

DITCHING YOUR DUTY: WHEN MUST PRIVATE ENTITIES COMPLY WITH FEDERAL ANTIDISCRIMINATION LAW?

BY TARA KNAPP*

INTRODUCTION

The federal scheme of antidiscrimination law seeks to eliminate discrimination against individuals with disabilities by providing strong and enforceable standards addressing discrimination, and playing a central role in enforcing those standards.¹ The Fifth Circuit in *Ivy v. Williams*² created a gaping loophole through which state agencies can avoid their obligation to comply with federal mandates to protect against discrimination of qualified individuals with disabilities.³

Donnika Ivy, the original Plaintiff in *Ivy v. Williams*, was a completely deaf twenty-one year old at the time of suit, whose primary means of communication was American Sign Language (ASL).⁴ The Texas Transportation Code required she obtain a certificate indicating she completed a driver education course to obtain a license,⁵ but the schools offering that course would not accommodate her with an ASL interpreter.⁶ The Fifth Circuit ultimately held the required course was not a federal “service, program, or activity,” and so distribution of that service need not comply with Title II of the Americans with Disabilities Act (ADA).⁷

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* J.D. Candidate, Duke University School of Law Class of 2018.

1. See Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101(b) (2012).
2. *Ivy v. Williams*, 781 F.3d 250 (5th Cir. 2015), cert. granted sub nom., *Ivy v. Morath*, 136 S. Ct. 2545 (2016), vacated and remanded sub nom., *Ivy v. Morath*, 137 S. Ct. 414 (2016).
3. *Williams*, 781 F.3d at 258; see also 42 U.S.C. § 12132; Rehabilitation Act, 29 U.S.C. § 794 (2012).
4. Joint Appendix at 17, *Morath*, 136 S. Ct. 2545 (No. 15-486).
5. See 7 Tex. Transp. Code Ann. §§ 521.142(d), 521.1601 (West 2015).
6. Joint Appendix, supra note 4, at 18.
7. *Williams*, 781 F.3d at 255.

The Plaintiffs appealed *Ivy v. Williams* to the Supreme Court of the United States as *Ivy v. Morath*. Under the Fifth Circuit decision, state agencies could license portions of their services to private companies, and consequently avoid contracting liability for the discriminatory carrying-out of those services.⁸ This contravenes their federal antidiscrimination obligations.⁹ Title II of the ADA and the Rehabilitation Act prohibit discrimination against those with disabilities in “services, programs, or activities” of a public entity,¹⁰ and in *Ivy v. Williams*, the Fifth Circuit construed these “services, programs, or activities” in a devastatingly narrow manner. The Fifth Circuit held that the distribution of drivers’ certificates are not a service of the Texas Education Agency (TEA), and thus their distribution need not comply with Title II.¹¹ The circuit court acknowledged the question is close, and the statutes, regulations, and case law provide little guidance in coming to this determination.¹²

The Fifth Circuit’s holding that the TEA is not responsible for ensuring driver education schools do not discriminate—because the schools are not providing a TEA service—was erroneous, because the facts indicate the schools *are* providing a TEA “service.” The facts of *Ivy v. Morath* ground the argument that the “services, programs, or activities” of a public agency must include the undertakings of its direct licensees when the licensees are the sole providers of the service, and the service is absolutely necessary to obtaining a right with “unique and indispensable importance.”¹³ The Fifth Circuit inappropriately divorced procurement of certificates necessary to obtain drivers’ licenses from the TEA-regulated driver education program, thus absolving the TEA from functionally complying with federal law.

The Supreme Court vacated and remanded the Fifth Circuit decision, with instructions to dismiss it as moot¹⁴ because the “five plaintiffs had either completed driver’s education courses or moved out of state.”¹⁵ The lack of a merit-based dismissal indicates the substantive

8. *See id.* at 256 (stating public entities are not accountable for discrimination by their licensees if the practice is not the result of the public entities’ requirements, and here, the practice is not the result of TEA requirements).

9. 42 U.S.C. § 12132; 29 U.S.C. § 794.

10. *See id.*

11. *Williams*, 781 F.3d at 255.

12. *Id.*

13. *Id.* at 259.

14. *Ivy v. Morath*, 137 S. Ct. 414, (2016); SUPREME COURT OF THE UNITED STATES BLOG, <http://www.scotusblog.com/case-files/cases/ivy-v-morath/> (last visited November 1, 2016).

15. Jim Malewitz, *U.S. Supreme Court orders dismissal of deaf Texans’ suit against state*,

issues underlying *Ivy v. Morath* are worthy of consideration. A future case need not address the issue in the context of Texas drivers; instead, Supreme Court language more clearly defining the “services, programs, or activities” of public entities will crucially add to the broader jurisprudence addressing public accommodations through licensing.

This Commentary will progress using the facts underlying *Ivy v. Morath* to illustrate a set of circumstances where private entity activity is fairly attributable to a public entity, and thus must comply with federal antidiscrimination law. Part I presents the facts and procedural posture of *Ivy v. Morath*. Part II outlines the legal background of what programs are subject to federal regulation in the context of the federal prohibition against discrimination based on disability in the ADA and Rehabilitation Act. Part III explains the Fifth Circuit’s majority holding and the dissenting opinion in *Ivy v. Williams*. Part IV examines how the Fifth Circuit construed the ADA in an unnaturally constrictive and prohibitive manner. Part V indicates the necessity of honoring Congress’s intent to prohibit discrimination and the necessity of looking holistically at the relationship between the TEA and driver education schools in Texas to determine which school activities are fairly attributable to the TEA.

To allow a public agency to avoid ADA compliance based upon the label of its relationship with its licensee would directly controvert Congress’s intent to eliminate discrimination. A future case, similar to *Ivy v. Morath*, could more clearly define the type of relationship between a public agency and a private entity that invokes dual obligations to accommodate.¹⁶ A distinction without any practical difference should not undermine the worthy and indispensable goal of eliminating discrimination against individuals with disabilities in receiving government services.

I. FACTUAL HISTORY AND PROCEDURAL POSTURE

In Texas, drivers under twenty-five years old are barred from obtaining drivers’ licenses without driver education certificates.¹⁷ One may only obtain a certificate from a private driver education school

TEXAS TRIBUNE (Nov. 1, 2016), <https://www.texastribune.org/2016/11/01/us-supreme-court-orders-dismissal-deaf-texans-suit/>.

16. Dual obligations to accommodate refer to the obligation for a private entity to comply with both ADA Title II, which covers public entities, and ADA Title III, which covers the obligations for public accommodations, commercial facilities, and certain private entities.

17. 7 Tex. Transp. Code Ann. § 521.1601 (West 2015).

licensed by the TEA.¹⁸ If the private driver education school-issued certificates are a service of the TEA, then the TEA as a public entity is required to assure these certificates are not issued on a discriminatory basis.¹⁹ Many of these private driver education schools effectively refuse to issue certificates to deaf people by failing to provide ASL accommodations, thus preventing young drivers from obtaining drivers' licenses.²⁰

At the time of her original suit, Donnika Ivy was a completely deaf twenty-one year old living in Texas who used ASL as her primary means of communication.²¹ In March 2010, Texas law required those under twenty-five years old who were applying for their first license to take a driver education course and obtain a TEA-issued driver education certificate of completion.²² Thus, in order for Ivy to obtain a driver's license, she had to get a certificate from a TEA-licensed driving school. Ivy sought a driving school that would provide a sign language interpreter, as this was the only means by which she would be able to complete a TEA-approved driver education course.²³ Ivy called numerous driving schools in Texas in May 2010, and again in May 2011 to request an interpreter, and was repeatedly denied her request by the schools.²⁴ Ivy was unable to secure consistent employment or complete her college education because she could not obtain a driver's license—an obstacle brought about by the refusal of the Texas driving schools to accommodate her with an interpreter, and the TEA failing to ensure this accommodation.²⁵

In May 2010, Ivy contacted a deaf resource specialist who informed the TEA of the inability of deaf people to obtain the certificates required to get drivers' licenses.²⁶ The TEA refused to intervene and enforce the ADA and Rehabilitation Act unless the United States Department of Justice (DOJ) determined individual driver education schools violated the ADA.²⁷ The TEA's refusal to acknowledge an

18. 5 Tex. Educ. Code Ann. § 1001.055 (West 2015).

19. See 42 U.S.C. § 12132 (2012) (“[N]o 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 any such entity.”).

20. See *Ivy v. Williams*, 781 F.3d 250, 252 (5th Cir. 2015).

21. Joint Appendix, *supra* note 4, at 17.

22. 7 Tex. Transp. Code Ann. §§ 521.142(d), 521.1601.

23. See *id.* § 521.1601.

24. Joint Appendix, *supra* note 4, at 18.

25. See *id.*

26. *Id.* at 21.

27. *Ivy v. Williams*, 781 F.3d 250, 252 (5th Cir. 2015).

affirmative responsibility to assure driver education school compliance with federal law sparked this suit.

Ivy originally filed suit in August 2011 against both driver education schools and then-TEA Commissioner Robert Scott “for failing to reasonably accommodate her disability in approved driver’s education programs,” in violation of Title II of the ADA, the 1973 Rehabilitation Act, and Title V of the Texas Education Code.²⁸ The complaint was amended to assert claims “on behalf of a class of all similarly-situated persons in order to obtain the full injunctive and declaratory judgment relief to which the individual class members are entitled.”²⁹ The resultant class action was a suit against the next TEA Commissioner, Michael Williams, asking the court to declare that the TEA must “make certain that the hearing disabled have access to mandatory driver education courses.”³⁰ The named Plaintiffs were all deaf people living in Texas between the ages of sixteen and twenty-five who contacted numerous TEA-licensed driver education schools and were denied accommodations for their disabilities.³¹ The lack of accommodations precluded these individuals from taking the driving course mandatory to earn a certificate, and thus they could not obtain drivers’ licenses.³²

Plaintiffs filed suit in federal district court requesting injunctive and declaratory relief requiring the TEA to bring driver education into compliance with the ADA.³³ The TEA filed a motion to dismiss for lack of jurisdiction and for failure to state a claim.³⁴ The district court denied the TEA’s motions to dismiss, certified the case’s order for interlocutory appeal to the Fifth Circuit, and stayed the case.³⁵ While the Fifth Circuit found that the plaintiffs did have standing to sue the TEA, it reversed the district court’s order denying the TEA’s motion to dismiss because it found the plaintiffs failed to state a claim upon which relief could be granted.³⁶ The Fifth Circuit dismissed the case with prejudice,³⁷ and the plaintiffs petitioned the Supreme Court for

28. See 42 U.S.C. § 12132 (2012); see also 29 U.S.C. § 794 (2012); 5 Tex. Educ. Code § 1001.001 *et seq.* (West 2015).

29. Joint Appendix, *supra* note 4, at 33–34.

30. *Id.* at 64.

31. *Williams*, 781 F.3d at 252.

32. *Id.*

33. Joint Appendix, *supra* note 4, at 66.

34. *Id.* at 1.

35. *Id.* at 8.

36. *Williams*, 781 F.3d at 253.

37. *Id.* at 258.

writ of certiorari.³⁸ The Court granted certiorari in June 2016 and replaced the TEA Commissioner with Mike Morath in his official capacity as Texas Commissioner of Education as the Defendant.³⁹ The Court then vacated and remanded the Fifth Circuit decision with instructions to dismiss it as moot because of the technicality that the named plaintiffs had moved out of state or completed a driving course by November 2016.⁴⁰ *Ivy v. Morath*'s ultimate dismissal was based on the lack of plaintiffs, which has left the underlying substantive determination of what circumstances force a private entity to dually accommodate under Title II undefined.

II. LEGAL BACKGROUND

Under Title II of the ADA, no disabled person shall 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 any such entity” because of his or her disability.⁴¹ Similarly, the Rehabilitation Act requires nondiscrimination in federally funded grants and programs by declaring that those with disabilities shall not be excluded from participating in, or denied the benefits of, any program conducted by an executive agency or receiving federal money, based on their disability.⁴² The ADA was statutorily meant to “establish a clear and comprehensive prohibition of discrimination on the basis of disability,”⁴³ and the Rehabilitation Act’s almost identical language reflects the same broad congressional objective.⁴⁴

The meaning of the ADA statute depends on determining which services, programs, and activities federally guarantee non-discrimination on the basis of disability, and thus require reasonable public accommodations to make them accessible. The ADA defines “[p]ublic entity” as “any department, agency, special purpose district, or other instrumentality of a State or States or local government.”⁴⁵ The ADA defines “[q]ualified individual with a disability” as an individual with a disability who, with reasonable modifications to policies, the removal of communication barriers, or the “provision of auxiliary aids

38. *Ivy v. Morath*, 136 S. Ct. 2545 (2016).

39. *Id.*

40. Malewitz, *supra* note 15.

41. 42 U.S.C. § 12132 (2012).

42. 29 U.S.C. § 794(a) (2012).

43. 42 U.S.C. § 12132.

44. 29 U.S.C. § 794(a).

45. 42 U.S.C. § 12131(1).

and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities.”⁴⁶ However, the ADA fails to clearly define the “services, programs, or activities” to which it intends to protect non-discriminatory access. The definition of the services, programs, and activities that are federally required to guarantee non-discriminatory access will determine whether private driving schools in cases like *Ivy v. Morath* are required to conform to Title II standards. If the driver certificates issued solely by driver education schools are found to be part of the TEA’s driver education program—the program of a public entity—then the schools must conform to Title II despite their private status.

A. *Services, Programs, or Activities*

In *Pennsylvania Dept. of Corrections v. Yeskey*,⁴⁷ the Supreme Court interpreted the benefits of the “services, programs, or activities” of a public entity to mean the “services, programs, or activities” that the public entity *provides*.⁴⁸ To determine the meaning of a statute, courts consider its “language, giving the words used their ordinary meaning.”⁴⁹ In plain terms, this means a particular service, program, or activity would not be available if the public entity did not make it so. Merriam-Webster’s Dictionary defines “provide” as “to make (something) available,” supporting an expansive interpretation of when a public entity has “provided” something.⁵⁰ This commonly understood definition does not constrain provision to something provided directly. Thus, indirect provision of a service, program, or activity is firmly within its scope.

There is limited Supreme Court case law defining which services are “provided” by public entities, however, the Second, Third, Sixth, and Ninth Circuits have broadly interpreted the concept to include “anything a public entity does.”⁵¹ The language has been interpreted as

46. *Id.* § 12131(2).

47. 524 U.S. 206 (1998).

48. *See id.* at 210 (citing *Block v. Rutherford*, 468 U.S. 576, 580 (1984)) (referring to “contact visitation program”); *Hudson v. Palmer*, 468 U.S. 517, 552 (1984) (discussing “rehabilitative programs and services”); *Olim v. Wakinekona*, 461 U.S. 238, 246 (1983) (referring to “appropriate correctional programs for all offenders”).

49. *Moskal v. United States*, 498 U.S. 103, 108 (1990).

50. *Provide*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1996).

51. *See Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001); *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998); *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 45 (2d Cir. 1997) (reasoning that the phrase “programs, services, or activities” is “a catch-all phrase that prohibits

“a catch-all phrase,” meant to encompass “virtually everything that a public entity does.”⁵²

The Rehabilitation Act supports this broad construction of the ADA, and Congress has instructed the ADA be interpreted consistently with the Rehabilitation Act.⁵³ Though the ADA leaves “services, programs, or activities” undefined, the Rehabilitation Act defines “program or activity,” as “all the operations of” a public entity.⁵⁴ The plain meaning of operation further strengthens the broad construction of the ADA’s bearing on services and programs by expanding the definition of what an entity *does* to all of its *operations*.⁵⁵ Merriam-Webster’s Dictionary defines “operation” as “performance of a practical work or of something involving the practical application of principles or processes.”⁵⁶ Under this interpretation, the programs or activities of a public entity include its performance of practical work. The added element of practicality allows for categorization of services, programs, and activities that are not *directly* performed by a public entity, but rather are practically services of a public entity, as subject to the ADA.

The federal regulations on nondiscrimination in government services ground the ADA and support this interpretation. Section 35.130(b)(1) says a public entity may not discriminate whether it acts directly or “through contractual, licensing, or other arrangements.”⁵⁷ Section 35.130(b)(1)(6) specifically states a public entity may not “administer a licensing or certification program” or “establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability.”⁵⁸ These regulations explicitly recognize that the ADA applies to a far broader scope of actions than mere direct actions of a public entity. Instead, the ADA prohibition against discrimination applies to public entity direct action, public services contracted or licensed out to independent entities, and even

all discrimination by a public entity, regardless of the context”), *superseded on other grounds*.

52. See *Johnson*, 151 F.3d at 569 (finding that “the phrase ‘services, programs, or activities’ encompasses virtually everything that a public entity does”).

53. See *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 n.3 (9th Cir. 1995) (“The legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA.”).

54. *Barden*, 292 F.3d at 1076 (citing 29 U.S.C. § 794(b)(1)(A) (2012)).

55. See *id.*

56. *Operation*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1996).

57. 28 C.F.R. § 35.130(b)(1) (2012).

58. *Id.*

“other arrangements”⁵⁹ that presumably create relationships between the public and independent entities that have characteristics similar to contractor and licensor relationships.

Section 35.130(b)(1) goes on to say in subsection (v) that a state may not “[a]id or perpetuate discrimination against a qualified individual with a disability by providing *significant assistance* to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity’s program.”⁶⁰ Ultimately, whether a private entity’s action reasonably and practically constitutes a “program, service, or activity” of a public entity turns on the relationship between the two entities. If the public entity significantly assists a non-public entity in providing any service to the beneficiaries of the public entity’s program, the non-public entity service must conform to Title II of the ADA to avoid violating federal law.

The DOJ’s Technical Assistance Manual (the Manual) helps explain “whether a particular entity that is providing a public service” is at least partially subject to Title II of the ADA. It explicitly recognizes that private entities with close relationships to public entities may have some of its activities affected by the Title II prohibition against discrimination.⁶¹ The Manual also states that a public entity is not responsible for discrimination on the part of a private entity if the private entity’s discrimination does not result from a requirement or policy established by the public entity.⁶² One of the Manual’s examples explains that where a public entity engages in a joint venture with a private entity, the public entity must ensure Title II is met, and the private entity must assure Title III is met. Where the standards differ, the joint project must meet the “standard that provides the highest degree of access to individuals with disabilities.”⁶³ The illustration does not focus on the technical relationship between the partners in the joint venture, but rather on the fact that the project is one in which the parties “act jointly” to achieve a particular goal.

Another of the Manual’s examples describes a privately owned restaurant within a state park that is required to conform to Title II

59. *Id.*

60. *Id.* § 35.130(b)(1)(v) (emphasis added).

61. THE AMERICANS WITH DISABILITIES ACT: TITLE II TECHNICAL ASSISTANCE MANUAL § II-1.3000 (1993), <http://www.ada.gov/taman2.html> [hereinafter ADA MANUAL].

62. *Id.*

63. *Id.*

obligations in order to maintain the park's obligations, despite the restaurant not being subject to Title II on its own.⁶⁴ This example illustrates the principle that if a private entity is carrying out activities within the structure of a public entity, it must abide by Title II in order to assure the public entity can meet its Title II obligations. This example also lends support to the idea that activities are subject to Title II if crucial enough that the public entity would provide them directly were they not licensed to an independent entity.

This practical inquiry into whether the public entity would provide the function if the private entity failed to do has been applied at the circuit court level.⁶⁵ The Second Circuit said the focus of the inquiry to determine if the private entity's service is subject to Title II should not be technical or "hair-splitting," but should instead consider whether the function is "a normal function of a governmental entity."⁶⁶ Again, the regulations strengthen this practically-focused interpretation by stating that public entities must operate in a manner such that their programs, "when viewed in [their] entirety," are compliant with Title II.⁶⁷ The ADA's legislative history supports the same broad and practical construction, stating its purpose as to provide a "national mandate to end discrimination," and "bring persons with disabilities into the economic and social mainstream of American life."⁶⁸ Congress explicitly wanted this legislation to "ensure that the Federal government plays a central role in enforcing [ADA] standards on behalf of individuals with disabilities."⁶⁹ Courts have tended to apply this construction as, if a public entity is in an arrangement with an independent agency to provide services to beneficiaries of the public entity's program, the independent agency must provide those services in compliance with the ADA.⁷⁰

64. *Id.* (requiring the public entity to ensure, by contract, that Title II obligations are met).

65. *See* Hason v. Med. Bd., 279 F.3d 1167, 1173 (9th Cir. 2002) (holding that medical licensing is a service, program, or activity for purposes of Title II); *see also* Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 731 (9th Cir. 1999) (holding that zoning is a service, program, or activity for purposes of Title II); Thompson v. Davis, 282 F.3d 780, 786–87 (9th Cir. 2002) (holding that a parole hearing is a service, program, or activity for purposes of Title II).

66. *See* Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 45 (2d Cir. 1997), *superseded on other grounds*.

67. *See* 28 C.F.R. § 35.150(a) (2012).

68. H.R. REP. NO. 101–485(II), at 84 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 367.

69. *Id.*

70. *See* Reeves v. Queen City Transp., 10 F. Supp. 2d 1181, 1187 (D. Colo. 1998) (stating that the arrangement to provide services to public entity beneficiaries was the crucial factor in determining whether Title II applies); *see also* Indep. Hous. Servs. of S.F. v. Fillmore Ctr. Assocs.,

III. HOLDING

The Fifth Circuit considered whether the plaintiffs in *Ivy v. Williams* were “excluded from participation in or . . . denied the benefits of the services, programs, or activities of [the TEA].”⁷¹ The key determination was “whether driver education is a service, program, or activity of the TEA.”⁷² The Fifth Circuit held that it was not, but admittedly made that decision with “little concrete guidance” from statutes, regulations, and case law.⁷³ Its analysis focused on whether the TEA directly provided driver education to its beneficiaries, and it manufactured a distinction between the TEA’s responsibility to license and regulate driving education schools, and the consequent driver education those schools directly provide.⁷⁴

In addressing the Rehabilitation Act’s express requirement that programs and activities include “all of the operations of” a public entity,⁷⁵ the Fifth Circuit cited the same distinction between directly providing driving education and licensing schools to fulfill that precise obligation.⁷⁶ It went on to state that the failure of driving schools to comply with the ADA was not a result of the requirements or policies established by the TEA, but instead a result of the TEA’s *failure* to establish requirements or policies to ensure nondiscriminatory access in driving schools.⁷⁷

The court’s decision was largely based on the absence of a “contractual or agency relationship” between the private driving schools and the TEA.⁷⁸ The Fifth Circuit decided that previous case law emphasized the formal label of “contract” over the practical repercussions the contract provides.⁷⁹ Finally, it acknowledged, but largely discounted, that “a driver education certificate—is necessary for obtaining an important governmental benefit—a driver’s license,”⁸⁰ and only a TEA-licensed driving school can provide that certificate.⁸¹

840 F. Supp. 1328, 1344 (N.D. Cal. 1993).

71. *Ivy v. Williams*, 781 F.3d 250, 255 (5th Cir. 2015) (citing 42 U.S.C. § 12132 (2012)).

72. *Id.*

73. *Id.*

74. *See id.*

75. 29 U.S.C. § 794(b) (2012).

76. *Williams*, 781 F.3d at 255.

77. *Id.* at 256.

78. *Id.* at 257.

79. *Id.* (citing *Castle v. Eurofresh, Inc.*, 731 F.3d 901, 910 (9th Cir. 2013) and *Indep. Hous. Servs. of S.F. v. Fillmore Ctr. Assocs.*, 840 F. Supp. 1328, 1344 (N.D. Cal. 1993)).

80. *Id.* at 258.

81. *See id.*

In dissent, Judge Wiener concluded that the regulations, statutes, and case law surrounding the ADA clearly indicate the phrase “service, program, or activity” applies to the TEA’s licensing of driving education to schools in this case.⁸² He determined that the “TEA does in fact engage in the public ‘program’ of driver education,” and thus is required to ensure nondiscriminatory access to said program through ADA compliance.⁸³

The dissent emphasized that the Manual specifies Title II obligations are triggered when public entities like the TEA have a “*close relationship* to private entities that are covered by Title III.”⁸⁴ Judge Wiener stated that there is no indication that *close relationship* should be limited to a contractual or agency relationship, and it would be improper to narrow DOJ’s language to force that meaning.⁸⁵ Instead, the relationship should be judged on “(1) whether a private party services the beneficiaries of the public entity’s program, and (2) how extensively the public entity is involved in the functions and operations of the private entity.”⁸⁶

The dissent stated that instruction by private driving schools is a single component of a far “broader program of driver education that is continually overseen and regulated in discrete detail by TEA,” which includes both driving education and driving safety.⁸⁷ The TEA is substantially involved with the everyday operations of the driving schools, further supporting that the driving schools are part of a TEA program, so the certificates they offer are a TEA service.⁸⁸ Though this case was remanded with orders to dismiss, defining the circumstances that subject a private entity to federal obligations is still significant.

IV. ANALYSIS

The Fifth Circuit’s decision in *Ivy v. Williams* turned on a prohibitively narrow construction of what the “services, programs, or activities of a public entity” includes. The majority opinion attached

82. *Id.* at 259 (Wiener, J., dissenting).

83. *Id.*

84. *Id.*

85. *Id.* at 259–60.

86. *Id.* at 260.

87. *See id.*

88. *See id.* at 261–63 (stating the TEA is responsible for overseeing “both driver *education* and driving *safety*,” and the instruction performed by the driving schools is “but one component of the broader program of driver education that is continually overseen and regulated in discrete detail by TEA”).

meaning to words in the statute's text without explaining its reasoning, and ultimately undermined Congress's explicit intent for the ADA to prohibit discrimination based on disability in federal benefits. Though the Supreme Court dismissed the case as moot, the underlying issue is poignant. Public entities absolving themselves of their obligation to provide nondiscriminatory benefits by simply licensing portions of their program to private entities is counter to the ADA's purpose, and can be avoided.

A more appropriate interpretation of Congress's statement, that public services include all services *provided* by a public entity, would look at which services are pragmatically *made available* because of the public entity. To outcast driving schools from the "close relationship" requirement that would subject them to federal law, because of the lack of a formal contract, would be an inappropriate application of form over substance. In practice, the driving schools perform a piece of the TEA's overarching program, and thus fit within the lottery case framework that establishes certain private entities must comply with federal obligations.

A. *Defining 'Provides'*

The majority opinion determined that Supreme Court precedent has interpreted the "services, programs, or activities of a public entity" to include all "services, programs, or activities" *provided* by the public entity.⁸⁹ It went on, however, to assert that the TEA did not provide driver education because it did not specifically teach courses or contract with the driving schools.⁹⁰ There is no basis for this limited interpretation of the word "provides." To provide simply means "to supply or make available."⁹¹ For the majority opinion to interpret that broad definition included only *directly* offered or contracted services contradicts Congress's express intention to forbid public entities from discriminating through "contractual, *licensing*, or other arrangements."⁹² It was without a thoughtful foundation that the majority opinion rejected this regulation.

On the other hand, the dissent interpreted "provides" in a more commonsensical and contextual manner by considering Texas's

89. *Id.* at 255 (majority opinion) (citing *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998)).

90. *Id.*

91. *Provide*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1996).

92. *See Williams*, 781 F.3d at 256 (citing 28 C.F.R. § 35.130(b)(1) (2012) (emphasis added)).

overarching policy goal as indicative of the TEA’s responsibilities.⁹³ Chapter 1001 of the Texas Education Code indicates that the TEA supervises a comprehensive driver-training program to bolster Texas’s goal of ensuring safe roads.⁹⁴ When contextualized as a TEA program designed to ensure driver safety, it reasonably follows that requiring training certificates is a portion of that program.⁹⁵ Without Texas’s policy goals, and the means by which Texas chose to achieve them—a TEA system to oversee, regulate, and ensure driver safety—the driver education certificates issued by private driving schools would not be required. In other words, but for the TEA’s system, the driving schools would not have a certificate requirement to fulfill. Thus, the provision of driver education certificates is a service “made available” or “provided” by the TEA.

The majority relied on the same restraining construction to interpret the Rehabilitation Act’s definition of “program or activity” as “all of the operations of” a public entity.⁹⁶ The opinion acknowledged that all operations should broadly include “the whole process of planning for and operating a business or other organized unit,” but for all its talk, it claimed that the TEA’s lack of direct driver education courses and contracts exculpated the public entity.⁹⁷ This reasoning is inconsistent with both the commonsense meaning of “all operations,” as well as the ADA’s policy goals to eliminate discrimination.⁹⁸ If the majority opinion had considered the TEA’s actual role in the services delivered by Texas’s private driving schools, it would have been unable to meaningfully distinguish the issuance of a required driving certificate from other services the TEA provides.

B. Defining ‘Close Relationship’

The TEA’s role in private driving schools is characterized by an “inextricably intertwined” relationship,⁹⁹ which fulfills the *close relationship* requirement the Manual indicates triggers Title II obligations on a private entity.¹⁰⁰ Determining the relationship between

93. *See id.* at 263–64 (Wiener, J., dissenting).

94. *See generally* 5 Tex. Educ. Code § 1001 (West 2015) (establishing state-mandated driver education certificates, driving safety courses, drug and alcohol awareness programs, driver’s license regulations, etc).

95. *See id.*

96. *See* 29 U.S.C. § 794(b) (2012).

97. *See Williams*, 781 F.3d at 255.

98. *See* 42 U.S.C. § 12132 *et seq.* (2012).

99. *Williams*, 781 F.3d at 260 (Wiener, J., dissenting).

100. ADA MANUAL, *supra* note 61.

the TEA and private driving schools is not *close* because there is no formal contract is an unsophisticated application of form over substance.

The pervasive power the TEA has to regulate the manner in which its public service, preparing drivers to safely operate vehicles on Texas roads, is delivered makes its relationship to driving schools dependent and unique.¹⁰¹ The TEA must approve every driving school's curriculum and textbooks and may order a peer review of any school to assure it meets the state's standards. Texas Education Code § 1001.204(9) also requires that the owners and instructors of driver education schools be of "good reputation and character."¹⁰² To become licensed, the driver education schools must post a bond payable to the TEA to ultimately be used to refund students.¹⁰³ Up until 2015, the TEA also had the authority to inspect any school "physically at least once a year as a condition of license renewal."¹⁰⁴ And it closely regulates the substance, personnel, materials, and physicality of the driver education schools and can determine the issuer of the public service of driver education by choosing which to license. Though no formal contract exists, in practice, the TEA provides the programming that prepares young drivers to drive safely, and driver education schools issue a formal recognition of such preparation in the form of a certificate.

C. *Relevance of Lottery Cases*

This conception of Texas's driver education and preparation program directly contradicts the Fifth Circuit's assertion that *Ivy v. Williams* does not fit the logic of two lottery cases, which each found that when a private entity performs a piece of a state entity's program, it must conform to the ADA.¹⁰⁵ No court has addressed a case precisely like *Ivy v. Williams*, in which a state determined a mandatory certificate was necessary to obtain a state benefit, and deliverance of that certificate was delegated by a state agency to a private business.¹⁰⁶ But in the lottery context, a situation in which "a state is extensively

101. See 5 Tex. Educ. Code § 1001.051 (West 2015).

102. *Id.* § 1001.204(9).

103. *Id.* § 1001.207.

104. See *Williams*, 781 F.3d at 262; see also 5 Tex. Educ. Code § 1001.303 (repealed 2015).

105. See *Williams*, 781 F.3d at 256 (majority opinion) (citing *Winborne v. Va. Lottery*, 677 S.E.2d 304, 307–08 (Va. 2009) and *Paxton v. State Dep't of Tax & Revenue*, 451 S.E.2d 779, 784–85 (W. Va. 1994)).

106. Petition for Writ of Certiorari at 11, *Ivy v. Morath*, 136 S. Ct. 2545 (2016) (No. 15-486).

involved in a program with strong parallels to driver education . . . courts have unanimously held that a public agency in charge of a lottery program bears Title II liability.”¹⁰⁷

Before dismissing *Ivy v. Williams* for mootness, the Fifth Circuit decided that this case differed from the lottery cases because (1) the agents selling lottery tickets were carrying out one component of the public lottery commission’s program, and (2) there existed a contract between the agents and the commissions.¹⁰⁸ The court failed, however, to support the first assertion with facts from the record. And it failed to justify why the absence of a contract should be—unprecedentedly and contra-statutorily—dispositive.

The first assertion relied on the assumption that driver education certificates issued solely by TEA-licensed driving schools were *not* a benefit of the TEA’s program to assure driver education and preparation.¹⁰⁹ But the Texas Transportation Code *requires* young drivers have the certificate to obtain a license,¹¹⁰ it permits *only* TEA-licensed driving schools to issue the certificates,¹¹¹ and it grants the TEA complete control over whether a particular driving school may issue a certificate—by giving it the authority to choose whether to license a school.¹¹² The TEA’s practical control and total discretion regarding where these certificates are issued proves a dependent relationship between the TEA and the driving schools.¹¹³ The certificates are required by state law, so if the driving schools did not exist, the TEA would presumably determine another venue to issue the certificates. The entity essential to and responsible for getting driving certificates issued is the TEA; the driving schools are merely a means to a state-mandated end.

Although TEA-licensed driving schools are not required to conform to the ADA simply because they are licensed by the TEA,¹¹⁴ even the Fifth Circuit acknowledged that “a public entity cannot discriminate ‘directly or through contractual, licensing, or other

107. *Id.*

108. *Williams*, 781 F.3d at 256–57.

109. *See id.* (stating TEA does not provide any portion of driver education).

110. 7 Tex. Transp. Code § 521.1601 (West 2015).

111. *See* 5 Tex. Educ. Code § 1001.055(a) (West 2015).

112. *Id.* § 1001.201 (stating no school may operate as a driver education or safety school without being licensed).

113. *See generally id.* § 1001.

114. *See* 28 C.F.R. § 35.130(b)(6) (2012) (“The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered [by the ADA].”).

arrangements.”¹¹⁵ The inquiry, then, is ultimately whether the certificates are available because of a decision made by the driving schools, or because the TEA has determined they shall be issued. But, by giving the TEA complete “jurisdiction over and control of driver training schools,” Texas law makes it clear that driver training schools are not autonomous.¹¹⁶ The TEA is the mastermind behind Texas’s driver education, and would find an alternative way to issue certificates if driving schools were not an option. Therefore, the certificates are a benefit of TEA programming. And because the certificates are a benefit of TEA programming, discrimination in their issuance *is* by a public entity “through contractual, licensing, or other arrangements,” and thus must be subject to the ADA.¹¹⁷

The Transportation Code specifically states that the certificate is required for young drivers to obtain a license,¹¹⁸ and the idea that the TEA would not find a way to effectuate certificate issuance to conform with Texas law if driving schools did not issue certificates is absurd. The critical entity providing the certificates is the TEA. Driving schools are merely the selected method for effectuating the TEA’s mandate. This framework supports the theory that driving schools are performing a portion of the TEA’s overarching program to prepare and educate drivers in Texas, and undercuts the Fifth Circuit’s first reason for why this case fundamentally differed from the lottery cases.

If the above argument is accepted, then the Fifth Circuit’s second assertion distinguishing this case from the lottery cases is easily debunked. Section 35.130(b)(1)(v) specifically tells us that “a public entity cannot discriminate against qualified individuals with disabilities ‘in providing any aid, benefit, or service,’ whether the state acts ‘directly or through contractual, licensing, or other arrangements.’”¹¹⁹ Asserting that a formal contract is the only arrangement that subjects private entities to ADA compliance ignores the explicit language of the federal statute. In reality, “[t]he crucial distinction” that renders a public entity liable for discrimination by a private entity is whether the private entity is meant to provide benefits to beneficiaries of the public entity’s program.¹²⁰ Here, the beneficiaries of the TEA’s driver education and

115. See *Ivy v. Williams*, 781 F.3d 250, 258 (5th Cir. 2015) (quoting 28 C.F.R. § 35.130(b)(1) (2012)).

116. See 5 Tex. Educ. Code § 1001.051.

117. See 28 C.F.R. § 35.130(b)(1)(v).

118. 7 Tex. Transp. Code § 521.1601 (West 2015).

119. *Williams*, 781 F.3d at 255 (quoting § 35.130(b)(1)).

120. See *Indep. Hous. Servs. of S.F. v. Fillmore Ctr. Assocs.*, 840 F. Supp. 1328, 1344 (N.D.

safety program are Texas drivers who experience decreased danger while driving because of section 1001, and the benefit is the driver certificate that enables young drivers to participate in the program of safer drivers that the TEA has created. Driving schools are directly providing the benefit of participation in a safer, TEA-regulated, driver community, and that benefit exists because of the TEA's program.

In order to minimize the salience of section 35.130's explicit instruction that public entities may not discriminate by delegating its functions to a private entity, the Fifth Circuit misapplied DOJ's interpretative guidance. The DOJ Technical Manual states that private entities licensed by public entities are accountable for discrimination under Title II if the private entities' practices are the "result of requirements or policies established by the [public entity]."¹²¹ The Fifth Circuit claimed that in this case, "failure of the driver education schools to comply with the ADA or Rehabilitation Act" was not the result of TEA requirements or policies, but rather a result of the TEA's failure to establish requirements and policies to protect against the driving school discrimination.¹²² This argument assumed that the driver education schools are not subject to Title II, and that they are only prohibited from discriminating if the TEA prohibits them. Based on the schools' issuance of TEA benefits (i.e. the certificates), however, the schools are directly responsible for assuring nondiscriminatory access to the benefits. TEA policy need not independently require that its licensees act non-discriminatorily because federal law already makes it explicit that TEA benefits cannot be distributed in a discriminatory way, regardless of whether the entity distributing the benefits is public, or private.¹²³

DOJ's guidance applies to the TEA requirement that driving schools issue certificates. The driver education schools' issuance of certificates to young drivers is a *direct* result of the TEA's requirement that all young drivers present a certificate from a licensed driving school in order to obtain a license. Thus, the private entity's practice of distributing benefits of a public entity is unquestionably the "result" of a policy established by the public entity—the policy demanding young drivers get a certificate before they may obtain a license.

Cal. 1993).

121. ADA MANUAL, *supra* note 61.

122. *Williams*, 781 F.3d at 256.

123. *See* § 35.130(b)(1)(v).

CONCLUSION

By permitting Texas driver education schools to deny certificates to all young deaf people by failing to provide ASL accommodations, the Fifth Circuit undermined the explicit federal goal of prohibiting discrimination based on disability laid out in the ADA. Though the Supreme Court dismissed the case as moot, the underlying issue remains relevant. Public entities may not absolve themselves of their obligation to provide benefits without discrimination by simply licensing portions of their program to private entities.

Here, the TEA comprehensively provides for the education and safety of drivers in Texas. The public agency has control over the substance, personnel, materials, and physicality of driver education schools. Though driver education schools technically issue the certificates necessary to obtain drivers licenses, the schools issue these certificates *because* the TEA determined that the certificates must be issued as part of its comprehensive program to make Texas roads safer. The Fifth Circuit's original determination that the driver education schools were not subject to Title II of the ADA manufactured nonexistent independence for the schools. But in reality, the schools carry out a critical portion of the TEA's program. As such, they must do so nondiscriminatorily.

The issue of determining what private entity activities are subject to federal anti-discrimination law will inevitably make its way back up to the Supreme Court. When it does, the Court must look holistically at the relationship between the public and private entity to determine the true source of the benefit. If the responsible party is the public agency, benefits must be distributed according to federal law.