad faith or wished to discriminate against Covington. The plaintiffs do not even have to establish that the defendants were aware that they were discriminating against Covington. It is enough to show that she was either excluded from participation in a service, program, or activity or was discriminated against in some other way.

Elements. To establish a violation of the ADA or Rehabilitation Act of 1973, Covington must show: (1) that she has a covered disability[28]; (2) that she was either excluded from participation in or denied the benefits of some public entity's services, programs or activities that she was otherwise qualified to receive, or was otherwise discriminated against by the public entity; and (3) the exclusion, denial of benefits, or discrimination was by reason of her disability. *Lightbourn vs. County of El Paso, Tex.*, 118 F.3d 421, 428 (5th Cir. 1997); *Darian vs. University of Massachusetts Boston*, 980 F.Supp. 77, (D.Mass, 1997). There is no genuine issue of material fact with regard to any of these three elements.

B. Covington is disabled

1. Definitions

The ADA and Rehabilitation Act utilize the definition of "disability" found in 29 CFR 1630.2, which provides:

> (g) Disability means, with respect to an individual –
> (1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (2) A record of such an impairment; or
> (3) Being regarded as having such an impairment.

2. "A physical or mental impairment. . ."

The definition of a "physical or mental impairment" is provided in section (h), which reads:

[28] "Disability" is a term of art which can include those who are not disabled but who have a record of being disabled or are regarded as disabled. This is discussed, *infra*.

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Covington had several physical impairments at the time of her accident because of disorders or conditions to three of her major body systems: (1) neurological; (2) musculoskeletal; and (3) genito-urinary.

Neurological. Covington has been under the care of neurologists since she was a child because of her epilepsy and predisposition to seizures. She also has a long-term history of headaches, sleep disorders, and other neurological defects. Prior to her accident, Covington has routinely seen her neurologist, Dr. Fayez Shamieh, who prescribed medical transportation and a wheelchair for her because she was experiencing mobility problems related to her seizures.[29] Dr. Shamieh has classified Covington as totally and indefinitely disabled and attributes this to her very frequent seizures followed with loss of concentration and short term memory loss[30]. He has also diagnosed her as having confusion and a genuine fear of being in public places due to her seizures.

Musculoskeletal. Covington has had a musculoskeletal defect since falling in a hole at McNeese in 1995 and injuring her knee. On April 2, 1996, Dr. David Drez performed surgery to correct a lateral meniscus tear in her left knee.

Covington was prescribed crutches and physical therapy, but she never fully recovered and began having severe problems with her knee in February, 2000. Three months later, Dr. Lynn Foret performed a second surgery, an arthroscopy.[31] At this time, she was prescribed Canadian crutches and a walker.[32] Covington's condition worsened to the point that, in December, 2000, Dr. Foret performed a third surgery, an osteoarticular autograft procedure to attempt to correct an osteochondral fracture.[33] As her condition deteriorated, Covington was prescribed a wheelchair[34] and a power wheelchair, which

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[29] Exhibit 12, certified medical records of Dr. Fayez Shamieh, report of September 11, 2001, March 26, 2001, and April 20, 2001.

[30] Exhibit 11, certified medical records of Lake Charles Memorial Hospital, report of Dr. Fayez Shamieh, January 7, 2003.

[31] Exhibit 9, certified medical records of Dr. Lynn Foret, May 15, 2000.

[32] Exhibit 9, certified medical records of Dr. Lynn Foret, prescription dated May 16, 2000.

[33] Exhibit 9, certified medical records of Dr. Lynn Foret, December 20, 2000.

[34] Exhibit 9, certified records of Dr. Lynn Foret prescription dated December 21, 2000 reads "Pt needs a

she was using at the time of her injury.[35] Throughout this time, Covington has been simultaneously prescribed a leg brace to assist with her attempts to walk short distances without her wheelchair and to protect her from falls in the event of a seizure.[36] Since the Spring of 2000, Covington has remained on medically-prescribed crutches, brace, or in a wheelchair continuously.

While Covington's nine-year-old injury has improved enough that she can occasionally walk short distances with a leg brace and significant dosages of pain medication, she has reached maximum medical cure but is still significantly limited in her ability to walk and cannot do so at all unaided. Because of these limitations, she must maintain her electric wheelchair at hand.

Genito-urinary. Covington has had a documented urinary condition since 1989 which requires that she have regular surgery to remove obstructions in her urinary tract.[37] Covington's condition frequently demands that she be near a restroom and is often so severe as to require her to wear diapers.

3. ". . .that substantially limits one or more major life activities."

Covington's documented conditions affected one or more major life activities, as provided in the regulations. "Major life activities" are defined in section (i) as follows:

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

The statute defines "substantially limits" as follows:

(j) Substantially limits –
(1) The term substantially limits means:
(i) Unable to perform a major life activity that the average person in the general population can perform; or
(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.
(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
(i) The nature and severity of the impairment;
(ii) The duration or expected duration of the impairment; and
(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment

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wheelchair".
[35] Exhibit 9, certified records of Dr. Lynn Foret prescription dated January 17, 2001 reads "Pt needs a power wheelchair".
[36] *See* numerous prescriptions from Drs. Foret and Shamiah, including one dated June 7, 2002 by Dr. Fayez Shamieh, noting that Covington needs a brace for the remainder of her life "in order to walk daily".
[37] Covington has been treated by Dr. Reed Fontenot since August 17, 1993.

The statute conspicuously does not require a showing that Covington cannot perform one or more major life activities. She simply must show that she was substantially limited in her ability to perform them. To establish that Covington was substantially limited in her ability to walk, perform manual tasks, care for herself, and drive, she must demonstrate that she was, "significantly restricted as to the condition, manner or duration under which" she could "perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."[38]

In reaching this conclusion, three factors are to be considered: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent of long term impact, or expected impact of the impairment.[39]

The nature, severity, duration, and impact of Covington's neurological condition substantially limited several major life activities.

The comments to the ADA Accessibility Guidelines promulgated by the U.S. Department of Justice mandate that impairments be evaluated without regard to the availability of mitigating measures. These comments specifically list epilepsy, noting that:

> The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modifications or auxiliary aids and services. For example, a person with hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.[40]

Thus, by definition, Covington's epilepsy qualified her as disabled under the ADA, even if it was controlled. In Covington's case, her epilepsy was uncontrolled enough that it presented an independent substantial impairment to several major life activities because, unlike the average person in the general population, she was not able to walk, drive, attend class, work, and school without the fear of frequent, unexpected seizures which rendered her unconscious and subjected her to falls and other potentially life-threatening injuries.

Dr. Shamieh describes Covington's condition in a letter dated January 7, 2003.

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[38] Official comments to 29 CFR 1630.2.
[39] *Id.*
[40] *Id.*

He notes:

> At this time, she is totally disabled. She is unable to work and attend classes. She is also unable to drive. In my opinion, I do not see that her condition is going to change in the future.[41]

In his report and in his deposition, Dr. Shamieh explained that Covington's seizures were more controlled prior to January 31, 2001 and that she was attempting to function as close to normally as she could, but that she nevertheless suffered from significant impairments because of her neurological conditions. These impairments made it difficult for Covington to be mobile and required that she be prescribed medical transportation to and from school. Dr. Shamieh testified in his deposition:

> Q: But before the accident, hadn't you prescribed or requested transportation due to problems she had with mobility and seizures?
>
> A: Right.
>
> Q: And she was having grand mal seizures prior to the accident, also, wasn't she?
>
> A: That's right.
>
> Q: She had problems with falling prior to the accident; didn't she?
>
> A: That's right.[42]

The defendants not only failed to dispute Dr. Shamieh's testimony, but in his deposition they took the position that Covington was disabled prior to January 31, 2001 because she had long-term seizures and mobility problems.

Dr. Shamieh not only diagnosed Covington with epilepsy, but he personally witnessed many of her seizures. He testified in his deposition:

> Q: Have you ever witnessed her seizures?
>
> A: Yes.
>
> Q: And how do they manifest themselves?
>
> A: They were really different types, different occasions witnessed here at the office, in the emergency room and also at the hospital. Where at times she would be just sitting in the waiting room or the examining room and it happened that while she was in the wheelchair in the past couple of years, she had several episodes where she blacked out and fell. There was no warning before except probably not feeling well. This is -- call it either an aura or preceding symptoms and then she would just blackout. And if somebody is with her, most of the time her daughter will be with her, she

[41] Exhibit 10, attachment to deposition of Dr. Fayez Shamieh. Shamieh wrote in his letter and report of Jan. 7, 2003 that Covington was unable to drive. Covington has been able to drive short distances occasionally during the last few years only in controlled settings and when it was absolutely necessary; however, she has been substantially limited in her ability to drive due to her numerous disabilities. Dr. Shamiah recently released Covington to return to McNeese if she is able to do so.

[42] Exhibit 10, Dr. Fayez Shamieh deposition, 14:14-23.

> would holler and we would go and check her. And if she's alone in the room and it happened at even one of the doctor's offices when she went to see namely Dr. Varela in his office, she fell from the wheelchair because she blacked out. We have seen her having also what we call chronic type of movement which is involving the arms and the legs as well as the abnormal movement of the head and the eyes. The eyes would be rolling back. And this would last for few minutes and then hereafter she recovers. We call it the postectol state where she becomes confused and sleepy at times. Those are a summary of what we witnessed on her.[43]

Only three months prior to the January, 2001 accident, Covington was documented as, "still having a lot of problems with headache and having episodes where she loses her consciousness and at times she will blackout. She has headache before and after and she sleeps a lot afterward."[44] It was in part because of this fear of Covington falling and injuring herself during a seizure that Dr. Shamieh requested that she use a wheelchair for mobility.

Covington has a documented medical history of seizures throughout her life. A sample of Covington's medical records demonstrate some of her neurological conditions around the time of her January, 2001 incident[45]:

(1) May 16, 1997. Lake Charles Memorial Hospital admitted Covington to the emergency room after she had a seizure. She was observed to be groggy, moving slowly, and to have slurred speech.[46]
(2) December 2, 1997. Lake Charles Memorial Hospital admitted Covington for five days following four episodes of seizures and severe headaches. She began vomiting while at the hospital and was diagnosed with Poorly Controlled Seizure Disorder.[47]
(3) July 26, 1998. Lake Charles Memorial Hospital admitted Covington to the emergency room after she was found on a restroom floor stating that she felt as if she were about to have a seizure. Her speech slurred, she vomited, and she was referred to Dr. Shamieh.[48]
(4) February 8, 1999. Lake Charles Memorial Hospital admitted Covington to the emergency room after suffering effects such as nausea and a feeling of being drugged after having seizures. She was ordered not to drive.[49]
(5) February 22, 1999. Shamieh documented that Covington had six seizures and the loss of bladder control following a head injury on February 2, 1999. She has had chronic headaches and twitches on the left side of her face since having them.[50]
(6) March 18, 1999. Shamieh documented school absences because of headaches and difficulty sleeping.[51]
(7) October 18, 2000. Shamieh documented that Covington was, "still having a lot of problems with headache and having episodes where she loses her

[43] Exhibit 10, Deposition of Dr. Shamieh, 8:20-9:14.
[44] *See* Exhibit 12.
[45] Covington testified that she has had seizures since she was two years old, when she was diagnosed with epilepsy (Exhibit 26, 8:25-9:2). She considered her seizures to be under control prior to the January, 2001 injury, and, indeed, the Plaintiffs plead in their petition that her seizures were under control. Covington's perception, however, is relative to her condition at the time of her filing suit and her deposition, when her seizures were a near-daily occurrence. Covington's medical records substantiate that "well-controlled" to Covington still qualifies as a disability under the ADA.
[46] Exhibit 11, Lake Charles Memorial Hospital records, May 16, 1997.
[47] Exhibit 11, Lake Charles Memorial Hospital records, Dec. 2, 1997.
[48] Exhibit 11, Lake Charles Memorial Hospital records, July 26, 1998.
[49] Exhibit 11, Lake Charles Memorial Hospital records, Feb. 8, 1999.
[50] Exhibit 12, Dr. Fayez Shamieh medical records, Feb. 22, 1999.
[51] Exhibit 12, Dr. Fayez Shamieh medical records, March 18, 1999.

consciousness and at times she will blackout. She has headache before and after and she sleeps a lot afterward."[52]

(8) October 26, 2000. Shamieh documented an abnormal 24 hour abulatory EEG following a seizure.[53]

(9) March 8, 2001. Shamieh documented that Covington was unable to tolerate the MRI procedure, even while sedated, because she would have seizures when she was positioned.[54]

(10) March 26, 2001. Shamieh documented that Covington had two seizures while at another doctor's office and was transported to Shamieh's office. He also documented numerous headaches followed by seizures and periods of prolonged sleep. Covington was ordered not to return to McNeese.[55]

(11) December 13, 2001. Shamieh documented that Covington had seizures and numbness and was allowed to renew her license only to be with her daughter to drive.[56]

(12) January 11, 2002. Shamieh documented that Covington had seizures, memory disturbance, speech disturbance, headaches, and numbness.[57]

(13) February 14, 2002. Shamieh documented that Covington had slurred speech, seizures, memory loss, and tingling and numbness in her hand and arms.[58]

(14) March 19, 2002. Shamieh documented that Covington had seizures, short term memory problems, numbness, blurred vision, and was confined to the wheelchair.[59]

(15) February 19, 2003. Lake Charles Memorial Hospital admitted Covington to the emergency room after she had three witnessed seizures.[60]

There is no genuine issue of material fact that Covington suffered severe and often uncontrolled seizures and that her condition dates back to her early childhood and will likely continue for life. Seizures which rise to the level of presenting the ever-present risk of falling and which create mobility problems so severe as to render Covington in need of independently prescribed transportation clearly substantially impair the major life activities of walking, driving, and attending class, work, and school without assistance.

The nature, severity, duration, and impact of Covington's musculoskeletal condition substantially limited several major life activities. The average person in the general population does not require crutches or a wheelchair in order to maneuver around a college campus. The average person does not possess a medical prescription for an insurance-reimbursed electric wheelchair or qualify for state-supported public disability transportation from her home to school.

The mere fact that Covington qualified for and received these medical services and that there is no medical evidence to contradict her need for them establishes that

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[52] Exhibit 12, Dr. Fayez Shamieh medical records, Oct. 18, 2000.
[53] Exhibit 12, Dr. Fayez Shamieh medical records, Oct. 26, 2000.
[54] Exhibit 12, Dr. Fayez Shamieh medical records, March 8, 2001.
[55] Exhibit 12, Dr. Fayez Shamieh medical records, March 28, 2001.
[56] Exhibit 12, Dr. Fayez Shamieh medical records, Dec. 13, 2001.
[57] Exhibit 12, Dr. Fayez Shamieh medical records, Jan. 11, 2002.
[58] Exhibit 12, Dr. Fayez Shamieh medical records, Feb. 14, 2002.
[59] Exhibit 12, Dr. Fayez Shamieh medical records, March 19, 2002.

there is no genuine issue of material fact that Covington was medically determined to be substantially impaired in her ability to walk, drive, and perform manual tasks and that her impairment was severe enough that she required assistance for even the smallest tasks.

Covington was given a functional evaluation at St. Patrick's Hospital only a few weeks prior to her January, 2001 accident. In the evaluation and upon her discharge from the hospital, Covington was considered to be ***totally unable*** to complete any of the following tasks without complete assistance:

(1) Bathing

(2) Dressing

(3) Bed/chair/wheelchair transfers

(4) Toilet transfers

(5) Tub/shower transfers

(6) Wheelchair/walking

(7) Stairs[61]

Covington was even determined to require supervision when attempting to groom herself, and because of these conditions, Covington was referred to home health care by Kathy Fontenot, the physical therapist assigned to Covington while she was at St. Patrick Hospital three weeks prior to her accident at McNeese.

While Covington is now able to assist herself in some of the major life activities evaluated in January, 2001, she still has significant impairments because of her musculoskeletal condition. Dr. Lynn Foret noted in his March 26, 2002 report that Covington:

> . . .recently still has been unable to walk unaided. She has maybe not quite given up the hope yet of securing employment. She stated recently that she was going to try to make an attempt to get back into school and I do not know at this time if she has gone back to school or not. But she was trying to back the last time she spoke with me. She is still having seizures, she still has chronic pain and she still needs assistance with daily chores. She uses a wheelchair for the majority of times.[62]

Dr. Foret recognized that she had reached maximum medical cure when he noted in the same report that:

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[60] Exhibit 11, Lake Charles Memorial Hospital medical records, Feb. 19, 2003.

[61] Exhibit 13, St. Patrick's Hospital medical records, "Functional Assessment Tool" Jan. 3, 2001, signed by Brandi Austin and Kathy Fontenot. Even prior to admission at St. Patrick Hospital, Covington required total assistance for "Wheelchair/walking" and "Stairs" and she required a device for dressing, bathing, toileting, bed/chair/wheelchair transfers, toilet transfers, and tub/shower transfers".

> I think the main thing on Collette is not coming from her orthopedics but coming from either pain management or neurology for her seizure control, since that will be the main stream problems that she will be left with. The shoulders will improve to some degree but will remain chronic and she will have chronic pain. Her knees will continue to give her trouble from time to time as well.[63]

While Dr. Foret characterized Covington's primary problems as related to her neurological conditions, he recognized that the pain from her musculoskeletal conditions exacerbated her seizures. He also recognized that some of her musculoskeletal defects are likely to be permanent and that she has been significantly impaired for many years because of her musculoskeletal conditions.

Dr. Shamieh testified that Covington's musculoskeletal impairments affected his treatment of her neurological conditions. He testified in his deposition of Sept. 11, 2003, at page 24:

> A: Probably the last visit when she was in the room she was able with the brace and the cane to ambulate. But this was probably the first time in probably two years I've seen her able to stand with the brace, long brace on her left leg and carrying the cane with her.[64]

Dr. Raul Varela, another of Covington's physicians, noted in Covington's chart, "She is disabled."[65] On June 10, 2004. Dr. Varela documented that Covington reported that for several years it had been difficult for her to walk, bend, stretch, sleep, do fine-motor work, work, cook, bathe and hygiene, or have hobbies. He diagnosed Covington with grand mal seizures, carpel tunnel syndrome, shoulder subacromial bursitis, hip greater trochonter bursitis, left shoulder rotator cuff tendonitis, generalized fibromyalgia, tennis elbow, sacroitiitis with probable seronegative spondyloarthropathy, probable peripheral neuropathy, and internal mechanical derangement of the left knee.[66]

Perhaps most significantly, Covington herself testified as to the severe limits that her musculoskeletal conditions have imposed on her over a number of years. She testified in her deposition that she was specifically prescribed a wheelchair to attend McNeese and has consistently used her wheelchair since prior to her injuries at McNeese in January, 2001 She testified:

> Q: What forces you to be confined to a wheelchair?
>
> A: Left leg neuropathy. Wait. Let me back up. You are talking about now or –

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[62] Exhibit 9, Dr. Lynn Foret medical records, March 26, 2002.
[63] Exhibit 9, Dr. Lynn Foret certified report.
[64] Exhibit 10, deposition of Dr. Fayez Shamieh, 24:12-16.
[65] Exhibit 14, Dr. Raul Varela medical records, Oct. 1, 2003.
[66] Exhibit 14, Dr. Raul Varela medical records, June 14, 2004.

Q: The whole shebang. How about that?

A: In the beginning, it was because I had surgeries on my left leg – on my left knee; and for me to get around quickly and easily without struggling just on crutches – actually, it was meant for going to school so they did the wheelchair.

Q: And how much time would you spend in a wheelchair in the beginning?

A. In the beginning? It depended. A lot of it depends on how bad it is. In the beginning, I didn't have a brace on my leg so I used it for school. At home, you know, like I said, it just depended. Go shopping.

Q: And you have used it fairly consistently since you first received it?

A: Uh-huh. Yes.[67]

Furthermore, Covington testified, consistently with Dr. Foret's report, that her musculoskeletal disabilities are of a permanent nature, and she is unlikely to fully recover. She testified:

Q: Do they have any treatment that you are undergoing for your leg?

A: Treatment meaning physical?

Q: Injections, physical therapy, medication?

A: I can't do physical therapy anymore. I tried, but after I hurt my arm, it was painful and brought on seizures. So basically no physical therapy. Medication.[68]

Therefore, there is no genuine issue of material fact that Covington suffered and continues to suffer from musculoskeletal impairments which rendered her disabled.

The nature, severity, duration, and impact of Covington's urological condition substantially limited several major life activities.

The average person also does not have a chronic urology disorder which often requires wearing diapers and presents an urgent, severe, and frequent need to urinate that interferes with the ability to sit through classes, work, or venture far from a restroom for any period of time. This condition is a part of the totality of factors leading to Covington's disability because it enhanced the effects of her other conditions to make her impairments more substantial.

Covington's urological condition is documented by ongoing surgeries, emergencies, and other medical procedures. On October 30, 1998, Covington was referred to Dr. Reed Fontenot because of "pain on voiding for several years with urgency

and incontinence." Dr. Fontenot was unable to cauterize Covington normally because of her obstructions, and he was required to perform cauterization surgery.

On March 27, 2002, Lake Charles Memorial Hospital admitted Covington to the emergency room when she was unable to urinate because of her condition. The hospital unsuccessfully attempted to cauterize Covington numerous times. In desperation, it gave up and sent her to Dr. Enright's office to handle the emergency.

Covington's urological condition is one reason why she needed to use the Old Ranch restroom on the day of the accident. The defendants' failure to have a single accessible restroom available to Covington in the Old Ranch and their failure to have appropriate directional signs was particularly discriminatory to a woman in a wheelchair with a risk of seizures and a urinary disorder.

4. Covington has a record of having impairments

Even if the defendants could present a genuine issue of material fact that Covington was not disabled, she would still have a cause of action under the ADA because she can establish a record of an impairment of a major life function. Section (k) provides that a person is disabled if she:

> (k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

The plaintiffs have attached Covington's medical records which clearly establish that she has a record of impairments that substantially limit several major life activities. Since at least May 16, 1997, Dr. Shamieh has regarded Covington as having seizures which have been only infrequently and briefly controlled. He has on numerous occasions documented her as being completely disabled, does not believe that her condition will improve, and has ordered her to use a public transportation van and wheelchair because of his belief that she is substantially limited in numerous major life activities.

Likewise, three weeks prior to Covington's accident, St. Patrick Hospital documented Covington as non-ambulatory and in need of home health care. Dr. Lynn Foret acknowledges that he has a record of Covington suffering such serious mobility impairments since 1999 that he conducted surgery on her, from which he acknowledges she still has not fully recovered. The State of Louisiana has a record of Covington having

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[67] Exhibit 26, Deposition of Collette Covington, 7:13-8:6.

an impairment of walking and driving severe enough to warrant an electric wheelchair and a wheelchair-compliant public transportation van approved by her physicians and paid for by the State of Louisiana.[69] Finally, Covington has medical records documenting her urinary condition.

Even if Covington were not to have needed these services and not had these conditions, she would be classified as disabled because of the exhaustive records documenting her impairments.

5. Covington is regarded as having impairments

Even if Covington had no impairments and had no documentation of impairments, she would be considered disabled and entitled to recover under the ADA because she was regarded as having such impairments. Section (I) provides:

> (l) Is regarded as having such an impairment means:
>
> > (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
> > (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
> > (3) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

With respect to the first and third parts of Section I, the defendants have admitted that they themselves regarded Covington as disabled. Tim Delaney, Director of Services for Students with Disabilities at McNeese and Covington have both testified that Covington sought assistance from the Office of Services for Students with Disabilities. Indeed, Delaney admitted that he advised Covington to "register" as disabled on numerous occasions. Delaney testified at page 27 of his deposition:

> Q: Let's go back to your talking to Collette. So, she came to you and talked to you a couple of times when you were in Farrar.
>
> A: Uh-huh (yes).
>
> Q: But she didn't register with you that year.
>
> A: Right.
>
> Q: But she registered with you in 2001?
>
> A: Uh-huh (yes).
>
> Q: Did she say why she had registered?

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[68] Exhibit 26, Deposition of Collette Covington, 8:18-24.

A: Okay. Am I allowed to talk about things that she told me without her permission? That's what I need to know.

Q: Yeah, you can. We're doing this on her behalf and with her –

A: Wait. I was asking somebody about that, and I was told to be careful. Actually, she – I told her that she needed to register with me.[70]

Delaney not only urged Covington to "register" as disabled in 2001, but he had urged her to do so for at least a semester prior to her accident. Delaney testified at page 15 of his deposition:

Q: Tell me about your encounter with Collette. You said --

A: I have a – I've been – our office has been moved three times, but at the time I was in Farrar Hall on the third floor. She had a class right down the hall, and she noticed that our – my office was there, so she was just coming every so often to talk to me, and she said she was going through LRS, and at the time, probably about half my students were going through Louisiana Vocational Rehabilitation Services, LRS, and they would pay their tuition and things like that. And normally if you're accepted by them, then you would automatically be accepted through my office. Used to they would have the students bring a sheet from them saying that they were registered, but she never did. But she'd talk to me, and she just would ask me questions about just things pertaining to her disability and things like that, and I always kept trying to get her to register with me, and this is like in, I think, 2000. It was a semester before she got in the accident. I remember her disability, something with her foot.[71]

Thus, the Defendants' own Director of Services for Students with Disabilities, acknowledged that he considered Covington to be disabled prior to her accident. Delaney further testified that he would not have encouraged Covington to "register" if he did not regard her as disabled. He testified at page 24 of his deposition:

A: In other words, I have to have documentation. I mean, she could tell me this and that, but unless I have proof from a doctor saying she has a disability, then that's just someone talking, you know.

Q: So, if somebody shows up in a wheelchair, that's not proof enough?

A: No. Anybody can ride a wheelchair. You can go buy one at the pawn shop, you know.[72]

Delaney made it clear that McNeese considered "registered" students to have proven their disability to his satisfaction. Delaney also admitted that during the semester of Covington's accident, he accepted her "registration" as a disabled student and that even prior to that semester, he considered her to have a disability. Therefore, McNeese

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[69] Exhibit 1, Affidavit of Collette Covington.
[70] Exhibit 15, deposition of Tim Delaney, 22:16-23:1.
[71] Exhibit 15, deposition of Tim Delaney, 14:21-15:19.
[72] Exhibit 15, deposition of Tim Delaney, 24:24-25:2.

regarded Covington as disabled.[73]

Furthermore, other McNeese officials and employees regarded Covington as disabled. McNeese Police Lt. Vickie Boudreaux testified that while she had never seen Covington in an electric wheelchair prior to January 31, 2001, she had seen her on crutches and braces for months and knew that she was had been substantially limited in her ability to walk for an extensive period of time and could get around only with mobility aids.

Boudreaux testified:

A: Uh-huh (yes) I seen her several weeks – I'm going to say at least a couple months. I don't remember which store I ran into her. She was on those canes.

Q: Braces?

A: Yes, with the braces. You know, you had – they held them up here. She had crutches. That's what she was on.

Q: So, a couple months before January 31st?

A: Yes. I seen her with those.

Q: Was she getting around okay?

A: With those, yes.[74]

Thus, another McNeese official admits that she regarded Covington as being able to get around only with the assistance of mobility aids. Boudreaux's admission that Covington could get "around okay" only with the assistance of orthopedic aids for months prior to the January 31, 2001 accident establishes yet again that Covington was regarded by McNeese officials as being substantially impaired in her ability to walk.

6. Conclusion: Covington was disabled

For the reasons provided, Covington was clearly a disabled person at the time of the accident. There are no issues of fact to contradict the testimony and medical evidence which establish her disability under federal and state law.

Facilities Discrimination

C. Covington was excluded from participation in or denied the benefits of McNeese's services, programs or activities, or was otherwise discriminated against by McNeese because of inadequate campus facilities. The exclusion, denial of benefits, or discrimination was by reason of her disability.

[73] Covington "registered" immediately after her accident. The chronology has no bearing on McNeese's decision to regard Covington as disabled, since she was "registered" on the basis of her pre-existing medical documentation.
[74] Exhibit 3, deposition of Vickie Boudreaux, 10:3-13.

Covington's second burden under Section 12132 is to show that she was excluded from participation in or denied the benefits of McNeese's services, programs, or activities, or that she was otherwise discriminated against. Her third burden is to show that such discrimination was by reason of her disability.

The "service" or "activity" at issue is the use of the McNeese student union facilities. The defendants admit through the testimony of McNeese President Hebert that the Old Ranch is considered one of the more important buildings on campus for students. There are a myriad of programs, services, and activities located within the building such as the cafeteria, debate team, student government, yearbook, and newspaper, and the building itself serves as a lounge and resting place for the students between classes and while waiting for transportation to and from campus.

"Service, program, or activity" has been interpreted to mean almost anything that a public entity does, including providing sidewalks and other conveniences. *Barden, et al vs. City of Sacramento, et al*, 292 F.3d 1073 (9th Cir. 2002). The definition of "service, program, or activity" has been so broadly construed by the U.S. Supreme Court that it even includes providing reasonable accommodations to disabled prisoners who are incarcerated. *Pennsylvania Dept. of Corrections vs. Yeskey*, 524 U.S. 206, 212 (1998). It is universally recognized that "all of the operations of" a qualifying public entity, or "anything a public entity does" is covered by the ADA.[75] This includes providing restrooms, especially in major buildings in a public university. Covington's use of the Old Ranch clearly falls within the scope of Section 12132.

1. The defendants discriminated by failing to provide adequate facilities

The defendants did not provide meaningful access to the Old Ranch. Rhoden admitted that there was not a single accessible restroom available to Covington in the Old Ranch and that she sought the most compliant restroom available in the building. Yet even this "most compliant" restroom contained several significant architectural barriers. It is not disputed that:

(a) The door required 10 foot pounds of pressure to open. ADAAG Section 4.13.11 specifies that it should require no more than 5 foot pounds.

[75] *Bay Area Addiction Research Treatment, Inc. vs. City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999).

(b) The door was 29 5/8 inches wide. ADAAG Section 4.13.5 specifies that it should be at least 32 inches wide.

The failure of the Old Ranch to comply with the ADA was no surprise, even to McNeese President Hebert. Hebert testified on page 23 of his deposition:

> Q: Okay. And if I told you that door [Old Ranch women's restroom] was 29 and 5/8th's inches wide, would that surprise you?
>
> A: No.
>
> Q: Why wouldn't it surprise you?
>
> A: Because I know for a fact we're not in 100 percent compliance.[76]

The ADAAG was created to set forth "standards for what constitutes discrimination on the basis of mental or physical disability. . ." Therefore, a violation of one or more of the guidelines establishes a *prima facia* case of discrimination. In this case, the defendants not only violated the Accessibility Guidelines, but they acknowledge that such violations are commonplace at McNeese.

McNeese was obligated to make the Old Ranch "readily accessible to and usable by individuals with disabilities" when it renovated the Old Ranch. As will be discussed, McNeese constructed a new computer lab in the Old Ranch and arranged for the renovation of its cafeteria in the Old Ranch, both since the passage of the ADA. By establishing the computer lab as an entirely new service, program, or activity within the building, the defendants had the obligation of complying with 28 C.F.R. 35.151, which:

> mandates that each facility or part of a facility for which construction or alteration was commenced after January 26, 1992, shall be designed, constructed, or altered 'to the maximum extent feasible' in such manner that the facility or part of the facility 'is readily accessible to and usable by individuals with disabilities.' *Schofeld at 1341, citing 28 C.F.R. 35.151.*

The test for determining whether a "construction" or "alteration" brings a public entity under the scope of 28 C.F.R. 35.151 is whether the construction or alteration affects the "usability" of the structure. This has been broadly construed, and it has been held that when a city paves a road, for example, it must comply with the requirements of the regulation because a newly paved road is more usable than an old one. *Kinney vs. Yerusalim*, 9 F.3d 1067, 1071 (3rd Cir. 1993).

The defendants have acknowledged that the hundreds of thousands of dollars

[76] Exhibit 16, deposition of Robert Hebert, page 23:13-18.

spent on the Old Ranch were designed to make the building more usable to students. The creation of a computer lab where none existed resulted in an entirely new service within the building, and the highly-publicized and anticipated renovation of the cafeteria was designed to make the building more usable to those dining in the building.

These Old Ranch renovations were made after January 26, 1992. Therefore, the ADA mandated that the building with the new construction accommodate the disabled "to the maximum extent feasible". Compliant restrooms are an integral part of providing access, *See Chaffin, et al vs. Kansas State Fair Board, et al*, 348 F.3d 850 (10th Cir. Oct. 28, 2003). The failure to provide readily accessible restrooms to the users of these new facilities constitutes clear discrimination.

Even if this were not the law, McNeese's chief policy maker admits that it makes sense. Hebert noted in his deposition at page 39:

> Q: Okay. So, I'm going to ask you to help me out here. If you built a state-of-the-art computer lab and you put an electric door to get into it, would you think logically that you would have to have an A.D.A. compliant rest room somewhere around for the disabled people who are using the computer lab?
>
> A: I would - - you know, I would think so but - - I would think so.[77]

Yet McNeese never even considered accessible restrooms in its renovation plans; thus, it failed to renovate the Old Ranch to accommodate the disabled to the maximum extent feasible, as required by law.

McNeese was obligated to make the Old Ranch safe and accessible to the disabled on or before January 26, 1992, even if it had not renovated the Old Ranch.. The defendants have made much of the fact that the Old Ranch was an existing structure at the time of the ADA's passage, and defense counsel has suggested that, despite the new construction in the building, the Old Ranch is somehow exempt from complying with the ADA. Even assuming that no construction had been done to the Old Ranch, the defendants have still failed to meet their obligations under the ADA.

The ADA requires that a public entity affirmatively act to make facilities built prior to January 26, 1992 safe and readily accessible to the disabled. 28 CFR 35.150(a)(1). In enforcing this regulation, courts have consistently ruled against universities when they fail to modify their public spaces to comply with the Accessibility

[77] Exhibit 16, deposition of Robert Hebert, 39:18-35.

Guidelines or otherwise prevent exclusion or injury to the disabled.

In *Parker vs. Universidad de Puerto Rico*, 225 F.3d 1 (1st Cir. 2000), a wheelchair-bound visitor to a university's botanical gardens suffered an injury when his wheelchair overturned on a garden path which had existed prior to the passage of the ADA. Even in the absence of new construction, the court reasoned that because the University held open its gardens as a public space, it had a duty under Title II to ensure that persons (even non-students) with disabilities could travel to and from the botanical gardens using safe walkways and ramps. The court further ruled that at least one passageway had to be accessible so that the disabled visitor could safely access the gardens and its services.

Likewise, the defendants hold the Old Ranch open as a public space and have an affirmative obligation to provide the disabled with safe access to the building's services, including its restrooms. This duty attaches to McNeese regardless of when the Old Ranch was last renovated.

Courts have specifically addressed the obligations of public entities to provide adequate public restrooms for the disabled under Title II of the ADA. It is well settled that public entities have a particularly high burden of ensuring that restrooms are made accessible and compliant with regulations such as the Accessibility Guidelines. McNeese cannot dispute this overwhelming body of case law, particularly since it reached the same conclusion in its own internal report.[78] In *Chaffin, et al vs. Kansas State Fair Board, et al*, 348 F.3d 850 (10th Cir. Oct. 28, 2003), the Tenth Circuit ruled:

> The Fair states that as long as Plaintffs had 'access' to the State Fairgrounds and programs and services at the Kansas State Fair, they could not have been 'excluded from' or 'denied the benefits of' the Fair. We reject the argument that the ADA requires no more than mere physical access. Instead, we have held that the ADA requires public entities to provide disabled individuals with 'meaningful access' to their programs and services. [citations omitted].

In *Chaffin,* the court ruled that there was no meaningful access to the Kansas State Fair when only 12 of 34 restrooms complied with the Accessibility Guidelines and disabled patrons had a difficult time getting to those restrooms because of their seating arrangement. The court mandated that the disabled be able to use restrooms on an equal footing as the able-bodied, and that this required that the State modify even "existing facilities" which pre-date the ADA.

The same holds true for McNeese. The ADA clearly requires that the defendants not only provide compliant restrooms in the Old Ranch, but that the restrooms must be readily and meaningfully accessible in order for McNeese to meet its unfaltering duty to make every service, program, and activity, "readily accessible to and usable by individuals with disabilities by January 26, 1995." 28 C.F.R. 35.150(a)(1) and *Schonfeld at 1336.*

Contrary to public perception, this does not require that McNeese make every restroom in the Old Ranch comply with the Accessibility Guidelines. It does, however, require <u>some</u> action on the Defendants' part, a fact which they have so far refused to acknowledge.

Courts interpreting 28 C.F.R. 25,150(a)(1) have held that compliance with the ADA in existing facilities may require:

> . . . relocating services to accessible buildings, constructing new facilities, or delivering services by assigning aides to program beneficiaries. The ADA Regulations expressly provide that an entity need not make structural changes to existing facilities, 'where other methods are effective in achieving compliance.' *Schonfeld, footnote 7.*

Therefore, the defendants had two choices: (1) Provide an accessible restroom in the Old Ranch; or (2) Otherwise accommodate the disabled by relocating all of the Old Ranch services, programs, and activities, constructing new facilities, or providing aides.

The defendants never considered "other methods" of achieving compliance. Instead, they selected their own, unlawful option (3), which was to do nothing to assure restroom accommodations for the disabled in the Old Ranch.

McNeese's President admits that McNeese does not consider the rights of the disabled to be "fundamentally important" or a "high priority". McNeese has actively defended its decision to discriminate against the disabled, and its chief policy maker has gone so far as to publicly dismiss the right of the disabled to access non-academic buildings. In perhaps the most egregious admission in the history of the Americans with Disabilities Act, President Hebert repeatedly confessed in his deposition that McNeese not only failed to make the Old Ranch accessible to the disabled, but that it was not "fundamentally important" or a "high priority" for McNeese to <u>*ever*</u> do so. Hebert stood by this assertion even after being reminded that the Old Ranch was an

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[78] See the "Smith Report", discussed, *supra* and *infra*.

important student building with at least four major offices and the school's only two cafeterias.[79]

He testified on page 43 of his deposition:

> A: Whether or not it's fundamental for them [the disabled] to get into that student union annex or that it's fundamentally important for them to obtain an education [by getting into the student union], I would question that. I'm not sure I would regard it as a high priority.[80]

This shocking acknowledgment establishes that McNeese does not consider it to be important to end its discrimination against disabled students who wish to eat in the campus cafeteria, join the debate team, be involved in the student government, write for the campus newspaper or yearbook, attend meetings in the Old Ranch, or use the Old Ranch as a student lounge, and/or resting place. By declaring it unimportant to provide access to the Old Ranch, Hebert has declared it to be the Defendants' official policy to do precisely what the ADA forbids them from doing—discriminate against the disabled by denying them participation in the benefits of the services, programs, or activities of McNeese!

Furthermore, President Hebert takes the strange position that McNeese, the owner of the Old Ranch, is somehow protected from its obligations to upgrade the Old Ranch because it is a "student" building. Hebert testified in his deposition on page 75:

> Q: All right. If it were concluded that there should be one rest room in the Old Ranch at least that complies with the accessibility guidelines and that were to be established, how high of a priority would you give funding for that project, and you can explain it in any term that you want? You can give a 1 to 10 scale.
>
> A: I think in this particular case, it would not have been—I don't think it would have come under operating funds. This is students – student money. This is a student building.[81]

On page 71 of his deposition, Hebert repeated his theory that "students" and not McNeese was responsible for making the Old Ranch ADA compliant. He testified:

> A: Of course, that [the Old Ranch] is a student building. So, I would think student funds would be involved in whatever improvements, if any, would take place.[82]

There is no issue of material fact regarding McNeese's stated policy of regarding

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[79] Exhibit 16, deposition of Robert Hebert, 30:9-31:6.
[80] Exhibit 16, deposition of Robert Hebert, 43:13-17.
[81] Exhibit 16, deposition of Robert Hebert, 75:6-17. Strangely, Hebert claims that unnamed "students" own the Old Ranch and are responsible for its compliance with the ADA. Hebert never alleged that the "students" have title to the building, pay taxes on the building, maintain the building, or have the right to exclude administrators from the building. This disingenuous attempt to pass off McNeese's non-delegable obligation to maintain its facilities and comply with the law is another disturbing example of the low regard that McNeese holds for the disabled.

the rights of the disabled to access many of McNeese's services as "not fundamental". There is also no issue of material fact that McNeese does not consider itself obligated to spend any of its money to bring the Old Ranch into compliance with the Accessibility Guidelines to stop discrimination against the disabled who wish to utilize the Old Ranch facilities.

2. The defendants discriminated by failing to provide proper signage

As discussed, the defendants not only failed to provide accessible facilities, but they also failed to provide informational signage as affirmatively required by 28 CFR 135.163. That regulation requires that:

> A public entity shall provide signage at all inaccessible entrances to each of its facilities directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each accessible entrance of a facility.

The defendants not only acknowledge not complying with this regulation, but in installing an electric door for the disabled in the Old Ranch, they actually created signage indicating that the Old Ranch was compliant with the ADA. This failure to direct the disabled to safe and accessible facilities and away from inaccessible and dangerous facilities is another violation of the ADA. The failure to post such signs hindered the disabled in their efforts to find accessible facilities, thus depriving them of their rights to reasonably use the McNeese campus.

It is clearly discrimination to require a disabled student to thoroughly explore the McNeese campus while engaging in the dangerous game of trying to find an accessible restroom through trial and error. Even if the defendants can establish that there are accessible restrooms somewhere on campus, such access is not meaningful and is discriminatory.

Intentional Discrimination Through Policies Designed to Harm the Disabled

D. Covington was excluded from participation in or denied the benefits of McNeese's services, programs or activities, or was otherwise discriminated against by McNeese because of policies that had the effect of discrimination. The exclusion, denial of benefits, or discrimination was by reason of her disability.

There is a second category of discrimination which harmed Covington and other disabled students at McNeese. Through their policies and procedures, the defendants

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[82] Exhibit 16, deposition of Robert Hebert, 71:5-7.

have systematically excluded the disabled from participation in McNeese's services, programs, and activities. These acts of discrimination carry with them a great degree of culpability.

1. The defendants discriminated by failing to complete a self-evaluation as required by 28 CFR 35.105 and the Rehabilitation Act of 1973; this alone mandates injunctive relief

28 CFR 35.105 requires that all public entities with more than 50 employees, regardless of whether they claim an "undue burden," do three things on or before July 26, 1992: (1) conduct a self-evaluation to evaluate which "services, policies, and practices, and the effects thereof" do not comply with the ADA; (2) provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation; and (3) to maintain the self-evaluation on file and available for public inspection for three years.

The Defendants' Director of Facilities and Planning supplied a document referred to as the SLIC Report and which begins, "The buildings indicated below do not meet requirements of the Americans with Disabilities Act of 1990."[83] Director Rhoden testified that this document purports to be the Defendants' self-evaluation.

The supplied document is simply an inventory of various McNeese buildings and their deficiencies. It does not evaluate any services, policies, or practices, or the effects thereof, and it does not even include the Old Ranch in its inventory of buildings. There is no evidence that public comment was allowed or that this document was ever made available for public inspection. Clearly, this document cannot be the defendants' self-evaluation.

Because no other self-evaluation document was supplied in discovery and because McNeese's self-evaluation is mandated to remain on file and available for public inspection, there is no issue of fact to dispute the plaintiffs' assertion that the defendants have failed to comply with the self-evaluation requirement of 28 CFR 35.105.

A private cause of action exists for enforcement of ADA regulations requiring public entities to evaluate their current services, policies, and practices. *McCready vs. Michigan State Bar*, 881 F.Supp. 300 (W.D. Mich. 1995).

To state a valid claim for enforcement of the self-evaluation requirements of the

[83] Exhibit 2, SLIC Report attached as Exhibit "A" to Richard Rhoden's deposition.

ADA, a plaintiff must allege a clear causal connection between defendant's failure to evaluate its services and her associated injury. *Matthews vs. Jefferson*, 29 F.Supp.2d 525 (W.D. Ark., 1998).

Had the defendants complied with 28 CFR 35.105, they would have identified the Old Ranch and its restrooms as non-compliant and identified the reasons for the non-compliance. They would have assessed the impact of the non-compliant restroom on the Student Government, cafeterias, student newspaper, and the myriad of other offices, programs, and services offered in the Old Ranch, including its role as a student lounge or resting place, which was the purpose for which Covington used it as she sought a public restroom.

Unquestionably, the self-evaluation would have identified the failure to have a single compliant restroom in one of the most important buildings on campus as a significant impediment to the safe and accessible offering of services and programs to a large segment of the disabled student population. The failure to have a self-evaluation thus bore a clear causal connection to Covington's injury.[84]

The defendants were also required to conduct a second self-evaluation as part of the 1973 Rehabilitation Act. The defendants have not even attempted to supply the self-evaluation mandated by this Act. They simply claim that 1973 is too long ago to have records. Since the defendants have failed to produce this document and have not alleged that it was ever created, it is an undisputed fact that no self-evaluation exists under the Rehabilitation Act of 1973, more than 30 years after it was mandated.[85]

2. The defendants discriminated by failing to draft a valid transition plan as required by 28 CFR 35.150(d) and the Rehabilitation Act of 1973; this alone mandates injunctive relief

The transition plan requirement. Thirteen years ago, 28 CFR 35.150(d) required that the defendants create a transition plan to establish a timetable for complying with the ADA.[86] The law mandated that the transition plan be designed so that all facilities became accessible on or before January 26, 1995.

The transition plan was to: (1) set forth the steps necessary to complete such

[84] The Defendants admit this. Indeed, their own "Smith Report" reaches the same conclusion.
[85] Exhibit 2, deposition of Richard Rhoden, 34:23-35:5. Rhoden testified, "I could not find anything that specifically addressed that."
[86] There is only one circumstance in which the defendants could avoid creating a transition plan—if the campus already complied with the ADA such that no renovations were necessary. This is clearly not the case.

changes; (2) provide an opportunity to interested persons, including persons with disabilities, to participate in the development of the transition plan by submitting comments; and (3) remain on file for public inspection.

The defendants were required to have completed their plan within six months of January 26, 1992. This written plan was to remain on file for public inspection and was required to, at a minimum: (1) identify physical obstacles in the public entity's facilities that limit accessibility of its programs or activities to individuals with disabilities; (2) describe ***in detail*** the methods that will be used to make the facilities accessible; (3) specify the schedule for taking the steps necessary to achieve compliance with this section, and, if the time period of the transition plan is longer than one year, (4) identify the steps that will be taken ***during each year*** of the transition plan; and (5) identify the ***official responsible*** for implantation of the plan. 28 CFR 35.150(d).

The defendants have no transition plan. The defendants failed to supply a transition plan when requested through discovery, although there are three documents which they might try to claim as their transition plan. All three documents fail to come close to satisfying the defendants' planning requirements under 28 CFR 35.150(d).

The first document, the "1998-2003 Capital Outlay Budget Request Five Year Master Development Plan"[87] was supplied by Rhoden at his deposition. It simply lists the amounts that the defendants estimate it would cost if they chose to upgrade various campus facilities to comply with the Accessibility Guidelines. The second document, the SLIC report,[88] was also supplied by Rhoden at his deposition. The third document, the "Smith" Report, was supplied by the defendants as their answer to Plaintiffs' Request for Production No. 8.

All three of these documents fail to meet the requirements of either a self-evaluation or a transition plan because they fail to do more than simply list some of the defendants' upgrade needs. Of those documents, only the Capital Outlay Budget Request even mentions the Old Ranch.

None of the documents established a schedule for upgrading the Old Ranch or established a detailed list of steps to be taken ***each year*** until the Old Ranch fully complies with the ADA. Therefore, these documents cannot satisfy the defendants'

[87] Exhibit 2, exhibit "C" to Richard Rhoden deposition.
[88] Exhibit 2, SLIC report, attached to deposition of Richard Rhoden as Exhibit "A".

requirements under 28 CFR 35.150(d).

Had the defendants utilized their own report, the Old Ranch restroom would have been prioritized for upgrades. According to the Smith Report submitted by the defendants, upgrading campus restrooms was considered to be McNeese's greatest need in complying with the ADA.[89] Had the defendants followed their own recommendations and prioritized restroom upgrades, Covington would have found a safe and compliant restroom on the date of her accident, 11 years after the report was written. But the defendants ignored the only document which might have purported to be their transition plan, resulting in there still not being a single compliant restroom in the Old Ranch. To this day, in 2005, the defendants still have no idea when they might get around to upgrading the restroom which injured Covington.

The defendants repudiated the only document which might purport to be their transition plan and admitted that it was used only as a tool to get money. Amazingly, when presented with the Smith report, McNeese President Hebert not only admitted that McNeese had not followed the recommendations contained in the document, but he repudiated the contents of the document! On at least three occasions, Hebert testified that the Smith report was only used to convince the State that it should give money to McNeese and that the Defendants had no intention of implementing the report's recommendations. First, he testified at page 31 of his deposition:

> Q: So, Mr. Smith identified the rest room facilities as the most important need on campus? Is that your take on what this says?
>
> . . .
>
> A: Well, I would certainly not quarrel with the fact that Wayne Smith regarded it as the No. 1 priority. Of course, without a doubt, it went to the state just as it is. We approved of the Smith Report and wanted the state to make it a reality, to fund it.
>
> Q: And I would assume – we've been assuming all along that you're using this as your self-evaluation?
>
> A: We use it as a means to get state funding for – to help us to be in compliance.[90]

Second, Hebert again acknowledged that the Smith report did not necessarily reflect McNeese's real ADA compliance priorities, and that the document was only used when applying for money. Hebert testified at his deposition:

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[89] Exhibit 7, Smith Report, page 3.

[90] Exhibit 16, deposition of Robert Hebert, 31:20-32:22. Hebert would not elaborate on what he meant by being "in compliance". He acknowledged that McNeese was not in compliance and refused to claim the Smith Report as a required document under the ADA.

A: So, I don't think it would be accurate to assume that these are our priorities. They were Mr. Smith's priorities and we accepted them verbatim because we felt that it increased the credibility of our institution with the state in trying to tell them we had some problems to address and we were hoping they would help fund our needs.[91]

Third, Hebert again stood by his assertion that McNeese never felt obligated to follow the recommendations in the Smith report, and that the Smith report was merely used to acquire funding. Hebert not only admitted that the Smith report would not necessarily be followed, but that there is no other document to guide the defendants toward compliance. On page 36 of his deposition, Hebert testified:

Q: I'm assuming that you have a transition plan document which lists your order of priorities because that's what the regulations require. If you're telling me that this is not your order of priorities, then I'm going to assume this can no longer be your transition--

A: No. I didn't say it wasn't. I'm saying that I don't recall a document that would give you a different set of priorities. I'm just telling you that we submitted this as is because we thought it might help get some funding.[92]

This is astonishing. McNeese's chief policy-maker was responsible for assuring that McNeese drafted a self-evaluation and a transition plan in order to comply with the law. When presented with the one document which might satisfy his obligations, he admitted that it had no bearing on the University's policies or practices, rendering meaningless the only document in which the disabled, through Mr. Smith, were allowed to suggest compliance priorities. Even more incredible is that McNeese exploited Mr. Smith and his report to convince the State to give McNeese public money under the auspices of complying with the ADA, even though it never intended to spend that money on the priorities listed in the document. This admission not only establishes a willful failure to comply with 28 CFR 35.150(d), but a calculated attempt to use the regulations to perpetuate a fraud against the State of Louisiana and at the expense of the disabled.

The defendants not only failed to have a self-evaluation or transition plan, but they <u>will not</u> create one. Perhaps more disturbing than the fact that the defendants have no self-evaluation or transition plan is the fact that they see no need to have one. Hebert repeatedly claimed in his deposition that he and various unnamed people "discussed" the ADA, suggesting that an undocumented, non-public series of "discussions" might somehow suffice under the regulations. Hebert testified in his deposition at page 13:

Q: Okay. And I'm assuming that we've asked for about three years now for a copy of your self-evaluation and what we've gotten is the SLICK [Smith] report. Is that what purports to be your self-evaluation?

A: No. I think there were fairly constant discussions. If you're asking for written reports, they weren't all in writing but we had meetings concerning our compliance with A.D.A. and addressed, of course, some of the complaints when they came along if they were reasonable and ones that we could afford. So, there was an ongoing effort on our part to discuss this.[93]

Hebert again claimed that he did not know that there was a need to have a written self-evaluation. He testified on page 14 of his deposition:

Q: And you said earlier, you said you had meetings dealing with your self-evaluation but that you don't have any one concrete self-evaluation in writing?

A: Nothing in writing in prior years but we discussed it frequently.

Q: But would you think that you would have to have that in writing under the regulations?

A: I don't know the answer to that.[94]

Hebert took the same position with respect to the transition plan. When provided with a copy of the regulation specifying that a copy of McNeese's transition plan shall be made available for public inspection, Hebert continued to claim that his "discussions" were sufficient. He testified in his deposition at page 18:

A: Okay. "(1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26th, 1992, a transition plan setting forth steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection."

Q: Did you do this within six months of January 26?

A: I'm not aware that we did. I know there was, as I said, some discussion about it.[95]

When asked point-blank whether he agreed with, or even understood, the transition plan requirements, Hebert refused to acknowledge the importance of anything more than the private "discussions" which he had with unnamed McNeese officials. He

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[91] Exhibit 16, deposition of Robert Hebert, page 35, line 20 through page 36, line 1.
[92] Exhibit 16, deposition of Robert Hebert, page 36, lines 3-14.
[93] Exhibit 16, deposition of Robert Hebert, 13:3-15.
[94] Exhibit 16, deposition of Robert Hebert, 14:20-15:2.
[95] Exhibit 16, deposition of Robert Hebert, 18:9-24.

noted in his deposition at page 37:

> Q: Again, my question is: Conceptually, though, do you understand why it's important to have one [transition plan]?
>
> A: I think it's very important for us to have discussed these things . . . [96]

Absent an order from this court, it is apparent that the defendants will not comply with these regulations. Their refusal to even acknowledge the validity of their duty shows a blatant and intentional disregard for the law.

Covington has the right to seek injunctive relief ordering the defendants to draft and follow a transition plan. A private cause of action exists for enforcement of ADA regulations requiring public entities to implement nondiscriminatory standards and proceed to make necessary modifications. *Schonfeld vs. City of Carlsbad*, 978 F.Supp. 1329 (S.D. Cal. 1997) *affirmed*, 172 F.3d 876. To state a claim for enforcement of the transition plan requirements of the ADA, a plaintiff must allege a clear causal connection between defendant's failure to comply and Covington's associated injury. *Matthews vs. Jefferson*, 29 F.Supp.2d 525 (W.D. Ark., 1998).

There is no genuine issue of material fact as to the existence of a clear causal connection between defendant's failure to follow a transition plan and Covington's injury. Had the defendants complied with the regulations, they would have brought at least one Old Ranch restroom into compliance by January, 1995. Had the defendants followed the recommendations in their own Smith report, they would have corrected their restroom deficiencies before addressing other ADA issues, thus assuring Old Ranch restroom compliance long before the January, 1995 deadline.

Therefore, the plaintiffs are entitled to injunctive relief ordering the defendants to promulgate and enforce a transition plan in accordance with 28 CFR 35.150(d).

3. Defendants failed to provide a responsible official under 28 CFR 35.150(3)(iv)

As noted above, the defendants had an obligation to designate a responsible official to oversee the defendants' progress in becoming ADA compliant. Had there been any sort of compliance plan, the most logical "responsible official" would have been the director of facilities and planning. Had he been designated, he would have been required to know when the Old Ranch women's restroom was to be upgraded and he would have

[96] Exhibit 16, deposition of Robert Hebert, 37:18-21.

been responsible for assuring that the upgrades were completed on schedule. Instead of taking responsibility for enforcing such a timeline, Director Rhoden provided the usual funding excuses and defended McNeese's decision not to have any plans at all to make the Old Ranch comply. This failure to designate a responsible official is a violation which is independent of the failure to draft a transition plan, and it bore a causal relationship to Covington's exclusion from the services, benefits, or activities of the Old Ranch.

4. The defendants discriminated by citing false "laws" and information to willfully mislead Covington and others about their rights under the ADA and to deter them from filing grievances. This violates 28 CFR 35.106.

a. The Defendants unlawfully claimed that Covington had to "register" to receive accommodations.

Prior to and after Covington's accident, Covington contacted McNeese's Office for Services for Students with Disabilities to inquire about services and to lodge grievances about the Old Ranch and other non-compliant McNeese facilities. Indeed, Covington did everything that she could to put McNeese on notice of the problems she was having accessing campus facilities and to comply with all of their requests. She testified in her deposition:

Q: So you had signed up for services at the disability office?

A: Definitely. More than once, as a matter of fact.

Q: Had you provided them a doctor's slip regarding your –

A: Anything they asked me for, I gave them.

Q: This was before you injured your arm?

A: Yes.[97]

But under the ADA, Covington had no obligation to contact McNeese's Services for Students with Disabilities. Indeed, such a requirement is itself discrimination, just as it would be to require students to "register" to access facilities because of their race, gender, or religion. Yet Tim Delaney, director of that office, admits that he routinely advised students, including Covington, that no one is entitled to accommodations under the ADA unless they "register" with him. He testified in his deposition:

Q: Do they [students] have to register in order to receive services?

A: To receive accommodations, yeah.[98]

[97] Exhibit 26, deposition of Collette Covington, 27:15-23.
[98] Exhibit 15, deposition of Tim Delaney, 13:13-15.

When Delaney was asked about McNeese's requirement for "registering" students, he testified that McNeese determined whether someone was entitled to accommodations based on its arbitrary "registration" process. Indeed, according to Delaney, anyone who presents herself at McNeese in a wheelchair would be presumed not to be entitled to accommodations! Delaney testified:

> Q: So, if somebody shows up in a wheelchair, that's not proof enough [that he or she is disabled]?
>
> A: No. Anybody can ride a wheelchair. You can go buy one at the pawn shop, you know.[99]

Nothing could be further from the truth. Under the ADA, there is no advance duty on the part of the disabled to prove their disability before being accommodated. It has been held in *Schonfeld* that the disabled do not even have to formally request accessible facilities and services. Upon entering campus, the disabled should find McNeese compliant. The court ruled in *Schonfeld* that:

> Defendant argues that plaintiffs are not 'qualified individuals with disabilities' if they do not request defendant's services. Defendant explains that plaintiffs should have made formal requests to utilize the facilities and services that are the subject of the instant lawsuit before bringing suit. The Court finds this argument without merit. The ADA does not require plaintiffs bringing a claim alleging inadequate access to a facility to have 'formally' requested to use that facility.

Under the *Schonfeld* rule, Delaney could not lawfully demand that Covington "register" with his office to access McNeese facilities, and the mere fact that he would suggest that Covington should "register" before being accommodated or being allowed to file a grievance establishes that the defendants' key disability liaison was himself engaging in egregious discrimination by using the ADA as an excuse to create additional and unlawful burdens for the disabled on a campus already grossly out of compliance. Delaney's actions are made worse by the fact that he repeatedly admitted in his deposition that disabled students are frequently embarrassed or intimidated by his "registration" process.[100]

Delaney's statements and McNeese's policies not only discriminate against the disabled, but they violate 25 CFR 35.106, which mandates that:

A public entity shall make available to applicants, participants, beneficiaries, and

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[99] Exhibit 15, deposition of Tim Delaney, 25:1-2. This testimony is cited, *supra*, for the proposition that the Defendants regarded Covington as disabled precisely because they encouraged and approved her "registration" as disabled.

[100] Exhibit 15, deposition of Tim Delaney, 27:23. Delaney testified, "And a lot of people, you said pride a while ago, I think are ashamed."

> other interested persons information regarding the provisions of this part an its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

Instead of making the disabled aware of their rights, the defendants actually conditioned the disabled to believe that unregistered students (and presumably all campus visitors) had no right to accommodation while on campus without going through an admittedly intimidating "registration" process!

b. The Defendants unlawfully claimed that Covington had to "register" to file a grievance.

Delaney also testified that he told Covington that it would not be "legal" for her to file a complaint about McNeese's accessibility problems unless she "registered" with him. He testified:

> A: . . . I told her that she needed to register with me. In other words, she was going to, I guess, file a complaint or whatever. I said, "Well, you need to register with me because" – in other words, everything has to go through my office to be legal or whatever. . .
>
> Q: So, you wouldn't accept her complaint without her registering?
>
> A: No. She wouldn't complain through me. She would complain through the grievance officer, which would be Dr. Duhon – well, it would have been Dr. Harris at the time.
>
> Q: So, McNeese wouldn't accept her – wouldn't accept a complaint –
>
> A: No, I wouldn't say that either. I'm saying that I think that it would look better on her part if she was registered with my office, in other words, if she would follow the rules like everybody else.[101]

Delaney admits that he told Covington that she had to "register" before submitting a grievance because it is: (1) a "rule"; (2) necessary to be "legal"; and (3) something that would "look better". There are no such laws, and the artificial burdens created by Delaney had the effect of discriminating against Covington.

c. The Defendants created their false "registration" process to get money.

Sadly, the defendants had a motive for disseminating this inaccurate and discriminatory information. Delaney admitted in his deposition that McNeese makes $50,000 every time a disabled student "registers" with his office. He explained:

> A: -- I prefer for them to register because it keeps my numbers up, and it makes, you know, any type of grants or whatever we try to shoot for, it makes us—it helps us out.[102] . . .

[101] Exhibit 15, deposition of Delaney, 22:25-23:24.
[102] Exhibit 15, deposition of Delaney, 27:16-19.

A: I think they [McNeese] look at each student as probably $50,000 [in funding]. So, no, they would love to see my students increase.[103]

Delaney's "students" are not disabled students—they are students who Delaney has "registered" with his office. Thus, it is undisputed that McNeese not only unlawfully advised the disabled that they must "register" to receive accommodations, but McNeese had a profit motive to do so.

5. The defendants discriminated by establishing a policy of waiting for complaints before addressing ADA violations

As noted, *Schonfeld* holds that a plaintiff is entitled to expect services, programs, and activities which are already accessible at the time that he seeks to utilize them. It is unlawful for a disabled person to be expected to request accommodations each time she needs to use a restroom or other facility which should already have complied with the Accessibility Guidelines This ruling is logical and consistent with the purposes of the ADA.

Indeed, it is easy to imagine how a public entity such as McNeese would ***never*** comply with the ADA if the law required that the disabled request accommodations for things as basic as restrooms. The public entity would simply delay the necessary work until after the disabled student was either graduated or dropped out of school, at which time there would no longer be a need to accommodate.

As cynical and contemptuous as this scenario sounds, it is exactly what McNeese has done to Covington. Today, nearly six years after this lawsuit was filed, the Defendants have ***still*** not made their campus compliant. Indeed, they have not even bothered to make the restroom which injured Covington compliant. Covington, meanwhile, has been forced to withdraw from school until the McNeese campus is made safe and accessible for the disabled.

In keeping with the calculated evasion of their duties, Hebert, Delaney and Rhoden admit that the defendants' stated policy is to not comply with the accessibility guidelines until ***after*** a disabled student has already complained about being discriminated against on the basis of inaccessible facilities.[104] This policy has been articulated many times by the defendants, and it constitutes an independent ground of discrimination.

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[103] Exhibit 15, deposition of Delaney, 66:2-5.
[104] Exhibit 2, page 11:15-12:1. Rhoden admitted that inaccessible facilities are corrected only when he is

Hebert testified in his deposition on page 38:

Q: If you don't have a transition plan, which it sounds like you might not, how do you pick the order for doing your projects?

A: You mean projects that relate to the A.D.A.?

Q: Right. Why did you decide, for example, to put 17 electric doors which aren't required by the code but you didn't fix this rest room?

A: Because we were addressing a complaint.

Q: So, instead of having a system wide plan, you just go complaint by complaint?

A: Well, I think we have gone to a large extent complaint by complaint because those are the kinds of things we're more likely to be able to address because we don't have sufficient funding to do it all.[105]

Because no disabled student will know to complain about inaccessible facilities until after he has encountered them, the defendants are always in the position of trying to remedy after-the-fact discrimination and never in the position of preventing it in the first place.

This discriminatory policy has a causal relationship to Covington's injury. Had the defendants corrected their violations before accidents occurred and complaints were filed, Covington would have not been denied safe access to the Old Ranch restroom.

But the defendants brazenly admit that they do not even attempt to remedy all discrimination on campus even after they have been made aware of it. In Covington's case, ***even her serious accident and this lawsuit have failed to motivate the Defendants to make the Old Ranch comply with the law*** nearly six years later. Clearly, this policy discriminates.

6. The defendants discriminated by not providing a meaningful grievance process

There is no question that Covington filed grievances about the Old Ranch restroom door both through university procedures[106] and by filing this lawsuit. The defendants are required to have in place a meaningful grievance process to assure "prompt and equitable resolution" of Covington's complaints. 28 CFR 35.107(b) provides:

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made aware of them, upon his recommendation, and only when he is provided with funding.

[105] Exhibit 16, deposition of Hebert, 38:4-17.

[106] Delaney, Director of Services for Students with Disabilities, admitted that Covington contacted him to file a grievance. Instead of assisting her with that process, he unlawfully created obstacles, telling her that she needed to "register" with him first. Notwithstanding the Defendants' efforts to deter Covington, it is admitted that she contacted the student disability liaison to lodge a complaint.

> (b) *Complaint procedure*. A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.

In clear violation of this requirement, ***nothing has been done after nearly six years*** to address Covington's complaint of being denied programs, activities, and services of McNeese. And ***unless this court acts, nothing will be done.***

The failure of the defendants to address Covington's grievance goes beyond incompetence. It shows an intentional and deliberate refusal to act in good faith. As established, Rhoden, the Director of Facilities and Planning, is the sole person responsible for fixing the defective door. Yet he admitted that he has no timeline for correcting the defect or any intention of doing so![107]

a. The Office for Students with Disabilities is inaccessible

To illustrate its lack of regard for the disabled, McNeese intentionally put the Office for Services for Students with Disabilities in an ***inaccessible location!***

Delaney testified that the disability office was located on the third floor of Farrar Hall, a building with rampant accessibility problems which made it impossible for some disabled to ever reach his office and for others to reach it for days at a time. For example, he testified in his deposition:

> Q: You were on the third floor of Farrar at the time?
>
> A: Uh-huh (yes).
>
> Q: Elevators ever break down –
>
> A: Uh-huh (yes).
>
> Q: -- at that time? How often did that happen?
>
> A: It's not as often as people would think. Well, I mean, people in wheelchairs, they'll make it sound like it's a lot more. It might be once every two or three months, but it is a convenience, you know. And the bad thing is sometimes when they have to do the maintenance and work, it might take a few days. But we move the classes if the students tell us or if we know ahead of time that it's going to be done. But it's not that bad. I do admit that they're old.[108]

Delaney further testified that at one time, many disabled persons could not even reach the buttons on the elevator to get to his office! He testified that:

> A: I had a couple of people that were, I guess through their disability, real,

[107] Exhibit 2, deposition of Richard Rhoden.
[108] Exhibit 15, deposition of Tim Delaney,15:23-16:12.

> real short, little people in wheelchairs. So, they might have little arms where they can't reach very far, but there might be someone like me in a wheelchair that's not going to have a problem, you know, reaching the buttons."[109]

While the elevator button has been fixed in that building, Delaney admits to other problems which have not been corrected, including the bizarre decision to put an electric door at the top of a set of steps of Farrar Hall while having a manual door which is frequently locked at the top of a ramp in Farrar Hall, where his office was located.[110]

Delaney himself acknowledged that his office was in a poor location but that he did nothing to have it moved. Delaney testified on page 18 of his deposition:

> Q. I'm going to ask you a question, and it may seem kind of silly. If McNeese has put your office on the third floor of Farrar –
>
> A. Uh-huh (yes).
>
> Q. -- to deal exclusively with disabled students in one way or another, and a lot of those are going to be folks in wheelchairs, and they're having trouble getting in the building and they're having trouble using the elevator to get to the third floor and there may or may not be an ADA compliant rest room on your floor, do you think that would be a disincentive for them to register with you?
>
> A. I just – I go wherever they put me. I don't know. I think it would probably make more sense to be on the first floor, but I don't know.[111]

This is a shameful, insensitive, discriminatory, and deliberate decision on the part of the Defendants. Of all of the possible office sites at McNeese, they chose to place the office for disabled students in a location that they acknowledge was often inaccessible to the disabled. In addition to having an unlawful "registration" process for the disabled, the Defendants took the additional discriminatory step of requiring that those who sought to "register" would have to do so in a location that they could often not even reach.

b. The Defendants will not respond to complaints

In addition to placing the students' disability liaison in an inaccessible location, the director of the office acknowledged that he rarely responds to complaints. Hebert acknowledged that part of Delaney's job was to investigate complaints by disabled students on campus. Delaney admitted that Covington informed him that she had been denied meaningful access to the Old Ranch. At the time of his deposition in 2003, Delaney had been McNeese's Director of Services for Students with Disabilities and its

[109] Exhibit 15, deposition of Tim Delaney, 16:19-17:1.
[110] Exhibit 15, deposition of Tim Delaney, 17:2-18:2.
[111] Exhibit 15, deposition of Tim Delaney, 18:15-19:4.

liaison to the disabled for ***six years.*** Despite knowing of Covington's accident for more than two years, he not only had failed to address her complaint, but ***he had failed to even find the Old Ranch!*** When discussing the location of Covington's accident, he noted:

> Q: That would be the old Ranch?
>
> A: See, I don't know. I always hear that term "old Ranch." See, I don't know. To me, I know where the quad is at. I guess, yeah, it wouldn't be the new part, so it would be the old part. It's by the student government building, wherever that, yeah.[112]

This would be comical if it did not establish such a blatant, intentional disregard for the safety and well-being of the disabled by the very man responsible for assuring their safety. Delaney's claim that he could not investigate Covington's accident more than two years after it occurred because he could not find the student union is not just an admission of mind-numbing incompetence; it rises to the level of an intentional refusal to address Covington's grievance, especially considering that the Old Ranch is located only a few hundred feet from Delaney's office. This is particularly ironic for a man charged with answering questions from the disabled and who claims that, "Pretty much just I'm a wealth, I guess, of information, you know."[113]

With respect to Covington's complaint, Delaney could not even recall her grievance or any details about it, even after having time to prepare for his deposition. He testified on pages 23 and 24 of his deposition:

> Q: Okay. What was her complaint?
>
> A: From what I remember - - actually, she never reported to me after this happened. She talked to me. She got a wheelchair, and she went to a bathroom. I think she either ran into the wall or something, and she smashed her leg or her arm. I don't exactly remember which one it was, but - - and I don't even know. See, when you said the old Ranch, I was thinking it was Kaufman. So, I didn't know that either, so.[114]

In his role of assisting students with disabilities, Delaney made it a habit not to become too close to the students he served or to pay much attention to them when they sought assistance from him in his capacity as their McNeese liason. When one of his "registered" disabled students went to the television station to submit his grievances about inaccessible facilities, Delaney expressed complete ignorance about the nature of his highly publicized problems:

> A. No, I can't – I can't think of – I mean, I've heard, you know, people

[112] Exhibit 15, deposition of Tim Delaney, page 31.
[113] Exhibit 15, deposition of Tim Delaney, page 9.
[114] Exhibit 15, deposition of Tim Delaney, 24:1-9.

joking. Matter of fact, the only person I can think that might fit that category [of students who have threatened lawsuits against McNeese], and the only reason I'm saying it because I've seen him on TV is Keith Gribble. He's physically disabled, but his deal was about, I think, the stairs. I don't know, or something. I don't remember exactly. . . .

Q: You think he said he had some sort of trouble with the stairs?

A: I don't remember. I don't know what his deal was. I know he wasn't mad at me and my department. I don't – it might have been – it seemed like it had something to do with evening classes, maybe doors locked. I'm not sure. I don't know.[115]

When another student complained in 1997 that she was unable to access McNeese restrooms with her scooter, Delaney, as McNeese's liaison to the disabled, once again showed a thorough lack of concern for her problem. He noted in his deposition:

Q: To your knowledge, that was the first and only time you've ever had one of those type of issues, a wheelchair bathroom accessibility?

A: Right. It was in King Hall. There was – no. There was a girl on a scooter. I don't know if that counts.

Q: Yeah.

A: It seems like she had had problems. I don't remember. This was right when I arrived there in '97. I don't think it was King Hall. I mean, I think it was Kaufman maybe, that one of the bathrooms there they had problems with it. It wouldn't fit in the door or something like that.

Q: Do you know how that was resolved?

A: I think whoever got her a scooter, got her a narrower one, whatever company she went through.

Q: So, McNeese didn't solve the problem. She had to pay –

A: I don't know. I don't know.[116]

Covington's experience is consistent with the experiences of these other students. McNeese has established an undeniable pattern of ignoring the problems of the disabled, regardless of whether or not they try to complain.

Covington was discriminated against by being denied a meaningful opportunity for her grievance to be addressed through a fair and competent process and to have her legitimate complaints of inaccessible facilities corrected as required by law.

7. The defendants used a false claim of a lack of resources as an excuse to discriminate, even when faced with millions of dollars in surplus revenues

The ADA is an **unfunded mandate**. There is no defense to discrimination under Title II, and there is no defense to not complying with the accessibility guidelines except

[115] Exhibit 15, deposition of Tim Delaney, 41:22-42:5 and 42:12-16.
[116] Exhibit 15, deposition of Tim Delaney.

for one hardship provision which is inapplicable to McNeese and discussed in the defenses section of this memorandum, *infra*. As such, it is normally unnecessary to discuss a public entity's funding or lack thereof when establishing a case of discrimination under the ADA.

But this case is unique. The defendants have publicly taken the unsupportable position that they are entitled to a hardship exemption from the ADA. However, when their funding is placed under scrutiny, the evidence overwhelmingly supports the assertion that there was more than enough money to bring not only the Old Ranch restroom in compliance, but the entire campus.[117] The defendants' ridiculous position actually reinforces the argument that they intended to discriminate against the disabled and used an alleged lack of funding as a shield under which to do so.

a. The defendants have spent more than $500,000,000 since 1990.

McNeese estimates its 2005 operating budget to be $49,537,799.[118] Of this amount, $240,558 will be spent on travel, $6,268,482 will be spent on "other services", $1,421,638 will be spent on acquisitions, $8,759,993 will be spent on employee benefits, and $27,203,966 will be spent on salaries. The defendants estimate that their operating budget will grow by $6,217,429 in the next five years alone, and they report receiving $1,776,135 more in self-generated funds last year than they estimated, which represents an 8.65% earnings surprise.[119]

Since the ADA was passed in 1990, the defendants have spent a total of $528,380,592—**over half a billion dollars**—to operate McNeese. This enormous sum does not include capital funds, McNeese Foundation founds, restricted donations, and other "off the books" money available to the defendants. Yet even without counting these funds, the operating budget reflects a near doubling of expenditures during the last 15 years from $27,138,623 to the current budget of nearly $50 million. Yet no contingency was made during this period of rampant growth to assure that McNeese's most basic ADA legal requirements were met.

These numbers are provided to illustrate the scope of the McNeese enterprise and

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[117] As noted previously, there are various figures being circulated regarding the cost of ADA compliance. Rhoden acknowledged that the Old Ranch restroom would cost no more than a few thousand dollars to bring into compliance. The Smith report estimated that approximately $80,000 would bring all campus restrooms into compliance. Rhoden estimated that, as of 2003, it would have cost only about $2 million to bring the entire campus into compliance.

[118] Exhibit 17, Final Capital Outlay Submittal, 2005-2006. Provided by Defendants in discovery.

the lunacy of its claim that a narrow door and an out-of-date door closer in the Old Ranch presented an insurmountable hardship. These numbers further illustrate that McNeese is no small entity, and its failure to comply with laws as basic as the ADA cannot be excused.

b. The defendants received $6,304,084.15 in casino revenues and other unrestricted money, yet they did not use it for ADA compliance

The defendants have argued that the massive scale of their budgets notwithstanding, most of the money that comes into the University must be spent on legislatively-mandated items which do not include ADA projects. However, there are many funding sources which could have gone toward ADA compliance but were spent on other things which were not legally required.

Beginning in 1995, McNeese began receiving a portion of a head tax levied on all casino patrons and was faced with the unique task of having to determine how to spend hundreds of thousands of dollars per year in unanticipated casino revenues. McNeese's "Community Support Fund" is comprised primarily of these casino revenues. The defendants admit that they received $6,304,084.15 in community support funds since 1995.[120] These funds have averaged approximately $630,408.42 per year, and their cumulative total is ***three times the amount of money which would have been needed to bring the entire campus into compliance*** with the ADA.[121]

Dr. Hebert admits that instead of spending these discretionary funds on compliance efforts or other legal mandates, he chose to allow each campus department to submit a "wish list" of items each year.[122] Some of the funded projects since 1997 have included:

(1) 41 inch big screen television for $1,769 for the Languages Department

(2) Robotic lighting for $11,123.89 for the Speech and Theatre Department

(3) Portable sound system for $1,456 for the Nursing Department

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[119] Exhibit 18, McNeese Budget Request, 2004-2005. Provided in discovery by Defendants.

[120] Exhibit 19, Community Support Funds Revenue by Fiscal Year, 1995-2004. Provided in discovery by Defendants.

[121] This assumes Rhoden's estimate of an approximately $2 million need for ADA improvements. The defendants' 2003-2008 Capital Outlay Budget requests approximately $2.6 million for ADA improvements. *See* Exhibit 20, provided by Defendants in discovery.

[122] Hebert claims that he had a "gentlemen's agreement" with local legislators to spend casino funds on non-recurring expenses using some type of campus process. He admits that this agreement is not binding and that ADA compliance would not have been an inappropriate use of this money even under the agreement. Hebert says simply that no department on campus requested that money be spent on the ADA, and he did not take the initiative to earmark any funds for that purpose or to make or suggest an ADA proposal.

(4) Two laser disc players for $1,724 for the Biological Science Department

(5) Speaker sound system for $4,814 for the Biological Science Department

(6) Development workshop for $2,577.62 for the Biological Science Department

(7) Furniture for $4,145.50 for the Enrollment Office

(8) Landscaping for $2,115 for the Enrollment Office

(9) A "work area" for $4,575 for the Enrollment Office

(10) Student records imaging for $38,073.38 for the Registrar's Office[123]

The plaintiffs do not question the merits of these projects. However, these projects are not legally-mandated, yet they have been given precedent over the clear and unambiguous requirement that the defendants had to make their campus accessible before 1995.

Amazingly, $231,518.02 of this money remains unspent today. Yet the defendants have not suggested that they will apply any of this unrestricted funding to ADA compliance.

In 2003, the Louisiana Legislature dramatically increased the amount of money available in this fund by adding a Delta Downs head tax to McNeese's annual casino revenues. This head tax resulted in an increase from $600,000 to $1.2 million in 2003 alone.

c. The defendants had access to McNeese Foundation money

As will be discussed,[124] the ADA requires that the defendants examine all available resources when evaluating what type of improvements they can afford. In addition to the direct state and federal funds, tuition money, self-generated fees, casino money, community and alumni donations, interest, and other sources of income, the defendants also had access to a private resource called the McNeese Foundation. While the defendants do not directly control the purse strings of the Foundation, the Foundation's purpose is to assist the University by providing privately-donated resources. The defendants admit that they failed to even request assistance from this resource.[125]

d. The defendants had the opportunity to generate additional funding through student fees

The defendants had the opportunity to raise revenue for ADA compliance and

[123] Exhibit 20. 2003-05 Capital Outlay Budget. Provided in discovery by Defendants.
[124] *See* the subsequent discussion of defenses available to the defendants.
[125] Exhibit 16, Deposition of Robert Hebert.

could have imposed a: (1) board generated fee; (2) university generated fee; or (3) student generated fee to provide funds for ADA projects. The defendants not only failed to impose such fees, but they failed to even investigate the possibility of doing so even though they admit having done so many times for other projects.

e. The defendants maintain a $1,000,000 surplus in their building use fund which is available for capital projects such as ADA improvements

The defendants assess each student a $10 "Building Use Fee" each semester to supplement their state-provided campus maintenance budget. This fee is designated as being usable on campus buildings or for educational and general capital purposes. The defendants admit that they average nearly $1,000,000 in surplus funds each year in this fund, yet they refuse to apply it to ADA compliance.

Specifically, the defendants' budget documents reveal that there was $974,616 in surplus money available for projects and operations in 2000-01. The defendants spent only $200,000 of that money for repairs and replacements to buildings and $75,000 for fiber optic wiring. Thus, the defendants had more than $700,000 available to comply with capital requirements such as the ADA in the year prior to Covington's accident.[126]

Since Covington's accident, and even in the face of rampant campus ADA deficiencies, the defendants have continued to hoard these "building use fees". In 2001-02, the defendants reported a $1,110,855 surplus.[127] In 2002-03, the defendants reported a $1,214,920 surplus.[128] In 2002-03, the last year in which full figures are available, the defendants spent $511,000 of this money and still anticipated a $988,593 surplus.[129]

Had the defendants wanted to comply with the ADA, this is one of many funding sources which would have been available to them. Instead, Hebert has admitted that McNeese intends to spend this money renovating an old dorm into office space referred to as Alpha Hall.[130]

Clearly, in the face of massive legal obligations under the ADA, the defendants' decision to spend the bulk of this money to create new office space demonstrates that the defendants' budgetary excuses for not complying are false and that they do not place a

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[126] Exhibit 21, Building Use Fund budgets, supplied by Defendants in discovery and deposition of Hebert.
[127] Exhibit 21. Building Use Fund budgets, supplied by Defendants in discovery and deposition of Hebert.
[128] Exhibit 21, Building Use Fund budgets, supplied by Defendants in discovery and deposition of Hebert.
[129] Exhibit 21. The defendants do not explain how they spent more than half a million dollars of this fund in 2002-03. However, a substantial surplus remains which could cover much of the university's ADA needs.
[130] Exhibit 16, Hebert deposition.

priority on making their programs, services, and activities accessible.

f. The defendants spent tens of millions of dollars on unnecessary capital improvements since 1992

While failing to bring existing buildings even to minimum codes, the defendants have spent millions on new construction since the passage of the ADA. According to the defendants' Capital Outlay Requests, several buildings were constructed or renovated in the last few years alone. While many of these buildings were constructed with state money rather than the defendants' money, the defendants admit that ***each year the cost of operating these new buildings is as much as the total amount of money spent on <u>all ADA compliance</u> efforts in the <u>ten years</u> prior to Rhoden's deposition in 2003!***

For each of these constructions, Dr. Hebert affirmed that, "this project has been reviewed, approved and integrated into our department's long range strategic plan and five year budget. The impact of this project's operating budget has been approved." A few capital outlay requests in recent Capital Outlay Budgets worth noting are:

(1) New Nursing Building $10,665,000 to construct a new building. The defendants acknowledge that their decision to construct this building cost McNeese an additional **$130,948 per year** in operating expenses. Dr. Hebert certified on July 25, 1997 that this project could be afforded by McNeese.

(2) New PBX Telephone System $1,497,600 to create a new phone system at McNeese. Dr. Hebert certified on July 25, 1997 that this project could be afforded by McNeese.

(3) Renovation of the Sherman Fine Arts Building $8,127,915 for renovations. Of that amount, **only $90,000, or 1%**, was spent on ADA compliance issues. Therefore, at least $8,037,915, or **99%**, was spent on non-ADA renovations. Dr. Hebert certified on July 25, 1997 that this project could be afforded by McNeese.

(4) Renovation and additions to Frazier Memorial Library $10,637,204 for renovations. Of that amount, **only $120,000, or 1%**, was spent on ADA compliance issues. Therefore, at least $10,517,204, or **99%**, was spent on non-ADA renovations. The defendants acknowledge that their decision to add to the library will cost McNeese an additional **$93,396 per year** in operating expenses. Dr. Hebert certified on July 25, 1997 that this project could be afforded by McNeese.

(5) New Women's Sport Complex $587,640 to build a new women's sports complex. The defendants acknowledge that this complex will cost an additional **$13,505 per year** in operating expenses. Dr. Hebert certified on July 25, 1997 that this project could be afforded by McNeese.

(6) Contraband Bayou Erosion Retaining Wall $2,108,400
Dr. Hebert certified on July 25, 1997 that this project could be afforded by McNeese.

(7) Improvements to the Athletic Complex $1,908,000 to "excel and win conference championships in all sports which are participated in" and comply

with gender equity requirements. This includes an unspecified amount for renovations to the Football Stadium pressbox and demolition of the existing pressbox. Dr. Hebert certified on July 25, 1997 that this project could be afforded by McNeese.

(8) Renovations to the Swimming Pool $300,000 to build a new cover on the swimming pool to allow it to be, "closed off from the outdoors in winter and opened for natural ventilation during the summer." Dr. Hebert certified on July 25, 1997 that this project could be afforded by McNeese.

(9) Unspecified repairs to campus buildings, 1997-2003, $5,205,000 Of this amount, ***only $181,000, or 3%,*** was earmarked for "modifications required to meet the Americans with Disabilities Act Accessibility Guidelines" over a five year period. Even though the defendants claim that the money is to "maintain satisfactory, safe and healthy physical facilities for all University programs," 97% of the funding was requested for non-ADA improvements. Dr. Hebert certified on July 25, 1997 that these projects could be afforded by McNeese.[131]

(10) Land acquisition, $972,000 to purchase 4 tracts of land and improvements adjacent to the McNeese Main Campus and Athletic Campus. Dr. Hebert certified on October 16, 1998 that this project could be afforded by McNeese.[132]

(11) Renovations of three buildings, $7,429,174 to renovate Farrar Hall, Gayle Hall, and Physical Education Building. Of this amount, the defendants do not specify that any money will be spent on ADA compliance. Dr. Hebert certified on August 3, 2001 that this project could be afforded by McNeese.[133]

(12) Campus Wall, $300,000 to construct a wall at the corner of Ryan Street and Common Street. Hebert acknowledged in his deposition that this was paid for with money partially raised through tuition fees.

As recently as 2003, two years after this suit was brought, the defendants' "Campus Development Committee" allocated $300,000 to "beautify" the Ranch Annex. Specifically, the defendants spent this money to, "improve lighting, painting, new flooring, ceiling replacement and cleaning, and new furniture" in the Ranch complex.[134]

As the defendants spent hundreds of thousands of dollars to make the Ranch Annex more aesthetically pleasing, they failed to even consider bringing the Old Ranch restrooms into ADA compliance. Amazingly, the defendants were unable to spend all of this money, and ***$89,568 sits in an account waiting for yet another "beautification" project in the Ranch, even as disabled students are deprived access to the very facilities that the defendants seek to beautify.***

The committee which made this decision was comprised of a combination of students and faculty members. Of particular interest is that fact that Rhoden, the director of facilities and planning and the man charged with assuring ADA compliance, was a

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131 Exhibit 22, Capital Outlay Request, 1997-2002.
132 Exhibit 23, Capital Outlay Request, 1999-2004.
133 Exhibit 24, Capital Outlay Request, 2002-2007.
134 Exhibit 25, Defendants' Answers to Plaintiffs' Second Set of Interrogatories, No. 5.

member of this committee.

This is not an example of past discrimination; it is not an icon of an earlier age. The recent decision by the defendants to take a sum of money nearly equal to their entire 15-year ADA budget and "beautify" the annex to the building where Covington was injured reflects a current environment of intentional disregard for the disabled. To go one step further and claim that the University is too poor to comply demonstrates an uncommon brazenness which deserves punitive sanctions.

8. The defendants discriminated by squandering what little money they allocated to the disabled and to Old Ranch improvements away from useful projects

Over the course of a decade, the defendants allocated only $400,000 out of a budget of hundreds of millions of dollars to bring the campus into compliance with the ADA.[135] Even these meager ADA resources were squandered on projects that were expensive but had a minimal impact on making the campus compliant. McNeese's ADA money was spent indiscriminately, without planning or forethought, and while siphoning resources which could have been used for more suitable projects such as restroom upgrades. Because of this policy, which failed to consider a transition plan or any other rational plan, there were no resources allocated to upgrade the Old Ranch restroom, which resulted in discrimination against Covington.

a. The defendants spent $400,000 on ADA compliance but failed to correct what they acknowledge is their greatest problem

Even when presented with resources and opportunities to make meaningful change, the defendants chose to squander their time and money on projects with little priority for the disabled. As discussed, the defendants' own Smith Report list the number one priority for McNeese as correcting restroom deficiencies. Yet the Defendants chose to ignore their own mandate, instead spending over $400,000 of ADA money on projects of little or no practical use to the disabled,[136] including 17 electric doors[137] which are not required by the Accessibility Guidelines and two special computers in the Old Ranch that Delaney admits "really nobody uses."[138]

Delaney elaborated on the uselessness of these computers when he noted, "A lot people probably look at it like it's a waste because, you know, everything [computers]

[135] Exhibit 2, deposition of Rhoden, 72:14-18.
[136] Exhibit 2, deposition of Richard Rhoden Exhibit C.
[137] Exhibit 2, deposition of Rhoden and Exhibit 16, deposition of Hebert.

turns obsolete in like a year or two, and we probably have maybe once or twice a year a student use it, but it's there."[139]

Delaney also explained that when given three budgetary requests per year to benefit the disabled from casino funds, he chose to purchase software, computers, phones, and copy machines for the disabled. He defended this decision as follows:

> A: We got our copy machine. They [the disabled] don't have to pay to go somewhere to use it. You know, it's things that you can prove that it's worthwhile, that it won't cost the university [because it came from casino funds].[140]

Thus, with staggering, unaddressed compliance deficiencies such as having no accessible restroom in the Old Ranch, McNeese's disability office chose to spend its resources on wasteful items such as computers that go unused and copy machines allegedly for those disabled students who do not wish to pay for copies. This failed to consider, as required by law, the needs of the disabled as promulgated in an official campus plan.

b. The defendants spent at least $450,000 to entice students into the Old Ranch but failed to provide a single accessible restroom, even when an outside company was willing to provide free renovations

Since the passage of the ADA, the defendants have spent hundreds of thousands of dollars on upgrades to the Old Ranch[141] without making a single restroom accessible in the building. Rhoden admits that McNeese spent $150,000 to $200,000 to turn an Old Ranch pool hall into a computer lab[142] and $300,000 to renovate the cafeteria in the Old Ranch when McNeese privatized food services with a company named ARAMARK Services.[143] McNeese actually convinced ARAMARK to pay for these renovations, but amazingly, failed to require that ARAMARK provide a single accessible restroom for the students as part of its renovation package even though such a requirement was mandated by law and would have cost the defendants nothing!

Hebert admitted that the defendants failed to even request that ARAMARK assure that McNeese students utilizing the ARAMARK facilities have access to a compliant

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138 Exhibit 15, Deposition of Tim Delaney, page 30.
139 Exhibit 15, Deposition of Tim Delaney, page 30.
140 Exhibit 15, deposition of Tim Delaney, page 65. On the second to last page of Exhibit 20, the price of these computers are shown to be $5,064.92.
141 Exhibit 2, deposition of Richard Rhoden, page 53.
142 Exhibit 2, deposition of Richard Rhoden, page 53. Rhoden testified that, "we took an existing room [in the Old Ranch] and made it into a computer lab. . . . I'm thinking it was about 200,000 [dollars to renovate]. Actually, about 150,000, if I remember correctly. That was for the renovations itself." Rhoden admitted that it never occurred to anyone at McNeese to provide an accessible restroom for the new computer lab. Yet he defended the unnecessary electric door because it "provided access."

restroom. Hebert testified on page 71 of his deposition that to his knowledge, "McNeese never asked" the suppliers of $350,000 in free renovations to meet this simple $16,000 legal obligation.

Incredibly, while failing to provide a single accessible restroom in the Old Ranch, McNeese spent money in the last few years to create additional inaccessible space in the building! Rhoden admits that the defendants built stairs to allow access to a loft office in the building.[144]

Because the defendants had an adequate opportunity to make such extensive improvements to the Old Ranch, it stands to reason that they had an adequate opportunity to make the Old Ranch restrooms accessible and safe, and there is no fact in dispute regarding the availability of ample time and money to have prevented Covington's accident. Her injuries occurred solely because the defendants chose to squander their resources on projects which should have received less priority and because they failed to even consider the needs of the disabled when providing programs, services, and activities at the Old Ranch.

9. The defendants discriminated by refusing to consider public comments

As discussed, there is no evidence in the record to show that the defendants allowed public comment as required under 28 CFR 35.105(b). Such comments are necessary in order to allow the public to have input into the compliance process so that the defendants will know how to make improvements where they are most needed, rather than where they arbitrarily decide to spend money. This failure to invite comments from Covington and other members of the public constitutes intentional discrimination.

10. The defendants knew that they denied disabled students an education

The uncontroverted evidence of widespread campus discrimination has taken its toll on disabled citizens of Southwest Louisiana who seek an education, including Covington, who has not re-enrolled at McNeese and continued with her education in part because of the ongoing discrimination on campus. Delaney has admitted in his deposition that inadequate and noncompliant housing alone deterred 100 to 300 disabled students per year from attending McNeese prior to 2003. This is an open admission that McNeese has knowingly and intentionally prevented untold thousands of otherwise

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[143] Exhibit 2, deposition of Richard Rhoden, page 54.
[144] Exhibit 2, deposition of Richard Rhoden, page 54.

qualified disabled citizens from receiving an education.[145]

E. The discrimination still prevents Covington from receiving an education

Covington has acknowledged that she is ready to return to school. As noted in her medical records, she is still disabled and still confined to a wheelchair much of the time because of her medical conditions, but she is otherwise qualified to attend McNeese.

Covington is deterred from returning to school, however, because of the condition of the campus and its policies. Were she to return, Covington would face campus-wide risks such as the one which led to her accident. Without a self-evaluation and annually-amended transition plan available for public inspection and without proper signage, Covington has no way of knowing which facilities are accessible to her and which ones pose further risks of injury. Without a meaningful grievance process, Covington is unable to readily seek redress for her grievances unless she submits to a burdensome and illegal "registration" process. Without a policy change, Covington's complaints will go undocumented, her comments will go unheard, and her accidents, injuries, and disenfranchisement will go unaddressed.

The failure of McNeese to attend to these obligations is an intentional refusal to comply with the ADA. It is ongoing, and it is unapologized for by the defendants. Therefore, it is real and present discrimination which will be remedied only with court intervention.

F. Equitable relief

The ADA provides for injunctive relief to assure compliance with its provisions. *Barnes vs. Gorman*, 536 U.S. at 181 at 187; *First Step, Inc. vs. City of New London*, 247 F.Supp2d 135, 156-57 (D.Conn. 2003); *Bertrand vs. City of Mackinac Island*, 662 N.W.2d 77, 78, 81-88 (City required to permit use of electric tricycle despite ordinance forbidding "motor vehicles").

The plaintiffs are entitled to injunctive relief for any violation of Section 12132 of the ADA, regardless of whether the defendants intended to discriminate or not. Indeed, it is an abuse of discretion for this court not to order mandatory injunctive relief after finding an ADA violation. *Layton vs. Elder*, 143 F.3d 469 (8th Cir. 1998). Furthermore, as discussed, courts have within their powers not only the right to order physical

[145] Exhibit 15, deposition of Tim Delaney.

compliance with the ADA, but to order that a suitable self-evaluation and transition plan be drafted. *See also Chaffin*.

In *Layton*, an Arkansas county failed to have an elevator in place to allow a wheelchair-bound courthouse visitor access to the second floor. The defendants in that case took extraordinary steps to accommodate the plaintiff. They moved his hearing to the first floor, drafted a written policy stating the county's intention to comply with the ADA, formed an ADA oversight board, developed a grievance procedure, and began removing architectural barriers. Yet the 8th Circuit held that *the district court was still required to issue an enforceable injunction against the defendants*, and that the failure of the court to do so was an abuse of discretion.

The McNeese defendants, in stark contrast, have not even acknowledged their wrong doing, have not offered to accommodate Covington in any way, have not drafted a written policy stating their intention to comply with the ADA, maintain that their flawed grievance procedure is adequate, and outright refuse to remove even the architectural barriers which have been complained about since the filing of this suit in 2001.

The standard for issuing an injunction is to establish a balance in favor of the plaintiff on the issues of: (1) the threat of irreparable harm to the movant; (2) the harm to be suffered by the nonmoving party if the injunction is granted; and (3) the public interest at stake.

In *Layton*, the plaintiff was admittedly only a one-time visitor to the courthouse as the defendant in a hunting violation case. Covington, by contrast, is a student who has between a semester and a year left before graduation. Therefore, she has and will suffer substantially more irreparable harm than the plaintiff in *Layton* by the ongoing discrimination because she has an immediate need to access the McNeese campus.

With regard to the second factor, there is no harm in requiring that the Defendants comply with the law. As a matter of law, the Louisiana legislature has concluded that there is no harm to providing compliant state facilities for the disabled; indeed, the state has mandated such compliance. Furthermore, the budgetary evidence submitted to the court demonstrates that even if compliance were predicated upon a showing of sufficient resources (which it is not), the defendants have far more than enough discretionary money to bring the campus into compliance. Therefore, there is <u>no</u> harm to be suffered by

the defendants if ordered to bring their facilities to code. Indeed, McNeese would be an improved campus.

With regard to the third factor, the plaintiffs have demonstrated that a significant public interest is at stake. Approximately 8,000 students attend McNeese. The failure of the campus to have a self-evaluation, transition plan, or even the semblance of a plan to assure accessibility to campus programs, services, and activities affects the safety and welfare of those students. Therefore, as a matter of law, the plaintiffs are entitled to injunctive relief ordering that the defendants conduct a self-evaluation, transition plan, and bring the campus into full compliance as required by the statutes cited in this memorandum.

G. Compensatory damages

It has been universally held that compensatory damages are available to those discriminated against under Section 12132 when it can be shown that the discrimination against the plaintiff was intentional. *Ferguson vs. City of Phoenix*, 157 F.3d 668 (9th Cir. 1998); *Swenson vs. Lincoln County Sch. Dist. No. 2*, 260 F.Supp 2d 1136 (D.C. Wyoming, 2003).

The Fifth Circuit has adopted this standard. In *Delano-Pyle vs. Victoria County*, 302 F.3d 567 (5th Cir. 2002), the Fifth Circuit upheld an award of $230,000 to a deaf man who was wrongly arrested at an accident scene because police officers mistakenly thought that he was intoxicated when he was unable to communicate with them because of his disability. The appeals court concluded that even in the absence of a policy of discrimination, this single incident was sufficient to warrant the damages under Title II of the ADA.

The Fifth Circuit held in *Delano-Pyle* that compensatory damages are mandated under Title II if a plaintiff shows (1) exclusion from participation in or denial of the benefits of a service, program, or activity of a public entity or any other discrimination; (2) intentional conduct; and (3) damages. There is no genuine issue of material fact as to Covington's proof of each of these elements.

It is not a fact in dispute that the defendants intentionally discriminated against Covington and other disabled students. They have admitted that they were aware that the disabled were unable to access a single compliant restroom in the Old Ranch but failed to

do anything about it, even years after Covington's accident and despite having adequate time and resources. Hebert unapologetically defended this by saying that he considered the Old Ranch the "students'" building and thus the "students'" responsibility to maintain.

Hebert further admitted that McNeese does not respond to all requests for assistance if it feels that the requests are too expensive, even though he acknowledges that he has had more than enough discretionary money to cover the costs of complete Accessibility Guideline compliance many times over but has chosen to spend it on pet projects such as a campus wall, big screen televisions, new buildings, beautification, and other non-mandated projects. Even today, the defendants admit that they have enough unused money sitting idling in their building maintenance fund, campus development fund, and casino revenue fund to bring the campus almost into complete compliance, but they will not conduct a self-evaluation, draft a transition plan, or even fix the Old Ranch restroom.

Delaney has admitted that McNeese has a history of discriminating against the disabled even after the passage of the ADA. He admitted telling Covington that she must "register" with him before complaining, a requirement which he admitted was done in part to bolster school grant revenue. Even years after she informed Delaney of her accident, he refused to inspect, or even find the site.

Because of the intentional nature of this discrimination, Covington is entitled to compensatory damages for her injury and discrimination. The amount of such damages shall be assessed at a trial on the merits.

H. Attorney fees

As a matter of law, an individual who prevails on the merits of Section 12132 or whose suit results in the defendants providing improved services to the disabled is entitled to receive reasonable attorney fees. 25 CFR 35.175. *Tyler vs. City of Manhattan*, 866 F.Supp 500 (D.C. Kansas, 1994); *Ciresoli vs. Maine Sch. Admin. Dist. No. 22*, (D.C. Maine, 1996); *Layton, supra*.

The standard for establishing reasonable attorney fees is by computing the "lodestar": the number of hours reasonably expended on the litigation multiplied by the reasonable hourly rate of the individuals working on the matter. *Giles vs. Gen. Elec. Co.*,

245 F.3d 474, 490-91 (5th Cir. 2001); *Fischer vs. SJB-P.D., Inc.*, 214 F.3d 1115, 1119 (9th Cir. 2000) ("A 'strong presumption' exists that the lodestar figure represents a 'reasonable fee,' and therefore, it should only be enhanced or reduced in 'rare and exceptional cases.'").

The plaintiffs seek reasonable attorney fees as established in the attached exhibit, which represents the actual hours expended on the ADA portion of this case multiplied by a below-market, more than reasonable rate of $175 per hour for attorneys in the Louisiana legal community who practice in the unique and challenging specialty of ADA and state and federal discrimination law.

IV. DISCRIMINATION COUNT II: DISCRIMINATION UNDER THE 1973 REHABILITATION ACT

Defendants discriminated against Covington under 29 U.S.C. 794 (Section 504)

By denying Covington access to the Old Ranch and engaging in policies which deterred her from filing a grievance, she was excluded from participation in, denied the benefits of, or subjected to discrimination under 29 U.S.C. 794. The arguments establishing her discrimination under Section 794 are the same as those establishing it under the ADA. Section 794 provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Within the statute, "program or activity" is defined to include "a college, university, or other postsecondary institution, or a public system of higher education." Because Covington was subjected to discrimination for the reasons provided under the analysis of the ADA, she was also subjected to discrimination under Section 504, whose analysis is substantially the same.

V. DISCRIMINATION COUNT III: DISCRIMINATION UNDER LA. R.S. 46:2254(A), (F), AND (J)

Defendants discriminated against Covington under La. R.S. 46:2254, La. R.S. 40:1731, and La. R.S. 40:1748 by not making <u>every</u> restroom in the Old Ranch accessible.

A. Louisiana forbids discrimination against disabled students

The defendants are also liable to Covington for violating her rights under Louisiana's anti-discrimination statute. Louisiana's R.S. 46:2254(A) is strikingly similar

to Section 12132 and provides that:

> No otherwise qualified person shall, on the basis of a handicap, be subjected to discrimination by any educational facility, in any real estate transaction, or be excluded from participating in, or denied the benefits of, any program or activity which receives financial assistance from the state or any of its political subdivisions.

There are few cases interpreting Article 2254. However, it is clear that at the time of the accident, Covington was attempting to exercise her rights on the McNeese campus and was "subjected to discrimination" and "excluded from participating in, or denied the benefits of, any program or activity" which receives financial assistance from the State. This discrimination and exclusion occurred when the defendants failed to provide an accessible restroom in the Old Ranch. Because the wording of Article 2254(A) parallels Section 12132, the same discrimination analysis applies and is incorporated by reference.

B. The defendants discriminated against Covington when they failed to make <u>every</u> restroom in the Old Ranch accessible as required by La. R.S. 46:2254(F)(1)

There are several important differences between Section 12132 and Article 2254. Article 2254 goes much further than the ADA to protect Covington against the defendants' discrimination. Under Article 2254(F)(1), it is unlawful for any educational institution to receive state funding if it denies, in any manner, "the full utilization of the institution" by the disabled.

La. R.S. 46:2254(F) provides that:

> In accordance with R.S. 46:2254(A) an educational institution shall not:
>
> (1) discriminate in any manner in the ***full utilization of the institution***, or the services provided and rendered thereby to an otherwise qualified individual because of a handicap that is unrelated to the individual's ability to utilize and benefit from the institution to its services, or because of the use of adaptive devices or aids. . . .

Under this powerful mandate, all of the four restrooms in the Old Ranch must be accessible in order for Covington to have "the full utilization" of the campus. By contrast, the ADA requires only that McNeese provide service, programs, and activities which are free from discrimination, which is generally held to require at least one accessible restroom per building in buildings such as the Old Ranch.

At the time of the accident, Covington was clearly deprived of her right to fully utilize McNeese. Indeed, she was shamefully deprived of her right to utilize **any** restroom in the main student union, in clear violation of Article 2254.

C. The defendants discriminated against Covington by limiting her educational

opportunities under La. R.S. 46:2254(F)(5)

The defendants also violated La. R.S. 46:2254(F)(5), which provides that an educational institution shall not:

> (5) Announce or follow a policy of denial or limitation of educational opportunities to a group or its members because of a handicap that is unrelated to the group or members' academic ability or ability to utilize and benefit from the institution or its services, or because of the use of adaptive devices or aids.

Article 2254(F)(5) prohibits the defendants from following a policy that denies or limits educational opportunities to Covington because of her disability. Clearly, the policies articulated in the analysis of Section 12132 had the effect of limiting Covington's educational opportunities, as did the policies which led to the inability of Covington to use *any* Old Ranch restroom. Because Covington was utilizing the Old Ranch as the only designated area for the pick-up and drop-off of disabled students, the denial of the Old Ranch restroom constituted a denial of her most basic educational opportunity—the opportunity to receive transportation to campus.

D. The defendants discriminated against Covington when they failed provide her with as many restrooms as they provided to able-bodied students, as required by La. R.S. 2254(J)(1)

Article 2254(J)(1) mandates that Covington is entitled to access all aids, benefits, and services on an equal basis with able-bodied students. It provides:

> In accordance with R.S. 46:2254(A), any program or activity which receives financial assistance from the state or any of its political subdivisions shall not directly or through contractual, licensing, or other arrangements:
>
> (a) Deny an otherwise qualified person on the basis of handicap the opportunity to participate in or benefit from the aid, benefit, or service.
> (b) Provide an otherwise qualified person with an aid, benefits, or service that is not as effective as, or equal to, that provided to others because of their handicap.
> (c) Provide different or separate aid benefits, or services to otherwise qualified persons because of handicap, unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others.

Under this section, the defendants had the obligation not only to provide Covington with a compliant restroom, but to provide her with equal restrooms. Thus, the Louisiana Legislature clarified that it is insufficient under Article 2254 for McNeese to provide any fewer restrooms or restrooms of inferior quality to disabled students than for able-bodied students, because doing so would be "not as effective as, or equal to" the aid, benefit, or service provided to the non-disabled.

This Legislature is so clear in its requirement of equal facilities that it made this policy known a third time, in a separate statute located in title 40. La. R.S. 40:1731(B) demands that McNeese remove all architectural barriers, "so that the physically handicapped may begin to share equally with the nonphysically handicapped the right to use and enjoy the man-made environment." This environment specifically includes educational facilities.

Finally, the Louisiana Legislature provided yet a fourth time, in La. R.S. 40:1748(A), that every state entity having jurisdiction over buildings where government services are provided to the public, "shall provide for *equal access* to such services by persons who are physically handicapped."

Covington was not provided with equal access to the Old Ranch restrooms. She was not provided with access to a single accessible restroom. Therefore, she was discriminated against under La. R.S. 40:1731, La. R.S. 40:1748, and yet another provision of La. R.S. 46:2254. Therefore, the undisputed facts in evidence mandate that the plaintiffs are entitled to summary judgment in their favor and against the defendants for discrimination under La. R.S. 46:2254(A), (F)(1), (F)(5), and (J)(1).

E. Equitable Relief

Like Section 12132, La. R.S. 46:2254 allows equitable relief against public entities which discriminate against the disabled. On at least four occasions, the Louisiana Legislature specifically prohibits an entity which discriminates against the disabled from receiving ***any*** state funding. These prohibitions are noted at La. R.S. 49:148, *et seq.*, La. R.S. 46:2254(A), 2254(J)(1), and 2254 (J)(2).

Therefore, under Louisiana law, the defendants have not been entitled to receive state funding since the adoption of these statutes 30 years ago. It is within this court's power to enforce these provisions and order the state to withhold funding from the defendants until they comply with these laws.

The plaintiffs seek a less drastic remedy. As noted in the damages section of this memorandum, the plaintiffs seek an order requiring that the defendants comply with the statutes.

VI. DISCRIMINATION COUNT IV: DISCRIMINATION UNDER LA R.S. 51:2231, LOUISIANA COMMISSION ON HUMAN RIGHTS

For the reasons provided, Covington's rights were also violated under La. R.S.

51:2231, *et seq*. That statute provides that it is the policy of Louisiana to

> . . .safeguard all individuals within the state from discrimination because of race, creed, color, religion, sex, age, disability, or national origin in connection with employment and in connection with public accommodations; to protect their interest in personal dignity and freedom from humiliation; to make available to the state their full productive capacities in employment. . .

Covington was an individual with a disability who was subject to discrimination in public accommodations. Furthermore, as established, she was subject to a deprivation of her personal dignity and freedom from humiliation. Therefore, as a matter of law, the plaintiffs are entitled to a finding of discrimination under La. R.S. 51:2231. This is a separate cause of action, as recognized in *Silvis vs. Mitchell*, 704 So.2d 25 (La. 1st Cir. 1997).

VII. THERE ARE NO DEFENSES AVAILABLE TO THE DEFENDANTS UNDER THE DISCRIMINATION STATUTES

The plaintiffs anticipate that the defendants will claim that they were not required to comply with the ADA, that Covington was not disabled, or that Covington failed to follow administrative procedures prior to filing the instant suit. These arguments are not supported by the facts.

A. Covington was not required to "register" in order to expect safe facilities

As discussed in the analysis of Section 12132, the defendants have become convinced that some sort of "registration" requirement exists for disabled students before they are entitled to accommodations under the ADA. The requirements of Section 12132 are clear and unconditional, and they include no such provision. Furthermore, the Accessibility Guidelines in no way restrict restroom facilities to use by disabled students who have "registered" with McNeese, and the ADA imposes no administrative requirement prior to filing suit. *See Dertz vs. City of* Chicago, 912 F.Supp. 319 (N.D. Ill., 1995). Indeed, the only effect of asking Covington to "register" with McNeese is to establish her as being regarded as disabled.

B. The defendants are obligated to follow the ADA and poverty is not a defense to complying with the Accessibility Guidelines

The plaintiffs anticipate that the defendants will allege that they were not required to comply with the Accessibility Guidelines. This assertion is incorrect.

1. The Law

With respect to existing facilities such as the Old Ranch, 28 CFR 35.150

provides:

> (a) General. A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not—
> (1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities. . . or
> (3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

In order for the defendants to take advantage of the defense in subsection (3) by claiming that they would suffer an "undue financial and administrative burden," they must meet the requirements of 28 CFR 35.150 (a)(3), which provides:

> In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, **a public entity has the burden of proving** that compliance with Sec. 35.150(a) of this part would result in such alteration [to a service, program, or activity] or burdens. The decision that compliance would result in such alteration [to a service, program, or activity] or burdens must be made by the head of a public entity or his or her designee **after considering <u>all resources available</u> for use in the funding and operation of the service, program, or activity**, and **must be accompanied by a written statement of the reasons for reaching that conclusion**. [emphasis added].

The defendants have the burden of showing that Dr. Robert Hebert, President of McNeese, or his designee, considered all resources available to McNeese and to the Board of Supervisors and drafted a written statement establishing the reasons why the defendants could not comply with the Accessibility Guidelines on or before the deadline of January 26, 1992 (*see* 28 CFR 35.150 (c)). The defendants have failed to provide such a statement.

Even if the defendants had completed the required statement of undue burden and even if such a statement were reasonable, the defendants would still be required, on or before January 26, 1995, or "as expeditiously as possible"[146] to "take any other action that would not result in such an alternation [of a service, program, or activity] nor such burdens" with respect to all facilities not covered by that written determination. 28 CFR 25.150(a)(3) provides:

> If an action would result in such an alteration [of a service, program, or activity] or such burdens, **a public entity <u>shall take any other action that would not result in</u> such an alteration** [to a service, program, or activity] **nor <u>such burdens</u>** but would nevertheless **ensure that individuals with disabilities receive the benefits or services provided by the public entity**. [emphasis and brackets added].

In other words, by January, 1995, the defendants were required to complete all ADA renovations and policy changes that were not provided for in the statement of undue burden, and they were required to ensure that no student was discriminated against under 42 U.S.C. Section 12132. Instead of taking whatever steps the defendants could afford, the defendants did nothing to the Old Ranch restrooms.

As a matter of law, the defendants are not allowed to claim that compliance with the ADA constitutes an "undue burden" because they failed to evaluate their needs and create a hardship statement prior to January, 1995, as required by the ADA. Even if the defendants had drafted a proper hardship statement prior to January, 1995, and even if such a statement had concluded that McNeese and the Board of Trustees were too poor to upgrade the Old Ranch restroom, such a conclusion would have been unreasonable and would fail to satisfy the defendants' burden under subsection (3) for the reasons provided in the analysis of their funding, *supra*.

It is unreasonable for the defendants to claim that an institution with an annual budget of nearly $50 million with such an abundance of excesses is unable to spend a few thousand dollars over the course of ten years to bring its main student union restrooms into compliance with the Accessibility Guidelines. It would have required only 0.003% of McNeese's half-billion dollar 15-year operating budget or 0.25% of its unrestricted and unanticipated casino revenues to bring all Old Ranch restrooms up to full compliance.[147] And because of the alternatives available to the defendants (such as replacing door closers or installing signage), even this miniscule burden would not have been necessary to prevent Covington's accident and mitigate the defendants' liability.

In summary, the defendants never completed any of the requirements to avoid having to comply with the Accessibility Guidelines by January 26, 1995. Even if they had completed the requirements, their self-serving declarations of undue burden would have been unreasonable. And even then, the defendants would have been required to take other, less burdensome actions to assure that they did not discriminate against disabled

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[146] *See* 28 CFR 25.150(c).

persons pursuant to Section 12132.

C. Ignorance is not a defense

Throughout discovery, the defendant employees have demonstrated a fundamental lack of understanding of their obligations under the ADA.[148] 28 CFR 35.177 provides that, "A public entity shall not be excused from compliance with the requirements of this part because of any failure to receive technical assistance, including any failure in the development or dissemination of any technical assistance manual authorized by the Act."

D. Conclusion

There is no defense which would prevent the defendants from having to comply with the ADA or the state code requirements. Therefore, the Defendants have violated the ADA and discriminated against Covington, entitling her to injunctive relief and attorney fees.

CONCLUSION AND DAMAGES

For the reasons provided, the plaintiffs seek a judgment finding that the Defendants discriminated against Covington under La. R.S. 46:2254, *et seq*., 42 U.S.C.12132, *et seq*., La. R.S. 51:2221, and the Rehabilitation Act of 1973 (29 U.S.C. 794).

A. Compensatory and punitive damages

Following the entry of judgment, the plaintiffs seek a trial to determine the amount of physical, medical, emotional, punitive, and other damages caused by the defendants' established negligence and past and ongoing acts of discrimination.

B. Equitable relief

Consistent with the requirements of Section 12132, La. R.S. 46:2254, and with general principles of equity, the plaintiffs request that this court order that the defendants

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[147] This assumes the Defendants' figure of $16,000.
[148] Exhibits 2 and 15, depositions of Richard Rhoden and Tim Delaney.

comply with all provisions of the Americans with Disabilities Act, the 1973 Rehabilitation Act, and La. R.S. 46:2254 on or before December 31, 2006, and the defendants be required to seek outside legal, engineering, and other technical assistance to assist in their compliance efforts.

The plaintiffs also request that all McNeese employees indefinitely be ordered to attend annual training to remain familiar with the requirements of the Americans with Disabilities Act, the 1973 Rehabilitation Act, La. R.S. 51:2231, and La. R.S. 46:2254. The defendants should not be allowed to use in-house personnel to conduct the training, as they have demonstrated that their in-house personnel are themselves unaware of the law.

The plaintiffs request that this court order the defendants to prove that they have complied with the proposed court order by December 31, 2006 and to maintain and submit records of their employees training attendance to the court and to plaintiffs' counsel on or before December 31 of each year. In the event that the defendants fail to comply with any term of the proposed order, the plaintiffs request that the defendants be sanctioned and subject to contempt of court proceedings.

C. Attorney fees

As shown by attached exhibit, the plaintiffs have expended nearly six years and hundreds of hours in the research, discovery, and preparation of this case. The plaintiffs have expended thousands of dollars, conducted over a dozen depositions, and enlisted te assistance of experts, including a nationally renowned ADA compliance expert, to establish the existence of numerous counts of intentional discrimination against the disabled. The plaintiffs have established the need for equitable relief to assure that no student is ever discriminated against again at McNeese State University. Furthermore, in the interest of saving court resources, the plaintiffs have preemptively and conclusively shown that the defendants have no defenses available under the ADA.

The unique and complex factual and legal issues justify the expenditure of time by the plaintiffs. Therefore, the plaintiffs seek an order entitling them to be compensated by the defendants for legal services at the rate of $175 per hour. The plaintiffs request that the defendants be ordered to pay the costs and fees in the accompanying exhibit within 30 days. Furthermore, the plaintiffs request that the court hold open the possibility

of awarding additional attorney fees if a trial in this matter is necessary or if the defendants' conduct warrants further prosecution by the plaintiffs under these statutes.

Respectfully submitted,

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