

COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA

DOCKET NO. CA-08-505

COLLETTE JOSEY COVINGTON AND JADE COVINGTON

Plaintiffs – Appellees

Versus

**MCNEESE STATE UNIVERSITY AND THE BOARD OF SUPERVISORS
FOR THE UNIVERSITY OF LOUISIANA SYSTEM**

Defendants - Appellants

CIVIL PROCEEDING

On Appeal from the Fourteenth Judicial District Court, Parish of
Calcasieu, State of Louisiana, Docket No. 2001-2355, Division “F,”
the Honorable Wilford Carter, Judge Presiding

**ORIGINAL BRIEF ON BEHALF OF APPELLEES, COLLETTE JOSEY
COVINGTON AND JADE COVINGTON**

Lee A. Archer
Bar Roll No. 16791
1225 Rustic Lane
Lake Charles, LA 70605
Telephone (337) 474-4712

Seth Hopkins, Appeal Counsel
Bar Roll No. 26341
1318 Dowling Street
Houston, Texas 77003
Telephone: (337) 540-9120

James Hopkins
Bar Roll No. 06990
P.O. Box 205
Sulphur, LA 70664
Telephone (337) 527-7071

Attorneys for Plaintiffs-
Appellees, Collette Josey
Covington and Jade Covington

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION AND SUMMARY	1
FACTS AND PROCEDURAL HISTORY	6
ARGUMENT	
I. Response to Assignment of Error 1: The Trial Court properly applied Louisiana Code of Civil Procedure Article 966.	8
II. Response to Assignment of Error No 2: The Trial Court properly found no genuine issue of material fact that Miss Covington was a qualified individual with a disability under the ADA.	11
III. Response to Assignment of Error No 3: The Trial Court properly found no genuine issue of material fact that McNeese violated the ADA.	17
IV. Response to Assignment of Error 4: Title II of the ADA is Constitutional.	26
CONCLUSION	27
CERTIFICATE OF SERVICE	29

TABLE OF AUTHORITIES

Cases	Page
<i>Babin v. Winn-Dixie Louisiana, Inc.</i> , 2000-0078 (La. 6/30/00), 764 So.2d 37, 39-40	9
<i>Bennett-Nelson vs. Louisiana Bd. of Regents</i> , 431 F.3d 448 (5th Cir. (La.) 2005), <i>cert. denied</i> , 547 U.S. 1098, 126 S.Ct. 1888, 164 L.Ed. 2d 568 (2006)	27
<i>Chaffin v. Kansas State Fair Board</i> , 348 F.3d 850, 858 (10th Cir. 2003), <i>overruled on other grounds</i> , 2005 U.S. Dist. LEXIS 2376 (D. Kan. Feb. 17, 2005)	5, 17, 21, 22, 23, 28
<i>Costello v. Hardy</i> , 2003-1146 (La. 1/21/04), 864 So.2d 129	9, 10
<i>EEOC v. Sears, Roebuck & Co.</i> , 417 F.3d 789, 802 (7th Cir. 2005)	13
<i>Kinney v. Yerusalim</i> , 9 F.3d 1067, 1073 (3rd Cir. 1993), <i>cert. denied</i> , 511 U.S. 1033, 114 S.Ct. 1545, 128 L.Ed.2d 196 (1994)	19, 20, 28
<i>Matthews v. Jefferson</i> , 29 F. Supp.2d 525, 533 (W.D. Ark. 1998)	4, 5, 19, 23, 25 28
<i>Olmstead v. L.C. ex rel. Zimring</i> , 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999)	19
<i>Pace v. Bogalusa School Board</i> , 403 F.3d 272 (5th Cir. (La.) 2005) <i>cert. denied</i> , 546 U.S. 933 , 126 S.Ct. 416 , 163 L.Ed.2d 317 (2005)	26
<i>Panzardi-Santiago v. University of Puerto Rico</i> , 200 F. Supp.2d 1 (D.P.R. 2002)	4, 5, 25, 26
<i>Parker v. Universidad de Puerto Rico</i> , 225 F.3d 1 (1st Cir. 2000)	22, 28
<i>Schonfeld v. City of Carlsbad</i> , 978 F. Supp. 1329 (S.D. Cal. 1997) <i>affirmed</i> , 172 F.3d 876 (9th Cir. 1999)	4, 5, 10, 13, 25
<i>Shotz v. Cates</i> , 256 F.3d 1077, 1080 (11th Cir. 2001)	21, 28
<i>U.S. Equal Opportunity Employment Commission v. E.I. DuPont de Nemours & Co.</i> , 406 F. Supp.2d 645, 654 (E.D. La. 2005), <i>affirmed in part, reversed in part</i> , 480 F.3d 724, (5th Cir. (La.) 2007)	4, 10, 13

Federal Statutes and Rules

11 th Amendment, U.S. Constitution	26, 27
42 U.S.C. 12132	9, 17
28 CFR 25.151	23
28 CFR 35.150	21
28 CFR 35.150(a)(1)	21
28 CFR 35.150(b)(1)	22, 24
29 CFR 1630.2	4, 10, 12
29 CFR 1630.2(j)	13

State Statutes and Rules

LSA-R.S. 46:2254(A)	2
LSA-R.S. 49:148.1	2
LSA-R.S. 51:2231	2, 6
LSA-C.C.P. art. 966	9

MAY IT PLEASE THE COURT:

Plaintiffs-Appellees, COLLETTE JOSEY COVINGTON and JADE COVINGTON, respectfully submit, through undersigned counsel, their Original Brief in the captioned matter, in compliance with the Uniform Rules of the Louisiana Courts of Appeal and the Local Rules of this Honorable Court.

INTRODUCTION AND SUMMARY

Plaintiffs submitted a large amount of undisputed evidence to persuade the trial court of one simple and obvious fact—that McNeese State University (“McNeese”) violated the Americans with Disabilities Act (“ADA”). The trial court agreed and granted a Partial Motion for Summary Judgment. This Honorable Court is presented with clear facts and an important duty to uphold the trial court’s ruling that the disabled have the fundamental right to access the facilities of Louisiana’s public universities free of discrimination.¹

Miss Collette Covington is an epileptic, wheelchair-bound McNeese student who filed this suit for damages and injunctive relief in 2001 after she soiled herself and injured her arm while unsuccessfully attempting to use the inaccessible Holbrook Student Union Old Ranch (“Old Ranch”) women’s restroom. The Old Ranch was marked as ADA compliant, and the State of Louisiana designated the building as the pick-up point to transport Covington and other disabled students in a Louisiana Vocational Rehabilitation van for the disabled. However, as admitted by Defendants, not a single accessible restroom exists in the building.

The nearly 60,000 square foot Old Ranch Student Union is indisputably one of the major buildings at McNeese, and McNeese admits that it installed a state-of-the-art computer lab and spent more than \$450,000 on the building since the passage of the ADA but will not spend the \$4,000 required to bring the restrooms in the building up to ADA code.² McNeese President Dr. Robert Hebert testified

¹ For the court’s convenience, and pursuant to new Internal Rule 24, Plaintiffs include several hyperlinks to video testimony in its Corresponding CD-Rom Brief. Links are also provided to: Plaintiffs’ Powerpoint in record; ADA Violations Chart, Record, Vol. 5, 1114-1127; Arguments Chart, Record, Vol. 5, 1139-1149; Summary of Relevant Statutes and Cases, Record, Vol. 5, 1151-1171; and Response to Defendants’ Statement of Material Fact, Record, Vol. 5, 1172-1179.

² Record, Vol. 1, 160:14-161:3; 161:15-25 (\$150,000-\$200,000 for renovations to computer lab); Vol. 5, 1023:5-10 (\$300,000 for the cafeteria, paid for through a service agreement with ARAMARK). Deposition of Rhoden. *See* also budget documents, Vol. 4, 992-993.

that McNeese will not make the Old Ranch accessible for the disabled because McNeese erroneously believes that it has the right to exclude the disabled from parts of campus that it does not consider “fundamentally important” for them to enter and that McNeese does not consider it a “priority” for the disabled to have access to the Old Ranch Student Union.³

McNeese has admitted all requisite elements of Plaintiffs’ ADA claim through Requests for Admissions and the damaging testimony of McNeese’s chief policy makers. Miss Covington filed a Motion for Partial Summary Judgment seeking a determination of law whether, under the undisputed facts, McNeese violates Title II of the ADA, the 1973 Rehabilitation Act, La. R.S. 49:148.1, La. R.S. 46:2254(A), (F), and (J), and La. R.S. 51:2231, and the Louisiana Commission on Human Rights.⁴

The parties stipulated and the Court limited its consideration to the single and simple question of whether McNeese violated the ADA by failing to provide a single accessible restroom in the Old Ranch and imposing a burdensome, ineffective, and unlawful “registration” process which served as a sword to deter the disabled rather than a shield to protect them.⁵ All other issues, including injunctive relief, damages, and attorney fees, remain to be tried.

The District Court held three lengthy hearings on this Motion. Judge Carter, a McNeese graduate, properly recognized that McNeese “is a vital institution to the community” and therefore took the matter under close consideration and advisement.⁶ At McNeese’s request, Judge Carter continued the hearing for a full year and twice continued the hearing after the presentation of plaintiffs’ arguments to permit McNeese additional time to produce any possible evidence to create an issue of material fact and defeat the Motion, to no avail.

³ Record, Vol. 3, 501:13-17, 502:5-7, 503:6-17; Hebert video (deposition of Robert Hebert).

⁴ By this suit, Covington hopes to help other wheelchair-bound McNeese students, many of whom have complained in written articles in the McNeese student media about harrowing experiences in non-compliant campus restrooms and facilities. Covington and other disabled students are entitled to equal treatment with able-bodied students, as required by federal and state law.

⁵ Transcript of Hearing, p. 148.

⁶ Transcript of Hearing, p. 147.

At the January 4, 2007 hearing on the Motion, counsel for McNeese was forced to agree with Judge Carter that McNeese had admitted that Miss Covington was in a wheelchair, that she had been injured in the restroom at the Old Ranch requiring the assistance of the campus police, and that the restroom in the Old Ranch, particularly the narrow and heavy door that caused Miss Covington to injure her arm, was not ADA compliant or wheelchair-accessible.⁷ When questioned by the District Court as to what further evidence McNeese could present at a trial on this issue, counsel for McNeese had no answer, except to suggest that it would attack Miss Covington's credibility as to her disability⁸; the same irrelevant and insensitive tactic it has employed in its brief before this Court.

The District Court correctly determined that the only issues remaining were issues of law that were properly decided on summary judgment⁹ and granted a Partial Summary Judgment in Plaintiffs' favor. This was not an easy decision for any Judge, particularly an alumnus, to render against McNeese, which is a venerable and beloved local institution. However, it was a decision that was absolutely necessary, considering McNeese's candid admissions and stubborn refusal to recognize the rights of the disabled to access the Old Ranch or to modify a single restroom after nearly eight years of litigation. Without intervention from the courts, McNeese admittedly will take no steps to comply with its obligations under the ADA and state law, to the detriment of the public and the disabled.

The District Court's Partial Summary Judgment is narrow, specific, and modest and reserves all issues regarding injunctive relief, liability, damages and attorneys' fees specifically for trial.¹⁰ First, it found that McNeese did not dispute that Miss Covington was in a wheelchair on the date of the accident¹¹ and that no genuine issue of material fact exists that Covington, who has been in a wheelchair for eight years and attended McNeese under the Louisiana Vocational Rehabilitation Service for the disabled, was and is disabled. The court

⁷ Transcript of Hearing, pp. 108-109.

⁸ Transcript of Hearing, p. 110

⁹ Transcript of Hearing, p. 120.

¹⁰ Transcript of Hearing, p. 148.

¹¹ *Id.*

noted that if a person requires “a wheelchair for mobility to go from classroom to classroom on campus, that person by definition is disabled.”¹²

The Court’s conclusion on disability was supported by the deposition testimony and reports of four doctors and ten exhibits. McNeese, by contrast, submitted **no evidence**, medical or otherwise.¹³ **No doctor has testified or opined that Miss Covington was not disabled.** Rather, McNeese’s effort to dispute Miss Covington’s disability is based solely upon its attorneys’ incompetent lay interpretation of notes in her medical records that are expressly contradicted by the actual Reports and depositions from her doctors. McNeese’s character attacks on Miss Covington are inaccurate, unwarranted, unnecessary and unkind. For example, McNeese’s attorneys and officials have accused Miss Covington of “making a mountain out of a molehill” over having to urinate on herself and injuring her arm in a non-compliant restroom marked as compliant and suggested that she purchased her wheelchair at a “pawnshop”.¹⁴ There is no material factual dispute in this case that Miss Covington was and is disabled.

Second, the District Court properly held that the ADA does not require or allow McNeese to demand the private medical records and “registration” of wheelchair-bound students and visitors as a condition for access to a restroom.¹⁵ Under the law, Miss Covington had the right to expect the Old Ranch to be readily accessible and usable to her and no purpose is served by requiring her to “register” since McNeese has already declared that it will not install compliant restrooms in the Old Ranch. Indeed, the trial court was intrigued by the admission of McNeese

¹² Transcript of Hearing at p. 166. See also 29 CFR 1630.2 and *U.S. Equal Opportunity Employment Commission vs. E.I. DuPont de Nemours & Co.*, supra, 406 F. Supp.2d at 654 and *Schonfeld vs. City of Carlsbad*, 978 F. Supp. 1329 (S.D. Ca. 1997).

¹³ McNeese did attach a few pages of Dr. Foret’s office notes and Dr. Shamieh’s deposition. Both of these were already in the record and cited by Plaintiffs.

¹⁴ McNeese’s conduct, and that of its counsel, has been insensitive to the point of outrageous. They go so far as to suggest that Covington faked her disability for the last eight years to defraud McNeese into bringing its restroom into compliance with the ADA. Transcript of Hearing, pp. 84-85, 97. Record, Vol. 2, 474:15-475:2.

¹⁵ Transcript of Hearing, pp. 166, 168. See also *Schonfeld vs. City of Carlsbad*, 978 F. Supp. 1329 (S.D. Cal. 1997), affirmed (the disabled are entitled to find a public entity readily accessible and usable without providing advance notice); *Panzardi-Santiago vs. University of Puerto Rico*, 200 F. Supp.2d 1 (D.P.R. 2002) (a university must be readily accessible and usable to those in wheelchairs without advance notice); and *Matthews vs. Jefferson*, 29 F. Supp.2d 525, 533 (W.D. Ark. 1998) (disabled were not required to seek assistance from courthouse personnel since even an old courthouse was required to be accessible).

Services for Disabilities Director Tim Delaney that the purpose of registration is not to help wheelchair-bound students, which his office does not customarily do,¹⁶ but to help McNeese get grants averaging \$50,000 per disabled student.¹⁷

McNeese has recently claimed during litigation that it might someday use its “registration” to justify hiring people to lift Covington onto inaccessible toilets,¹⁸ an approach which is specifically outlawed under the ADA for obvious reasons, including a lack of reliability and privacy.¹⁹ The trial court never had to consider McNeese’s unlawful plan because it properly found that Covington was not required to contact the Defendants in advance of her decision to utilize the Old Ranch and its restroom.²⁰

Finally, the Court found, as a matter of law, that McNeese violated the ADA “in not making the door to the [Old Ranch] bathroom ADA compliant.”²¹ The Court correctly stated that there was no dispute of material fact as to whether the Old Ranch should be in compliance, and that it was not in compliance.²² The trial court’s decision is supported by Plaintiffs’ overwhelming evidence, which included McNeese’s Admissions of Fact and the incriminating video and deposition testimony of McNeese officials, all of which are in this Record.

The District Court’s Judgment against McNeese was not an easy one for the judge to render, but it was one that the law absolutely required. The Judgment simply corrects McNeese’s policy of declaring that the disabled are not entitled to meaningful access to non-academic buildings.

¹⁶ Record, Vol. 2, 475:8-18; Vol. 5, 1004:15-18, 1005:13-21 (Delaney deposition).

¹⁷ Record, Vol. 2, 482:2-8 (Delaney deposition).

¹⁸ McNeese’s position in 2001 was that it would not provide Covington with such assistance because its personnel were not trained to do so and it could not afford to hire full-time personal assistants for each of its disabled students.

¹⁹ See *Matthews vs. Jefferson*, 29 F. Supp.2d 525 (W.D. Ark. 1998); *Chaffin vs. Kansas State Fair Board*, 348 F.3d 850 (10th Cir. 2003).

²⁰ See, e.g., *Schonfeld vs. City of Carlsbad*, 978 F. Supp. 1329 (S.D. Cal. 1997), *affirmed* (ADA does not require a formal request to utilize facilities and services.). See also, *Matthews and Panzardi-Santiago vs. University of Puerto Rico*, 200 F. Supp.2d 1 (D.P.R. 2002).

²¹ Transcript of Hearing, p. 169. The court found that there have been sufficient improvements and program introductions to the Old Ranch that the standards for renovated facilities should apply. However, even if the court had not reached this conclusion, the Old Ranch still requires at least one accessible restroom to meet the Title II Program standards for existing facilities. *Id.*

²² Transcript of Hearing, p. 171.

Judge Carter aptly noted that he felt that McNeese had not taken the ADA and state law on the rights of the disabled seriously enough “to give it the attention it deserves.” He felt that this ruling on summary judgment and this suit “has brought it to McNeese’s attention, and I’m comfortable that the President, who I know to be a good President and wanting the best for the community and the university would take appropriate action.” The court felt that McNeese needed a “catalyst” and this judgment would be that catalyst.²³ Unfortunately, rather than listen to the court, fix the restroom doors, and avoid the further embarrassment of a published opinion, McNeese and its attorneys instituted this appeal, focusing their efforts on assassinating the character of Miss Covington.

As discussed in detail *infra*, there are no grounds to reverse the trial court’s Judgment, which is based upon the law and uncontroverted facts. Plaintiff, Collette Covington, on behalf of herself and other wheelchair-bound students attending Louisiana state schools, respectfully requests the assistance of this honorable Court in upholding the Judgment of the District Court.

FACTS AND PROCEDURAL HISTORY

On January 31, 2001, Collette Covington was an epileptic wheelchair-bound McNeese student who was recognized as disabled by the State of Louisiana and provided with Louisiana Vocational Rehabilitation Services for the disabled, including transportation to and from campus.²⁴ It is undisputed that in prior semesters Covington spoke on numerous occasions about her disabilities to McNeese’s Disabilities Director Tim Delaney and that he was familiar with her case and aware that she suffered from epilepsy and mobility impairments.²⁵

Covington was not a mere guest on McNeese’s campus. Rather, she was a registered and enrolled student who was entitled to utilize the services, programs, and activities of McNeese. Among these services was the use of the Old Ranch,

²³ Transcript of Hearing, p. 172.

²⁴ Record, Vol. 1, 136 (affidavit of Covington).

²⁵ Delaney erroneously thought that Covington’s mobility problems came from her foot rather than her knee, but he specifically testified that he was aware of Covington’s epilepsy, mobility problems, and that she would need surgery at least a semester prior to January, 2001. Record Vol. 2, 466:21-467:22.

the designated pick-up and drop-off point for the State of Louisiana's Vocational Rehabilitation van. It is significant that Covington was using the very building the State designated for disabled students to wait for their transportation and that this building has undergone significant renovations since the passage of the ADA.²⁶

Despite McNeese's recent assertions that she should not have done so, Covington utilized this building on January 31, 2001, as she waited for her Louisiana Vocational Rehabilitation van. While waiting, she had an urgent need to use the restroom.²⁷ Covington had no experience in this building in a wheelchair, and she relied upon McNeese's signage indicating that the Old Ranch was ADA-compliant when, in fact, it is undisputed that it is not. Indeed, it is undisputed that not a single accessible restroom exists anywhere in the Old Ranch.

Covington entered the restroom in her wheelchair. She suffered the humiliation of urinating on herself while unsuccessfully trying to transport from her wheelchair through the narrow, non-compliant restroom stall door.²⁸ Soaked in her own urine, Covington attempted to leave. The Old Ranch women's restroom door must be pushed to enter and must be pulled to exit, and Covington was unable to gain sufficient leverage on the narrow, heavy door to exit in her wheelchair and was injured.²⁹ These injuries resulted in the McNeese Police being summoned.

Soon after the accident, and despite not being required to do so by law, Covington "registered" with McNeese as disabled and subsequently attempted to re-enroll at McNeese.³⁰ Since 2001, Covington has sought a commitment from McNeese to bring at least one restroom in the Old Ranch into compliance with the ADA and to correct its inaccurate signage. At the least, Covington requests that

²⁶ The Old Ranch was a logical site for the State to designate as the place for Covington and other disabled students to wait for their rides. It contains a myriad of facilities to accommodate students before, after, and between classes. These facilities include public restrooms and a student lounge, a brand-new major computer lab, the school's only cafeteria, and offices of the Student Government, newspaper, yearbook, job placement service, and Media Services.

²⁷ Covington had sutures in her bladder on January 31, 2001 due to a long-term urinary disorder. Today, Covington has a permanent catheter.

²⁸ Record, Vol. 5, 1033:15-23. McNeese outrageously suggests that the accident was Covington's fault because she should have known to ignore McNeese's signs and abandon her wheelchair outside the restroom. If Covington had been able to ambulate on this day, she would not have ended up urinating on herself when she could not reach the restroom stall. No ambulatory person chooses to voluntarily urinate on herself.

²⁹ It is undisputed that the door violates the ADA because it is too narrow and is too heavy.

³⁰ Covington was forced to withdraw from McNeese for a semester after her Old Ranch injuries.

McNeese conduct a self-evaluation and transition plan and make them available to the public, as the ADA required it to do in 1992 and 1995. These documents would enable Covington to learn which parts of McNeese are accessible to her.

McNeese represented that it will not do any of this, that it does not see the purpose of conducting a self-evaluation or transition plan³¹, and that the disabled are not entitled to utilize the Old Ranch since it is not a “classroom.”³² Plaintiffs deposed six McNeese officials hoping that one of them would assert that McNeese would honor its obligations, but each only added to the admissions of the last.

In its latest effort to blame Covington for the inaccessible Old Ranch Student Union, McNeese now claims that it cannot accommodate Covington because she has not provided her medical records to McNeese to prove that she did not purchase her wheelchair at a “pawnshop” and merely pretend to be disabled.³³ In reality, McNeese has had Covington’s full medical records for five years³⁴ but still will not offer her any form of accommodation and still denies that she has the right to access the Student Union.

McNeese admits that it was aware of its obligations under the ADA but that it never bothered to check the Old Ranch restroom for ADA compliance prior to installing signs indicating that the building was compliant.³⁵ McNeese further admits that it has no defense, including financial hardship, under the ADA. McNeese simply argues that it is not important to provide the disabled access to the Student Union and that the disabled should take it upon themselves to determine if the building is compliant and not enter if it is not.

ARGUMENT

I. Response to Assignment of Error 1 - The trial court correctly applied Louisiana Code of Civil Procedure Article 966.

Contrary to defendants’ unsupported argument, the trial court applied the correct standards for summary judgment. A court “must” grant a motion for

³¹ Record, Vol. 2, 490:20-491:2, 492:6-24; video (Hebert deposition) and McNeese brief.

³² Record, Vol. 3, 501:13-17, 502:5-7, 503:6-17; video (Hebert deposition) and McNeese brief.

³³ Record Vol. 2, 474:15-475:2.

³⁴ Indeed, McNeese supplied Covington’s medical records to Covington during discovery.

³⁵ Record, Vol. 1, 155:11-18, 156:6-157:1, 158:15-19, 159:15-20 (Rhoden deposition).

summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law.” LSA-C.C.P. art. 966(B); *Costello v. Hardy*, 2003-1146 (La. 1/21/04), 864 So.2d 129, 137-138. As the Louisiana Supreme Court stated in *Costello*, pursuant to the 1996 amendments to article 966, “summary judgment procedure is now favored under our law.” 864 So.2d at 137, citing LSA-C.C.P. art. 966(A)(2).

In 1997, the legislature amended LSA-C.C.P. art. 966(C)(2) to clarify the burden of proof in summary judgment proceedings. The Louisiana Supreme Court explained the effect of the amendment in *Costello*, 864 So.2d at 137-138. Therein, the Court noted, in pertinent part: “**Once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion.**” 864 So.2d at 137-138 (emphasis added); *Babin v. Winn-Dixie Louisiana, Inc.*, 2000-0078 (La. 6/30/00), 764 So.2d 37, 39-40.

To prevail on an ADA claim under 42 U.S.C. 12132, plaintiffs merely must establish that Covington is a qualified individual with disabilities and that she was denied access to a service, program, or activity at McNeese, or, alternatively, that she was otherwise discriminated against in some way because of her disability. Quite simply, McNeese **admitted** in response to plaintiffs’ Requests for Admissions, in the depositions of its officials, and at the hearing before the trial court, every element of Miss Covington’s claim.

In support of its argument that the trial court applied the wrong standard, McNeese now attempts to manufacture a “credibility issue” regarding Miss Covington’s disability;³⁶ however, her alleged lack of credibility is not **material**.

³⁶ McNeese alleges that “plaintiff’s credibility is lacking” and that “plaintiff’s statements directly conflict with her medical providers and with the defendant’s Director of Services for Students with Disabilities.” Covington’s testimony is completely consistent with all medical conclusions and reports. Indeed, the only two physicians that McNeese names in its argument both prescribed Covington wheelchairs.

Covington’s testimony is also materially consistent with that of McNeese Director of Services for Students with Disabilities Tim Delaney. The only inconsistent testimony in this entire case occurs as to matters that McNeese admits in its appellate brief that Delaney “misspoke” about. The contradictory statements of Tim Delaney do not create a material issue of fact with respect to the Old Ranch and do not constitute a material contradiction with Covington.

The undisputed facts are that Miss Covington has been in a prescribed wheelchair for eight years and was in a prescribed wheelchair on the date of the accident. The court noted that McNeese did not dispute that Miss Covington was in a wheelchair on the date of the accident.³⁷ The court stated that if a person requires “a wheelchair for mobility to go from classroom to classroom on campus, that person by definition is disabled.”³⁸ Moreover, although the Court did not so state, Miss Covington’s long-standing epilepsy also qualifies her by law as disabled.³⁹ As such, the court was correct in determining that no genuine issue of material fact exists that Covington was and is disabled.

The Court’s conclusion on disability was supported by the deposition testimony and reports of four doctors and ten exhibits. McNeese, by contrast, submitted **no evidence**, medical or otherwise.⁴⁰ **No doctor has testified or opined that Miss Covington was not disabled.** Rather, McNeese’s effort to dispute Miss Covington’s disability is based upon its own incompetent lay interpretation of notes in her medical records that is expressly contradicted by the actual Reports and depositions from her doctors. McNeese’s lay opinion of Miss Covington’s medical records is not “evidence.” Again, **“the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion.”** Costello, 864 So.2d at 137-138 (emphasis added).

In sum, there is no material factual dispute in this case that Miss Covington was and is disabled, and her alleged lack of “credibility” as to the details of her disability is immaterial. As discussed in more detail *infra*, the Court applied the correct standards for summary judgment, and its decision should be affirmed.

³⁷ *Id.*

³⁸ Transcript of Hearing at p. 166. See also 29 CFR 1630.2 and *U.S. Equal Opportunity Employment Commission vs. E.I. DuPont de Nemours & Co.*, 406 F. Supp.2d 645, 654 and *Schonfeld vs. City of Carlsbad*, 978 F. Supp. 1329 (S.D. Ca. 1997).

³⁹ See, 29 CFR 1630.2.

⁴⁰ McNeese did attach a few pages of Dr. Foret’s office notes and Dr. Shamieh’s deposition. Both of these were already in the record and cited by Plaintiffs.

II. Response to Assignment of Error No 2: The Trial Court properly found no genuine issue of material fact that Covington was a qualified individual with a disability under the ADA.

Collette Covington has a complex set of disabilities documented by hundreds of pages of medical records from nearly a dozen medical providers over the last 20 years. Since 2000, at least four physicians, one registered nurse, the State of Louisiana, and even McNeese have declared Covington disabled, and no medical provider has disagreed with this assessment. Covington's physicians span a wide range of specialties, yet each concluded that Covington suffers from multiple impairments substantially limiting the major life activities of walking, attending class, and caring for herself.

Covington's impairments include a lifetime of uncontrolled seizures and blackouts resulting in frequent falls and injuries requiring hospitalizations. She has neurological impairments that cause numbness, sleep disorders, blurred vision, and a chronic bladder condition that now requires a catheter. Covington also has long-term orthopedic impairments spanning more than 10 years. Covington's condition has grown worse over the years, and she was prescribed a walker and crutches on May 16, 2000 and a wheelchair on December 21, 2000. In 2000, Dr. Foret performed two surgeries on Covington's knees, but her condition never improved. By January 17, 2001, Covington's physicians prescribed her a power wheelchair both for her orthopedic conditions and because of her frequent seizures, pain, weakness, and neurological impairments. By January, 2001, the State of Louisiana had long recognized Covington as disabled through the Louisiana Vocational Rehabilitation Program for the disabled. Covington's condition has not improved, and she has utilized her prescribed wheelchair since 2000.

McNeese presented absolutely no evidence to contradict these clear medical conclusions, yet McNeese alleges that the trial court erred when it ruled that there is no genuine issue of material fact regarding whether Covington meets the ADA's definition of "disabled." McNeese's assertion is bewildering, as McNeese fails even to state the proper standard for "disabled" under the ADA, and McNeese failed to depose any of Covington's physicians except one. In that one deposition, McNeese took the position that Covington was disabled.

The three tests for “disability” under the ADA.⁴¹ As McNeese admits, the ADA and Rehabilitation Act utilize the definition of “disability” found in 29 CFR 1630.2, which provides three distinct ways that Covington could be disabled under Title II. She could: (1) have an actual physical or mental impairment that substantially limits one or more major life activities; or (2) have a record of such an impairment; or (3) be regarded as having such an impairment. Thus, McNeese is incorrect when it states that, “the key issue is whether the individual has an impairment that results in a substantial limitation in a major life activity” because this addresses only the first of the three ways that Covington may be a qualified individual with a disability.⁴² McNeese never even addresses the other two tests, both of which Covington meets.

Covington’s epilepsy automatically qualifies her as disabled under the ADA. The official comments to 29 CFR 1630.2 note that:

. . . persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

It is undisputed (and even asserted by McNeese) that the effects of Covington’s epilepsy, including her seizures, frequent falls, and hospitalizations, contributed to her need for a wheelchair and substantially limited Covington’s major life activities of walking and caring for herself.

There is no genuine issue of material fact that Covington has an actual impairment that substantially limits several major life activities. To prove that Covington is actually disabled under 29 CFR 1630.2, Covington only has to show that she has a “physical or mental impairment that substantially limits one or more major life activities” under 29 CFR 1630.2. 29 CFR 1630.2 conspicuously does not require Covington to prove that she cannot perform one or more major life

⁴¹ For a thorough discussion, *see* Plaintiffs’ Memorandum in Support. Record, Vol. 1, 67-80.

⁴² Cases interpreting Title II have defined “disability” broadly. The policy behind this is to prevent public entities from forcing those with putative disabilities from undergoing a medical exam each time they enter a public facility. Title II requires that public entities recognize that people do not fabricate medical records or ride around in medically prescribed wheelchairs for long periods of time without purpose and that requiring the disabled to submit to rigorous challenges to their disabilities would render the ADA meaningless.

activities. She simply must show that she was substantially limited in her ability to perform them as compared to the average person in the general population.⁴³ Furthermore, the statutes do not provide a minimum length of time that Covington has to have her impairment, only that there be at least a long-term impact.

The case law supports this straightforward interpretation of the regulations. In *U.S. Equal Opportunity Employment Commission vs. E.I. DuPont de Nemours & Co.*, 406 F. Supp.2d 645, 654, *reversed in part on other grounds*, 480 F.3d 724, (5th Cir. (La.) 2007), the Louisiana Eastern District concluded that a woman was disabled under the ADA when she could walk unaided for up to ten to fifteen minutes at a time without assistance and could stand for an hour without rest if she were willing to experience pain afterwards. The plaintiff could even walk up stairs and walk on a steep levee on occasion, but because she was substantially limited in her ability to walk as compared to the average person, she was actually disabled under the ADA. The court ruled that a person can be substantially limited in her ability to walk and, thus, disabled, even if she never requires any assistance device.

Other courts have made similar rulings. For instance, in *Schonfeld vs. City of Carlsbad*, 978 F. Supp. 1329 (S.D. Cal. 1997) *affirmed*, 172 F.3d 876 (9th Cir. 1999), it was held that, “Plaintiff Alice Schonfeld, *who, at times must use a wheelchair*” meets the test for being disabled under Title II of the ADA.⁴⁴

The length of time Covington used her wheelchair prior to the accident is irrelevant. McNeese asserts that Covington only used her wheelchair a week when she was injured at McNeese.⁴⁵ First, this is inaccurate and unsupported by any evidence. Covington used crutches and a walker since May 16, 2000. She was prescribed a wheelchair on December 21, 2000, more than a month before the accident and a power wheelchair on January 17, 2001.⁴⁶ On January 31, 2001, Covington went into the Old Ranch for the first time in her wheelchair. Second, as

⁴³ 29 CFR 1630.2(j).

⁴⁴ *See also EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 802 (7th Cir. 2005) (holding that being unable to walk fast and a "severe difficulty in walking the equivalent of one city block was a substantial limitation compared to the walking most people do daily").

⁴⁵ Even McNeese admits that it regards those temporarily disabled to be disabled. Record, Vol. 5, 1016:10-13 (Delaney deposition).

⁴⁶ Record, Vol. 1, 136 (Covington affidavit); Vol. 2, 387, 388, 391, 392, 393, 397 (Foret records); and Vol. 2, 407:14-23, 408:4-18 (Shamieh deposition).

noted, *supra*, the length of time that a person has a disability is not relevant under the ADA, so long as the disability is either expected to be of a long-term duration or actually ends up being of a long-term duration.⁴⁷

Covington's 2001 interrogatory answers note she had once hoped her wheelchair confinement would be temporary but that it has become permanent. As Dr. Foret confirmed in his March 26, 2002 report, Covington always hoped to reduce her dependence on her wheelchair after months or years of therapy. That never happened, and Covington's pre-2001 dream of wheelchair independence does not create a genuine issue of material fact as to whether she suffered a long-term impairment in her ability to walk.

McNeese improperly attempts to impeach Dr. Foret by disregarding his medical conclusions and imposing its own unqualified lay interpretations of his office notes. McNeese makes much of the fact that on January 16, 2001, Dr. Foret, like every encouraging doctor, suggested that Covington "walk and exercise as much as possible." Dr. Foret also concluded, however, that Covington was substantially limited in her ability to walk as compared to the average person in the general population. Indeed, the very next day, on January 17, 2001, Dr. Foret prescribed Covington a power wheelchair to augment the manual wheelchair she had been using. While Dr. Foret encouraged Covington to walk if she could, he was always aware of her substantial limitations on walking, which is why he prescribed her two wheelchairs, operated on her twice, and provided years of reports confirming her continued need for a wheelchair.

In one of the dozens of similar reports, he noted that, "I will do housing authority for her because she needs a bigger place to get around in her wheelchair; she keeps falling, not seizure [at this time] as much as just weakness."⁴⁸ Dr. Foret notes on other occasions that Covington's walking impairments are also related to

⁴⁷ Covington's neurological impairments began at age two; her musculoskeletal impairments began when she fell into a hole at McNeese in 1995; and her urinary impairments began in the late 1980s. All three continue in 2008, and Covington has used a wheelchair since 2000.

⁴⁸ Record, Vol. 2, 391 (Foret medical records, May 29, 2001). Dr. Foret notes in other reports that at times seizures also contribute to Covington's falls. McNeese concedes that Covington cannot walk because of pain, weakness, and seizures but mistakenly believes that this does not constitute a "substantial impairment" under the ADA because it is not related to her knee injury.

her seizures, and he prescribed repairs to her wheelchairs over many years. Each of Dr. Foret's years of reports reached the same conclusion—that Covington required a wheelchair. McNeese's lay interpretation of Dr. Foret's notes do not change Dr. Foret's conclusions or create an issue of material fact.

McNeese also claims to know that Dr. Foret was "reluctant to prescribe Covington a wheelchair",⁴⁹ but there is no evidence to support this patently false assertion. McNeese simply fabricates this claim *without even bothering to depose Dr. Foret or hire its own expert* to review his records and reports.

McNeese improperly attempts to impeach Dr. Shamieh by disregarding his medical conclusions and personal observations. Dr. Shamieh, a neurologist, provided compelling testimony that he has witnessed Covington's seizures on many occasions, considers Covington to be completely disabled, and requires that Covington either not attend McNeese or do so in a wheelchair to protect her from falls due to her weakness and seizures.⁵⁰ Dr. Shamieh testified that he actually saw Covington have seizures without warning in his waiting room and in his exam room and that her seizures are one reason he wanted her to use her wheelchair.⁵¹

Dr. Shamieh also documented Covington's orthopedic problems. During his 2003 deposition, he testified that when Covington had last visited his office:

. . .she was able with the brace and the cane to ambulate. But this was probably the first time in probably two years I've seen her able to stand with the brace, long brace on her left leg and carrying the cane with her.

McNeese never hired a medical expert to counter Dr. Shamieh's or any other doctor's testimony. Instead, McNeese merely claims that Dr. Shamieh "cannot give clear, objective testimony about the plaintiff's condition" solely because he utilizes Covington's history as part of his diagnosis. McNeese's attorneys are not medical experts, and their unqualified opinions about Dr. Shamieh's testimony do

⁴⁹ McNeese appellate brief, pg. 2. There is no support for this assertion.

⁵⁰ Contrary to McNeese's assertions, Covington did suffer from abnormal EEGs, one of which, from October 26, 2000, only three months prior to the accident, is in the record at Vol. 2, 448.

⁵¹ Dr. Shamieh often witnessed Covington black out and fall as her eyes roll back into her head and her arms and legs engage in abnormal "chronic-type" movement. Covington recovers but resorts to a postictal state and is confused and sleepy. Record, Vol. 2, 405:15-406:14.

not create a genuine issue of material fact, especially given Dr. Shamieh's first-hand accounts.

McNeese mischaracterizes the evidence to claim a “credibility issue.”

McNeese claims that Covington's “answers to interrogatories directly contradict her affidavit” because her 2005 affidavit stated that she was “prescribed a wheelchair because she was unable to stand without assistance [from orthopedic aids] and could not walk any appreciable distance” while her 2001 interrogatory answers noted that she could walk short distances with orthopedic aids but that they “slowed her down”, requiring that she upgrade to a wheelchair. As discussed, McNeese's “credibility” claims are not proper in a summary judgment. Nevertheless, Covington's statements are consistent with each other⁵² and with her medical records and consistent with the fact that her condition changed somewhat between 2000 and 2005 and that she was prescribed more than one wheelchair more than one time and for more than one reason.⁵³

McNeese also questions Covington's honesty regarding her shoulder injuries at the Old Ranch.⁵⁴ This is irrelevant because Plaintiffs have not begun to prove damages, and the condition of her shoulder is unrelated to her need for a wheelchair. The trial court's ruling was limited to the issue of discrimination under the ADA, and it is disingenuous and inappropriate for McNeese to claim a “credibility issue” about damages that Plaintiffs have not yet attempted to prove. This is yet another attempt by McNeese to muddy the waters of a clear case.

McNeese ignores the fact that Covington is entitled to ADA protection because she is “regarded as disabled” and has a “record of impairment”. Even if this honorable court disagreed with the trial court and found a genuine issue of material fact as to Covington's actual disability, it is undisputed that both the State

⁵² Covington further explained her answers in her deposition and testified that she has consistently had to use her wheelchairs at McNeese since they were prescribed.

⁵³ Whether Covington could walk 100 feet with crutches in 2000 and no appreciable distance in 2001 is immaterial since Covington is and has consistently been substantially limited in her ability to walk as compared to the average person.

⁵⁴ McNeese suggests that Covington may have fabricated the fact that she was injured in the Old Ranch, and McNeese speculates that the injury she received (and that the McNeese police documented) did not require surgery and that the surgery that Covington did have on her arm resulted from another fall subsequent to the one in the Old Ranch. This, of course, only reinforces that Covington required a wheelchair because of frequent falls.

of Louisiana and McNeese regarded Covington as disabled and that she had a record of her impairments, thus qualifying her under the ADA because Covington was accepted by the Louisiana Vocational Rehabilitation service, which automatically accepted her as disabled by McNeese.⁵⁵ McNeese also independently accepted her “registration” as disabled in February, 2001⁵⁶ and does not dispute her extensive records of her disabilities.

In sum, the trial court did not err in determining that there is no genuine issue of material fact regarding Miss Covington’s disability and standing under the ADA, and that decision must be affirmed.

III. Response to Assignment of Error No 3: The Trial Court properly found no genuine issue of material fact that McNeese violated the ADA.

The overriding mandate of 42 U.S.C. 12132⁵⁷ is that McNeese cannot deny Covington the benefits of any service, program, or activity at McNeese or subject Covington to any form of discrimination or segregation because of her disability. The ADA is a broad civil rights statute. Just as McNeese cannot maintain segregated facilities based on race, McNeese may also not maintain outdated architectural barriers such as narrow doorways that exclude or segregate the disabled from the rest of the student body.

In *Chaffin vs. Kansas State Fair Board*, 348 F.3d 850, 858 (10th Cir. 2003), the 10th Circuit noted that Congress found that discrimination is usually inadvertent rather than hostile and takes the forms of segregation of the disabled, “failing to modify existing facilities and practices,” and “relegation to lesser services, programs, activities, benefits, and other opportunities.” *Chaffin* specifically held that, even at existing facilities, a public entity has an affirmative obligation to remove architectural barriers to prevent these forms of discrimination from occurring.

⁵⁵ Delaney testified in his deposition, “[a]nd normally if you’re accepted by them [Louisiana Vocational Rehabilitation], then you would automatically be accepted through my [McNeese] office.” Record, Vol. 2, 466:21-467:22.

⁵⁶ Record, Vol. 2, 474:10-12, 472:10-13 (deposition of Delaney).

⁵⁷ 42 U.S.C. 12132 provides that, “No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by such entity.”

The trial court easily determined that McNeese discriminated against Covington, as McNeese judicially admits that it maintains architectural barriers throughout its campus, including the Old Ranch, that it has long been aware of these barriers, and that it will not correct them. Plaintiffs propounded the following Request for Admissions on McNeese:

REQUEST FOR ADMISSION NO. 4:

Please admit or deny that the Old Ranch women’s restroom where the accident which forms the basis of this suit occurred does not meet the requirements of the Accessibility Guidelines promulgated by the U.S. Attorney General for restroom doors.

RESPONSE TO REQUEST FOR ADMISSION NO. 4:

Admit.⁵⁸

Furthermore, McNeese judicially admitted that:

- ❖ the “Old Ranch women’s restroom door has a clear opening of [only] 29 5/8 inches at its narrowest point from door edge to the opposite frame jamb stop;”
- ❖ “no warning exists to discourage disabled students from using the Old Ranch restroom or to direct them to safe facilities within the Old Ranch;”
- ❖ “in January 2001, no women’s restroom in the Old Ranch met the Accessibility Guidelines promulgated by the U.S. Attorney General for restroom doors;” and,
- ❖ McNeese was aware of all of these facts in January, 2001.⁵⁹

Furthermore, McNeese commissioned an internal study finding that restrooms were the biggest problem for the disabled at McNeese⁶⁰ and that McNeese had only 25 percent of the number of disabled that it should due to lack of accommodations.⁶¹ Yet, Dr. Hebert testified that McNeese will not bring the Old Ranch up to Code because he does not regard it as important or a priority for McNeese. In other words, McNeese believes that the disabled should be forced to

⁵⁸ McNeese Facilities and Planning Director Richard Rhoden and President Hebert both testified that McNeese has many architectural barriers on campus, and neither was surprised to learn that the Old Ranch was inaccessible. Record, Vol. 1, 155:11-18 (deposition of Rhoden) and Vol. 2, 493:13-22 (deposition of Hebert).

⁵⁹ Record, Vol. 2, 284-286.

⁶⁰ Record, Vol. 2, 343 (Smith Report)

⁶¹ Record, Vol. 2, 482:13-25 (Delaney deposition)

wait only in classrooms or outside in the heat, cold, or rain for their transportation while the able-bodied use the student union's facilities. McNeese even states in its appellate brief that "Ms. Covington would be better served if her transportation picked her up at her classroom building"⁶² so that McNeese will not have to spend \$4,000 to make its Student Union accessible. By definition, McNeese has "relegated the disabled to lesser services, programs, activities, benefits, and other opportunities" and has engaged in segregation in its ugliest form.⁶³

Lack of funding is not a defense. McNeese specifically repudiates any defenses under the ADA, including financial hardship, yet it half-heartedly implies that a lack of resources is responsible for its noncompliant campus. This excuse fails for three reasons. First, the ADA specifically forecloses upon this defense.⁶⁴ Second, Dr. Hebert and Richard Rhoden admit that McNeese cannot utilize this defense.⁶⁵ Third, the problem is not a lack of resources. McNeese, one of the few state universities to receive casino funds, has abundant funding, including hundreds of thousands of unused dollars currently available for building improvements that are being spent, instead, on \$300,000 campus walls, \$150,000 "Cowboy" statues, a new scoreboard, and many other luxuries. Indeed, at the time of the accident, McNeese had \$1,110,855 in surplus money from fees sitting in a "building use" account. Dr. Hebert testified that McNeese simply does not want to spend its own funds because accommodating the disabled in the Old Ranch Student Union is not part of "the role of the institution."⁶⁶

The trial court properly found that McNeese has altered the Old Ranch.

McNeese concedes, as it must, that if the Old Ranch is an altered facility, it must

⁶² McNeese appellate brief, pg. 27.

⁶³ When this country was unjustifiably segregated on the basis of race, at least the discriminators declared that facilities should in principle be "separate but equal," but there is only "separate" and not even the promise of "equal" in McNeese's policies.

⁶⁴ McNeese would have had to submit a self-evaluation and transition plan before qualifying for a hardship defense, and even then, Plaintiffs have found no published case in which a public entity was granted a hardship. The standards are so rigorous that McNeese would have to prove that bringing the Old Ranch into compliance would result in the University having to shut down. *See Olmstead vs. L.C. ex rel. Zimring*, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999); *Kinney vs. Yerusalim*, *supra*, 9 F.3d at 1074; and *Matthews vs. Jefferson*, 29 F. Supp.2d 525, 534 (W.D. Ark. 1998).

⁶⁵ *See* Record Vol. 1, 159:21-25, 160:1-6, 159:12-14, 160:7-10. Video. (Hebert deposition).

⁶⁶ *See* Record Vol. 3, 502:5-7, 503:6-17 Video. (Hebert deposition). *See also* detailed discussion of funding available to McNeese, Record, Vol. 1, 103-112 (Plaintiffs' Memorandum).

comply with the Accessibility Guidelines. McNeese also admitted that it made numerous recent alterations to the building which totaled approximately \$450,000. While McNeese argues that the individual projects were small, the trial court found that the cumulative effects were significant. Perhaps most importantly, McNeese added the new service of a state-of-the-art computer lab to the Old Ranch. In *Kinney v. Yerusalim*, 9 F.3d 1067, 1073 (3rd Cir. 1993), *cert. denied*, 511 U.S. 1033, 114 S.Ct. 1545, 128 L.Ed.2d 196 (1994), the Third Circuit held:

[c]hanges to the defining characteristic of a facility—to that which makes the facility desirable to the public—mandates that the facility be made accessible to all. Further, accessibility is generously construed to accommodate a wide range of needs, to ensure that patrons ‘are able to get to, enter, and use the facility.’ For example, the path of travel to bathrooms, telephones, and drinking fountains [must be] readily accessible to and usable by individuals with disabilities.

It is undisputed that when the Old Ranch was built in 1967, no one could have anticipated that it would house a state-of-the-art computer lab. This is, by definition, a “change to the defining characteristic” of the Old Ranch, and it was done to make the Old Ranch more “usable” to the students and more “desirable”, a fact which even President Hebert admitted in his deposition.⁶⁷

Without explaining the case, McNeese cites *Association for Disabled Americans vs. City of Orlando*, 153 F.Supp. 2d 1310 (M.D. Fl., 2001), for the proposition that the Old Ranch has not been altered. In direct contradiction of McNeese’s position, the court held that something as simple as adding seats and replacing a counter in a massive theater was enough to affect the usability of the arena and make it subject to the “new or altered” standard. However, the court recognized that most of the City’s renovations were for the very purpose of making it more accessible. On equitable grounds, the court declined to apply the heightened standards because it did not want to punish the City for retrofitting its facilities for the disabled. (“Each of these alterations appears to have affected the

⁶⁷ Shockingly, even Dr. Hebert begrudgingly admitted that the Old Ranch includes new construction and should have an accessible restroom. While admitting on one hand that the Old Ranch has new construction that should include an accessible restroom, McNeese claims on the other that it does not have to provide such a restroom. Record, Vol. 2, 499:18-25; Vol. 3, 502:5-7, 503:6-17.

usability of the theater; however, the end result of those alterations was to make the facilities more accessible to disabled individuals.”). McNeese’s addition of a computer lab, the addition of stairs the disabled cannot climb, and the alteration of its cafeteria—all without providing any accessible restroom—were clearly not for the benefit of the disabled, and McNeese is not entitled to any equitable remedy.⁶⁸

Even “existing facilities” at McNeese must be readily accessible, usable, integrated, and meaningful to the disabled. Assuming, *arguendo*, that the trial court erred in ruling that the undisputed renovations and the addition of a new computer lab constituted an alteration or the addition of a new service, program, or activity under the ADA, then the trial court’s error would be harmless since McNeese violates even the standard for existing facilities. 28 CFR 35.150(a)(1) provides that “existing” facilities must still be “readily accessible and usable by individuals with disabilities” whether those facilities were last altered in 1990 or 1890, and McNeese still has an affirmative duty to ensure that Covington can use them. Public entities can never be “grandfathered” out of ADA compliance.⁶⁹

Had the Old Ranch been an existing facility, Covington’s case would be similar to *Chaffin, supra*. Mandy Chaffin attended a concert at the Kansas State Fair in a wheelchair and soiled herself when she was unable to reach a restroom in time due to the distance between the designated wheelchair seating area and the Fair’s accessible restrooms.⁷⁰ Unlike McNeese, the Fair did provide clearly marked accessible restrooms but still discriminated because they were too far away and because not enough of them were accessible. The court ruled that it is not enough for the Fair to provide access to restrooms; the Fair must assure that the access is meaningful and that the disabled can easily find and use the restrooms.⁷¹

⁶⁸ Furthermore, unlike Covington, the Plaintiffs in *Orlando* admitted having no trouble using the facilities, and none of them were injured. This is the most important distinction in the cases.

⁶⁹ As a practical matter, Plaintiffs only seek injunctive relief for one restroom in the Old Ranch, which is the standard for “existing” facilities.

⁷⁰ In *Chaffin*, it was undisputed that 12 of 34 restrooms in the vicinity complied with the ADA, and the Kansas State Fair, unlike McNeese, conducted a self-evaluation and transition plan and attempted to upgrade each of its existing facilities for the disabled. Also unlike McNeese, the Fair never discouraged the disabled from using its facilities. Nevertheless, the appeals court held that the Fair discriminated against Ms. Chaffin and denied the disabled “meaningful access” to the Fair because there were not enough accessible restrooms.

⁷¹ See also, *Shotz vs. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001): “A violation of Title II, however, does not occur only when a disabled person is completely prevented from enjoying a

In *Parker vs. Universidad de Puerto Rico*, 225 F.3d 1, 15 (1st Cir., 2000), a guest at a public university suffered an injury similar to Covington's when his wheelchair tipped over at an old and non-compliant campus botanical garden that he was visiting. The First Circuit held that the University discriminated against the man by not providing compliant facilities. Significantly, this man was (1) "unregistered"; (2) a non-student; (3) in a non-academic building; (4) that was an "existing facility" not altered since the passage of the ADA; (5) at a public university. The First Circuit held that the University's botanical gardens must provide services to those in wheelchairs "in the most integrated setting appropriate" so that even visitors in wheelchairs can use the gardens safely and independently.

Parker forecloses on each of McNeese's legal arguments. Existing facilities do not have to be 100 percent compliant, but, as *Chaffin* and *Parker* hold, they must still be "readily accessible and usable in the most integrated setting appropriate," which means at least one accessible restroom. This duty extends to all parts of a public entity, including botanical gardens, sidewalks, gymnasiums, and even prison recreational facilities.⁷²

McNeese is not entitled to use "other methods" because the Old Ranch is an altered facility. The ADA offers public entities the opportunity to accommodate the disabled in existing facilities with "other methods" besides code compliance. However, this is only available for "existing facilities", as provided by 28 CFR 35.150(b)(1). In arguing for "other methods", McNeese ignores the trial court's finding that the Old Ranch has been altered and presupposes that the Old Ranch has not been altered, which it may not do.

Even if McNeese were able to use the "other methods" defense, McNeese's particular methods are inefficient, ineffective, and declared

service, program, or activity. The regulations [for "existing" facilities] specifically requires that services, programs, and activities be 'readily accessible.' 28 CFR 35.150. If the Courthouse's wheelchair ramps are so steep that they impede a disabled person or if its bathrooms are unfit for the use of a disabled person, then it cannot be said that the trial is 'readily accessible', regardless of whether the disabled person manages in some fashion to attend the trial."

⁷² For additional cases and support, see relevant portions of Plaintiffs Memorandum in Support of Motion for Summary Judgment, Record, Vol. 1, 80-103.

unlawful. The “other method” that McNeese selected after several years of litigation is to provide Covington (and presumably all disabled persons as soon as they appear on campus) the “assignment of aides to beneficiaries.”⁷³ Typically, this method is used when a deaf person requires an interpreter or a blind person requires an escort, not when a person in a wheelchair needs to be lifted onto a toilet in a narrow restroom stall or carried upstairs in a building with no elevator. Indeed, courts have universally declared that aides to beneficiaries cannot be used in cases such as Covington’s because they are unreliable, embarrassing, and result in segregation of the disabled who must either forego the use of inaccessible facilities or suffer the humiliation of having a stranger involved in their most intimate moments on a daily basis. In *Matthews vs. Jefferson*, 29 F. Supp.2d 525, 533 (W.D. Ark. 1998), for instance, an Arkansas District Court held:

The County concedes, as it must, that carrying a mobility impaired individual [to inaccessible locations] is not an acceptable method of providing program accessibility in these circumstances.

Thus, McNeese not only cannot use “other methods” in the Old Ranch, but it cannot use the very method that it selected for Covington’s particular disability.

McNeese has the burden of proving its “other methods” are effective. In *Chaffin*, the 10th Circuit held that public entities have the burden of proving that “other methods” are just as effective as code compliance and that if a disabled person is denied meaningful access even once, the public entity has failed to accommodate with its “other methods” and must upgrade its facilities to meet code.⁷⁴ Thus, McNeese, not Plaintiffs, bears the burden of proof on this issue,

⁷³ McNeese’s “other methods” are certainly not cost effective, as the continuous labor costs of a staff of personnel on hand to escort every disabled person who shows up anytime, day or night, at McNeese would certainly exceed the \$91,000 total cost of bringing all McNeese restrooms into compliance. Record, Vol. 2, 343 (Smith report).

⁷⁴ *Chaffin* holds, “The Fair has shown by its failure to accommodate disabled individuals, despite its efforts to redesign and renovate its existing facilities, that no methods are effective in achieving program accessibility other than making structural changes. In fact, the Fair has already begun to make structural changes to parts of the Grandstand. Because the Fair must make these alterations to its existing facility, it must comply with the accessibility requirements stated in 28 CFR 25.151. As noted above, 35.15 requires that the public entity, in making alterations to existing facilities, comply with either the ADAAG [the ADA “code” or “Accessibility Guidelines”] or the UFAS, or else provide clearly equivalent access to the altered facility.”

since the ADA obligates McNeese to provide access to its campus, and McNeese has chosen not to meet its obligations in the method preferred by the statute.

Even if McNeese could offer Covington “other methods”, it has not. Perhaps most significantly, McNeese never offered Covington any aides to help her urinate on January 31, 2001⁷⁵ or at any time since, despite the fact that McNeese acknowledges that Covington registered as disabled and that McNeese has had Covington’s complete medical records for five years.⁷⁶

Tim Delaney is not an “other method”. McNeese also argues that its “other methods” include hiring Tim Delaney, and that somehow, Delaney’s existence on McNeese’s payroll solved McNeese’s accessibility problems. Delaney, however, admitted that when Covington contacted him and “registered” with him following her accident, he never bothered to investigate and never suggested any remedy to allow her access to the Old Ranch.⁷⁷ Furthermore, he admits that Covington’s wheelchair problems were not his concern because his office mostly deals with students facing academic problems and not accessibility problems.⁷⁸ Perhaps this is one reason why Delaney was not concerned that his disabilities office was in an inaccessible location.⁷⁹

The trial court properly found that McNeese’s “registration” requirement is unlawful and discriminatory. McNeese conceded for the first time in its appellate brief that there is no law requiring that the disabled “register” their disabilities with McNeese.⁸⁰ Yet this is not what McNeese has steadfastly

⁷⁵ Indeed, until McNeese was faced with summary judgment, it opposed the very idea it now proposes, claiming it lacked the resources to provide “aides to beneficiaries.”

⁷⁶ McNeese’s real reason for not accommodating Covington is that it does not have a plan for doing so. McNeese has not specified who would provide these humiliating “services” on a campus supposedly understaffed, what exactly they will do when Covington encounters inaccessible facilities, or how such “other methods” will make McNeese’s services, programs, or activities readily accessible to and meaningfully usable by Covington, in the most integrated setting appropriate as required by 28 CFR 35.150(b)(1).

⁷⁷ After six years on the McNeese payroll, Delaney claims he still *could not find* the Old Ranch Student Union, a few hundred feet from his office, and he would not look for it on Covington’s behalf. Record, Vol. 2, 478:15-21.

⁷⁸ Record, Vol. 2, 475:8-18; Vol. 5, 1004:15-18, 1005:13-21 (Delaney deposition).

⁷⁹ Record, Vol. 2, 467:23-471:4 (Delaney deposition). Also, the Smith Report recommended that Delaney’s office be moved out of Farrar because of accessibility concerns. Ironically, it recommended that the Services for Students with Disabilities Office be moved to the Ranch. Record, Vol. 2, 351 (Smith Report).

⁸⁰ McNeese’s appellate brief, page 29.

maintained for several years. McNeese admits that its own director in charge of assuring McNeese's compliance with the ADA "misspoke" under oath when he claimed that he told Covington that the law requires that she "register" to access McNeese. Delaney did more than misspeak. He admitted under oath that he browbeat Covington into "registering" with him so that he could get his "numbers" up and apply for grants⁸¹ while not actually offering or intending to offer Covington any accommodations. Indeed, it is hard to imagine that Delaney could have helped Covington access the Old Ranch since he could not even find it.⁸²

Title II of the ADA distinguishes between cases in which the disabled merely seek access to a facility from those in which the disabled request specialized, individual, and often expensive accommodations such as a sign language interpreter. Covington does not want specialized attention. She simply wants to be able to trust McNeese's signs and know that she can find one accessible restroom in each major building so that she has no more accidents.

In *Schonfeld vs. City of Carlsbad*, 978 F. Supp. 1329 (S.D. Cal. 1997) *affirmed*, 172 F.3d 876 (9th Cir. 1999), it was held that, "The ADA does not require plaintiffs bringing a claim alleging inadequate access to a facility to have 'formally' requested to use the facility." In *Matthews vs. Jefferson*, 29 F. Supp.2d 525, 533 (W.D. Ark. 1998), it was held that a public entity may not insist upon "registration" from the disabled.⁸³

The only case McNeese cites is *Panzardi-Santiago vs. University of Puerto Rico*, 200 F. Supp.2d 1 (D.P.R. 2002) in which a woman sued claiming that she was denied access to the University of Puerto Rico. Contrary to McNeese's assertions, *Panzardi* actually holds:

⁸¹ Delaney testified that McNeese could receive \$50,000 per disabled student. Record, Vol. 2, 474:15-475:2, 465:12-466:10, 476:16-19, 482:2-8, and 472:10-473:12.

⁸² Record, Vol. 2, 478:15-21, 473:25-474:9.

⁸³ *Matthews* held at 533: "It states plaintiffs never gave courthouse personnel the opportunity to make such arrangements, never filed a grievance, and never requested alternative accommodation. . . Assuming courthouse personnel were unaware of plaintiff's disability prior to the first hearing, they were certainly aware of it prior to the second and third hearings."

Cases involving access generally proscribe to the theory that a plaintiff bringing a claim alleging inadequate access to a facility does not have to formally request accommodation.⁸⁴

Ms. Panzardi's case was not dismissed because she failed to register with the University of Puerto Rico, as McNeese claims. Her case was dismissed because she was a non-student who did not seek any services, programs, or activities yet attempted to access a university that was closed for the holidays prior to the ADA becoming fully effective.⁸⁵

The district court properly concluded that Covington was not required to "register" with McNeese. But even if the trial court had erroneously concluded that she did have to inform McNeese of her needs, no genuine issue of material fact exists that McNeese did have actual notice of Covington's disabilities and failed to properly meet her request for accommodation.⁸⁶

IV. Response to Assignment of Error 4: Title II of the ADA is Constitutional.

Defendants allege that the District Court erred in not ruling that McNeese has 11th Amendment immunity. However, this issue has been squarely and definitively resolved by the Federal Fifth Circuit and United States Supreme Court in the last three years, and McNeese cites only inapplicable and overruled cases.

In *Pace vs. Bogalusa School Board*, 403 F.3d 272 (5th Cir. 2005), *cert. denied*, 546 U.S. 933, 126 S.Ct. 416, 163 L.Ed.2d 317 (2005), the Fifth Circuit interpreted *Tennessee vs. Lane* to conclude that a Plaintiff may sue a Louisiana school under Title II of the Americans with Disabilities Act and Congress validly abrogated Louisiana's sovereign immunity, in part because Title II of the ADA is duplicative of the Rehabilitation Act and other laws which have been held to be valid. The *Pace* decision has been cited and supported in at least 105 opinions and treatises since 2005.

⁸⁴ *Panzardi* at 18.

⁸⁵ Unlike McNeese, the University of Puerto Rico thanked Ms. Panzardi for "making a mark" by bringing accessibility issues to the school's attention and assigned an engineering class to document all architectural and accessibility barriers on campus.

⁸⁶ It is undisputed that Covington provided documentation of her disabilities as soon as it was practicable and Delaney admits that she "registered" on February 16, 2001. McNeese also admits that it has Covington's medical records, but it continues to unlawfully hold the position that the Old Ranch should be off-limits to Covington since it is a "student" building.

Later in 2005, the Fifth Circuit again upheld the rights of Louisiana students to file suit under Title II of the ADA in *Bennett-Nelson vs. Louisiana Bd. of Regents*, 431 F.3d 448 (5th Cir. 2005), *cert. denied*, 547 U.S. 1098 , 126 S.Ct. 1888, 164 L.Ed.2d 568 (2006). This suit was filed against Louisiana Tech by deaf students who successfully argued that the University’s Office of Disabled Student Services “only occasionally” provided accommodations such as interpreters and note-takers, and that they were entitled to have such accommodations at all times.⁸⁷ Since January, 2007, when summary judgment was granted in Plaintiffs’ favor, the Federal courts have further added to the growing body of case law supporting Plaintiffs’ position that McNeese has no 11th Amendment immunity.

CONCLUSION

This entire case boils down to one easy legal determination—are the disabled entitled to at least one wheelchair-accessible restroom in the renovated and taxpayer-funded Old Ranch Student Union and do they have to be humiliated in order to use it? McNeese does not dispute any material facts. Instead, it alternatively argues that the disabled: (1) are not entitled to use the Old Ranch Student Union and should be segregated and denied access to services, programs, and activities which are enjoyed exclusively by the able-bodied or (2) should have to submit their private medical records to McNeese for absolutely no reason and be subjected to the humiliation of begging strangers for help each time they need to use the restroom. Title II of the ADA forbids both.

The law requires that McNeese provide an accessible campus and an accessible student union, not only because of McNeese’s significant upgrades to its facilities, but also because, as a public entity, McNeese can never be grandfathered into allowing discrimination on its campus. Rather than simply spending what McNeese admits is a small amount to bring its Old Ranch Student Union into minimal compliance, McNeese has stubbornly provided no compliance and

⁸⁷ *Bennett-Nelson* also held that, as recipients of Federal funds, Louisiana universities consented to Federal jurisdiction under the five-factor *Dole* test. Thus, even if Congress had not abrogated Louisiana’s 11th Amendment immunity and even if Title II of the ADA were not duplicative of the Rehabilitation Act, Title II of the ADA would still be valid.

imposes a burdensome system that deters the disabled from attending McNeese. It is not McNeese's function to scrutinize its students' medical records and accuse them of faking the need for a wheelchair. Under the regulations and the well-established law of *Kinney, Chaffin, Parker, Shotz, Matthews*, and all other Title II access cases, McNeese's function is simply to make its facilities accessible to the disabled, including non-students who would not have a chance to submit their medical records.

McNeese is not allowed to define the terms of its compliance with the ADA by making its own set of rules in conflict with the ADA. Instead of defending some vague, illegal, and unworkable excuse not to comply, McNeese must, by law, concentrate its efforts on changing its policies and bringing its facilities into compliance. The trial court was correct.

Plaintiffs-appellees, COLLETTE JOSEY COVINGTON and JADE COVINGTON, respectfully request this Court to affirm the decision of the District Court, casting all costs of this appeal to defendants-appellants, MCNEESE STATE UNIVERSITY AND THE BOARD OF SUPERVISORS FOR THE UNIVERSITY OF LOUISIANA SYSTEM.

Respectfully submitted,

Lee A. Archer
Bar Roll No. 16791
1225 Rustic Lane
Lake Charles, LA 70605
Telephone (337) 474-4712

Seth Hopkins, Appeal Counsel
Bar Roll No. 26341
1318 Dowling Street
Houston, Texas 77003
Telephone: (337) 540-9120

James Hopkins
Bar Roll No. 06990
P.O. Box 205
Sulphur, LA 70664
Telephone (337) 527-7071

Attorneys for Plaintiffs-
Appellees, Collette Josey
Covington and Jade Covington

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Original Brief was sent by United States mail, postage prepaid and properly addressed to all counsel of record:

Mr. Adam Ortego
Louisiana Department of Justice
Office of the Attorney General
One Lakeshore Drive, Suite 1200
Lake Charles, Louisiana 70629

On this, the 25th day of June, 2008.

SETH HOPKINS