No. 18-1371

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MYCAL ASHBY,

Plaintiff-Appellant

v.

WARRICK COUNTY SCHOOL CORPORATION,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
(Hon. Richard L. Young, No. 3:16-cv-190)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLEE AND URGING AFFIRMANCE

JOHN M. GORE
Acting Assistant Attorney General

GREGORY B. FRIEL
Deputy Assistant Attorney General

THOMAS E. CHANDLER
Attorney
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 307-3192

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

REGULATIONS:

MISCELLANEOUS: **PAGE**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-1371

MYCAL ASHBY,

Plaintiff-Appellant

v.

WARRICK COUNTY SCHOOL CORPORATION,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
(Hon. Richard L. Young, No. 3:16-cv-190)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLEE AND URGING AFFIRMANCE

STATEMENT OF THE ISSUES

This Court has invited the United States to file a brief as amicus curiae addressing "whether the Christmas program at issue here is a 'service, program, or activity' of the Warrick County School Corporation" within the meaning of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.* and Section 504 of the Rehabilitation Act, 29 U.S.C. 794, as well as "any other issue" the Department of Justice (Department) deems appropriate. Order of June 7, 2018 (App. Doc. 21). The United States accepts the Court's invitation and addresses the following questions:

1. Whether the Christmas concerts held at the private museum at which a public elementary school choir performed were "services, programs, or activities" of the public school within the meaning of Title II of the ADA (Title II), 42 U.S.C. 12132, and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794(a).

2. Whether, even assuming the concerts were the school's services, programs, or activities under Title II and Section 504, the School District violated these statutes and can be held liable for compensatory damages.

STATEMENT OF THE CASE

1. Statutory And Regulatory Background

The ADA forbids disability-based discrimination in three main areas: Title I governs employment, 42 U.S.C. 12111 *et seq.*; Title II governs public entities, including agencies of state and local governments, 42 U.S.C. 12131 *et seq.*; and Title III governs public accommodations, such as hotels, restaurants, and museums, 42 U.S.C. 12181 *et seq.*

Title II 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 any such entity." 42 U.S.C. 12132. Congress modeled Title II on Section 504, which prohibits disability discrimination in "any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). Because the substantive provisions of Title II and Section 504 are "materially identical," courts tend to

"construe and apply them in a consistent manner." *A.H.* v. *Illinois High Sch. Ass'n*, 881 F.3d 587, 592 (7th Cir. 2018) (internal quotation marks and citations omitted).

Title III is applicable to places of public accommodation, such as the Warrick County Museum. It provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. 12182(a). The statute and regulations provide architectural standards with which new construction or alterations must comply. See 42 U.S.C. 12183; 28 C.F.R. 36.401–36.406. For places of public accommodation already in existence when the ADA was enacted, Title III requires the removal of architectural barriers "where such removal is readily achievable," 42 U.S.C. 12182(b)(2)(A)(iv), which the regulations define as "easily accomplishable and able to be carried out without much difficulty or expense," 28 C.F.R. 36.304(a).

The ADA directs the Department both to issue implementing regulations, 42 U.S.C. 12134, 12186(b), and to provide technical assistance to help individuals and entities understand their rights and obligations under the ADA, 42 U.S.C. 12206(c). See generally *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998). Under that authority, the Department has promulgated regulations and published Technical Assistance Manuals for both Title II and Title III. See 28 C.F.R. Pt. 35 (Title II regulation); 28 C.F.R. Pt. 36 (Title III regulation); U.S. Dep't of Justice, *ADA Title II Technical Assistance Manual* (Title II TA Manual), https://www.ada.gov/taman2.html; U.S.

Dep't of Justice, *ADA Title III Technical Assistance Manual* (Title III TA Manual), https://www.ada.gov/taman3.html.

2. Factual Background

a. The plaintiff, Mycal Ashby, is a woman with a mobility disability. Doc. 51, at 2.[1] She requires a wheelchair to move and cannot climb stairs. Doc. 51, at 2. Ms. Ashby's son attended Loge Elementary School, a public school operated by defendant Warrick County School Corporation (the School District), from first through fifth grades. Doc. 51, at 3. School staff knew Ms. Ashby and was aware that she used a motorized wheelchair. Doc. 37, at 2-3; Doc. 51, at 3.

In 2014, Ms. Ashby's son joined the Loge Elementary School choir (the school choir), an after-school activity available to fourth and fifth graders at the school. Doc. 51, at 3. The school choir rehearsed on school grounds once a week after school throughout the school year and was directed by the school's music teacher. Doc. 51, at 3; Doc. 36-1, at 2. It held a number of performances open to parents throughout the year. Doc. 51, at 3. In 2014, Ms. Ashby attended the school choir's Veterans Day concert held at Loge Elementary School and the choir's December holiday performance at a local nursing home, both of which were accessible to wheelchair users. Doc. 51, at 3, 6.

In September 2014, the school choir was invited to perform at a Christmas concert at the Warrick County Museum, a small private museum housed in an

---

[1] Citations to "Doc. __, at __" refer to documents in the district court record, as numbered on the docket sheet, and page numbers within those documents.

early-20th century building. Doc. 51, at 4-5. The school choir had performed at Christmas concerts at the museum in previous years, as had choirs from other schools within the School District. See Doc. 36-5, at 40-53. The museum opened these concerts to the public as a way to attract visitors and solicit donations. Doc. 41-2, at 2. The museum did not share any funds raised with the school, nor did it charge the school a rental fee to perform at its facility. Doc. 41-2, at 2; Doc. 51, at 4.

As in previous years, the school music teacher accepted the invitation, and she and the museum's representative agreed that the performance would occur on December 16, 2014. Doc. 36-5, at 24, 33; Doc. 51, at 5. The museum advertised the concert to the public in the local paper. Doc. 36-5, at 7; Doc. 41-2, at 2. The school notified parents whose children were in the school choir about the concert by sending a flyer home with their children. Doc. 51, at 5 (citing Doc. 36-1, at 2). The actual flyer is not in the record. The record does not establish whether the school also sent the flyer to anyone other than choir members and their parents. However, the school calendar, which the school sent to all students' parents, listed the concert. Doc. 36-1, at 7; Doc. 51, at 5.

When Ms. Ashby and her family arrived at the museum to attend the concert, they discovered that it was not accessible to persons who use wheelchairs. Doc. 51, at 5. Specifically, there were stairs both to enter the building and to reach the second floor, where the concert was being held, and the museum had neither a ramp nor an elevator. Doc. 36-1, at 21. As a result, Ms. Ashby could not watch her son perform in the Christmas concert; instead, because it was too late to go home, she

spent the entire concert at a local Walmart waiting for her husband and son to pick her up after the concert. Doc. 51, at 5-6. Following the concert, Ms. Ashby and her husband spoke to both the school principal and the music teacher to express their dismay about the school choir's performance being held at a venue that was not accessible. Doc. 51, at 6. The music teacher apologized, and the principal assured Ms. Ashby that it would not happen again. Doc. 51, at 6.

The music teacher had not visited the museum before the students were to perform in December 2014 and thus was unaware, before the night of the concert, that the museum was not wheelchair accessible. Doc. 36-3, at 12. The Loge Elementary School choir had performed at the museum in previous years under the direction of a different music teacher (Doc. 36-5, at 40-43, 49-53), and the record contains no evidence that any person previously raised the museum's lack of accessibility with school officials.

In September 2015, the museum emailed the music teacher to invite the school choir to perform again that December. Doc. 36-5, at 19. In that email, the museum representative stated that the museum was in the process of installing an elevator. Doc. 36-5, at 19. The music teacher and the museum representative agreed that the choir would perform at the museum on December 17, 2015. Doc. 51, at 6. The museum reiterated in October that it was "safe to say the elevator will be available" for the concert. Doc. 51, at 6. Ms. Ashby again received notice that the choir would be performing at the museum (Doc. 36-1, at 4), and the school again advertised the performance on its school calendar (Doc. 36-1, at 8; Doc. 51, at 6).

After learning from the school that the choir would again be performing at the museum, Ms. Ashby's husband contacted both the music teacher and school principal to ask whether the concert would be accessible. Doc. 51, at 6. He was told that it would be, based apparently upon the museum's representations in the fall that it was installing an elevator and that it would be ready. Doc. 51, at 6. Neither school personnel nor Mr. or Ms. Ashby followed up with the museum to confirm that the elevator had in fact been installed. Doc. 36-2, at 11; Doc. 36-3, at 22-24.

When the Ashby family arrived at the museum for the 2015 concert, they learned, as did school personnel, that the elevator was not yet operational. Doc. 51, at 7.[2] Unable to access the second-floor performance, Ms. Ashby once again spent the entire concert at the nearby Walmart. Doc. 51, at 7. Following the concert, Ms. Ashby's husband complained to the music teacher, principal, and school superintendent about the school choir's concert again being inaccessible. Doc. 51, at 7. Although the music teacher apologized, both the principal and superintendent disclaimed any responsibility on the school's part to ensure that the concert at the museum would be accessible, because, in their view, the concert was not a school event. Doc. 51, at 7.

b. Ms. Ashby sued the School District, alleging that it violated both Title II of the ADA and Section 504 of the Rehabilitation Act. Doc. 1. The district court granted summary judgment in favor of the School District, concluding that the Christmas concerts were services, programs, or activities of the museum, not of the

[2] The elevator installation was not completed until September 2016. Doc. 36-5, at 4.

school, and thus that the School District had no obligation under Title II or Section 504 to ensure that the concerts were accessible to parents of performing choir members. Doc. 51, at 12, 14-15. Ms. Ashby appealed, and oral argument before this Court took place on June 1, 2018.

SUMMARY OF ARGUMENT

1. The school choir's *performances* at the Christmas concerts held at the Warrick County Museum were a service, program, or activity of the School District within the meaning of Title II and Section 504. The *concerts themselves*, however, were not. Although Title II's statutory phrase "services, programs, or activities" is broad, in the context here, where a private entity has invited the public entity to perform at the private entity's Christmas concerts held at the private entity's facility, the concerts themselves are not services, programs, or activities "*of [the] public entity*" School District. 42 U.S.C. 12132 (emphasis added).

The undisputed facts establish that the Christmas concerts were not programs "of" the School District. The school did not plan or organize the concerts and did not control them or public access to them. The school also did not contract or otherwise engage in a joint venture with the museum to provide the concerts. Rather, the museum planned and organized the concerts, invited the school to attend, controlled public access to the concerts, reaped all of the financial benefits, and alone provided the opportunity for parental and public attendance. The School District thus had no duty under Title II or Section 504 to ensure that members of

the public with disabilities, including Ms. Ashby, had access to the concerts. Her claims must lie against the museum under Title III of the ADA.

2. Even if the Christmas concerts were services, programs, or activities of the School District, the School District should nevertheless prevail in this matter for two reasons. First, even if the School District had an obligation, in general, to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability," 28 C.F.R. 35.130(b)(7)(i), the sole modification that Ms. Ashby proposed—moving the concert to a different venue—was not required because it would have "fundamentally alter[ed] the nature of the service, program, or activity," *ibid.* Thus, the School District's failure to move the concerts to accommodate Ms. Ashby would not have violated Title II or Section 504. Second, the School District should not be liable for damages because Ms. Ashby cannot establish that any discrimination on the part of the school was intentional, a necessary element of a private action for damages.

ARGUMENT

I

THE CHRISTMAS CONCERTS AT THE WARRICK COUNTY MUSEUM WERE NOT SERVICES, PROGRAMS, OR ACTIVITIES OF THE SCHOOL DISTRICT

A. General Principles

1. Title II of the ADA 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 any such entity." 42 U.S.C. 12132 (emphasis added). An individual is "qualified" if she "meets the essential eligibility requirements for the receipt of services or the participation in programs provided by a public entity." 42 U.S.C. 12131(2). The Department's Title II regulations make clear that the statutory mandate applies to "all services, programs, and activities provided or made available by public entities." 28 C.F.R. 35.102(a). Congress modeled Title II on Section 504 of the Rehabilitation Act, which likewise prohibits disability discrimination in "any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a).[3]

The terms "services, programs, or activities" are broad. As relevant here, Section 504 defines "program or activity" to mean "*all of the operations of* * * * a department, agency, special purpose district, or other instrumentality of a State or a local government[,] * * * any part of which is extended Federal financial assistance." 29 U.S.C. 794(b)(1)(A) (emphasis added). Although Title II does not define the phrase "services, programs, or activities," Congress directed that Title II not be "construed to apply a lesser standard than the standards applied under [Section 504]" and its regulations. 42 U.S.C. 12201(a). Consistent with the Department's interpretation, the Seventh Circuit, like most circuits, has construed Title II to encompass "anything a public entity does." *Oconomowoc Residential*

[3] The School District concedes that it is a federal funding recipient within the meaning of Section 504. See School Dist. Br. 13 n.5.

Programs v. *City of Milwaukee*, 300 F.3d 775, 782 (7th Cir. 2002) (quoting Department's preamble to its Title II regulation in what is now 28 C.F.R. Pt. 35, App. B (Section 35.102 Application), at 687 (2017)); see also *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 210-212 (1998) (recognizing the breadth of Title II's "program, service, or activity" language).[4]

The mandate of Title II and Section 504 is clear: whenever a public entity or federal funding recipient "does * * * anything," *Oconomowoc Residential Programs*, 300 F.3d at 782, it must extend "the benefits of," and cannot "discriminat[e]" in, that thing on the basis of disability (subject to applicable defenses), 42 U.S.C. 12132. At the same time, Title II and Section 504 allow public entities and federal funding recipients to define the scope and parameters of their services, programs, and activities, so long as they do so without discriminating on the basis of disability. *Ibid.*; 29 U.S.C. 794(a). Thus, the question whether a particular event is a "service[], program[], or activit[y]" "of" a public entity, 42 U.S.C. 12132, turns on the parameters of what the entity is "do[ing]," *Oconomowoc Residential Programs*, 300 F.3d at 782, "provid[ing]," 42 U.S.C. 12131(2), or "mak[ing] available," 28 C.F.R. 35.102(a).

---

[4] Accord *Disability Rights N.J., Inc.* v. *Commissioner, N.J. Dep't of Human Servs.*, 796 F.3d 293, 301 (3d Cir. 2015); *Bahl* v. *County of Ramsey*, 695 F.3d 778, 787-788 (8th Cir. 2012); *Seremeth* v. *Board of Comm'rs of Frederick Cty.*, 673 F.3d 333, 338-339 (4th Cir. 2012); *Lee* v. *City of L.A.*, 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, 44-45 (2d Cir. 1997).

2. In the ordinary Title II or Section 504 case, only a single public entity is involved in offering a particular service, program, or activity, to which a person with a disability seeks access, and therefore it is obvious that the service, program, or activity is "of" the public entity. Resolution of this case, therefore, generally turns on other elements of a claim of disability discrimination, *e.g.*, was the plaintiff excluded from the program by reason of her disability.

The question whether a particular service, program, or activity is one "of" a public entity becomes more complicated where, as here, a private entity is also involved.

a. One end of the spectrum is obvious: where the public entity and the private entity engage in a true joint endeavor, *both* entities may be responsible for complying with the ADA (and any federal funding recipient with Section 504) with respect to the entire event. Thus, in joint endeavors, both Title II and Title III of the ADA may be implicated: the public entity is responsible for meeting its legal obligations under Title II, while any private entity that qualifies as a public accommodation is responsible for complying with Title III.

For example, the Department's Title II regulation makes clear that public entities cannot evade their Title II obligations by ceding the provision or administration of public services, programs, or activities to private entities via "contractual, licensing, or other arrangements." 28 C.F.R. 35.130(b)(1). In other words, a public entity that tasks a private entity, by contractual or other arrangement, to carry out a public program remains obligated to ensure that the

program complies with Title II. See *ibid.* Thus, as the preamble to the Department's original 1991 Title II regulation explains, "a State is obligated by title II to ensure that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with title II's requirements," while the "private entity operating the inn would also be subject to the obligations of public accommodations under title III of the Act and the Department's title III regulations." 28 C.F.R. Pt. 35, App. B (Section 35.102 Application), at 687 (2017).

The Department's Title II and Title III Technical Assistance Manuals reinforce the principle that "[w]here public and private entities act jointly, the public entity must ensure that the relevant requirements of title II are met; and the private entity must ensure compliance with title III." Title II TA Manual, § II-1.3000 Relationship to title III, https://www.ada.gov/taman2.html ("In many situations[,] public entities have a close relationship to entities covered by title III, with the result that certain activities may be at least indirectly affected by both titles."); accord Title III TA Manual, § III.1-7000 Relationship to title II, https://www.ada.gov/taman3.html (same). This might occur, for example, when a "city engages in a joint venture with a private corporation to build a new professional sports stadium." Title II TA Manual, § II-1.3000, https://www.ada.gov/taman2.html.

b. At the other end of the spectrum, there are limits to a public entity's obligations under Title II and Section 504 when the public entity does not engage in a joint endeavor with the private entity, but instead participates in an event of the

private entity. In that scenario, the public entity's Title II obligations are coextensive with whatever its program, service, or activity is, 42 U.S.C. 12132; *Oconomowoc Residential Programs*, 300 F.3d at 782, but do not extend to the entire event.

Such a scenario may arise when a school group is invited to participate in an event hosted and controlled by another entity and held off school grounds. For example, imagine that a school's choir was invited, along with 50 other school choirs, to perform at a three-day festival of choirs held at a private venue. While each participating school would be obligated to ensure that its own choir's performance is accessible to its own choir members, see Part B, *infra*, any given school would not be obligated to ensure that the *entire festival—e.g.*, the seating, bathrooms, or performances by some other school choir—is accessible to every member of the audience on every day of the festival. In such a scenario, the school choir and its performance would be programs or activities "of" the school for the students who were given the opportunity to perform, while the festival as a whole would not be. It would be an event of a private entity subject to Title III.

This case falls between the ends of the spectrum: while the school choir supplied the only performance at the Christmas concerts, it did not control the concerts or public access to them and did not engage in a contractual relationship or joint venture with the museum to provide them on the school's behalf. Thus, as explained more fully below, while the school choir was a service, program, or activity of the School District, the Christmas concerts were not. Therefore, the

School District had no obligation under Title II or Section 504 to make them accessible to Ms. Ashby.

B. The School Choir's Performance At The Museum Was A Service, Program, Or Activity Of The School District With Respect To Student Participants

It is undisputed that the school choir was a program, service, or activity "of" the School District. The choir was an extracurricular activity directed by the school's music teacher whose participants were students of the school. The music teacher taught and prepared students in weekly rehearsals held after school on school grounds, and she conducted the students when they performed. Public schools offer many voluntary extracurricular opportunities, including drama clubs; musical groups such as choir, orchestra, and band; athletic activities; and various interest clubs. Courts have recognized these types of extracurricular activities as school "programs" and "activities" subject to Title II and Section 504. See, *e.g.*, *A.H.* v. *Illinois High Sch. Ass'n*, 881 F.3d 587, 592-594 (7th Cir. 2018) (public high school track and field meets are a program or activity covered by Title II and Section 504); *Swenson* v. *Lincoln Cty. Sch. Dist. No. 2*, 260 F. Supp. 2d 1136, 1139-1141, 1146-1147 (D. Wyo. 2003) (recognizing that Title II and Section 504 cover extracurricular activities such as band, theater, and athletics); Title II TA Manual § II-2.8000, https://www.ada.gov/taman2.html#II-2.8000 (listing "school plays, athletic events, and graduation ceremonies" as examples of a school's programs and activities under Title II); 34 C.F.R. 104.37 (stating that Section 504 applies to "non-academic and extracurricular services and activities").

Thus, the School District was obligated to ensure that "anything [the school] does" with the student choir—including offering the opportunities to join, to attend rehearsals, and to perform—complied with Title II and Section 504. *Oconomowoc Residential Programs*, 300 F.3d at 782. Accordingly, the school may not "exclude" any student "from participation in" the choir, "den[y]" any student "the benefits of" the choir, or otherwise "discriminat[e]" against any student on the basis of disability (subject to applicable defenses). 42 U.S.C. 12132. That includes the performances at the Christmas concerts here. The School District recognizes as much: it concedes that it "provided and made available" both the choir and "an opportunity to perform" at the museum. School Dist. Br. 18. It therefore was obligated to make choir performances, including performances at the Christmas concerts, accessible to students with disabilities interested in participating in them (subject to applicable defenses). See 42 U.S.C. 12132.

Moreover, if a public school acting alone plans and holds a student play or concert on school grounds, that play or concert would obviously be a program or activity "of" the public entity. If the school opened that play or concert to parents and other members of the public, the school would have Title II obligations as to those individuals. 28 C.F.R. Pt. 35, App. B (Section 35.102 Application), at 688 (2017) ("Public school systems must comply with the ADA in all of their services, programs, or activities, including those that are open to parents or to the public."). Thus, where a public school opens to parents or the general public its "graduation ceremonies, parent-teacher organization meetings, plays and other events[,] and

adult education classes," it must make those events accessible to attendees with disabilities unless doing so would result "in an undue burden or in a fundamental alteration of the program." *Ibid.* Under this principle, the School District was required to make accessible to Ms. Ashby any of the choir's concerts held on school property, such as the Veteran's Day concert (see Doc. 51, at 3), so long as those concerts were open to parents. See also 28 C.F.R. 35.149–35.151.

C. The Concerts, Including The Opportunity For Audience Members To Attend, Were Provided By The Museum, Not The School District

It does not follow, however, that, by having its school choir perform in the Christmas concerts, the School District was obligated under Title II or Section 504 to ensure the accessibility of the concerts. That obligation (subject to applicable defenses) would arise only if the concerts, and not merely the choir performances, were services, programs, or activities "of" the School District. 42 U.S.C. 12132.

The undisputed facts make clear that the Christmas concerts were not services, programs, or activities "of" the School District. The school did not plan or organize the concerts, did not control them or public access to them, and did not enter into a contractual arrangement or joint venture with the museum to provide them on the school's behalf. Rather, it is undisputed that the museum planned and organized the concerts as a community event for its own benefit; invited school choirs to perform; and advertised the concerts to the public. The museum controlled access to the venue and alone could determine whether the concerts were provided or made available to parents and the public, as opposed to only museum donors, private invitees, or no spectators whatsoever. Moreover, the School District did not

pay rent or share in the proceeds of the concerts; instead, the museum retained all proceeds for itself. Indeed, the whole point of having the Christmas concerts at the museum each year was to attract people to visit the museum and possibly donate to the museum. See p. 5, *supra*. Thus, the concerts were the museum's events, not the school's. The School District, therefore, had no obligation under Title II or Section 504 to make the concerts accessible to Ms. Ashby.

To be sure, the school music teacher worked with a museum official to select the date of the concerts, and the school provided a flyer to parents of students in the choir and placed the concerts on the school calendar provided to the school community. But in light of the facts recounted above, the school's scheduling assistance and notification to parents do not render these concerts services, programs, or activities of the school or joint endeavors between the museum and school. The school's minimal actions do not alter the fact that it was the *museum* that planned, organized, and held the concerts.

In some cases, discerning whether an off-site event is "of" the public entity may pose difficult questions. But here, where the museum planned and organized the events for its own benefit, extended the invitation to the school choir to participate, made its own decision to open the concerts to the public, advertised them to the public, selected the site, and kept all of the proceeds, the concerts as a whole are not a service, program, or activity of the public school. For these reasons, the School District had no responsibility under Title II or Section 504 to ensure that

the concerts at the museum would be accessible to Ms. Ashby. The Court should affirm the judgment.

II

EVEN IF THE CONCERTS WERE SERVICES, PROGRAMS, OR ACTIVITIES OF THE SCHOOL DISTRICT, THE SCHOOL DISTRICT DID NOT VIOLATE TITLE II OF THE ADA OR SECTION 504 AND IS NOT LIABLE FOR DAMAGES

Even if the Court were to assume or conclude that the Christmas concerts were services, programs, or activities of the School District and that Ms. Ashby is a qualified individual with a disability,[5] the Court still should affirm the judgment because the School District did not violate Title II or Section 504 and would not be liable for damages in any event.

1. Ms. Ashby alleges that the School District violated Title II's reasonable modifications requirement. Where a public entity provides a service, program, or activity, the statute requires it to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the [entity] can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7)(i); see also *A.H.* v. *Illinois High Sch.*

---

[5] Title II and Section 504 prohibit disability discrimination against a "qualified individual with a disability." 42 U.S.C. 12132; 29 U.S.C. 794(a). Such an individual must "meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. 12131(2); see *Washington* v. *Indiana High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 849 (7th Cir. 1999) (defining "qualified individual" under Section 504 to be the same as under Title II).

Ass'n, 881 F.3d 587, 594 (7th Cir. 2018) (stating that a modification "is unreasonable if it imposes significant financial or administrative costs, or it fundamentally alters the nature of the program or service"). A fundamental alteration occurs when a "significant change" "alters an essential aspect of the program" and "affects all [participants] alike." *A.H.*, 881 F.3d at 595 (citing *PGA Tour* v. *Martin*, 532 U.S. 661, 682-683 (2001)).

Here, the only modification Ms. Ashby has proposed, either below or on appeal, is moving the concerts to an entirely different, accessible venue, such as the school. See Ashby Br. 27-28; Doc. 37, at 21-22; Doc. 43, at 10-12. We agree with the School District that moving the concerts was not a required modification because it would constitute a fundamental alteration of the school's program or activity. While in some cases the location of a performance may be immaterial, here—as the music teacher explained—the school choir would not have otherwise participated in either year's concert but for the invitation by the museum to perform at its facility. Doc. 36-3, at 29; Doc. 41-1, at 3. This makes obvious sense: the primary purpose of the concerts here was to bring visitors to and raise donations for the museum, a purpose that could not have been fulfilled had the concerts been held elsewhere. Doc. 41-1, at 2-3; Doc. 41-2, at 2. Thus, performing at the museum venue was an essential aspect of these particular concerts that the school would not have been obligated to alter. See *A.H.*, 881 F.3d at 595.

Other possible modifications may have existed that Ms. Ashby could have requested, including livestreaming or videotaping the performance to enable Ms.

Ashby to enjoy it, or working with the museum to try to relocate the concert to a more accessible part of the museum. The record does not reflect that Ms. Ashby asked for other modifications or whether such modifications would have been possible. We take no position on whether there were other modifications that might have been reasonable. On this record, and in light of arguments advanced by Ms. Ashby, this Court should hold that the School District did not violate Title II or Section 504 in any event.

2. Finally, even if the Court concludes or assumes that the School District violated Title II or Section 504, Ms. Ashby cannot establish entitlement to any remedy. Injunctive relief is unavailable because the museum now has an elevator (see n.2, *supra*), and Ms. Ashby's son is now in middle school and no longer in the elementary school choir. Thus, the only possible remedy is compensatory damages. As the parties have agreed, compensatory damages would be available only if Ms. Ashby could show that the School District intentionally discriminated against her. *Reed* v. *Columbia St. Mary's Hosp.*, 782 F.3d 331, 337 (7th Cir. 2015); *Strominger* v. *Brock*, 592 F. App'x 508, 511-512 (7th Cir. 2014).

This Court has not yet decided whether discriminatory animus or deliberate indifference is required to show intentional discrimination under Title II. *Strominger*, 592 F. App'x at 511. Ms. Ashby, however, cannot establish intentional discrimination under either standard. With respect to the 2014 concert, although the school choir had performed at the museum in previous years, Ms. Ashby has not shown that the school was aware both that she was planning to attend the concert

and that there was no elevator in the museum that she could use. As to the 2015 concert, the school was aware both of Ms. Ashby's interest in attending and her need for an elevator, but the museum assured the school twice in the fall of 2015 that it was installing an elevator and that the elevator would be ready in time for the concert. Perhaps it would have been advisable for the school (or Ms. Ashby) to confirm, prior to the concert, that the elevator was operational. But the school's failure to do so is insufficient to show intentional discrimination under any standard. See *Strominger*, 592 F. App'x at 512.

CONCLUSION

This Court should affirm the judgment of the district court.

Respectfully submitted,

JOHN M. GORE
Acting Assistant Attorney General

GREGORY B. FRIEL
Deputy Assistant Attorney General

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 307-3192

CERTIFICATE OF COMPLIANCE

I certify that the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLEE AND URGING AFFIRMANCE:

(1) complies with Circuit Rule 29 because it contains 5690 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Circuit Rule 32(b) and Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word, in 12-point Century Schoolbook font.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

Dated: August 20, 2018

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2018, I filed a true and correct copy of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLEE AND URGING AFFIRMANCE with the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney