

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION**

EVERYBODY COUNTS, INC.,)	CIVIL NO. 2:98CV97 JM-1
a Center for Independent Living, et al.,)	
)	CLASS ACTION
Plaintiffs,)	
)	JURY DEMAND
v.)	
)	
NORTHWEST INDIANA REGIONAL)	
PLANNING COMMISSION, et al.,)	
)	
Defendants.)	
)	
)	

CONSENT DECREE

WHEREAS the Plaintiffs initiated this matter on April 1, 1998 in Indiana State Court; the case was subsequently removed to federal court; and amended on July 27, 1998. The First Amended Complaint alleged that the Defendants committed violations of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 *et seq.*, and the corresponding regulations associated with those laws.

WHEREAS, the Court certified this class action pursuant to Federal Rules of Civil Procedure 23 (a) and 23 (b) (2) for an injunctive Class consisting of:

“All persons eligible for paratransit services under the ADA pursuant to 49 C.F.R. § 37.123 who are or will be paratransit riders in Lake County, State of Indiana.”

WHEREAS, Centers for Independent Living (CILs) are consumer-controlled non-profit organizations authorized by Title VII of the Rehabilitation Act of 1973 as amended. Centers for

Independent Living are governed and staffed by a majority of qualified people with disabilities, who empower and provide direct assistance to people with disabilities in their local community in order which help them to achieve personal and/or professional goals. However, the most significant role of Centers for Independent Living is to assist the disabled community to identify and resolve systemic barriers that make it difficult for them to achieve community integration. Everybody Counts' board of directors and staff include individuals with extensive expertise in application of the ADA, community organizing, public relations and training activities.

WHEREAS, on or about March 30, 2006, the United States District Court for the Northern District of Indiana issued a ruling and order which found that although the Indiana Department of Transportation ("INDOT") was entitled to Eleventh Amendment immunity from suit under the Americans with Disabilities Act ("ADA") with respect to the provision of public transportation based on the facts at issue in this proceeding, INDOT had waived its Eleventh Amendment immunity with respect to Plaintiffs' allegations under the Rehabilitation Act;

WHEREAS, on January 17, 2001, the United States Court of Appeals for the Seventh Circuit in *Ozowski v. Henderson* ruled that the standards for determining a violation under Section 504 of the Rehabilitation Act are the same as applied to determine a violation under Title II of the ADA;

WHEREAS, although Plaintiffs could have sought to challenge by appeal the ruling issued by the United States District Court for the Northern District of Indiana with respect to INDOT's immunity under Title II of the ADA, Plaintiffs elected not to do so in exchange for INDOT's willingness to enter into this Consent Decree;

NOW, THEREFORE, Plaintiffs, including the Members of the Class, and Defendant Indiana Department of Transportation (the "Parties"), intending to be legally bound, stipulate and agree to a settlement of this matter as follows:

I. DEFINITIONS AND CONSTRUCTION

A. The following federal regulations, 49 CFR § 37.105, 49 CFR § 37.121, 49 CFR § 37.131, 49 CFR § 37.171, other federal regulations to which the aforementioned federal regulations refer, and any other applicable federal regulations provide specific definitions and standards for performance. Any conflict between the specificity of the federal regulations and the specificity of the terms, conditions, and definitions of this Consent Decree shall be resolved in favor of the federal regulations. In addition to the common sense meaning for each term, the following definitions apply to each of the terms listed below:

1. "ADA" means the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., and its corresponding regulations.

2. "Auxiliary aids and services" means any form of communication which ensures effective communication with individuals with disabilities, in accordance with the provisions of the Americans with Disabilities Act and its corresponding regulations. If the provision of auxiliary aids and services is requested, it shall be provided in the requested format unless doing so would result in undue hardship to the Defendant. 42 U.S.C. §12111(10)(a); 28 C.F.R. § 35.160. Auxiliary aids and services shall include, but not be limited to, materials in alternate format including materials in large print, audio cassette tapes or compact discs, Braille, or the use of a sign language interpreter, real-time captioning, and audio loops.

3. "Complementary Paratransit" means the transportation provided by a public entity, or the public entity's contract carrier, to comply with 42 U.S.C. § 12143, 49 C.F.R. § 37.121 and other applicable regulations.

4. "Contractor" means any transit provider that contracts, or otherwise arranges, with NWICAC, their successors, assigns, or contract carriers to operate Demand Response Services and/or Complementary Paratransit services, directly or indirectly, to the general public in Lake County, Indiana.

5. "Defendants" means Northwest Indiana Community Action Corporation (f/k/a Lake County Economic Opportunity Council) ("NWICAC"), INDOT, Northwestern Indiana Regional Planning Commission ("NIRPC"), Hammond Transit System ("HTS"), East Chicago Public Transit ("ECPT"), Gary Public Transportation Corporation ("GPTS"), and TradeWinds Rehabilitation Center, Inc.

6. "Demand Response System" means a system of transporting individuals, including but not limited to Designated Public Transportation by public entities and public transportation by private entities, including but not limited to Specified Public Transportation, that is not a Fixed Route System.

7. "Demand Response Service" means those transportation services provided through a Demand Response System.

8. "Designated Public Transportation" means transportation provided by a public entity (other than public school transportation) that provides the general public with general or special service, including charter service, on a regular and continuing basis.

9. "Effective Date" is the date on which this Consent Decree is approved by the United States District Court for the Northern District of Indiana, Hammond Division.

10. "Fixed Route System" means a system of transporting individuals, including the provision of Designated Public Transportation service by public entities and the provision of transportation service by private entities, including but not limited to Specified Public Transportation service, on which vehicles are operated along prescribed routes according to fixed schedules.

11. "INDOT" means the Indiana Department of Transportation, which includes but is not limited to its governing or policy-making body, officers, employees, and agents.

12. "Marketing" means aggressive outreach by forms of advertisement and public education to inform the general public and people with disabilities about paratransit and fixed route eligibility, availability and usability.

13. "Missed Trip" means both:(a) a Complementary Paratransit Trip for which any Transit Defendant or Contractor fails to pickup a Rider; and (b) a Complementary Paratransit Trip for which any Transit Defendant or Contractor arrives to pick up the Rider more than one hour after the scheduled pickup time.

14. "Next Day Scheduling" means the scheduling of a trip request for any Complementary Paratransit Rider at the time requested by the Rider, or within the two-hour window around that desired time, on a particular day in response to a request for service made the previous day during business hours.

15. "NIRPC" means the Northwestern Indiana Regional Planning Commission, which includes but is not limited to its governing or policy-making body, officers, employees, agents, successors and assigns.

16. "Operates" includes operation of a, Complementary Paratransit System, or Fixed Route System by an entity under a contractual or other arrangement or relationship with Defendant, its successors, assigns, or contract carriers.

17. "Provider" means any entity that operates Demand Response Services and/or Complementary Paratransit services, directly or indirectly, to the general public in Lake County, Porter County, and/or LaPorte County, Indiana.

18. "Rehabilitation Act" means § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 et seq., and its corresponding regulations.

19. "Specified Public Transportation" means transportation provided by a private entity to the general public, with general or special service, including charter service, on a regular and continuing basis.

20. "Subscription Service" means a paratransit service offered to individuals who have repeated trips to the same destination during a limited period, which eliminates the need to call in for a daily ride reservation. Typically, subscription service is provided for trips to work, work training, education, and specialized medical care. Subscription service is regulated by 49 CFR § 37.133 (b) which provides that, 'subscription service may not absorb more than fifty percent of the number of trips available at a given time of day, unless there is excess non-subscription capacity.

21. "Transit Defendants" means NWICAC, Hammond Transit System, East Chicago Public Transit, Gary Public Transportation Corporation, and TradeWinds Rehabilitation Center, Inc.

22. "Trip" means a one way trip, or other trip configuration.

23. "Trip Denial" means the refusal or inability to schedule a Complementary Paratransit Trip within the two-hour window and/or in accordance with next-day scheduling.

24. "Two-Hour Window" means the time period from one hour before to one hour after the time for which a Rider requests a Complementary Paratransit Trip.

25. "Untimely Pick Up" means any Complementary Paratransit Trip pick up that is made more than fifteen (15) minutes before or fifteen (15) minutes after the Rider's scheduled pick up time.

II. INDOT OVERSIGHT

A. In general. As the grantee of 49 U.S.C. § 5303 (§ 5303) Metropolitan Planning Program funds, INDOT shall monitor its subgrantee NIRPC for compliance with all Federal requirements associated with the receipt of those funds, including without limitation those requirements enumerated in FTA Circular 5010.1C, and any Circular succeeding and/or supplementing FTA Circular 5010.1C. INDOT understands and agrees that as the grantee of § 5303 funds, INDOT is responsible for ensuring that persons with disabilities are not denied the benefits of the transit planning activities undertaken by NIRPC with § 5303 funds, including engineering, design, and technical studies performed by or on behalf of NIRPC. INDOT also understands and agrees that as the grantor of Public Mass Transit Funds ("PMTF") from the state of Indiana, INDOT is responsible for ensuring that persons with disabilities are not denied the benefits of the transit services provided by grantee transit Providers.

B. Annual review. At least once every year, INDOT shall review NIRPC for compliance with the ADA and all applicable regulations. INDOT shall provide Plaintiffs with thirty (30) days advances notice prior to initiating said annual review. As part of that review, INDOT shall verify that NIRPC:

1. Provided the public with satisfactory opportunity to comment prior to approval of any long-range transportation plan;
2. Held all meetings and hearings for the purpose of receiving public comment on the regional transportation plan or the Transportation Improvement Program (including the Program of Projects) at accessible facilities;
3. When holding multiple meetings or hearings on a single topic, held at least one of those meetings or hearings at a location and time of day when transportation for persons with disabilities was available;
4. When holding single meetings or hearings on any given topic, held that meeting or hearing at a location and time of day when transportation for persons with disabilities is available;
5. Posted notice of all meetings and hearings at the NIRPC office;
6. Published notice of meetings and hearings in newspapers when required by law, e.g., for public hearings;
7. Released announcements and press releases of public meetings and hearings to newspapers, radio stations and television stations in northwestern Indiana;
8. Provided copies of announcements and press releases to Plaintiffs;
9. Provided auxiliary aids and services to ensure effective communications at meetings and hearings upon request;
10. When holding legally-noticed public hearings, prepared and made available to the public on request written responses to questions and/or comments posted at the public hearing within thirty (30) days of that hearing; and

11. Utilized special efforts in planning mass transportation services to ensure those services can be used by individuals with disabilities, as provided in 49 U.S.C. § 5301.

C. Utilization of § 5303 Funds. Each year, INDOT shall also verify that NIRPC utilized § 5303 funds appropriately. Such verification shall include, without limitation, an examination of NIRPC's receipts and records of equipment purchased with § 5303 federal funds, records of transportation planning activities undertaken by or on behalf of NIRPC and funded in whole or in part with § 5303 federal funds, and payroll records of salaries paid in whole or in part to NIRPC employees with § 5303 federal funds.

D. Certifications. INDOT's required certifications to the Federal Transit Authority ("FTA") regarding NIRPC may not occur prior to the scheduled review of NIRPC in any year.

E. Utilization of PMTF. Each year, INDOT shall also verify that each Provider to whom INDOT provides PMTF utilizes those PMTF appropriately. If a Provider contracts with a third party for the provision of transit services, INDOT shall review that third party on the same annual basis. At each annual Provider review, INDOT must examine the following areas, including but not limited to the documentation created by each Provider in connection with that area:

1. Trip records, including monthly service reports, trip denial lists, missed trip lists and daily vehicle logs;
2. Complaint procedure, including complaint logs;
3. Reservations and scheduling process and systems;
4. Vehicle maintenance, including maintenance logs and lift maintenance records;
5. Vehicle fleets, including fleet composition;

6. Driver training, including training procedures and records;
7. Service marketing and methods of informing the public of proposed changes in service; and
8. Utilization of PMTF, including receipts and records of equipment purchased with such PMTF.

III. DURATION OF CONSENT DECREE, REPORTING AND FUTURE LITIGATION PERIOD

A. Expiration. This Consent Decree shall expire eight (8) years from the effective date of the Consent Decree.

B. Reporting. INDOT shall provide counsel for Plaintiffs and the Class with yearly reports and pertinent raw data demonstrating the process and outcome of INDOT's annual reviews of NIRPC for compliance with the ADA.

C. Maintenance of Records. INDOT shall maintain the data and records required by this Consent Decree until one (1) year after its expiration.

D. Dispute Resolution. In the event of a dispute between the parties relating to the Consent Decree, Plaintiffs' and Class counsel shall notify INDOT in writing of any alleged violation of this decree. INDOT shall respond in writing to Class counsel within twenty (20) business days. If the alleged problems are not resolved, Plaintiffs' and Class counsel shall meet with INDOT within ten (10) business days of receipt of written response from INDOT in order to identify with specificity the outstanding issues in dispute and attempt to resolve the identified issues in a mutually acceptable manner. Only if a resolution of the identified issues is not achieved, may the Plaintiffs and Class Members seek the Court's assistance in resolving the underlying dispute.

E. Contracts and Liquidated Damages.

1. **Conforming Provisions.** All of INDOT's fund conveyance agreements and/or grant agreements with NIRPC shall incorporate the following provisions:

“The Consent Decree entered on _____ by the United States District Court for the Northern District of Indiana, Hammond Div, in the case of Everybody Counts, Inc., et al v. Northwest Indiana Regional Planning Commission, et al, Civil No. 97CV98 is attached hereto and by this reference is incorporated herein.”

2. **Damages and Costs.**

a. **Damages to Named Plaintiffs.**

(i) INDOT shall compensate the seven Named Plaintiffs in the total amount of \$1,000 per Plaintiff in damages.

(ii) INDOT shall compensate Plaintiff Everybody Counts, Inc. in the total amount of \$7,500 in damages.

b. **Attorney Fees and Litigation Costs.**

(i) INDOT shall pay Plaintiffs' attorney fees and litigation costs in the amount of \$9,000.

(ii) INDOT acknowledges and agrees that Plaintiffs' attorneys shall apply to the Court for reasonable additional fees and litigation costs in the event of any breach or violation by INDOT of this Consent Decree. INDOT reserves the right to dispute and contest the necessity and reasonableness of those fees.

F. Court Approval & Class Notice

1. **Submission to Court.** Plaintiffs and INDOT will jointly submit this Consent Decree to the United States District Court for the Northern District of Indiana for approval. INDOT agrees to pay \$2,500 as reimbursement to Jenner & Block LLP to cover

INDOT's pro rata share of the reasonable costs of class notification, unless the Court determines that the proposed means of class notification is inadequate, in which case INDOT shall pay its pro rata share of any additional notification ordered by the Court. If the Court approves the Consent Decree, it shall operate as an Order of the Court. If the Court fails to approve the Consent Decree, it will be null and void, and the litigation will proceed.

2. **Term of Consent Decree.** The United States District Court for the Northern District of Indiana shall have continuing jurisdiction over the terms of this Consent Decree for a period of eight (8) years after its effective date, or as this eight (8) years may be extended by mutual agreement of the parties.

3. **Class Notice of Proposed Settlement.** Defendants shall fund the costs of Class notification regarding this proposed Consent Decree subject to the terms of this Consent Decree. Class counsel shall propose an appropriate Class notice to the Court. Class counsel, pursuant to an Order from the Court, shall notify the Class Members of the proposed Agreement and that a public hearing for final approval of this Consent Decree is scheduled at the time appointed by the Court in the Federal Courthouse, Hammond Division, 5400 Federal Plaza, Hammond, Indiana pursuant to Federal Rule of Civil Procedure 23(e).

ENTERED:

United States District Judge