CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY

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OPINION NO. 2005-02

SUBJECT:	Full-Time or Continuous Driving as an Essential Eligibility Requirement for Taxi Permits
REQUESTED BY:	San Francisco Taxi Commission
PREPARED BY:	Thomas J. Owen Deputy City Attorney
DATED:	December 9, 2005

QUESTION PRESENTED:

May the Commission eliminate full-time or continuous driving as an essential eligibility requirement under the Americans With Disabilities Act ("the ADA") for taxi permits?

SHORT ANSWER:

The voters and the Board of Supervisors have mandated that full-time or continuous driving be a requirement for taxi permit holders. For that reason, there is a serious question as to the Commission's ability to eliminate full-time or continuous driving as an essential eligibility requirement for the taxi permit program under the ADA.

BACKGROUND:

Title II of the Americans with Disabilities Act of 1990 ("the ADA") provides, in relevant part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." (42 U.S.C. § 12132; see also 28 C.F.R. § 35.130(a).) Under the ADA, a public entity is required to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would

fundamentally alter the nature of the service, program, or activity. (28 C.F.R. § 35.130(b)(7).)

A "qualified individual" under the ADA is one who "with or without reasonable modifications to rules, policies, or practices, . . . meets the essential eligibility requirements" for the program or service. (42 U.S.C. § 12131(2); see also 28 C.F.R. § 35.104.) An "essential eligibility requirement" is a requirement reasonably necessary to accomplish the purpose of program or activity provided by public entity. (42 U.S.C. § [201(2)]; 42 U.S.C. § 12131(2).)

The City and County of San Francisco licenses taxicabs under Section 4.133 of the San Francisco Charter (creating the Taxi Commission), Appendix 6 of the San Francisco Administrative Code (commonly referred to as "Proposition K"), and Chapter 16 of the San Francisco Police Code (regulating motor vehicles for hire). Proposition K and the Police Code require that all permit holders who first received their permits after 1978 drive a minimum number of hours or shifts per year as a condition of receiving and keeping their permits. (See SF Administrative Code, Appx. 6; SF Police Code, § 1081(f).)

In Resolution No. 2002-93, adopted October 8, 2002, the Taxi Commission declared that "continuous driving is an essential eligibility requirement of the City's programs for the permitting of motor vehicles for hire, and that exempting a permit holder from that requirement would fundamentally alter the nature of those programs; . . ."

ANALYSIS:

A public entity's duty under Title II of the ADA to provide a "reasonable modification" if necessary to make a particular program or service accessible to the disabled does not extend to waiving or compromising an essential eligibility requirement:

> Title II does not require States to employ any and all means to make . . . services accessible to persons with disabilities, and it does not require States to compromise their essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service.

(*Tennessee v. Lane* (2004) 541 U.S. 509, 531-32, citing 42 U.S.C. § 12131(2).)

While a public entity may not arbitrarily impose eligibility criteria that tend to screen out an individual with a disability, it may impose criteria having such an effect if "such criteria can be shown to be necessary for the provision of the . . . activity being offered." (28 C.F.R. § 35.130(b)(8).)

> It is clear from the language of Title II . . . that public entities are not required to create new programs that provide heretofore unprovided services to assist disabled persons. Nor, ordinarily, must public entities make modifications that would fundamentally alter existing programs and services administered pursuant to programs that do not facially discriminate against the disabled: "A public entity shall make *reasonable modifications* in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, *unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity*." As the regulatory language makes clear, entities are required only to make *reasonable* changes in existing policies in order to accommodate individuals' disabilities.

(*Townsend v. Quasim* (9th Cir. 2003) 328 F.3d 511, 518; internal citations omitted, emphasis in original.)

In deciding whether a modification is required under Title II of the ADA, a public entity first must determine whether the eligibility requirement at issue is "essential." (*Pottgen v. Missouri State High School Activities Assn.* ("*Pottgen*") (8th Cir. 1994) 40 F.3d 926, 930-31.) The entity does so by "reviewing the importance of the requirement to the . . . program." (*Id.*) "Eligibility requirements are deemed 'essential' or 'necessary' when such requirements are reasonably necessary to accomplish the purposes of a particular program." (*Cole v. NCAA* (N.D.Ga. 2000) 120 F.Supp.2d 1060, 1070-71; *Matthews v. NCAA* (E.D.Wash. 1999) 79 F.Supp.2d 1199, 1206.)

The decision must be based on a fact-specific assessment of the program or benefit. "[W]e examine the essential nature of the program and assess what criteria are necessary to implement its purpose." (*Ulrich v. Senior and Disabled Services Division* (1999) 164 Or.App. 50, 54; internal citations and quotations omitted; *Easly v. Snider* (3rd Cir. 1994) 36 F.3d 297, 303 ["An examination of the actual services offered demonstrates that personal control is essential to the program, and that mental alertness is a necessary requirement for receipt of the program's essential benefit. . ."].)

But where certain requirements essentially "define" the benefit, the courts will defer to that definition. "Although questions of the reasonableness of an accommodation or the essentialness of an eligibility requirement generally need a fact-specific inquiry, ***certain eligibility requirements of a program by their nature are essential and any alteration unreasonable as a matter of law***." (*Castellano v. City of*

New York (S.D.N.Y. 1996) 946 F.Supp. 249, 254; internal citations omitted, emphasis added.) "Reasonable accommodations do not require an institution to lower or to effect substantial modifications of standards to accommodate a handicapped person. (*Pottgen*, *supra*, 40 F.3d at p. 930; internal citations and quotations omitted.) "Because [the proposed modification] would essentially rewrite the statute, it must be seen as a fundamental alteration in the nature of the program." (*Aughe v. Shalala* (W.D. Wash. 1995) 885 F.Supp. 1428, 1432.)

The courts will not substitute their own concept of the proper purposes of a program for those embodied in the eligibility requirements adopted by the legislative or executive branch:

> In enacting the AFDC, Congress determined that the completion by age nineteen requirement was an essential element of that program. It may well be that a better social policy would extend benefits to those who are [excluded by the completion requirement]. That policy, however, is for Congress, and not this Court, to determine.

(*Aughe v. Shalala*, *supra*, 885 F.Supp. at p. 1433.; see also *Alexander v. Choate* (1985) 469 U.S. 287, 303 ["Section 504 does not require the State to alter this definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs."].)

The *Cole* and *Matthews* cases provide useful examples. Both cases involved questions whether the National Collegiate Athletic Association ("the NCAA") was required to modify or waive its academic requirements for student athletes with learning disabilities. (*Cole v. NCAA*, *supra*, 120 F.Supp.2d 1060; *Matthews v. NCAA*, *supra*, 79 F.Supp.2d 1199.)

The role of the NCAA goes beyond regulating athletic competition at and between its member schools. It has chosen to define its program to include an additional and substantial academic component, including minimum requirements for course loads and grade point averages. (*Matthews v. NCAA*, *supra*, 79 F.Supp.2d at p. 1206.) In both *Matthews* and *Cole*, the courts deferred to the organization's determination of those minimum requirements and held that the NCAA was not required to modify the substance of those requirements for learning disabled students:

> To require Defendants to continually issue waivers of its requirements for Plaintiff would be to completely dispense with its essential requirements. This is something that the ADA does not require.
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> *Matthews v. NCAA*, *supra*, 79 F.Supp.2d at p. 1207.

> A court-ordered waiver of the academic standards would have essentially negated the academic eligibility standards and compromised the educational purposes of the NCAA. * * * Abandoning the eligibility requirements altogether for this or any athlete is unreasonable as a matter of law and is not required by the ADA.
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> *Cole v. NCAA*, *supra*, 120 F.Supp.2d at p. 1071.

An organization would not necessarily have to include an academic component in order to function as a regulatory body for college athletics. Nor did the NCAA necessarily have to adopt the particular academic performance standards that it did. But the court did not question the NCAA's right to establish the program it chose, or require the NCAA to compromise that program to satisfy the ADA.

One of the major goals of Proposition K was to place taxi permits in the hands or working drivers. According to the official argument in favor of Proposition K, the then-current system hurt "the paying customer and *individual taxicab driver who wants to obtain a permit and be allowed to engage in the taxicab business himself.* [Emphasis added.]" (SF Voter Information Pamphlet, June 6, 1978 Primary Election, at p. 37.) According to the same argument, passage of Proposition K would mean that "new permits would be issued to people who actually want to drive a taxicab." (*Id.*)

Proposition K did so by imposing a full-time driving requirement for taxi permit holders. (See SF Administrative Code, Appx. 6; see also SF Police Code, § 1081(f).) That requirement has been confirmed by the Court of Appeals. (*San Francisco Taxi Permitholders and Drivers Assn. v. City and County of San Francisco*, 2002 WL 1485354 (Cal.App. 1 Dist.).) As the Taxi Commission itself stated,

> [T]he text of Proposition K indicates the importance that measure places on permit holders driving on a continuous basis, by
>
> - requiring every applicant for a motor vehicle for hire permit to declare under penalty of perjury that he or she intends actively and personally to engage full-time as permittee-driver under any permit issued to him or her;
> - defining full-time driving with considerable specificity; and
> - requiring the Taxi Commission, in determining whether or not public convenience and necessity exist for the issuance of a permit, to find that the applicant will be a full-time driver; . . .

(SF Taxi Comm. Res. No. 2002-93.)

The driving requirement gives drivers an incentive to stay in the industry and permit holders an active and immediate stake in the ongoing operation and vitality of the industry.

> [T]he requirement that permitholders drive on a continuous basis serves the public interest in a number of ways, including that
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> - it tends to promote stability in the driving work force, because if permits can be held by absentees, there will be fewer opportunities for nonpermitholding drivers to obtain permits and thus less incentive for drivers to stay in the industry for lengthy periods of time;
>
> - it tends to promote experience in the driving work force, because it ensures that for a significant part of the time a permitted vehicle is driven, the driver must be someone who drives frequently;
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> - it tends to promote a sense of equity among the driving work force, because it requires that persons doing the day-to-day work of driving receive the rewards of being a permitholder;
>
> - it tends to promote greater cleanliness, comfort, and safety of vehicles, because the permitholder must drive the permitted vehicle frequently and this has a personal incentive to ensure that the vehicle is clean, comfortable, and safe; and
>
> - it provides an entrepreneurial opportunity and a degree of upward mobility for drivers; . . .

(*Id.*)

Since the adoption of Proposition K in 1978 and Taxi Commission Resolution 2002-93 in 2002, both the voters and the Board of Supervisors have confirmed the driving requirement. In 2003, the voters rejected Proposition N, an initiative ordinance that would have waived the driving requirement for disabled permit holders. Proposition N stated, in its entirety:

> Any taxicab permit holder who is unable to comply with a driving requirement due to disability shall not be subject to permit revocation or suspension for failure to comply with the driving requirement.

(SF Voter Information Pamphlet, November 4, 2003 Consolidated Municipal Election, at p. 196.) This measure placed the question of waiver of the driving requirement of disabled permit holders squarely before the voters, who had also adopted

Proposition K, and the measure was defeated. (SF Board of Supervisors Res. No. 761-03, at p. 3.) And in 2004, the Board of Supervisors adopted Ordinance No. 111-04. As part of that ordinance, the Board re-stated in very explicit terms the full-time driving requirement for permit holders and provided additional administrative penalties for failure to comply. (SF Police Code §§ 1081(f), 1186, 1188.)

CONCLUSION:

The voters and the Board of Supervisors have mandated that full-time or continuous driving be a requirement for taxi permit holders. Regulations adopted by the Taxi Commission must be consistent with Proposition K and the Police Code. (*Colmenares v. Braemer Country Club, Inc.* (2003) 29 Cal.4th 1019, 1029; *Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 299-300.) For that reason, there is a serious question whether the Commission may eliminate full-time or continuous driving as an essential eligibility requirement for the taxi permit program under the ADA.

Very truly yours,

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APPROVED:

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