

A Case Study on Inclusive Disaster Preparedness Planning in Upstate New York

Introduction

This century our planet has been impacted by disasters of all kinds – terrorism, hurricanes, collapse of aging infrastructure, record breaking snow storms, and more.¹ While the cause and nature of these disasters have been vastly different, the peril that they put people in is often the same. These events have proven that a foreseeable result of disasters is that they will have a disproportionately devastating impact on individuals with disabilities.² The mortality rate for individuals with disabilities has been reported to be 2 to 4 times higher for individuals with disabilities as compared to others.³

In the fall of 2013 the United Nations brought together thousands of representatives from around the world and attempted to raise awareness regarding the need to include people with disabilities in the emergency planning process to minimize the impact of disasters.⁴ This is not a new message, but it is a message that is supported by recent court cases in New York and California. The major cases have all been brought in cities with a sizable population and cities that have recently experienced a significant disaster.

¹ It has been reported that between 2002 and 2011 there were 4130 disasters resulting in 1,117,527 deaths. United Nations Office for Disaster Risk Reduction, *Toward a Post-2015 Framework for Disaster Risk Reduction*, <http://www.unisdr.org/we/inform/publications/25129> (Last visited 1/19/2015). I have not broken out elder individuals as a separate group and a fair amount of research has been done on that particular group. See, Fernandez, Dyard, Lin, Benson and Barbera, *Frail Elderly as Disaster Victims: Emergency Management Strategies*, Prehospital and Disaster Medicine <http://pdm.medicine.wisc.edu> (April-June 2002).

² *Out of the Frying Pan Into The Fire: Heightened Discrimination and Reduced Safeguards When Pandemic Strikes*, Necia B. Hobbes, 72 U. Pitt. L. Rev. 779 (2010).

³ United Nations Office for Disaster Risk Reduction, *Summary of IDDR panel discussion on disaster resilience and disability: ensuring equality and inclusion*, www.unisdr.org/we/inform/publications/35300; *Disaster Risk Reduction and Emergency Response Panel Discussion (13/3/14)*, <http://webtv.un.org/meetings-events/watch/disaster-risk-reduction-and-emergency-responses-panel-discussion/3922335616001> (last visited 1/19/2015)

⁴ See United Nations Office for Disaster Risk Reduction, *International Day for Disaster Reduction 2013 found*, www.unisdr.org/2013/iddr/#.VIQakSvF8io (visited 1/12/2015).

In many areas including New York State, where significant responsibility for disaster planning falls on the counties, it is necessary to focus on both rural and urban areas.⁵ However, the case law thus far has not dealt with broad geographic regions with a mix of both urban and rural settings. There is, therefore, concern that individuals living in rural or suburban settings will be particularly vulnerable in a disaster.

In the spring of 2014 the Civil Rights and Disabilities Law Clinic (the Clinic) at Albany Law School, examined disaster planning in ten counties in upstate New York to evaluate the extent to which these counties were including individuals with disabilities in the disaster planning process, and in those counties where the inclusion of this population was not a part of disaster planning, to advocated for a more inclusive process.

The Clinic became involved in this work when Brad Williams, the Executive Director of the New York State Independent Living Council, Inc. (NYSILC), contacted me in my former role as the director of the Clinic to raise concerns that New York State had not sufficiently included individuals with disabilities in the planning for disasters and that past events have led to tragic results for individuals with disabilities including permanent transitions to segregated institutional living and death.⁶ Mr. Williams reported that it was his perception that the role of individuals in both disaster planning and in the recovery process was not a priority for the state and that few resources had been dedicated to raising awareness on this issue, requiring the inclusion of individuals with disabilities and targeting individuals with disabilities for training. According to Mr.

⁵ “The involvement of local governments and communities in the design and implementation of disaster risk management programs is well accepted good practice”. United Nations Office for Disaster Risk Reduction, *Toward a Post-2015 Framework for Disaster Risk Reduction* http://www.unisdr.org/files/25129_towardsapost2015frameworkfordisaste.pdf (Last visited 1/19/2015).

⁶ www.NYSILC.org.

Williams in 2013 public meetings scheduled by the New York State Office of Emergency Management Human Services Committee to seek input from individuals with disabilities had to be cancel last minute due to issues ranging from physical access, accessible format and communication access for the event itself.

A lack of inclusion of individuals with disabilities in disaster preparedness or disability awareness may well be the result of the tendency of Americans to infantilize individuals with disabilities. Much of society focuses on the dependence of individuals with disabilities and not on their strength. While during an emergency many of us will depend upon assistance of others, and some codependence is a part of a healthy society, we somehow are incapable of looking beyond this codependence for individuals with disabilities.

I challenge the reader to identify anyone who is not to some degree dependent on others. We should view this as a natural part of community living and recognize that each member of the community is likely capable of a meaningful contribution. When someone is identified as a person with a disability, we focus on their functional limitations rather than their strengths, the insights they have developed, or the ways in which they can serve the community interests.

There has been a realization that individuals with disabilities may have particular needs in the event of a disaster, such as:

- (1) Lack of access to early warnings and information provided to other community members due to the inaccessible format of the communication;
- (2) Disruption of needed health services;
- (3) Loss of needed durable medical equipment;

- (4) Breakdown of social support network;
- (5) Increased number of physical barriers caused by the disaster;
- (6) Breakdown of technology utilized to overcome functional differences;
- (7) Intolerance of relief system of need for reasonable accommodations.⁷

Finding the best ways to address these needs at a local level will be much easier by including individuals with disabilities and various functional abilities in the planning process.⁸ Federal Emergency Management Agency (FEMA) and New York Department of Homeland Security has recognized the importance of including individuals with disabilities in the conversation. At a local level, however, society often fails to recognize that individuals with disabilities are likely the best partners in planning how to address these needs.⁹ Instead representatives of social services organizations are asked to help plan the response without consideration of the representatives of individuals with various functional abilities¹⁰. One might be tempted to excuse this behavior by suggesting that it is easier to plan with individuals who are already organized. This overlooks the amazing independent living organizations that exist around the country but are often left out of the discussion.

⁷World Health Organization, *Disaster Risk Management for Health: People with Disabilities and Older People* May 2011, http://www.who.int/hac/events/drm_fact_sheet_disabilities.pdf (Last visited 1/19/2015).

⁸ While for brevities sake I may use the phrase individuals with disabilities, it is important that the reader keep in mind that it is not the status of being a person with a disability that is of utmost importance. It is much more critical that we keep in mind the variety of functional abilities and limitations because these are the issues that will have the greatest impact on an emergency situation. See, Kailes, Enders, *Moving Beyond "Special Needs" A Function-Based Framework for Emergency Management and Planning*, Journal of Disability Policy Studies, Vol 17 No. 4/2007, pp. 230-237.

⁹ *UN Global Survey Explains Why so Many People Living with Disabilities Die in Disaster*, United Nations Office for Disaster Risk Reduction www.unisdr.org/archive/35032 (Last visited 1/12/15).

¹⁰ I am of course not suggesting that the social service agencies should not also be involved in the preparation, mitigation and response.

History teaches us that individuals with disabilities are disproportionately harmed by disasters. In New Orleans during hurricane Katrina thirty-seven individuals drowned in one nursing home and one hundred and fifty nursing home residents died.¹¹ During hurricane Sandy New York City officials advised many nursing homes to ride out the storm, rather than evacuated individuals. The residents were left in flooded buildings, without extra food flashlights and generators needed to ride out the storm. For those who were evacuated medication and medical charts were not available.¹² In the aftermath of the storm a large number of individuals were placed into overcrowded shelters run by managed care organizations who stood to make large profits.¹³ When the twin towers came down on 9/11 a disproportionate number of people who died were individuals with disabilities.¹⁴ While no amount of planning can ensure that there will not be devastating consequences to a disaster, certainly as a society, we can do better.

These events and the litigation that has followed should provide valuable lessons to big cities. There seems to be a greater awareness in these areas that particular attention to the needs of individuals with disabilities is critical. However, Disasters are not

¹¹ See: Adam Nossiter, *Nursing Home Owners Acquitted in Deaths*

http://www.nytimes.com/2007/09/08/us/nationalspecial/08nursing.html?_r=0, NYT (Sept 7, 2007).

¹² Courtney Davenport, *Nursing Home Investigated over Hurricane Sandy preparations* December 18, 2012 American Association for Justice, Professional Negligence Law Reporter,

<http://www.justice.org/cps/rde/xchg/justice/hs.xsl/19891.htm> (accessed 12/12/13); See also Jeanine Ramirez, NY! Exclusive: 125 Nursing Home Residents Died Within Months of Sandy Evacuation

http://www.ny1.com/content/news/sandy_one_year_later/191202/ny1-exclusive--125-nursing-home-residents-died-within-months-of-sandy-evacuation

<http://www.justice.org/cps/rde/xchg/justice/hs.xsl/19891.htm>;

http://www.ny1.com/content/news/sandy_one_year_later/191202/ny1-exclusive--125-nursing-home-residents-died-within-months-of-sandy-evacuation.

¹³Medicaid Shift Fuels Rush for Profitable Clients

http://www.nytimes.com/2014/05/09/nyregion/medicaid-shift-fuels-rush-for-profitable-clients.html?_r=0 (last visited 5/28/2014).

¹⁴ National Council on Disability, *Saving Lives: Including People with Disabilities in Emergency Planning*

(April 15, 2005) <http://www.ncd.gov/publications/2005/04152005#disaster1> (accessed 12/12/13); *The Forgotten Victims of 9/11: People with Disabilities*, <http://reunifygally.wordpress.com/2011/09/11/the-forgotten-victims-of-september-11-people-with-disabilities/> (9/11/2011).

experienced in cities alone. Small towns, suburban areas and rural areas can experience disasters as well. In these regions, lack of planning can also have tragic results as was the case with a deadly fire in a home for individuals with developmental disabilities in upstate New York.¹⁵

It is the hope of the author that this article will help raise awareness and provide some needed insights into the disaster planning process and the critical need to include individuals with disabilities in that planning. This article is broken into four parts. Part one contains a description of the Clinic's project; part two addresses the legal issues. Part three reports on the information learned through the Clinic's project and addresses why counties are facing possible litigation if they do not address the concerns identified and part four provides recommendations for how we might do better going forward.

Part I

The Clinic's Disaster Planning Project

During the Spring 2014 semester the Civil Rights and Disability Law Clinic at Albany Law School on behalf of the NYSILC explored the disaster preparedness planning for ten local counties and the degree to which these counties effectively including people of all ages, disabilities, and functional abilities in the planning and training and anticipated supports in services for their county. The counties that we

¹⁵ Fire Kills Four at State Run Group Home in New York, March 21,2009
<http://www.nytimes.com/2009/03/22/nyregion/22fire.html>

explored include: Albany¹⁶, Fulton¹⁷, Columbia¹⁸, Montgomery¹⁹, Saratoga²⁰, Schoharie²¹, Schenectady²², Ulster²³, Greene²⁴ and Rensselaer²⁵.

The following objectives were established for this project by the NYSILC sub-committee devoted to this topic and the Civil Rights and Disability Law Clinic:

1. To obtain a copy of each county's emergency management plan and review the process used to ensure the accessibility of shelters, public communication, transportation, evacuation, services and supports plans;
2. To seek the appointment of people with disabilities to various county emergency management committees, and
3. To connect people with disabilities, who are involved with county emergency management, to Community Emergency Response Team (CERT) training opportunities, and to serve during emergencies at Disaster Recovery Centers (DRCs).

¹⁶ www.albanycounty.com; A population of 304,204 was reported in the 2010 census and the county covers approximately 530 sq. miles. http://en.wikipedia.org/wiki/Albany_County,_New_York.

¹⁷ www.fultonconuntyny.gov; A population of 55,531 was recorded in the 2010 census and the county covers 533 sq. miles. http://en.wikipedia.org/wiki/Fulton_County,_New_York.

¹⁸ www.columbiacountyny.com; The population of 63,096 was reported in the 2010 census and the county covers approximately 648 square miles. http://en.wikipedia.org/wiki/Columbia_County,_New_York.

¹⁹ www.co.montgomery.ny.us; A population of 50,219 was reported in the 2010 census and the county covers 410 sq. miles. http://en.wikipedia.org/wiki/Montgomery_County,_New_York.

²⁰ www.saratogacountyny.gov. A population of 219,607 was reported in the 2010 census and the county covers 844 sq. miles. http://en.wikipedia.org/wiki/Saratoga_County,_New_York.

²¹ www.schohariecounty.ny.gov; A population of 32,749 was reported in the 2010 census and the county covers 626 sq. miles. http://en.wikipedia.org/wiki/Schoharie_County,_New_York.

²² <http://www.schenectadycounty.com/>; A population of 154,727 was reported in the 2010 census and the county covers 210 sq. miles. http://en.wikipedia.org/wiki/Schenectady_County,_New_York.

²³ www.Ulstercountyny.gov; A population of 182,493 was reported in the 2010 census and the county covers 1,161 sq. miles. http://en.wikipedia.org/wiki/Ulster_County,_New_York.

²⁴ www.greenegovernment.com; A population of 49,221 was reported in the 2010 census and the county covers 658 sq. miles. http://en.wikipedia.org/wiki/Greene_County,_New_York.

²⁵ www.rensco.com; A population of 159,429 was reported in the 2010 census and the county covers 665 sq. miles. http://en.wikipedia.org/wiki/Rensselaer_County,_New_York.

In each of the ten counties we set about to access the county's emergency preparedness plans. While in some counties this was as simple as looking on the counties web site or calling the county emergency manager and asking for a copy of the plan, other counties were quite protective of their plan. In Saratoga, Rensselaer and Fulton counties students were unable to access the plans without a FOIL request. Saratoga and Fulton were very prompt in providing us with the plan once they received our request. However, Rensselaer County denied our FOIL request and ignored the Clinic's appeal of that denial, and therefore, we were dependent on information obtained through interviews.

While a review of the county's plan is an important first step, the typical county plan contains little detail about the accessibility of shelters, public communication, transportation, human services and support plans. David Whalen, Project Director at Niagara University's Disability Awareness Training, and Brad Williams, Executive Director of the New York State Independent Living Council, provided the students in the Clinic with a check sheet on the specific issues that the NYSILC was interested in which highlighted elements such as:

- ✓ Physical Accessibility of Shelters & Accessibility Plan (surveys completed by ILC)
- ✓ Accessibility of Communication
- ✓ Accessibility of Evacuation and Transportation
- ✓ Representation on committees of ILC, organizations serving individuals with disabilities, &/or individuals with disabilities.
- ✓ Disability awareness training for first responders, and
- ✓ Involvement of individuals with disabilities as volunteers and first responders.

To get the answers that were not available in the counties' emergency preparedness plans the students²⁶, Michael Gadomski, a Clinic Fellow, and I interviewed the county emergency managers. After we had reviewed the plans and reached out to the managers we met with the NYSILC to review our preliminary results. Since we had reason to believe from this conversation that there might be some discrepancies between the information we had gathered and the insights of the representatives of the local independent living centers, the NYSILC sent a survey on the topic to all of the local independent living centers to confirm our information. All but one of the centers responded to the survey.

Part III

The Legal Context

Before turning our attention to what the Clinic learned through the examination of the ten counties, it is useful to have an understanding of the legal context. Understanding

²⁶ Albany Law Students who participated in the project included: Michael Fiske ('15), Patrica Monroe ('15), Peter Stroe ('15), Lucya Pak (15'), Courtney Heinel ('15), Ben Botelho ('14). Diana Aulicino ('14), Alison Zaloba ('15), Kyra Thornton ('15), and Shaniqua Jackson ('15).

the laws governing disaster planning requires consideration of national security, municipal planning, civil rights, and public health laws.²⁷ There are multiple interests, legal systems and a variety of complex problems. At the local, state and federal level direction for disaster planning is dispersed among a number of agencies. State and federal law requires that each government entity engage in disaster preparedness planning. In the event of a disaster the local governments are considered the first responders and the state is charged with the responsibility to provide appropriate and necessary supportive services. The Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and Post-Katrina Emergency Management Reform Act of 2006 mandate the integration and inclusion of people with disabilities and others with access and functional needs into all emergency management efforts.²⁸

a. FEMA, Community Planning and Our Right to Know

The Federal Emergency Management Agency (FEMA) has primary responsibility for coordination, preparation and relief. In addition to FEMA seventeen other federal agencies are involved in the preparation, mitigation and response to emergencies.²⁹

However, FEMA, as the lead agency, has responsibility for:

²⁷ See, e.g., Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties In An Age of Terrorism* 53-55 (2006); Philip Bobbitt, *Terror And Consent: The Wars for the Twenty-First Century* (2008); Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 61 (2007).

²⁸ Useful resources on this topic include: the National Organization on Disability's website http://nod.org/disability_resources/emergency_preparedness_for_persons_with_disabilities/ (Last visited 1/19/2015); United States Department of Justice's *ADA Best Practices Tool Kit for State and Local Governments*, Chapter 7 available at: <http://www.ada.gov/pcatoolkit/toolkitmain.htm> (Last visited 1/19/2015).

²⁹ For a listing of seventeen federal agencies and over seventy programs see: <http://www.disasterassistance.gov/disaster-assistance/assistance-by-federal-agency> (Last visited 1/19/2015).

- Leading the nation’s comprehensive emergency Management efforts (including protection) for all hazards, including catastrophic incidents;
- Partnering with non-federal entities to build a national emergency management system;
- Developing federal response capabilities;
- Integrating FEMA’s emergency management responsibilities;
- Building robust regional offices to address regional priorities;
- Building non-federal emergency management capabilities, including those involving communications; and
- Developing and coordinating the implementation of a risk-based all hazards preparedness strategy that addresses the unique needs of certain incidents.³⁰

In keeping with these responsibilities, FEMA issues guidance documents that are intended to share best practices with state and municipal emergency planners. One such guidance which is particularly helpful in this area is *Guidance on Planning for Integration of Functional Needs Support Services in General Population Shelters*.³¹ For organizations seeking grants from the Department of Homeland Security³², the agency reinforces the integration mandate: “FEMA expects that integration occurs at all levels from planning,

³⁰ P.L. 109-295, §611, See: FEMA, *Federal Emergency Management Policy Changes After Hurricane Katrina: A summary of Statutory Provisions (Government and Finance Division)*, <http://www.training.fema.gov/emiweb/edu/docs/Federal%20EM%20Policy%20Changes%20After%20Katrina.pdf> (Last visited 1/19/2015).

³¹ See FEMA, *Guidance on Planning for Integration of Functional Needs Support Services in General Population Shelters*, 2010, http://www.fema.gov/pdf/about/odc/fnss_guidance.pdf (Last visited 1/19/2015).

³² FEMA is a sub-agency of the Department of Homeland Security.

to purchasing of equipment and supplies and exercises/drills.”³³ Applicants are encouraged “to address how [their] Investments will increase the involvement of disability inclusion experts as partners across all aspects of emergency management.”³⁴

Apart from the federal agencies responsibilities, each State and tribe in the United States must establish a state or territory emergency response commission (SERCs/TERCs).³⁵ These commissions in turn establish local emergency planning committees (LEPCS) which are primarily responsible for the planning, mitigating and responding to emergency situations involving hazardous materials. Any facility that maintains any “extremely hazardous substance” must notify the relevant SERC and LEPC.³⁶ If there is a release of the substance the facility must notify the SERC and LEPC.³⁷ For facilities storing chemicals which are subject to OSHA restrictions must provide a list of the chemical inventory to local fire departments as well as SERC and LEPC.³⁸

Under the Emergency Planning and Community Right-to-Know Act³⁹ (EPCRA), Local Emergency Planning Committees (LEPCs) must develop an emergency response plan, review the plan at least annually, and provide information about chemicals in the

³³ U.S. Department of Homeland Security, *Fiscal Year 2013 Homeland Security Grant Program Supplemental Resource: People with Disabilities in Disaster Guidance*, http://www.fema.gov/media-library-data/20130726-1916-25045-7338/fy13_hsgp_disabilities_guidance_final.pdf.

³⁴ *Id.*

³⁵ 42 USC §11001

³⁶ Emergency Planning and Community Right to Know Act (EPCRA) 42 USC §§11001; See also 40 CFR Part 355, Appendices A & B; See also, Weeks, *The Bumpy Road to Community Preparedness, The Emergency Planning and Community Right to Know Act*, 4 *Envtl. Law* 827 (1998); Tang, *The Emergency Planning and Community Right-To-Know Act and National Security Restricting Public Access to Location Information of Hazardous Chemicals*, 8 *Envtl. Law* 369 (2002).

³⁷ 42 USC §11004.

³⁸ 42 USC §§11011-11012.

³⁹ 42 USC §11003; 40 CFR §355.

community to the public.⁴⁰ Plans are developed by LEPCs with stakeholder participation. There is one LEPC for each of the more than 3,000 designated local emergency planning districts.⁴¹ The LEPC membership must include (at a minimum):

- Elected state and local officials
- Police, fire, civil defense, and public health professionals
- Environment, transportation, and hospital officials
- Facility representatives, and
- Representatives from community groups and the media.⁴²

b. New York State's Scheme for Emergency Management

At the state level, in New York, planning is overseen by the New York State Division of Homeland Security and Emergency Services.⁴³ This agency is popularly referred to as the Office of Emergency Management (OEM).⁴⁴ The preparedness work of various state agencies is coordinated by New York State Disaster Preparedness Commission (DPC).⁴⁵ DPC is comprised of the commissioners, directors and chairpersons of 28 State agencies, the American Red Cross and two representatives associated with New York State Council for Independent Living. DPC is responsible for: the preparation of State disaster plans; the direction of State disaster operations and coordinating those with local government operations; and the coordination of federal, State and private recovery efforts.⁴⁶

⁴⁰ 42 USC §11013; Gray, EPCRA: *Emergency Planning and Community Right to Know Act*, American Bar Association (2002).

⁴¹ 42 USC §11001

⁴² *Id.*

⁴³ N.Y.S. Executive Law Article 2-B § 20.

⁴⁴ Office of Emergency Management's web presence: <http://www.dhSES.ny.gov/oem/>

⁴⁵ DPC's web presence: <http://www.dhSES.ny.gov/oem/disaster-prep/>

⁴⁶ NYS Executive Law Article 2-B §21.

The local governments have a significant role as the first responders in the event of a disaster.⁴⁷ Article 2B of the N.Y. Executive Law authorizes each county, city, town and village to develop disaster preparedness plans to minimize the effect of disasters by: (i) identifying appropriate local measures to prevent disasters, (ii) developing mechanisms to coordinate the use of local resources and manpower for service during and after disasters and the delivery of services to aid citizens and reduce human suffering resulting from a disaster, and (iii) providing for recovery and redevelopment after disasters.⁴⁸

The planning process must involve coordination of resources, manpower and services and it must include local government officials, regional and local planning agencies, police agencies, fire departments and fire companies, local civil defense agencies, commercial and volunteer ambulance services, health and social services officials, community action agencies, the chief administrator of the courts, organizations for the elderly and the handicapped, other interested groups and the general public.⁴⁹

The plans must include: (1) identification of potential disasters and disaster sites; (2) recommended disaster prevention projects, policies, priorities and programs, with suggested implementation schedules, which outline federal, state and local roles; (3) suggested revisions and additions to building and safety codes and zoning and other land use programs; (4) other reasonable measures to prevent disasters or mitigate their impact.⁵⁰

⁴⁷ N.Y.S. Executive Law Article 2B §20.1.

⁴⁸ N.Y.S. Executive Law Article 2B §§23.1 & 23.2.

⁴⁹ N.Y.S. Executive Law Article 2B §23.5.

⁵⁰ N.Y.S. Executive Law Article 2B§22.3.a.

Plans which involve the delivery of services related to disasters and which require the coordination of the use of resources and manpower for service during and after disasters must include:

- Centralized coordination of resources, manpower, services, and directions for requests which utilizing existing organizations;
- A system for warning populations who are or may be endangered;
- A communication plan including how information will be provided to the public;
- A plan for coordinating evacuation procedures and establishing temporary housing;
- A system for training local government personnel and volunteers in disaster response operations;
- A system of care for the injured and needy;
- Coordination of programs available to assist victims of disasters, which should include those focused on the needs of the poor, the elderly, individuals with disabilities, and other groups which may be especially affected, and
- Coordination of programs to assist individuals with household pets and service animals following a disaster.⁵¹

c. The American's with Disabilities Act and Other Federal Statutes

All of the actions of the state and local governments must be done in a manner which does not discriminate against individuals with disabilities. Title II of the American's with Disabilities Act (ADA) prohibits a public entity, including a state or

⁵¹ N.Y.S. Executive Law Article 2B §23.7.

local government, from excluding an individual with a disability from participating in or benefiting from “the services, programs, or activities of a public entity”.⁵²

It would be discrimination under title II and the implementing regulations for the state or local government to provide a service, program or activity that serves or benefits an individual with a disability in a manner that is not equal to the service or benefit provided to individuals.⁵³ Generally the services provided to individuals with disabilities must be the same as those provided to others. Further, individuals with disabilities and others should be served together unless that would defeat the effectiveness of the service.⁵⁴

The Department of Justice, the agency that implements the ADA, has made it clear “that promoting integration of individuals with disabilities into the mainstream of society is an important objective of the ADA and agrees that, in most instances, separate programs for individuals will not be permitted.”⁵⁵ Title II’s integration mandate requires that the “services, programs, or activities of a public entity” be provided “in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”⁵⁶ Such a setting is one that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible”.⁵⁷ The goal must be to provide the individual with the disability with services, programs and activities that are in all ways equal to those provided to others.⁵⁸ While it may be allowable in special circumstances

⁵² 42 U.S.C.12132; 28 C.F.R. § 35.130.

⁵³ 28 C.F.R. §§ 35.130b(1)(ii),(iii), (vii).

⁵⁴ 28 C.F.R. §35.130b(1)(iv).

⁵⁵ 28 C.F.R. pt 35. A, at 549.

⁵⁶ 28 C.F.R. § 35.130(d).

⁵⁷ 28 C.F.R. pt. 35, app. B at 673.

⁵⁸ 28 C.F.R. §35.130.

to provide the services in a separate location, to maximize the benefit to the disabled individual, if the individual with the disability chooses to participate in the regular location, they cannot be prevented from doing so.⁵⁹

However, Title II *does not* require that services that *are not* provided to others must be provided to individuals with disabilities.⁶⁰ Further, while there are clear requirements for making new construction accessible, modifications to an existing structure or program that would entail a fundamental alteration to the program or undue financial or administrative burdens would not be required.⁶¹ However, in determining if a program would involve an undue burdens, it is necessary that one look at the overall resources of the public entity, and not just the cost of the particular program or service.⁶² Counties should also keep in mind that it is discriminatory for the public entity to fund a program or services that is provided by another entity in a discriminatory manner.⁶³

⁵⁹ 28 C.F.R. §35.130(b)(1)(ii) (2007); See *When are Public Entities Required to Provide Services, Programs or Activities to Disabled Individuals Under the Americans with Disabilities Act*, 42 USCA §12132, 160 A.L.R. Fed. 637 (Originally published in 2000 and updated bi-weekly).

⁶⁰ Generally to be successful on a Title II claim the plaintiff must show that: (1) they have a disability that qualifies under the ADA; (2) the the defendant is a public entity, and (3) the plaintiff was discriminated against through a denial of the opportunity to participate in or benefit from the defendant's services, programs or activities. The Second Circuit in *Noel v. New York City Taxi and Limousine Commission* refused to hold New York's commission responsible for discrimination by an inaccessible cab when the commission did not provide taxi services but rather regulated the taxi industry. 687 F.3d 63 (2nd Cir. 2012)

⁶¹ 28 C.F.R. §35.130(b)(7); §35.150(a)(3)(2007); 28 C.F.R. §35.164; See *Henrietta D. v. Bloomberg*, 331 F.3d. 261, 286 (2nd Cir. 2003) cert Denied; *Kerr v. Heather Gardens Ass'n*, Civ. A. No. 09-cv-00409-ms-msw 2010 WL 3791484; 28 C.F.R. Pt 35, AppA, at 634(2012).

⁶² See: United States Justice Department, Civil Rights Division, *The American's with Disabilities Act Title II Technical Assistance Manual Covering State and Local Government Programs and Services* II-5.1000: "Are there any limitations on the program accessibility requirements? Yes. A public entity does not have to take any action that it can demonstrate would result in a fundamental alteration in the nature of the program or activity or undue financial or administrative burdens. This determination can only be made by the head of the public entity or his or her designee and must be accompanied by a written statement of the reasons for reaching the conclusion. The determination that undue burden would result must be based on all resources available for use in the program." <http://www.ada.gov/taman2.html> (last visited 1/19/2015).

⁶³ 28 C.F.R. §35.130(b)(1)(v).

The ADA does not just address physical accessibility. It also addresses programmatic issues such as communication. The regulations implementing Title II require that communication with individuals with disabilities should be “as effective as communication with others”.⁶⁴ The public entity is required to utilize auxiliary aides and services as needed to achieve the necessary communication.⁶⁵ The possible auxiliary aids and services could include utilizing notes, interpreters, video remote interpretation, and other means of achieving effective communication. In determining which of the possible aids and services should be utilized the entity should start with asking the individuals what they would prefer.⁶⁶ However, the entity may use an alternative service as long as they are able to achieve effective communication.⁶⁷ In some instances cities have been found responsible for maintaining modern equipment when necessary for effective communication.⁶⁸

In choosing a communication method the entity should consider the communication skills and needs of the individual, the nature and complexity of the communication and the available resources.⁶⁹ It is important that the entity keep in mind that for individuals who are Deaf and communicate using American Sign Language, the differences between that language and English are significant and therefore written notes may not allow for effective communication in many situations.⁷⁰ While the use of a live

⁶⁴ 28 C.F.R. §35.160; See *Tyler v. City of Manhattan*, 857 F.Supp 800 (Kansas District Ct. 1994).

⁶⁵ 28 C.F.R. §160(b)(1).

⁶⁶ 28 C.F.R. §160(b)(2).

⁶⁷ *Civic Ass’n of Deaf of New York City v. Giuliani*, 915 F.Supp.622(1996).

⁶⁸ *Ferguson v. City of Phoenix*, 931 F.supp 688 (D. Ariz 1996).
affirmed 157 F.3d 668 as amended certiorari denied 119 S.Ct 204.

⁶⁹ Registry of Interpreters for the Deaf Inc. , *Video Remote Interpreting Standard Practice Paper*, 2010, http://rid.org/UserFiles/File/pdfs/Standard_Practice_Papers/VRI_SPP.pdf (last visited 1/18/2015).

⁷⁰ Michael Strong & Philip Prinz, *A Study of the Relationship Between Sign Language and English Literacy*, Journal of Deaf Students 2:1 Winter 1997 Oxford University Press.

interpreter may not always be possible, the availability of remote video interpretation has become much more accessible and may be readily available.⁷¹ The entity must evaluate all of the functional issues that impact communication when choosing the means of communication that will be effective. While the video remote interpretation may seem like the ideal solution in all situations, for individuals with certain visual limitations, video remote interpreting may not result in effective communication.⁷² In such an instance it may be necessary to use a live interpreter to achieve meaningful communication.

One mistake that many municipalities make when interpreting the ADA is to believe that long existing programs and facilities are not required to come into compliance with the ADA.⁷³ However, when it was implemented the ADA required all state and local municipalities to complete a self-evaluation of their facilities, programs, policies and practices by the end of January 1993.⁷⁴ These evaluations were required to identify the remedial measures necessary.⁷⁵ The municipalities are also required to develop transition plans that identifies structural changes required to programs and provides a schedule for when they will be completed.⁷⁶

A public entity can be found to have discriminated under the ADA without a finding of an intention to discriminate.⁷⁷ While compensatory damages will not be awarded without a finding of discriminatory intent, even without a finding of

⁷¹ FEMA Media, <https://www.fema.gov/media-library/assets/images/67363> (last visited 1/19/2015).

⁷² Registry of Interpreters for the Deaf Inc. *supra*.

⁷³ U.S. Department of Justice, Civil Rights Division, Disability Rights Section, *The ADA and City Governments: Common Problems*, 2008, <http://www.ada.gov/comprob.htm> (last visited 2015).

⁷⁴ 28 C.F.R. §35.105

⁷⁵ *Id.*

⁷⁶ Rothstein & Irzyk, *Disabilities and the Law* §5:9 (4th ed.), Lawyers Cooperative Publishing (2014).

⁷⁷ *Mosier v. Kentucky*, 640 F.Supp 2d 875 (E.D. Ky 2009).

discriminatory intent, the public entity can be ordered to take corrective action and liable for the plaintiff's attorney fees.⁷⁸ The intent that is needed for compensatory damages includes an actual intent to discriminate or deliberant indifference.⁷⁹ While there has been some disagreement by the courts on the question of an individual's private right of action for a municipalities' failure to complete a self-evaluation, there seems no question but that the failure to complete a self-evaluation and develop a remediation plan would be evidence of the municipalities' deliberant indifference for the purposes of damages.⁸⁰

The Rehabilitation Act of 1973 extends the obligation to nongovernmental organizations that receive federal funds.⁸¹ Also, Title III of the ADA prohibits discrimination on non-governmental places of public accommodations such as stadiums or restaurants, doctors' offices and taxi services.⁸² These entities could be found liable for punitive damages as well as compensatory damages.⁸³

In November 2013 a federal Court reviewed the obligations that the ADA placed on a municipality engaged in preparation, mitigation and recovery. The independent living center in Brooklyn sued the city for discrimination in their preparation, mitigation and recovery process. The court held that the City has violated the Americans with Disabilities Act, the Rehabilitation Act, and the New York City Human Rights Law by failing to provide people with disabilities meaningful access to its emergency

⁷⁸ 42 USC §12205.

⁷⁹ *Lovell v. Chandler*, 305 F.3d 1039 Cert denied 123 S.Ct. 871 (C.A. 9 2002).

⁸⁰ *Iverson v. City Of Boston*, 452 F.3d 94 (1st Cir. 2006); *Chaffin v. Kansas State Fair Bd.*, 348 F.3d 850 (10th Cir. 2003); *Uttilla v. City of Memphis*, 40 F. Supp. 2d 968 (W.D. Tenn. 1999), aff'd, 208 F.3d 216 (6th Cir. 2000); *Deck v. City of Toledo*, 76 F. Supp. 2d 816 (N.D. Ohio 1999); *Tyler v. City of Manhattan*, 857 F. Supp. 800, 6 A.D.D. 238 (D. Kan. 1994).

⁸¹ Rehabilitation Act of 1973 §504(a), 29 U.S.C. §794(a); See *Pangburn v. Northern Kentucky University*, 210 F.3d 372 (6th Cir. 2000).

⁸² 42 U.S.C. §12181 et. Seq.

⁸³ *Recovery of Punitive Damages under the Americans with Disabilities Act of 1990 42 USCA §12101 et Seq*, 44 ALR Fed 2nd 31 (Originally published 2010 updated bi-weekly, Last viewed 1/19/2015).

preparedness programs.⁸⁴ In September of 2014 the parties reached a settlement intended to address these violations.⁸⁵

In particular the federal court found that the following portions of the plan failed to accommodate individuals:

1. Evacuation plans with respect to high-rise evacuation and accessible transportation;
2. Shelter plans did not require sufficiently accessible shelters;
3. The lack of a plan for canvassing the ability of isolated individuals with disabilities to access the services provided by the city after an emergency;
4. Lack of accessible communication regarding distributing resources and existence and location of accessible services, and
5. Lack of accessibility in outreach and education on the need for a personal emergency plan.⁸⁶

The settlement of this litigation required the City to do the following:

1. The development of 60 accessible emergency shelters by September 2017;
2. The city must hire a disability, access and functional needs coordinator;

⁸⁴ *Brooklyn Center for Independence of the Disabled V. Bloomberg*, 290 F.R.D. 409 (S.D.N.Y. 2012).

⁸⁵ See Notice of Settlement of Class Action Lawsuit, http://www.nyc.gov/html/oem/html/about/bcid_class_notice.html (Last visited 1/19/2015).

⁸⁶ *Brooklyn Center for Independence of the Disabled V. Bloomberg*, *supra*; see also, *Loye v. County Of Dakota*, 647 F.Supp.2d 1081, (D. Minn, 2009), *aff'd* 625 F.3d 494 (8th Circ); Writ of Cert Denied, 131 S.Ct. 2111; Jones, *The Americans with Disabilities Act and Emergency Preparedness and Response Congressional Research Service* (December 29, 2010) <http://www.fas.org/sgp/crs/homesec/RS22254.pdf> (accessed 12/10/13).

3. Develop a fully operational post-emergency canvassing operation by August 2017 to provide door-to-door inquiries after a disaster assessing needs and accessing critical resources;
4. Revise and improve accessible transportation plans by Aug 2017;
5. Assemble a High Rise Building Evacuation Task Force and implement high rise evacuation plan by September 2018;
6. Assemble a Disability Community Advisory Panel charged with gathering expertise and feedback from disability community.⁸⁷

There has been other litigation of this type around the country, although primarily in large urban areas.⁸⁸ However, there is at least one example of relevant litigation in a rural area. *Loye v. County of Dakota*, involved a mercury spill in a rural area and accommodations for the county services provided to plaintiffs who were deaf⁸⁹. The court concluded that failure to provide a sign language interpreter during the decontamination was not a violation of the American's with Disabilities Act, given the emergency nature of the situation, *and* that in a series of community meetings and in meetings with a community nurse, sign language and other forms of communication were used. Based on the overall communication the court ruled that effective communication had been achieved.⁹⁰

⁸⁷Disability Rights Advocates, <http://www.dralegal.org/pressroom/press-releases/new-york-city-and-disability-advocates-reach-historic-agreement-providing> (visited October 1, 2014).

⁸⁸ *CFILC v. Oakland* (resulting in a settlement agreement available at: <http://www.dralegal.org/cfilc-v-city-of-oakland>); *Communities Actively Living Independent and Free v. Los Angeles*, 2011 WL 4595993, C.D.Cal., 2011, (resulting in a settlement agreement available at: <http://www.dralegal.org/impact/cases/communities-actively-living-independent-and-free-calif-et-al-v-city-of-los-angeles>).

⁸⁹ *Loye*, *supra*.

⁹⁰ *Id.*

There are a few issues which did not seem to be addressed by the court. For example, it is not clear from the court's decision the extent to which the rural nature of the community impacted the decision. It is possible that the relative lack of resources as compared to an urban area like Oakland, L.A. or Brooklyn played a role in this decision. Furthermore, the plaintiffs focus on post emergency rather than planning may have been a factor in the courts conclusion as well. Finally there appeared to be no evidence offered on the availability or utilization of a remote interpretation system. Since these issues were not addressed in the decision, it would *not* be reasonable to overly interpret this case to suggest that there is little responsibility for planning in a rural community.

If we apply these rules to the Clinic's findings in the investigation of the ten counties there are some areas, where there seems to be clear discrimination and other areas where although no service would be provided in the event of an emergency, it is not as clearly discriminatory.⁹¹

Part II What Did We Learn?

Our project revealed that: (1) there was little involvement of individuals with disabilities in the planning process for emergency preparedness, (2) the people who would be depended on in the event of an emergency seldom had disability awareness training, (3) many of the resources available in the event of the emergency were not vetted for their viability for individuals with a variety of functional needs and (4) counties delegate responsibility for tasks to other entities without consideration of the entities ability to fulfil their role in a legally sufficient manner.

⁹¹ 28 C.F.R. §35.130(b)(1)(ii) (2007).

A. Appointment of people with disabilities to various county emergency management committees

For the most part the counties have not taken advantage of the independent living centers which should always be utilized as the experts in both the functional needs and cultural issues regarding individuals with disabilities. Prior to our work none of the counties had formally appointed a representative of an independent living center or someone with a disability to their planning committee and all but one county had not developed a strong working relationship with the independent living center.

The best relationship between planners and individuals with disabilities was seen in Albany County where there was a productive relationship between the independent living center and the county. The Capital District Center for Independence has had a long and productive relationship with that county and that center has consistently been actively involved with the counties' emergency planning, mitigation and response process. For example. The Capital District Center for Independence has been given opportunities to review the plans regarding equipment purchased for a possible response to an emergency, reviewed the shelters accessibility, agreed to have their office serve as a shelter in the event of an emergency and commented on and engaged in outreach for the counties registry plans. This has been a beneficial collaboration for both organizations.

Further, in a few of the counties, particularly Ulster, Schoharie and Greene Counties, while there was no such history of collaboration between the local independent living center and the county officials engaged in disaster planning, a relationship has developed or strengthened in response to our suggestion. If these counties really involve these knowledgeable organizations in their preparation, mediation and recovery process, this will be mutually beneficial to all who are involved.

It is our view that the lack of including local independent living centers in the past has been more a product of oversight than any animus on the part of these counties. While it would be discriminatory to refuse to include individuals in the county's planning board, this does not appear to be the case for any of the counties. In most counties the emergency managers worked closely with other organizations that serve individuals with disabilities and have an active process for emergency planning. In some counties there are regular meetings and many human services organizations are invited and regularly participate and are assigned to subcommittees to further work between meetings. In other counties while there may be regular meetings, and open invitations for the whole community, there are no subcommittees actively working to prepare the county for a possible emergency.

B. Disability Awareness Training

Accepting that the likelihood of a positive outcome for individuals with disabilities in the event of a disaster is in part dependent on the level of understanding or disability awareness of the responders, the Clinic examined the extent of disability awareness training in each of the ten counties. We found that none of the ten counties had provided disability awareness training to either their professional or volunteer responders.

It is useful to note that a counties response to a disaster is carried out by both professionals and volunteers. Further, in a disaster, communities depend significantly on hospitals, fire departments and police departments over which they have no real authority. Each of the counties that we interacted with has multiple fire departments and

stations. Throughout the region there are over three hundred fire departments.⁹² Three of the ten counties depend entirely on volunteer fire fighters⁹³. In those counties where there are some professional fire stations, the majority of the stations are still completely dependent on volunteer fire fighters.⁹⁴ There are 23 hospitals in the region.⁹⁵ Some of the counties have multiple hospitals run by different entities and Greene County does not have a hospital.

In addition to these municipal workers and volunteers, counties are also very dependent on Red Cross volunteers for critical services such as sheltering. Further, the Red Cross is largely dependent on volunteers with minimum training.⁹⁶ The diversity of responders and entities overseeing responders results in the risk of a highly uncoordinated effort and supports the needs for extensive planning and training to bring all of these entities together and prepare the individuals to respond to the imminent needs in a disaster. However, it also highlights the challenges that any individual county has in ensuring that the planning process will be well informed and meet the needs of the community in the event of an emergency.

⁹²FireDepartment.Net: Albany has 47; Columbia has 37; Fulton has 15; Greene has 19; Montgomery has 17 Rensselaer has 46, Saratoga has 38, Schenectady has 27; Schoharie has 13 and Ulster has 43. Data from <http://firedepartment.net/directory/new-york> (visited 5/19/2014).

⁹³ According to New York State Professional Fire Fighters Association Albany, Fulton, Montgomery, Rensselaer, Saratoga, Schenectady and Ulster all have some professional firefighters. <http://www.nyspffa.org/main/about-us/districts/> (visited 5/19/2014).

⁹⁴ In Albany for example 43 of the 47 fire departments are volunteer fire departments. See: <http://www.fasny.com/index.php/membership/find-a-local-department/?dept=albany&submit=Go> and <http://firedepartment.net/directory/new-york/albany-county> (visited 5/19/2014).

⁹⁵ The NYS Health Department website lists 23 hospitals in the ten county region. In Albany there are five hospitals; in Columbia there is one, in Fulton there is one, in Montgomery there are two, Saratoga there are six, Schenectady there are four, Schoharie there is one and in Ulster County there are three. <http://hospitals.nyhealth.gov/> (visited 5/19/14).

⁹⁶ The Red Cross responds to nearly 70,000 disasters every year using 95 percent volunteers. See: <http://www.redcross.org/support/volunteer/disaster-volunteer> (visited 5/19/2014).

Some of the volunteers, such as fire fighters, participate in significant training, but they have not been adequately trained for all of the roles that the county anticipates the volunteers will fill in the event of a disaster. A fire fighter in New York will receive training in fire and arson prevention and control⁹⁷ which includes training to recognize hazards, safety protocols for the fire station, a fire scene, clothing, use of tools and equipment.⁹⁸ This training is critical for response to a fire. However, it is not enough to address all of the tasks that a firefighter will be called on to do in an emergency. In many counties the fire department is not just called upon to put out a fire. They may be expected to reach out to and/or evacuate individuals with disabilities if there is the need in a disaster. In other counties the fire fighters are sent door to door to assess individuals' needs.⁹⁹ These tasks require a level of disability awareness that is not intuitive.

While training in disability awareness is available in New York, its utilization by disaster relief volunteers, professionals or even the emergency managers is somewhat sporadic.¹⁰⁰ In the ten counties that we reviewed six counties indicated that their volunteers and responders had not been provided any training. Three counties were unable or unwilling to provide information regarding training provided of this type. Only one county indicated that some of the responders had received some disability awareness training. However, this training was not sponsored by the county and the records of the

⁹⁷ New York Executive Law §156(6); ? NYCRR §§438.1 to 438.10.

⁹⁸ New York State Division of Homeland Security and Emergency Services, *Firefighter Training and Education Best Practices from the Division of Homeland Security and Emergency Services, Office of Fire Prevention and Control* see <http://www.dhSES.ny.gov/ofpc/training/> (visited 5/19/2014).

⁹⁹ Schoharie County reported that this was the planned practice.

¹⁰⁰ See Niagara University First Responders Disability Awareness Training at <http://www.fr-dat.com/>. Training may also be arranged through local independent living centers. See <http://www.nysilc.org/directory.htm> for contact information for a local center.

entities trained do not suggest that a large percentage of the professional or volunteer responders in the county were trained.¹⁰¹

Counties may be exposing themselves to claims of discrimination where they depend on first responders, or other organizations to provide services and they do not train those responders do so in a nondiscriminatory manner. Further utilizing such a diverse professional and voluntary work force without providing clear nondiscriminatory policies and by not offering training could be considered sufficient proof of deliberate indifference to the potential discrimination that ultimately occurred. Therefore, while failure to provide disability awareness training is not per se discrimination, taking no steps to ensure that these professionals and volunteers understand that individuals with disabilities should be provided services in a manner equal to those who are not disabled and how to avoid discrimination could be considered deliberately indifferent and the county could be responsible for compensatory damages and attorney fees.

For example when a county depends on a voluntary fire department to address the needs of individuals with disabilities without taking any steps to ensure that the approach used by the responder will not be discriminatory the County can be found liable for discrimination.¹⁰² The same would be true for the county for the actions of a shelter run by the Red Cross. The Department of Justice has stressed the importance of training individuals to avoid mishaps during an emergency.¹⁰³ The prudent course of action would be to identify what will be necessary to avoid discrimination, assess the

¹⁰¹ List of attendees at: <http://www.fr-dat.com/training/past-events/> (last visited 11/15/14).

¹⁰² 28 C.F.R. §35.130(b)(1)(v)(2007).

¹⁰³ United States Department of Justice, Civil Rights Division, *An ADA Guide for Local Governments Making Community Emergency Preparedness and Response Programs Accessible to People with Disabilities*, www.ada.gov/emergprepguidescrn.pdf pg 7. (last visited 1/19/2015).

responders' ability to provide the services in a nondiscriminatory manner and to remedy the situation where the capacity does not exist, but a similar services would be available for an individual without a disability.

C. Physically Accessible Shelters

While not all emergencies result in the need to shelter people, this is one of the eventualities that is often needed and for which planning is needed. When they are needed, the shelter must meet accessibility standards.¹⁰⁴ However, few of the counties have done the planning and preparation necessary to avoid discrimination caused by an inaccessible shelter. Most of the counties were heavily dependent on the Red Cross for shelters. The Red Cross is often involved in the selection, assessment of accessibility and the running of the shelter. We ascertained that in three of the counties the shelters were not consistently physically accessible. In other counties it was assumed that the Red Cross would assure the shelters were accessible. Even in instances where the Red Cross is contracted with to fill all of these functions, the ultimate responsibility for these matters is the County's and therefore, the County should, therefore, assure that the shelters are going to be accessible.

Initially our greatest concern involving the physical accessibility of shelters was generated by the Ulster County plan which indicated that the County had one shelter designated as the accessible shelter and all individuals with disabilities were encouraged to go to that shelter regardless of the distance from their home. However, while we were engaged in this project, Ulster welcomed the local independent living center to become

¹⁰⁴ National Organization on Disabilities, *Functional Needs of People with Disabilities, A Guide for Emergency Managers, Planners and Responders*, nod.org/assets/downloadsguide_emergency_planners.html/#tools. Pg 6 (last visited 1/19/2015).

more involved in the planning process and asked a representative from the independent living center to take on the role as chair of the shelter subcommittee. That subcommittee is now actively engaged in improving the accessibility of all of the potential shelters in the county. Although Ulster's initial plan to have one shelter for all individuals with disabilities may have been discriminatory, the steps Ulster has taken to address the issue, suggest that there is no discriminatory intent, and therefore, it seems unlikely that there could be exposure for compensatory damages. Further, we are hopeful that there will be a reasonable number of accessible shelters before the next disaster and that individuals with disabilities will be welcome at all shelters.

While the situation in Ulster initially caused the greatest concern, in the end the failure of counties to confirm the physical accessibility of shelters for future disasters is a much more serious concern. In four of the counties we were told that the shelters were accessible, but this determination was made based on an assessment of the Red Cross with no apparent investigation or documentation to support the assessment. In one county, where shelters were primarily public schools, the county official indicated a belief that since the shelters were in public schools, they could assume that the places were accessible. Three counties failed to provide information sufficient to assure the accessibility of the shelters. In at least one of these instances we were told that the location of potential shelters needed to be kept confidential for security purposes. Neither the Clinic nor an Independent Living Center was given an opportunity to assess these shelters.

Since the counties can be responsible for the discriminatory action of the Red Cross and the counties have taken no steps to confirm that the services that would be

provided by the Red Cross would be accessible, any failure of the Red Cross to provide accessible shelters to individuals with disabilities could result in the counties exposure to compensatory damages.¹⁰⁵ Counties could address this issue through a partnership with an independent living center and by doing an accessibility survey which most independent living centers are equipped to do.¹⁰⁶

On a practical note, we caution against the complete dependence on the Red Cross to provide shelters. In Greene County, the Red Cross determined that the need was so great throughout the region that they would be unable to run the shelters in the County for a recent disaster. Greene County has therefore decided that going forward it would not only plan on the Red Cross running the shelters, but that it would also plan on a means for running the shelters themselves if the Red Cross was unable to do so. They have also agreed to work with their local independent living center to evaluate the shelters that could potentially be uses. These seem like positive steps to avoid potential liability and anticipate the functional needs of their citizens.

The best practice that we saw regarding the planning accessible shelters took place in Albany County. In that County Red Cross was used to do an initial assessment of the accessibility of the potential shelters, but the Capital District Center for Independence was given the opportunity to do a review of the building and the assessment of accessibility to ensure that the sheltering system throughout the county would be suitable for a population with varied functional limitations and abilities. They

¹⁰⁵Supra ; See also, *The Impact of Hurricanes Katrina and Rita on People with Disabilities: A Look Back and Remaining Challenges*, <http://www.ncd.gov/publications/2006/Aug072006> (last visted 1/19/2015).

¹⁰⁶ U.S. Department of Justice Americans with Disabilities Act ADA Checklist for Emergency Shelters, ada.gov/pctoolkit/chapter7shelterchk.htm.

were also given the opportunity to recommend equipment and supplies that would be needed.

D. Programmatic Accessibility of Shelters

Our concern over the lack of planning and preparation of the shelter programs and policies to avoid discrimination is far greater than our concern about the failure to explore the physical accessibility of the shelters. Most of the emergency managers are not taking responsibility for ensuring that the shelters are able to offer reasonably accessible sheltering programs in the event of an emergency beyond provision of medical care and physical accessibility and in some instances the sheltering of service animals with their master. This could cause great discomfort for countless individuals with disabilities. Further, it could expose the counties to discrimination claims under the Americans with Disabilities Act and could be easily rectified.¹⁰⁷

On a number of basic issues the counties failed to demonstrate recognition of the components of an accessible program or what was necessary to address the variety of functional needs of the population.¹⁰⁸ For example, while some counties had appropriate policies allowing service animals, none of the counties provided information regarding the accessibility of the provision of meals or communication at the shelter. A failure to provide the necessary communication for a deaf individual or requiring individuals in a wheelchair to eat away from all of the other diners who are in an inaccessible dining hall or refusing to allow individuals with significant post-traumatic stress to sleep with a light on should all be deemed inconsistent with the legal obligations of the counties. Here to

¹⁰⁷ See Guidance on Planning for Integration of Functional Needs Support Services in General Population Shelters, Created for FEMA by BCFS Health and Human Services, San Antonio, Texas, http://www.fema.gov/pdf/about/odc/fnss_guidance.pdf (last visited 1/19/2015).

¹⁰⁸ *Id.*

counties would be wise to partner with local independent living centers to examine the accessibility of their potential shelter programs. Further counties should review both the state and federal publications regarding accommodating the functional needs of individuals in an emergency.¹⁰⁹

E. Full Range of Accessible Communication

Shelters are not the only places where counties should be exploring the accessibility of their responses to a disaster. Every aspect of the response must include effective communication for individuals who are deaf or have a functional limitation in communication. None of the counties were able to report that they could provide a full range of accessible communication. Materials are not available in alternative formats, the alert systems do not place phone calls using the relay system for individuals who are deaf; first responders are not provided technology or training for communicating in American Sign Language, and sign language interpreters are not on call. Emergency managers must keep in mind that due to functional variations in hearing, vision, speech, cognitive or intellectual ability, some individuals will not benefit from standard communication methods. However, technology and other resources exist to address some of these issues.¹¹⁰ Although independent living centers would not be able to

¹⁰⁹ Supra FNs 12 & 15; New York Department of Homeland Security, *New York State Overview on Functional Needs Support Services*, <http://www.dhss.ny.gov/oem/planning/documents/NYS-FNSS-Overview.pdf> (2011).

¹¹⁰ *Guide for Emergency Managers*; UNWEBTV The United Nations Live & on Demand, *Disaster Risk Reduction and Emergency Responses – Panel Discussion*, <http://webtv.un.org/meetings-events/watch/disaster-risk-reduction-and-emergency-responses-panel-discussion/3922335616001> (Dec 3, 2014, visited 1/14/15); *General Effective Communication Requirements Under Title II of the ADA* (2/23/2007) Chapter 3 ADA Best Practices for State and Local Governments, <http://www.ada.gov/pccatoolkit/toolkitmain.htm> (last visited 1/19/2015).

address all of these issues, they certainly would be able to work with the counties to plan for a reasonable approach to these vital communication issues.

Therefore, greater attention should be paid to communication and the degree to which deaf individuals and individuals with other communication disorders are not provided equal communication.¹¹¹ If the public notice provided through the telephone system is not utilizing the relay communication system or providing any means of communication with someone who cannot hear the message. County managers should insist that they do so or provide other means for communication. If they are using television notices, they must ensure that there are captions on these notices. If they are sending fireman door to door they must provide the firemen with the means of communication with individuals of various functional abilities. Although note taking may be appropriate in some instances, in others this will not be sufficient for meaningful communication.

Evacuation and Transportation

While evacuation and the provision of transportation in the event of an emergency, like sheltering, is not needed in all emergency situations, planning for the possibility is critical and in at least one of the counties evacuation was necessary in the recent past due to severe flooding. However, this was one area where counties were particularly reluctant to provide information. With regard to the evacuation plans, one

¹¹¹ See, National Council on Disability, *Impacts of Hurricane Katrina and Rita on People with Disabilities: A Look back and Remaining Challenges*, <http://www.ncd.gov/publications/2006/Aug072006>; National Council on Disability, *Saving Lives Including People with Disabilities in Emergency Planning* (2005) <http://www.ncd.gov/publications/2005/04152005> ; Amy Dolittle, *Katrina reveals lack of resources to evaluate deaf*, the Washington Times (October 6, 2005); National Council on Disability, *Design for Inclusion; Creating a New Marketplace*, <http://www.ncd.gov/publications/2004/10282004> (2004); National Council on Disability, *Information Technology and Americans with Disabilities: an Overview of Innovation, Laws, Progress and Challenges, 2005*, <http://www.ncd.gov/publications/2005/08022005-Inf> (websites last visted 1/19/2015).

could reasonably conclude that many of the counties are aware that their plans would not be accessible for individuals with various functional needs and the managers would rather ignore the problem than develop a plan to address it.

It is not clear if counties were concerned about sharing this information for legitimate security reasons or if counties were simply providing a pretext to avoid providing the information. The later seems to be the more likely explanation. In most instances evacuation routes are identified in advance and public signage is put in place long before the needed evacuation. Further, identification of the fleet of vehicles that would be used to transport citizens in the event of an evacuation and assessment of the suitability of this fleet given the anticipated population needing evacuation, seems only prudent.

In some counties, such as Schoharie County, the plan for municipal assisted evacuation was heavily dependent upon the fire department, despite the fact that there was an awareness that the fire department did not have any accessible vehicles in their fleet. This clear understanding that the County plans on using an inaccessible fleet is discriminatory unless modification would be an undue burden and an evaluation and has been done to determine that there are insufficient resources to address this and that is memorialized in writing.¹¹²

¹¹² United States Justice Department, Civil Rights Division, *Americans with Disabilities Act, An ADA Guide for Local Governments Making Community Preparedness Accessible*, <http://www.ada.gov/emergencyprepguide.htm>; FEMA, *Orientation Manual for First Responders on Evacuation of people with Disabilities 2002*, <http://www.eadassociates.com/fa-235-508.pdf>; National Fire Protection Agency, *Emergency Planning guide for People with Disabilities, 2007* <http://www.nfpa.org/~media/Files/Safety%20information/For%20consumers/Disabilities/evacuationguidePDF.pdf> (websites last visited 1/19/2015).

Based on the information that we received, it seems that a process to identify the fleets' capacity to serve individuals with a variety of functional needs has not been done in any of the counties. One good step that has been taken in a few of the counties, such as Albany and Schoharie, has been an attempt to partner with existing public transportation and school bussing systems by developing memorandums of understanding regarding the partners role in the event of an emergency. It is possible that these entities have vehicles that are prepared to address a variety of functional needs. However, there has not been a real assessment of the ability of these fleets to meet various emergencies or their suitability for the citizens who will need transportation or an attempt to organize a drill to practice such an evacuation. Failure to do this could result in liability for compensatory damages if an individual is discriminated against and injunctive relief to correct the situation.

Greene County is in the very unfortunate situation of not having an existing infrastructure to provide transportation to anyone in the county if there is a need. There is almost no public transportation. Even the public schools do not use their own school buses but contract out with private companies for student transportation. These private companies have been unwilling to enter into an agreement to provide transportation in the event of an emergency. Since transportation will not be a service available to anyone, it would not be discriminatory to not provide the service to individuals with disabilities. However, this is a significant area for the counties vulnerability in a disaster where evacuation would be necessary.¹¹³ Counties would be wise to avoid future discrimination

¹¹³ Richard Deylder with the California Governor's office of Emergency Services, See Evacuation webnair *Integration Access and Functional Needs into Evacuation Planning and Responses*, www.fema.gov/media_library/assets/docuemnts/97495; ADA National Network/FEMA/ Webinar Series, *Emergency Management and Preparedness – Inclusion of Persons with*

and liability by engaging in an assessment of their fleet and developing remediation plans.

F. Enroll people with disabilities in Community Emergency Response Team (CERT) training opportunities, and as volunteers during emergencies at Disaster Recovery Centers

Including individuals with disabilities as responders or volunteers is not currently a priority in any of the counties and there are mixed feelings expressed on the appropriateness of targeting this group. However, no county indicated an unwillingness to include a person with a disability in the training. While the National Organization of Disabilities, FEMA and the United Nations would all recommend that having individuals who have various different functional abilities as first responders would be best practice, failure to have attracted the interest of individuals in these ranks should not be deemed discrimination.

G. Public Forums for Individuals with Disabilities

Preparedness for a disaster should be a joint effort between individuals and the municipality. While we found that many counties and organizations like the Red Cross offered free public forums emphasizing the need for individual preparedness, only Albany County offered these trainings specifically for individuals with disabilities. Given the unique issues that arise for this population, the generic training will hardly address the needs of this program, and failure to provide the more specific type of

Disabilities, adapresentations.org/schedule.php; Yeager, Patricia & DeSutter, Nick, *FEMA Promising Practice: Including Emergency Management In Independent Living Centers To Maximize Potential for Whole Community Preparedness*, adapresentations.org/doc/11_13_14/yeager_suttere_13_11_14.pdf (11/13/2014); Connecticut Developmental Disabilities Network, *A Guide for Including People with Disabilities in Disaster Preparedness Planning*, www.ct.gov/ctcdd/lib/ctcdd/guide_final.pdf (websites last visited 1/19/2015).

training seems misguided. Training of this type could both help the counties identify the populations' needs and provide the preparation needed to avoid discrimination.

Part IV Recommendations

Overall we found there were a number of areas of potential discrimination through omission in planning for assessment of the needs and avoidance of failure to provide equal and inclusive services. However, in counties such as Albany, Ulster, Green and Schoharie we were heartened by the development of partnerships between the counties and the local independent living center. In terms of disaster response and planning one size will not fit each county and these relationships will help prepare for the particular needs of the county.

However, in Fulton, Montgomery, Rensselaer, Saratoga, Schenectady and Columbia County we were not provided any information from the county or the local independent living center which suggested that any meaningful steps were being taken to prevent discrimination. This complete omission, exposes each of these counties to an action like that brought in Brooklyn. Further, without such a plan, it is difficult to imagine that the municipalities could raise an affirmative defense in such an action. Therefore, the counties are at very real risk of having judicial oversight which could result in the loss of the counties' ability to establish priorities or identifying the necessary steps for addressing those priorities.

Of course the counties' potential liability is minor compared to the impact that the failure to have these plans could have on individuals with disabilities. There is the very real risk that these failures could result in fatalities and serious harm that could have been avoided. History demonstrates that these tragic consequences will be disproportionately

experienced by individuals with disabilities. The following further action should be taken to avoid the potentially tragic results:

1. Legislation should be passed to *require* counties make a good faith effort to include individuals with various functional abilities in their disaster planning process and train responders in disability awareness;
2. Grants should be offered to counties actively developing supports for sign language training, portable devices for remote interpretation and alternative format materials;
3. Each county should engage in an assessment process that assesses the programs, services and activities they support which are related to disaster relief, their ability to provide equivalent services to individuals with disabilities and the steps necessary to remedy any deficiencies found, and
4. Provide additional funding to independent living centers to allow them to fully engage as partners in this process.