

# NYC Class Action Case – Opinion & Order

## Summary with Relevance & Relationship to Hampton Roads, VA

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“The question in this case, however, is not whether the City, or individual first responders, have done an admirable job in planning for, or responding to, disasters generally. They plainly have. Instead, the question is whether the City has done enough to provide people with disabilities meaningful access to its emergency preparedness program given the broad remedial purposes of the ADA, the Rehabilitation Act, and the NYCHRL. The answer to that question is that it has not, and in doing so it has deprived people with disabilities of what they are entitled to under the law, not to mention of the peace of mind that people without disabilities can have when it comes to the City’s preparedness plans.” (p.117)

## Evacuations

### Highlights from evidence from trial

#### PLANNING

- NYC Coastal Storm Plan fails to provide specific details about how the City will ensure that people with disabilities are to evacuate (p.14)
- 2005 Area Evacuation Plan (in effect at time of events and trial) did not include any information regarding the evacuation of people with disabilities (p.14)
- Provides little information about exactly how disabled populations will be accommodated in ‘operational strategies’ (p.14)
- With the exception of the Homebound Evacuation Operation (HEO), there is no information in the Area Evacuations Plan about how the city will evacuate people with disabilities from multi-story buildings or how it will ensure sufficient accessible transportation (p.14)
- City’s plans generally assume people will be able to evacuate their buildings without assistance (p.15)
- City’s emergency plans fail almost entirely to address the needs of people with disabilities during evacuation of a multi-story building (p.16)

- Fire Chief testified there was no need to plan specifically for the evacuation of people with disabilities because the fire department treats everybody the same way (p.16)
- FDNY and NYPD are capable of rescuing individuals with disabilities from high-rise buildings under ordinary circumstances but less clear that they would be able to do so in large scale evacuation, particularly with no notice(p.17)
- City plans for people to find their own way to evacuation centers, OEM Director testified it is not the city's responsibility to transport people to the evacuation centers (p.19)
- Court very critical of emergency plans using "may"; for example "MTA may reroute Paratransit vehicles to support special needs evacuations"
- HEO does not resume AFTER an event (p.22)
- City does not even inform the public of the HEO program (p.25)
- City depends on 311 for people to request evac assistance but those not able to call have no other way of requesting assistance; 311 system may become unreliable (p.25, 26)

#### PARATRANSIT SERVICES

- City has not determined if sufficient accessible transportation is available (p.21-22)
- Most of the city's transportation is inaccessible to people with disabilities (p.19)
- Paratransit ordinarily requires 24 hour advance reservation (p. 20)
  - *This is an issue HRT has already addressed*
- City directs people with disabilities to continue to rely on Paratransit during an emergency but nothing in City's plans ensures people are actually able to use Paratransit in an emergency, that it remain open for a certain amount of time after an evac order is issued, or that it is even available during an emergency (p.20-21; 25)
  - *If I understand their system correctly, MTA is not owned by NYC so much like the problem of engaging HRT, NYC doesn't necessarily have the authority to require MTA to do anything*

#### Court's final opinion

- **City's plans are not in compliance (p.89, 116)**
  - The City assumes that people will be able to evacuate their buildings unassisted. (p.89)
  - NYC has no plan for multi-story building evacuation. (p.90)

- The City has failed to ensure the availability of sufficient accessible transportation. (p.90)
  - Ensure that it remains open for as long as other forms of public transportation (p.91)
  - No need for advance reservation (p.91)
  - Ensure vehicles will be available (p.91)

## Sheltering system & Shelter-in-place recommendations

### Highlights from evidence from trial

- Individuals with disabilities may be less able to stay with friends, family and in hotels because of their needs for accessible housing, medical equipment, etc. (p. 34)
- NYC has 8 special medical needs shelters (SMNSs) intended to shelter individuals whose needs exceed the capability of general shelters but who don't require hospitalization (p.35)
- During every emergency all evac centers and SMNSs are opened; some SMNSs are in evac centers (p.35)
- Vast majority of evac centers and shelters are in school buildings (p. 35)
- Shelter system, fully activated, can shelter more than 600,000 (p. 36)
- City does not have a plan for implementing any corrective action needed to ensure the shelter system is accessible or for FUNDING such action. NYC had proposed a \$10mil budget for a corrective action plan but there was no evidence it would be approved. (p.51)

### FACILITY ACCESSIBILITY

- No information in the Sheltering Plan about accessibility of the shelter system (p.36)
- Plan doesn't require that the City (p.36-37):
  - consider accessibility in choosing shelter facilities
  - mandate that any portion of the system be accessible
  - ensure accessible pathways between shelter entrance, rooms used for sheltering, bathrooms, etc
- Plans instruct shelter operators to identify accessible areas of the shelter but provide no instructions on how to do so or actually require that areas be accessible (p. 37)
- The City doesn't know which shelters and evac centers are accessible (p. 37)

- The City is well aware that many shelters and evac centers are not fully accessible (p. 38)
- The City has adopted a 'usability' standard that does not comply with ADA accessibility standards; additionally, the usability standard is unclear, confusing and inconsistent (p.39)
- Shelters lack accessible bathrooms, food areas, and dorms. (p. 40, 41)
- Nothing in the City's plans require any evac centers or shelters to be usable and they do not define the term or provide guidance on making areas and building usable. (p. 41)
- Plans state that the City will provide accessible transportation to a shelter that is sufficiently accessible but has no written plans about how they will do that. (p. 42)
- Refuge of Last Resort facilities DO NOT need to be accessible to people with disabilities to be chosen as ROLRs. (p.52)

#### PUBLIC INFORMATION RELATING TO SHELTERS

- The City's guidance that people, including those with disabilities, prepare to shelter in place is simply that: guidance that people should be prepared for the possibility that assistance within the first 72 hours will not be available. (p. 53-54)
- The City does not publicize location of shelters but does publicize evacuation center locations so that people can develop an evacuation plan in advance of a storm. (p.36)
  - *It is very common not to publicize shelter locations in advance of an event. If you do, when an emergency occurs, people will go to the nearest one on the list but that shelter may not be safe and may not be 'open' with services, staff and resources. I disagree that this is a violation of rights because no individuals, with or without disabilities, have this information in advance. All residents of NYC will have to find transportation to an evac center and be directed from there. An evacuation plan for anyone would essentially look the same. Arguments that needing Paratransit makes this advance knowledge a need are unfounded because the City provides evac center locations for advance planning.*
  - *If accessible shelters are identified in advance, guess where people, with and without a need for accessibility, are going to go. This will quickly overwhelm those shelters.*
- Warnings that shelters do not have special equipment such as oxygen and batteries, and are not equipped to provide food for special diets, to bring

your own food and equipment, are likely to discourage people with disabilities from evacuating to a shelter in the first place. (p. 49)

- Even though NYC does have a system in place to provide adequate supplies to people with disabilities, it tells the public it will not do so. “This misinformation not only violates the requirement that people with disabilities must be able to attain accurate information about the provision of accessible services, but also dissuades people with disabilities from attempting to use the shelter system. Both are a violation of their rights.” (p. 49,
  - *This seems like a catch-22. Tell people to bring their own supplies and they are less likely to evacuate but if a locality does tell people they have the equipment/supplies to meet needs and then that capability is hampered for some reason or too many people overwhelm your capabilities, they will be facing angry residents and news media waiting to pounce. It is understandable, however, that such warnings might discourage evacuation to shelters because these individuals know if they leave their home and go somewhere that might not or does not have the equipment they need, it will endanger their health & safety. This issue will need some additional discussion to come up with the best approach to messaging.*

## PROGRAMMATIC ACCESSIBILITY

- People with cognitive or sensory disabilities may require accommodations in order to effectively communicate with shelter staff, receive information and navigate the shelter. (p. 42)
- Sheltering plans do not mention accessible communications in the shelters or provide for accommodations such as ASL interpreters. (p. 43, 44)
- City does not provide interpreters at shelters. (p.44)
- City relies on people to find ways of communicating their needs without assistance and advises people with hearing disabilities to practice communicating through gestures, note cards, text messages, etc. (p. 44)
- Plans give conflicting guidance on whether people with disabilities will be permitted to stay in the same shelter with their caregivers; suggest that people with disabilities may be placed in the same general shelter as their caregiver, but that caregivers may not be permitted to stay in SMNSs. (p.45)
- Some shelters are only accessible if the elevator is working (shelter must have power). (p.45)

## BACKUP POWER

- FEMA guidance states that emergency plans should include strategies for providing power for services that require a backup power system. (p.45)
- City's shelter plans do not include strategies to provide backup power generators at shelters or to otherwise ensure that electricity will be available at shelters for those who depend upon it. (p.46)
  - *Chief Campbell – You had contacted me before about generators at shelters and I think this case could give you additional leverage for funding support*

## Durable Medical Equipment (DME)/SUPPLIES

- FEMA advises planners to include in plans a process “for locating, purchasing, and storing as much of the supplies and equipment as possible and practical to meet the needs of shelter residents with special needs and that, PRIOR to an emergency, planners ‘develop agreements with the private sector to ensure that necessary equipment and supplies that have not been purchased and stored will be available.” (p.47)
  - *This is something I have begun working on with local agencies and organizations in Hampton Roads. I am working on establishing MOAs and LOAs to loan DME and assistive technology to shelters, provide SMEs to help you identify accessibility improvements and needs at shelters, and to help provide services in shelters or during other areas of response/recovery at no cost. It would be a very “how we as service providers can help you” versus “we’re going to tell you what you can do for us” approach. Ideally, this would be a regional tool because most of these groups and agencies do not serve just one locality. This would develop into a kind of toolkit each EMA could access to get the help you need from the community subject matter experts, lending closets, and service providers with accessibility. This concept will be put before the Special Needs Subcommittee in January or March 2014.*
- City maintains a stockpile designed to provide the shelter system with the ‘basic supplies’ required to house and care for up to 70,000 people for 7 days; pre-configured into sets to be delivered in the event of an emergency. Only supplies configured for SMNSs include “some” items to accommodate people with disabilities. City's plans do not call for such items to be provided to general shelters. (p.47, 48)
  - *Shelter Support Units – the concept presented above is similar to the SSUs we have in place here in Hampton Roads and the FNSS*

*Trailers in Anchorage, AK. I feel we are a step ahead because, even though our units are not large enough to support 70,000 people, they are rapidly deployable to any location and can be used at either a medical shelter or a general population shelter and are specifically designed to provide supplies for individuals with medical and disability needs.*

- The City has no MOAs with organizations to provide shelter supplies in an emergency. (p.48-49)
  - *See bullet above under “FEMA advises”. I have already been working on this and will continue if the Special Needs Subcommittee supports it.*

## PERSONAL CARE SERVICES

- Even if attendants (people assigned to assist individuals with disabilities in the shelter) aided people with disabilities in receiving sheltering services, they arrived a week after the shelters were opened; this means they did not have meaningful access to the shelter system because they had to wait a week after the disaster to use it. (p.98)
- The attendants were provided by FEMA; they were not made available pursuant to any City plan. Therefore there is no reason to believe they will be available in the future. (p.98)

## INTEGRATED SHELTERS

- SMNSs were fully accessible. (p. 98)
- ADA requires public entities provide services in the most integrated setting appropriate to the needs of qualified individuals with disabilities that enables them to interact with individuals without disabilities to the fullest extent possible. (p.98)
- Requiring people with disabilities who do not require medical care to seek shelter in SMNSs would violate the ADA regulations. (p. 98)
  - *Special Needs Shelters, Functional Needs Shelters, and segregating people with disabilities within a general populations shelter, are all violations of people’s rights.*
- “Unjustified isolation...is properly regarded as discrimination based on disability.” (p.98)
- “Ordinarily, a public entity is not required ‘to provide to individuals with disabilities personal devices’... [This] does not apply in special circumstances such as where the individual is an inmate of a custodial or correctional institution... An emergency constitutes a similar special circumstance.” Failure to provide the goods and services people with

disabilities need to remain healthy, safe and functional when an emergency has rendered them unable to provide these goods and services for themselves is a violation of their rights under the ADA. (p.103)

## Court's final opinion

- City's plans are not in compliance (p.93, 116)

### FACILITY ACCESSIBILITY

- Due to architectural barriers and programmatic failures, City's plans deprive people with disabilities of meaningful access to its shelter system. (p.93)
- "A public entity may not select a facility to provide a public service that would 'defeat or substantially impair' the ability of people with disabilities to access that service." "This does NOT mean that every building used for a public service must be accessible." "Section 150(a) does not 'necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities'." (p. 94, 99)
- The ability of people with disabilities to enter a facility is necessary, but not sufficient, for compliance with ADA. (p. 96)
- "At a MINIMUM, to provide people with meaningful access to the City's shelter system
  - The City's evacuation centers must be accessible to people with disabilities
  - A sufficient number of shelters to accommodate people with disabilities must also be accessible
  - The City must be able to identify with shelters are, in fact, accessible."
- Refuge of Last Resort facilities DO NOT all need to be accessible to people with disabilities to be chosen as ROLRs; must ensure a sufficient proportion are accessible, identify which are accessible, and provide that information to the public. (p.100)

### PROGRAM ACCESSIBILITY

#### The City's Sheltering Plans:

- Fail to accommodate communication needs (p.101)
- Fail to provide appropriate auxiliary aids and services (p.101)
- Do not provide sign language interpreter or common signage in Braille (p.101)

- Limit accommodation of people with disabilities to SMNSs (p.102)
- Do not provide for ensuring electricity at general shelters (p.102)

## Power outage planning

### Highlights from evidence from trial

- People with disabilities are particularly vulnerable to power outages, as they often rely on equipment that requires electricity
- NYC maintains a Power Disruption Plan that includes Con Ed attempting to contact a list of customers dependent on electricity for life-saving equipment. Customers are contacted by telephone and advised to use back-up equipment or to go to the nearest hospital emergency room. If Con Ed is unable to reach a customer on the list, NYPD will dispatch an officer to make sure the person is safe.
- Many people with disabilities use equipment that requires electricity but is not technically 'life-supporting'.
- The Power Disruption Plan recognizes that people with disabilities may be affected by a power outage but there is nothing in this, or any other City plan, about accommodating the needs of these individuals.
- During Hurricane Sandy, the City was concerned people might be trapped in their homes but the City's emergency plans did not account for this situation and NYC has no plan for canvassing after a power outage or any other emergency.
- NYC did put together a canvassing effort after Sandy but it was ad hoc and started 10 days after the hurricane. The canvassing effort did, however, reach thousands of residents.
- NYC intends to develop a canvassing plan.

### Court's final opinion

- **City's plans are not in compliance**
  - City's plans do not require that, when possible, residents (or even just those who are dependent on electricity) be notified in advance of a power outage
  - The plans do not provide sufficient evacuation assistance to ensure that during a power outage people with disabilities can exit their buildings
  - The plans do not call for canvassing after an emergency to reach those unable to leave their buildings

## Recovery operations

## Highlights from evidence from trial

### RESOURCE PROVISION

- The City's primary plan for distributing life-sustaining commodities after an emergency is the Commodities Distribution Point Plan. The City plans to use the POD approach for distributing goods and requires all sites be accessible to people with disabilities and that sites be clear of debris.
  - *The POD approach may still be deemed inadequate because it does not reach people who are homebound due to a medical issue or disability. Chesapeake - The same problem would apply to the approach of getting retailers back online in lieu of PODs. Resource distribution plans need to specify how to distribute resources to the temporarily and permanently homebound individuals.*
- City also has a Disaster Assistance Service Center plan.
- Nothing in either plan requires accessible communications at the sites.
- The City provided substantial assistance to those who required prescription medication but does not have a plan directing the provision of prescription medication assistance.
- No evidence was presented that people with disabilities were unable to access these centers.

### DEBRIS REMOVAL

- The City's Debris Management Plan provides that the City will 'coordinate efforts' to address the needs of people with disabilities but does not provide any guidance on for their needs will be taken into account.
- No evidence was provided that anyone with disabilities was hindered by debris in the aftermath of Hurricanes Irene or Sandy.

### INTERIM HOUSING

- The City had no operational plan to provide interim housing for anyone following an emergency.
- The City created the Office of Housing Recovery Operations after Sandy and helped ensure that people with disabilities had livable housing.
- The City provided accessible hotel rooms to people with disabilities and special needs who required interim housing.

## Court's final opinion

- **For the most part, City plans are in compliance (term used is "sufficient")**

- Resource provision – Failure to plan for accessible communications at the centers is in violation of the regulations
- Debris Removal – “The ADA does not mandate that all City services provide special accommodations for people with disabilities. Instead, it mandates that people with disabilities have meaningful access to all services; special accommodations are required only if necessary to achieve this access.”
- Interim Housing – The City failed to plan for any interim housing; because the City does not plan for interim housing for anyone, the ADA does not require that it do so specifically for people with disabilities.

## Communications & outreach

### Highlights from evidence from trial

#### EDUCATION & OUTREACH

- City trains volunteers to educate their communities about emergency preparedness and to assist with the City’s emergency response
- The information provided by the City fails to provide people with disabilities sufficient information to prepare for and plan for an emergency
  - Provides almost no information about the accessibility of the shelter system
  - Information that is provided is incorrect
  - City websites lack shelter accessibility information
  - Appears to be no way for people with special needs to determine in advance which shelters or evacuation centers are accessible
  - City tells people with disabilities to plan for transportation in an emergency but does not provide information about whether accessible transportation will be available or how to use it

#### COMMUNICATIONS

- People with disabilities are more likely to receive and heed emergency information that is disseminated through people who are familiar with, and trusted by, those receiving the information
  - *This is something I experienced and learned through my work with the deaf and hard of hearing community in Anchorage. People with disabilities may be much more wary of information received directly from the government, particularly the deaf/HOH population. Also, knowing how to communicate with the various populations and understanding their needs is crucial in providing public information.*

*This is why community partners are a critical part of an information response.*

- The City provides emergency communication through traditional media, governmental websites, social media, door to door notification, and the 3-1-1 system.
- The City also distributes information through the Special Needs Advance Warning System – a network of service providers for people with disabilities and other special needs organizations.
  - These providers receive information from the City and then push it out to their clients/patients
  - OEM also conducts conference calls with this group and allows them to provide information on how the event is impacting their clients
    - *I think this is a fantastic idea and would like to incorporate it in Hampton Roads.*
  - The City has never evaluated the effectiveness of the program
  - Limited resource agencies are unlikely to be able to provide staff and resources to convey the information to clients; particularly during an emergency event
    - *This is why disclosing their client list would be beneficial to their clients!*
  - Also, many people with disabilities are not connected to a service provider
- The City's Public Information Plan provides recommendation about how emergency announcements should be publicized (do not overlap closed-captioning space when using a crawl; include a sign language interpreter in the same frame if there is an interpreter at all, etc) but there is no requirement that they be followed and no agreements in place that they will be.
  - *I am fairly certain the City does not have the authority to require these things but agreements or at least documented requests would make sense*
- The City's Coastal Storm Public Information Plan states that the OEM will work with the media to make sure information is disseminated to people with sight and hearing impairments and will ensure that the information is available in an accessible format. The plan does not, however, specify how those things will be done.
- During Hurricane Sandy, City drafted a policy titled "Engaging the Deaf/Hard of Hearing Community" and it specifies that interpreters will be used, at a minimum, when the Mayor provides critical and time-sensitive

information about a significant and imminent threat to the public. It also states the City will issue a media advisory requesting networks provide closed captioning and post written bullets summarizing the Mayor's official statement.

- NO EVIDENCE that the City's websites were inaccessible
- The 3-1-1 Call Center is accessible to people with hearing impairments thru the NY Relay System
- Much of the information provided by the City regarding emergencies does not directly provide information relevant to people with disabilities but instead directs them to call 3-1-1
- Evidence showed that 3-1-1 may not always be a reliable source of information or services during an emergency and may not always be available. Additionally, not everyone can use or has access to a phone but there is no other way for them to get information.
- Notify NYC – self-registry for all residents
  - Available in multiple formats (email, text, recorded call)
  - Service was determined to be accessible
- Door – to – Door Notifications – Passing out fliers in neighborhoods
  - Nothing in the City's plans requiring that these fliers be accessible to those with visual disabilities or that the information communicated in the fliers also be communicated in other ways
  - Court cited not providing the fliers in Braille and not providing instructions about other methods of distributing the information as making the door-to-door notifications inaccessible to people with vision impairments
  - NYPD also used loud speakers in the neighborhood

## CONTENT

- The absence of information for people with disabilities was more a function of content rather than methods of distribution
- The City's plans do not require that the City provide information about shelter accessibility, accessible transportation, evacuation assistance, or any other information required by people with disabilities to respond to an emergency
- Information that was provided was frequently incorrect or incomplete
- The City failed to provide sufficient information about evacuation and transportation assistance for people with disabilities; did not provide any information about evacuation assistance.

- Templates provided in the Coastal Storm Public Information Plan state “if you have a disability that may prevent you from evacuating your home on your own, seek assistance from friends, relatives, and neighbors.”
  - *Most of these individuals, however, will not own accessible transportation or have accessible homes in which to shelter someone with a disability.*
- Telling people with disabilities to call 3-1-1 immediately before or during an emergency is not as effective as providing them with information directly and in advance of an emergency and it undermines their ability to develop a personal plan in advance of an emergency.

### Court’s final opinion

- **City’s means of communicating (outside shelters) are compliant**
- **City’s content of communications is not compliant**
  - City’s outreach plan fails to provide crucial information to enable people with disabilities to plan in advance of an event
  - The City does not publicize which shelters or evacuation centers are fully accessible
  - The City does not provide information about accessible transportation and how to access it
  - “The proper standard is not whether every communication is accessible, but rather, as a whole, the communication provided to people with disabilities is ‘effective; and ensures ‘meaningful access to services being provided’.”
  - The failure to provide information about which evacuation centers or shelters were actually accessible plainly deprives people with disabilities of the ability to “obtain information as to the existence and location of accessible services, activities, and facilities.”

### Additional interesting and relevant information

- Special Needs Coordinator (SNC)
  - NYC has Special Needs Coordinator within their emergency management agency
  - The SNC had no involvement in drafting some of City’s core plans including evacuations and sheltering
  - The SNC may make suggestions but doesn’t have authority to approve or reject; no requirement that the SNC signs off on plans
  - Suggestions are taken under advisement and either used or ignored
  - Position is ‘lowest rung’ in org chart

- No other person in the City government has the responsibility of ensuring the rights of disabled in disaster planning
- Special Needs Advisory Group
  - “Meaningful participation by the disability community is central to effective disaster planning.”
  - SNAG is composed of ~50 community representatives
  - Chaired by Special Needs Coordinator
  - Meet quarterly to discuss emergency planning and provide input and feedback to NYC
  - Members have participated in training and presentations and advised on some outreach materials
  - No decision making authority
  - SNAG participants see their role and participation as lacking the opportunity for meaningful engagement
  - Many groups have discontinued participation because it was not a good use of their time; because they were not able to provide comments or input on planning; because their concerns were not being addressed.
- Ad Hoc solutions
  - Reiterated the court’s findings in LA Case that ad hoc solutions are not adequate for meeting ADA and the needs of the disabled
  - “Ad hoc accommodations (including providing assistance or determining need on a case by case basis) are both legally inadequate and practically unrealistic.”
  - “benign neglect” – judge stated that ADA was not intended to protect only from blatant and purposeful discrimination but also from discrimination through benign neglect, thoughtlessness, and indifference
  - The purpose of a preparedness program is to *anticipate* the needs of residents and *minimize* last minute, individualized requests for assistance and improvisation, particularly when the City’s infrastructure may be substantially compromised or strained. To ensure that people with disabilities are able to access the services provided by the City after an emergency, therefore, such a response must at least be incorporated in the City’s plans.
- Reasonable accommodations
  - Court emphasized that the ADA and Rehab Acts do not require that substantively different services be provided to the disabled no matter how great their need
  - “This cursory mention of people with special needs was insufficient to ensure that the needs of people with disabilities were met.”
  - The statutes do not require ‘optimal’ accommodations

- Does not require perfection
- Does not require a public entity to make EACH of its existing facilities accessible
- “The court has found no cases, and plaintiff has not provided the court with one, which stand for the proposition that plaintiff is entitled to whatever accommodation he desires.”
- Inclusion of people with disabilities in the planning process
  - The ADA does not mandate that the City involve people with disabilities in the formulation of its emergency preparedness program. Even if they are, such inclusion does not remedy the failure of the emergency plans themselves to adequately accommodate people with special needs.