

WHEN POLICIES COLLIDE: CITIZENSHIP DOCUMENTATION REQUIREMENTS AND BARRIERS TO OBTAINING PHOTO IDENTIFICATION—THE NEW MEDICAID CITIZENSHIP REQUIREMENT AS A CASE ILLUSTRATION

MEREDITH A. DEVLIN*

INTRODUCTION

Federal and state legislatures have been increasingly eager to implement legislation requiring photo identification in order to access various programs,¹ services, and even to exercise fundamental rights, such as voting.² Likely motivated by pressure to crack down on illegal immigration³ and often masked with concerns of fraud,⁴ these statutes have appeared at the federal level and in states across the country overnight. But what happens when a person is unable to obtain the required photo identification?

The new photo identification requirement statutes have many implications, one of which is illustrated by the new federal Medicaid citizenship requirement.⁵ One example of a barrier some disabled Indiana residents will face attempting to meet this new requirement is an inability to physically access the state Bureau of Motor Vehicles (“BMV”) branches to obtain the required identification.

This new federal policy collides with the BMV’s policy, which requires individuals to personally visit a BMV facility to obtain state-issued identification cards.⁶ Under the Medicaid citizenship requirement, most individuals will need a state-issued identification card because they will be required to prove identity in addition to citizenship.⁷ They will be subject to the proof of identity requirement because it is unlikely they will possess one of the “primary” sources of identification outlined in the Medicaid citizenship requirement.⁸ However, many severely disabled individuals are not able to physically visit an Indiana BMV branch due to restricted mobility or frail health, which is currently the only mechanism for obtaining state-issued identification cards. Failure to comply with

* J.D. Candidate, 2008, Indiana University School of Law—Indianapolis, M.S.W., 2000, Indiana University, Indianapolis. I would like to thank my husband, James Devlin, for all of his support and encouragement. I would also like to thank Ken Falk, Executive Director, ACLU-Indiana and Dennis Frick, Director, Senior Law Project, Indiana Legal Services for their assistance and insight with the writing of this Note.

1. *See, e.g.*, Deficit Reduction Act of 2005, 42 U.S.C.A. § 1396b(x) (West Supp. 2007) (implementing photo identification requirements for applicants and recipients of Medicaid).

2. *See, e.g.*, IND. CODE § 3-10-1-7.2 (Supp. 2006) (requiring Indiana voters to present a photo identification prior to casting their ballots).

3. *See infra* note 57 and accompanying text.

4. *See infra* note 57 and accompanying text.

5. 42 U.S.C.A. § 1396b(x).

6. *See infra* note 98 and accompanying text for a discussion of this requirement.

7. *See infra* notes 73-74 and accompanying text for a discussion of this requirement.

8. *See infra* notes 68-70 and accompanying text for a discussion of the “primary” sources of identification.

this rule results in a severe consequence: denial or loss of crucial Medicaid benefits.⁹

Further, there are possible Americans with Disabilities Act (“ADA”) implications of the BMV’s current policy, namely the requirement of reasonable accommodation. Increasing access for disabled individuals to state-issued identification cards will not only prevent the denial and discontinuation of Medicaid benefits for these individuals, but will also help ensure that disabled individuals can participate fully in any program or activity that requires photo identification. It will also protect the state from potential ADA Title II lawsuits.

However, before one begins to fully understand the current issue, a grasp of the relevant policies and procedures of all of these programs and services is necessary. Part I of this Note discusses the basics of the Medicaid, Medicare, Supplemental Security Income, and Social Security Disability programs, which is necessary to understand the concepts discussed later in the Note. Part II discusses the first policy in the collision of policies: the Medicaid citizenship requirement. Part III discusses the second policy, the Indiana BMV requirements for obtaining a state-issued photo identification card. Part IV discusses how Indiana BMV’s policy violates the ADA, and Part V outlines policy recommendations designed to remedy the disconnect between the two policies.

I. THE BASICS OF MEDICAID, MEDICARE, SUPPLEMENTAL SECURITY INCOME, & SOCIAL SECURITY DISABILITY INSURANCE

Before the practical implications of the Medicaid citizenship requirement can be fully understood, a working knowledge of the Medicaid, Medicare, Supplemental Security Income (“SSI”), and Social Security Disability (“SSDI”) programs and their eligibility requirements is necessary. The following sections provide a broad overview of each of these programs.

A. Medicaid Basics

In the most basic sense, Medicaid provides health insurance to the poor. Often confused with Medicare,¹⁰ Medicaid is a federal and state governmental program that currently provides both healthcare and long-term care coverage for more than fifty-five million people living in the United States.¹¹ This figure includes six million seniors and eight million disabled individuals.¹² Unlike Medicare, which does not have financial eligibility requirements, applicants for and recipients of Medicaid “must meet financial criteria and also belong to one

9. *See infra* Part II.

10. *See infra* Part I.B.

11. KAISER COMMISSION ON MEDICAID AND THE UNINSURED, THE MEDICAID PROGRAM AT A GLANCE (2007), <http://www.kff.org/medicaid/upload/7235-02.pdf>. “[T]he Kaiser Family Foundation is a non-profit, private operating foundation focusing on the major health care issues facing the U.S., with a growing role in global health.” About the Kaiser Family Foundation, <http://www.kff.org/about/index2.cfm> (last visited Nov. 4, 2007).

12. KAISER COMMISSION ON MEDICAID AND THE UNINSURED, *supra* note 11.

of the groups that are ‘categorically eligible’ for the program: children, parents of dependent children, pregnant women, people with disabilities, and the elderly.”¹³

The federal requirements for the Medicaid program are contained in Title XIX of the Social Security Act.¹⁴ The Act outlines requirements states must fulfill in order to receive federal funding for the program.¹⁵ States are not required by the statute to have a Medicaid program; however, every state has opted to have a Medicaid program¹⁶ due to federal financial reimbursement incentives. Federal law outlines the minimum standards for the Medicaid program, but states have the authority to broaden eligibility if so desired.¹⁷ Thus, state Medicaid programs are not exact replicas of one another.¹⁸

In 2003, Indiana provided Medicaid services to nearly one million individuals, 81,300 of which were seniors and 131,800 of which were blind or disabled.¹⁹ Eligibility for Medicaid in Indiana is determined by the county Division of Family Resources office.²⁰ To qualify for Medicaid in Indiana in 2006, an individual’s income generally could not exceed \$603 per month, and a couple’s income could not exceed \$904 per month.²¹ However, it is possible for individuals in Indiana to qualify for Medicaid even if their incomes exceed these amounts. Indiana has a provision entitled Medicaid “spend down” that allows individuals who are over the state’s income guidelines to qualify for Medicaid if their medical expenses exceed their spend down obligations.²² The spend down obligation is “the amount of any excess monthly income remaining in the eligibility determination.”²³ For example, based on the 2006 guidelines, if an individual’s income is \$653 per month, his or her monthly spend down will be \$50 per month because his or her income is \$50 over the income guideline for an

13. *Id.*

14. ROBIN RUDOWITZ & ANDY SCHNEIDER, THE NUTS AND BOLTS OF MAKING MEDICAID POLICY CHANGES: AN OVERVIEW AND A LOOK AT THE DEFICIT REDUCTION ACT 4 (2006), <http://www.kff.org/medicaid/upload/7550.pdf>. The Medicaid provisions can be found in the Social Security Act at 42 U.S.C.A. § 1396(b) (West Supp. 2007).

15. RUDOWITZ & SCHNEIDER, *supra* note 14, at 4.

16. *Id.*

17. KAISER COMMISSION ON MEDICAID AND THE UNINSURED, *supra* note 11.

18. State Medicaid programs vary in eligibility guidelines and extent of coverage. *Id.*

19. Kaiser State Health Facts, State Medicaid Fact Sheet: Indiana & United States, <http://www.statehealthfacts.org/mfs.jsp?rgn=16&rgn=1&x=6&y=4> (last visited Nov. 4, 2007).

20. *See* 405 IND. ADMIN. CODE 2-1-2 (2002).

21. INDIANA FAMILY & SOCIAL SERVICES ADMINISTRATION, INDIANA CLIENT ELIGIBILITY SYSTEM (ICES) MANUAL § 3010.20.05 (2007), *available at* <http://www.in.gov/fssa/files/3000.pdf>. The ICES Manual is the program policy manual used by the Indiana Division of Family Resources offices. Indiana Family & Social Services Administration, Program Policy Manual for Cash Assistance, Food Stamps and Health Coverage, <http://www.in.gov/fssa/df/6389.htm> (last visited Nov. 4, 2007). This manual is developed based on state and federal laws and regulations. *Id.*

22. 405 IND. ADMIN. CODE 2-3-10 (Supp. 2007).

23. *Id.*

individual. The spend down amount is the amount of medical expenses a person must pay for out-of-pocket before the individual can begin receiving health coverage through the Medicaid program.²⁴ Thus, it is possible for an individual with very large medical expenses to have Medicaid coverage, even if his or her income significantly exceeds the income guidelines.

It is important to note that, in Indiana, a person is not automatically granted Medicaid benefits once that person is found to be eligible for SSI benefits.²⁵ The individual will only be eligible for Medicaid if he or she “meets the income and resource requirements established by statute or the office unless the state is required to provide medical assistance to the individual under [a provision of the Social Security Act].”²⁶ Additionally, the Indiana Medicaid program requires disabled persons applying for assistance to undergo a determination of whether or not the person is disabled according to Indiana standards.²⁷ A prior disability determination by the Social Security Administration necessary to receive SSI benefits or SSDI benefits will not suffice.²⁸

B. Medicare Basics

Similar to Medicaid, Medicare also provides health insurance benefits.²⁹ Medicare is available to persons who are over sixty-five years old, disabled, or have End-Stage Renal Disease.³⁰ In general, to be eligible for Medicare, a person must have worked at least ten years in employment covered by Medicare, be at least sixty-five years old, and be a United States citizen or permanent resident.³¹ An individual who does not have enough work credits to qualify for Medicare

24. *Id.*

25. *See id.* 2-1-2 (“[E]ach applicant for and recipient of medical assistance or the individual authorized to act in the individual’s behalf must be interviewed by the county office at the time of initial investigation and at each annual reinvestigation of eligibility.”). SSI benefits are discussed *infra* Part I.C.

26. IND. CODE § 12-15-2-6 (2004).

27. 405 IND. ADMIN. CODE 2-2-3 (Supp. 2007). “The determination of whether an applicant or recipient is disabled according to the definition of disability prescribed in IC 12-14-15-1(2) is made by the Medicaid medical review team” *Id.*

28. *See infra* Part I.C-D and accompanying text for an overview of the eligibility requirements for the SSI and SSDI programs.

29. Medicare.gov, Medicare Eligibility Tool, <http://www.medicare.gov/MedicareEligibility/Home.asp?dest=NAV|Home|GeneralEnrollment#TabTop> (last visited Nov. 4, 2007). However, it is important to note that Medicare is *not* based on a person’s income; it is not “needs based.” *Id.* Additionally, Medicare coverage is not “total” healthcare coverage, and it is not as extensive as Medicaid coverage. *Id.* For example, Medicare does not pay for long-term nursing home care, nor does it pay for long-term home health care services. *Id.* Additionally, Medicare Part B, which covers out-patient healthcare services, is not “free.” *Id.* An individual must pay a monthly premium to receive Medicare Part B. Medicare Part A is simply hospital insurance. *Id.*

30. *Id.*

31. 42 U.S.C. § 426(a) (2000).

can qualify for Medicare based upon his or her spouse's work credits once he or she turns sixty-five years old.³² Additionally, a person who receives either the Social Security or Railroad Retirement Board disability payments for at least two years can also receive Medicare.³³ Thus, unlike Medicaid, Medicare is not based on any financial criteria and is most often associated with seniors.

C. Supplemental Security Income Basics

As the title of the benefit connotes, the SSI program provides supplemental income³⁴ through monthly payments to low-income individuals over age sixty-five, as well as blind and disabled individuals.³⁵ To qualify for SSI due to disability, an individual must meet the federal Social Security regulation's definition of "disabled."³⁶ The program is similar to Medicaid in that eligibility for SSI is determined by an individual's income and resources.³⁷ "The basic SSI amount is the same nationwide."³⁸

The SSI benefit amounts for 2007 were as follows: an individual living alone or paying his or her share of living costs could receive up to \$623, and a couple in that same situation could receive up to \$934.³⁹ For example, if an individual living alone who qualifies for SSI has monthly income of \$500 per month, SSI would "supplement" that income by providing the individual with \$123 per month. The resource⁴⁰ limits for 2007 were \$2000 for an individual and \$3000 for a couple.⁴¹ In 2005, 5.8 million disabled persons and 1.2 million seniors received SSI benefits.⁴²

32. *Id.* § 426(a)(2)(A). In order for a spouse to obtain Medicare under this provision, he or she must be entitled to receive Social Security benefits based on his or her spouse's work credits. *Id.* See also *id.* § 402(b) (outlining the eligibility criteria for Social Security Retirement benefits for spouses).

33. *Id.* § 426.

34. It is important to note that for most SSI recipients, SSI is the *only* income they receive.

35. 20 C.F.R. § 416.202 (2007).

36. *Id.* § 416.905. Disability is defined "as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." *Id.*

37. *Id.* § 416.203.

38. SOCIAL SECURITY ADMINISTRATION, SUPPLEMENTAL SECURITY INCOME (SSI) 4 (2007), available at <http://www.ssa.gov/pubs/11000.pdf>.

39. Social Security Online, Understanding Supplemental Security Income (SSI)—General Information, <http://www.socialsecurity.gov/ssi/text-general-ussi.htm> (last visited Nov. 4, 2007).

40. "Resources means cash or other liquid assets or any real or personal property that an individual owns and could convert to cash to be used for support and maintenance." 20 C.F.R. § 416.120(c)(3) (2007) (citation omitted).

41. Social Security Online, *supra* note 39.

42. SOCIAL SECURITY ADMINISTRATION, ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, 2006, at 309 (2007), available at <http://www.socialsecurity.gov/policy/docs/>

D. Social Security Disability Insurance Basics

Often confused with SSI, SSDI “pays benefits to people who cannot work because they have a medical condition that is expected to last at least one year or result in death.”⁴³ Social Security does not pay benefits to individuals due to partial or short-term disability.⁴⁴ Similar to SSI, individuals must meet the federal Social Security regulation’s definition of “disability” in order to qualify for this benefit.⁴⁵ Additionally, a person cannot qualify for SSDI if he or she has not met the earnings requirements.⁴⁶ SSDI is what is commonly referred to as “disability.”⁴⁷

Additionally, a person must have worked a certain amount of time and paid Social Security taxes in order to qualify for this benefit.⁴⁸ There are two different earnings “tests” that must be met before a person qualifies for SSDI.⁴⁹ One test is called the “recent work” test, which is based on a person’s age at the time he or she becomes disabled; the other test is the “duration of work” test, which is used to determine if a person has met the work duration requirement under Social Security.⁵⁰ In sum, due to these earnings tests, only disabled individuals who have worked and paid Social Security taxes are eligible to receive SSDI.

E. Putting the Pieces of the Puzzle Together: A Summary of the Interrelationship of the Benefit Programs

It is not uncommon for confusion to exist among practitioners concerning these benefit programs. However, a working knowledge of the interrelationship of these programs is useful to understanding the forthcoming discussion. The following is a brief summary of how all of the programs mentioned above fit together and how they relate to disabled individuals.

Medicare and Medicaid are separate and distinct health benefit programs. It is possible for a person to qualify for and receive both Medicare and Medicaid. Additionally, it is possible for a person in Indiana who exceeds the income requirements for Medicaid to still qualify for the program under the “spend

statcomps/supplement/2006/supplement06.pdf.

43. SOCIAL SECURITY ADMINISTRATION, DISABILITY BENEFITS 2 (2006), available at <http://www.ssa.gov/pubs/10029.pdf>. It is important to note that SSDI is not the same as Social Security retirement benefits or survivor benefits, which do not require any type of physical disability for individuals to be eligible for the benefits. Social Security retirement benefits or survivor benefits are what laypersons typically simply refer to as “Social Security.”

44. *Id.*

45. 20 C.F.R. § 404.315 (2007).

46. *Id.*

47. For example, it is not uncommon to hear someone receiving SSDI benefits to say, “I’m on disability.”

48. 20 C.F.R. § 404.315.

49. SOCIAL SECURITY ADMINISTRATION, *supra* note 43, at 3.

50. *Id.*; see also 20 C.F.R. § 404.130 (2007).

down” provision. It is also important to point out that because a person must pay Medicare taxes in order to later receive the Medicare benefit, many older adults and disabled individuals do not qualify for Medicare. Some of these individuals might have worked in employment that did not withhold Medicare taxes, or some individuals might have been domestic workers for a private family.

The SSI program has strict income and resource guidelines, and only those individuals who meet those guidelines will qualify for the program. Thus, because of the Medicaid “spend down” provision, it is possible for a disabled person to qualify for Medicaid but not qualify for SSI benefits.

Because of the work requirements under the SSDI program, not every disabled individual receives SSDI, and if an individual does not meet the income criteria for the SSI program previously discussed, it is possible that an individual, even if severely disabled, would not receive any benefits through the Social Security Administration. For example, a parent may set up a special needs trust for a disabled child that pays income to the child.⁵¹ This income would likely disqualify the child, now an adult, from the SSI program because of the income criteria.⁵² However, this adult child could still qualify for Medicaid under the “spend down” provision.

II. POLICY #1: THE MEDICAID CITIZENSHIP REQUIREMENT

The Medicaid citizenship requirement was enacted as just one provision of the Deficit Reduction Act of 2005 (“DRA”),⁵³ which went into effect on July 1, 2006.⁵⁴ In general, the Act requires Medicaid applicants and recipients to provide documentation of United States citizenship or nationality.⁵⁵ While individuals eligible for Medicare, SSI, and SSDI are exempt from the requirements, those who do not qualify for those programs will be left out in the cold. They will be required to provide documents they do not have.

The following sections highlight the documentation requirements of the DRA, as well as the events that lead up to a recent statutory amendment, which

51. Electronic Mail Interview with Dennis Frick, Director, Indiana Legal Services Senior Law Project (Jan. 11, 2007) (on file with author).

52. *Id.*

53. Deficit Reduction Act of 2005, 42 U.S.C.A. § 1396b(x) (West Supp. 2007).

Section 6036 of the DRA creates a new section 1903(x) of the Act that prohibits Federal financial participation (FFP) in State expenditures for medical assistance with respect to an individual who has declared . . . to be a citizen or national of the United States unless the State obtains satisfactory documentary evidence of citizenship or a statutory exemption applies.

Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. 39,214, 39,215 (proposed July 6, 2006) (to be codified at 42 C.F.R. pts. 435, 436, 440, 441, 457, and 483).

54. CENTER ON BUDGET AND POLICY PRIORITIES, THE NEW MEDICAID CITIZENSHIP REQUIREMENT: A BRIEF OVERVIEW 1 (2006), <http://www.cbpp.org/4-20-06health.pdf>.

55. Centers for Medicare & Medicaid Services, Proof of Citizenship, http://www.cms.hhs.gov/MedicaidEligibility/05_ProofofCitizenship.asp#TopofPage (last visited Jan. 4, 2008).

exempts some Medicaid applicants and recipients from the citizenship requirement. Furthermore, this Note discusses the impact of the DRA on the severely disabled population.

A. The Deficit Reduction Act of 2005

As its title implies, the purpose of the DRA is to reduce the federal deficit. In an effort to achieve this goal, the DRA “contains a large number of changes in Medicaid policy which are expected to reduce federal Medicaid spending by \$28.3 billion over the next ten years.”⁵⁶ One of these changes is the Medicaid citizenship requirement. This new requirement “was intended by its sponsors to keep illegal immigrants from fraudulently enrolling in Medicaid.”⁵⁷ However, “the requirement’s main impact is likely to be to impede or delay coverage for significant numbers of *eligible U.S. citizens*.”⁵⁸

A citizenship requirement is not new to the Medicaid program.

Since enactment of the Immigration Reform and Control Act of 1986 . . . , Medicaid applicants and recipients have been required by . . . the Social Security Act . . . to declare under penalty of perjury whether the applicant or recipient is a citizen or national of the United States, and if not a citizen or national, that the individual is an alien in a satisfactory immigration status.⁵⁹

What the DRA changes, however, is that “[s]elf-attestation of citizenship and identity is no longer an acceptable practice.”⁶⁰ Medicaid applicants and recipients must now supply documentary evidence of citizenship in addition to making declarations that they are United States citizens.⁶¹ Failure to comply with this requirement will result in a state losing its federal Medicaid funding.⁶² The required documentation must be presented upon initial application to the Medicaid program for applicants or during the first redetermination screening after July 1, 2006, for current recipients.⁶³ If an applicant or recipient does not comply with the Medicaid citizenship requirement, he or she can be denied or

56. RUDOWITZ & SCHNEIDER, *supra* note 14, at 4.

57. CENTER ON BUDGET AND POLICY PRIORITIES, *supra* note 54, at 1.

58. *Id.*

59. Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. 39,214, 39,215 (proposed July 6, 2006) (to be codified at 42 C.F.R. pts. 435, 436, 440, 441, 457, and 483) (citations omitted).

60. *Id.*

61. *Id.*

62. *Id.* at 39,217 (“FFP will not be available for State expenditures for medical assistance if a State does not require applicants and recipients to provide satisfactory documentary evidence of citizenship, or does not secure this documentary evidence which includes the responsibility to accept only authentic documents on or after July 1, 2006.”).

63. *Id.* at 39,215.

terminated from the Medicaid program.⁶⁴

Prior to the enactment of this legislation, many states, including Indiana, already required documentation and verification of citizenship for Medicaid applicants and recipients.⁶⁵ However, Indiana did not require applicants or recipients to provide identity documentation in addition to the citizenship documentation, nor was a hierarchy of acceptable documentation established.⁶⁶

1. *The Documentation Process & Requirements.*—The federal regulations outline what documentation is acceptable to fulfill the Medicaid citizenship requirement for those individuals who are not subject to an exemption. A hierarchy of acceptable documentation was established based upon reliability.⁶⁷ If an individual provides documentation that falls under the “primary evidence” category, such documentation will satisfy *both* the citizenship *and* identity documentation requirements of the DRA.⁶⁸ The documents considered “primary evidence” of citizenship include: U.S. passport, Certificate of Naturalization, and Certificate of U.S. Citizenship.⁶⁹ Additionally, the regulation provides that a valid state driver’s license will satisfy this requirement, “but only if the State issuing the license requires proof of U.S. citizenship before issuance of such license or obtains a social security number from the applicant and verifies before certification that such number is valid and assigned to the applicant who is a citizen.”⁷⁰ This provision, however, will not be effective until a state follows the

64. *Id.* at 39,217 (“An applicant or recipient who fails to cooperate with the State in presenting documentary evidence of citizenship may be denied or terminated.”). “Failure to provide this information is no different than the failure to provide any other information which is material to the eligibility determination.” *Id.*

65. See INDIANA FAMILY & SOCIAL SERVICES ADMINISTRATION, INDIANA CLIENT ELIGIBILITY SYSTEM (ICES) MANUAL § 2402.15.00 (2002) (revised by ICES PROGRAM POLICY MANUAL TRANSMITTAL 41, available at <http://www.in.gov/fssa/files/iceschange41.pdf>).

66. *Id.* It is important to mention that even though the policy manual did not require identity documentation for Medicaid applicants and recipients, the Food Stamp program, which is administered by the same state agency, did (and still does) require identity documentation for its applicants and recipients. INDIANA FAMILY & SOCIAL SERVICES ADMINISTRATION, INDIANA CLIENT ELIGIBILITY SYSTEM (ICES) MANUAL § 2408.05.00 (2007), available at <http://www.in.gov/fssa/files/2400.pdf>. Nevertheless, the requirements for identity verification in the Food Stamp program are more flexible than the new requirements under the DRA. For example, Indiana permits the following documents which are not permitted by the DRA: work identification card, voter registration card, wage stubs, birth certificate, and health benefits identification for any assistance or social services program. *Id.* Many eligible Medicaid applicants and recipients are also eligible for Indiana’s Food Stamp program. However, the identity requirements for Medicaid are now stricter than such requirements for the Food Stamp program.

67. Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. at 39,218.

68. 42 C.F.R. § 435.407 (2007).

69. *Id.*

70. *Id.*

above-listed criteria.⁷¹ No state, including Indiana, currently meets this criteria.⁷²

If a person does not possess one of the listed documents in the “primary evidence” category, then that individual will be required to submit documentation of *both* citizenship⁷³ *and* identity.⁷⁴ The documents acceptable for proof of identity include:

- (i) Driver’s license issued by a State or Territory either with a photograph of the individual or other identifying information such as name, age, sex, race, height, weight, or eye color.
- (ii) School identification card with a photograph of the individual.
- (iii) U.S. military card or draft record.
- (iv) Identification card issued by the Federal, State, or local government with the same information included on drivers’ licenses.
- (v) Military dependent’s identification card.
- (vi) Native Tribal document. . . .
- (vii) U.S. Coast Guard Merchant Mariner Card.⁷⁵

A voter registration card or Canadian driver’s license will not be accepted as proof of identity.⁷⁶ Most of the above-listed documents are only available to certain categories of people. The only accepted identity documentation that every U.S. citizen is eligible for is a state-issued identification card. Consequently, if a disabled individual does not have a Passport, he or she will need a state-issued identification card to prove identity—a document that can only be obtained through the BMV.

2. *The Interim Citizenship Regulation & Subsequent Statutory Amendment—Exemptions to the Citizenship Requirement.*—Some Medicaid applicants and recipients are exempt from the citizenship documentation requirements. An Interim Final Rule for the DRA, effective July 6, 2006, clarified the Medicaid

71. *Id.*

72. *See id.* (“This provision is not effective until such time as a State makes providing evidence of citizenship a condition of issuing a driver’s license and evidence that the license holder is a citizen is included on the license or in a system of records available to the Medicaid agency.”); *see also* Indiana Bureau of Motor Vehicles: FAQ—Identification Requirements, <http://www.in.gov/bmv/3496.htm> (last visited Jan. 4, 2008).

73. Secondary evidence of citizenship includes items such as “[a] U.S. public birth certificate,” “[a] Certification of Report of Birth,” “Report of Birth Abroad of a U.S. citizen,” “Certification of birth issued by the Department of State,” “[a] U.S. Citizen I.D. card,” “[a] Northern Mariana Identification card,” “[a]n American Indian card,” “[a] final adoption decree showing the child’s name and U.S. place of birth,” “evidence of U.S. Civil Service employment before June 1, 1976,” or a “U.S. Military Record showing a U.S. place of birth.” 42 C.F.R. § 435.407 (2007). The regulations also provide for third and fourth levels of citizenship evidence.

Id.

74. *Id.*

75. *Id.*

76. *Id.*

citizenship requirement.⁷⁷ The Rule provided there would be an exemption for persons entitled or enrolled in Medicare or persons receiving SSI benefits.⁷⁸ The new section of the Social Security Act added by the DRA provided for an exemption from the new citizenship requirement; however, the Interim Regulation states a drafting error occurred.⁷⁹

This section exempts an “alien” eligible for Medicaid and entitled to or enrolled in Medicare or eligible for Medicaid by virtue of receiving Supplemental Security Income (SSI) However, because aliens are not citizens and cannot provide documentary evidence of citizenship, this exemption, if limited to aliens, does not appear to have any impact.⁸⁰

This exemption was instead likely intended to apply to citizens and nationals.⁸¹ Thus, the regulation provided, “[I]n order to give meaning to the exemption, it is appropriate to treat the reference to ‘alien’ as a ‘scrivener’s error.’”⁸² To give effect to the actual words used by Congress would “lead to absurd and counter-intuitive results.”⁸³ The Rule went further stating:

To adopt the literal reading of the statute could result in Medicare and SSI eligibles, a population which are by definition either aged, blind, or disabled, and thereby most likely to have difficulty obtaining documentation of citizenship, being denied the availability of an exemption which we believe the Congress intended to afford them.⁸⁴

Congress later amended the statutory language itself to reflect the changes outlined by the Interim Rule.⁸⁵ The legislation amending the language was passed shortly before the 109th Congress closed its session.⁸⁶ In addition to codifying the Interim Rule’s interpretation of the DRA, the amendment also exempted a new category of individuals from the DRA requirements: SSDI

77. Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. 39,214, 39,214 (proposed July 6, 2006) (to be codified at 42 C.F.R. pts. 435, 436, 440, 441, 457, and 483).

78. *Id.* at 39,215-16.

79. *Id.* at 39,215.

80. *Id.*

81. *Id.*

82. *Id.* “Courts have employed the doctrine of correcting a ‘scrivener’s error’ in order to correct obvious clerical or typographical errors.” *Id.* The comments to the interim regulation cite Supreme Court decisions to support this assertion. *Id.* (citing *Yates v. Hendon*, 541 U.S. 1, 17-18 (2004); *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 462 (1993); *United States v. Brown*, 333 U.S. 18, 27 (1948)).

83. *Id.*

84. *Id.* at 39,215-16.

85. National Senior Citizens Law Center, *Congress Tinkers with DRA*, NSCLC WASH. WKLY., Dec. 15, 2006, at 189.

86. *Id.* The “technical corrections” were included in the Tax Relief and Healthcare Act of 2006. *Id.* The Act can be found at Pub. L. No. 109-432, 120 Stat. 2922 (to be codified at 42 U.S.C. § 1396b(x)).

recipients.⁸⁷

3. *The Impact of the DRA.*—While the DRA does provide an exemption to the Medicaid Citizenship Requirement for persons on Medicare, SSI, or SSDI, concern regarding the DRA's impact remains. There are many vulnerable populations, including disabled individuals who do not receive Medicare benefits, SSI, or SSDI, because they did not work long enough or are not poor enough, who are entitled to Medicaid under the spend down provision, who remain subject to the documentation requirements. These individuals will likely have great difficulty satisfying the requirement.⁸⁸ Prior to the passage of the DRA amendment that included an exemption for SSDI recipients,⁸⁹ “an estimated 38 million current Medicaid beneficiaries, as well as an additional 10 million applicants, [were] subject to the new [Medicaid citizenship] requirement.”⁹⁰ This figure is astonishing because it is often assumed that most Medicaid recipients also receive other benefits such as SSI.⁹¹ While there are no current figures highlighting the number of individuals who remain subject to the Medicaid citizenship requirement since the DRA was amended, it is likely the number remains significant due to the eligibility requirements for SSDI.⁹²

The impact of the requirement on non-exempt disabled persons is of particular concern because they are the least likely population to be able to obtain the required identity documentation. Prior to the passage of the DRA amendment, of the 38 million persons not exempt from the citizenship documentation requirement, 750,000 were disabled persons.⁹³ The exact number of disabled persons in Indiana without Medicare, SSI, or SSDI is not known; however, given the national figures of disabled individuals without SSI or Medicare, the number is likely significant.

Assuming that most individuals do not possess one of the documents listed in the “primary evidence” category, such as a U.S. Passport, these individuals will be required to submit identity documentation in addition to citizenship documentation.⁹⁴ Additionally, if it is assumed that most individuals are not eligible for a majority of the documents accepted to prove identity, such as a school identification card, a U.S. military card, or a Native American Tribal document, then it can be assumed that most individuals will be required to document their identities with a state-issued driver's license or state

87. National Senior Citizens Law Center, *supra* note 85, at 191. However, the exemption does *not* include “traditional” Social Security retirement or survivor beneficiaries. *See supra* note 43 and accompanying text for an explanation of “traditional” Social Security benefits.

88. CENTER ON BUDGET AND POLICY PRIORITIES, *supra* note 54, at 1.

89. *See supra* notes 85-87 and accompanying text.

90. CENTER ON BUDGET AND POLICY PRIORITIES, *supra* note 54, at 1.

91. *See supra* Part I.B-E for a discussion of the eligibility requirements of the programs and how individuals might qualify for Medicaid, but not qualify for the exempted programs.

92. *See supra* Part I.B-E for the eligibility requirements of the exempted programs.

93. CENTER ON BUDGET AND POLICY PRIORITIES, *supra* note 54, at 2.

94. *See supra* text accompanying notes 67-74.

identification card.⁹⁵ However, many of these individuals will be unable to obtain the necessary identification card because the agency charged with providing this service, the BMV, does not have a policy in place to serve persons who cannot physically access the agency.

For example, imagine an eighty-three year old female in a nursing home facility. This woman never married, and she worked her entire life as a private housekeeper. She does not have Medicare because her job was not “Medicare covered” employment.⁹⁶ Now, she resides in a nursing home because she is no longer able to take care of herself after suffering a severe stroke. She also has dementia⁹⁷ as a result of the stroke. The woman uses a wheelchair to ambulate, but is unable to push the wheelchair on her own—she must ask a nurse or aide at the nursing home for help. None of her family lives nearby, and most of them have passed away. Her financial resources have been exhausted paying for her nursing home care. She must now apply for Medicaid. However, she cannot locate her photo identification card. It must have been lost in the move to the facility five years ago. She is unable to leave the nursing facility due to her frail health. She does not have a U.S. Passport or any of the other documents that are considered primary evidence of citizenship under the DRA. She will, thus, be required to prove *both* citizenship *and* identity. How is she going to get a photo identification card from the Indiana BMV in order to complete her Medicaid application?

III. POLICY #2: INDIANA’S REQUIREMENTS FOR OBTAINING STATE-ISSUED IDENTIFICATION CARDS

In order to obtain a driver’s license or a state-issued identification card in Indiana, an individual must go in person to a local BMV branch.⁹⁸ A person cannot renew a license through the Internet.⁹⁹ Identification cards are available for Indiana residents who do not qualify for or need a driver’s license.¹⁰⁰ “To obtain [a non-driver] ID card, the applicant must meet the requirements when proving his or her identity from the current acceptable ID list.”¹⁰¹

95. *See supra* text accompanying note 75.

96. *See supra* Part I.B.

97. Dementia is defined as “a usually progressive condition (as Alzheimer’s disease) marked by deteriorated cognitive functioning often with emotional apathy.” Merriam-Webster Online Dictionary, <http://www.m-w.com/dictionary/dementia> (last visited Nov. 13, 2007).

98. *See* IND. CODE § 9-24-9-1(a) (2004) (“The application must be presented in person.”); *see also* § 9-24-16-2 (Supp. 2007) (requiring verification of applications for state-issued identification cards by authorized personnel); Indiana Bureau of Motor Vehicles: FAQ—Identification Requirements, *supra* note 72.

99. Indiana Bureau of Motor Vehicles: FAQ—Identification Requirements, *supra* note 72.

100. *Id.*

101. *Id.* Thus, applicants must provide proof of identity in order to obtain a state-issued identification card needed to prove identity for Medicaid purposes. This documentation criteria is very circular.

The BMV does provide one exception to the requirement that a person must physically visit a BMV local branch. A person may obtain a photo exempt driver's license if a person is out of the state or country due to U.S. military duty, business, college, or missionary work.¹⁰² In order to apply for this special license, a person must complete a designated state form.¹⁰³ This form can also be used to apply for an identification card.¹⁰⁴ However, no exemption or special forms exist for individuals who cannot physically access the BMV.

Because there is no provision for persons who cannot physically access a state BMV branch to obtain a state-issued identification card, such persons will be unable to satisfy the identity requirement of the new Medicaid Citizenship Requirement. Medicaid applicants and recipients who are disabled to the point they are unable to physically travel to a local license branch will be the unfortunate victims of two incongruent policies because they do not have primary evidence of citizenship and will not be able to obtain the necessary state-issued photo identification card.

IV. THE COLLISION OF THE TWO POLICIES CREATES A PROBLEM WITH THE AMERICANS WITH DISABILITIES ACT

The inaccessibility of the Indiana BMV to persons physically unable to access a local BMV branch due to disability violates Title II of the ADA.¹⁰⁵ The Indiana BMV violates this ADA provision because of its failure to reasonably accommodate these disabled individuals, which is required under the ADA regulations.¹⁰⁶ The Indiana BMV would not likely be able to assert a cost defense to avoid this violation.

A. The ADA Generally

The ADA is a powerful federal statute that “provides broad nondiscrimination protection in employment, public services, public accommodation and services operated by private entities, transportation, and telecommunications for individuals with disabilities.”¹⁰⁷ Additionally, it is frequently touted as the “most sweeping nondiscrimination legislation since the Civil Rights Act of 1964.”¹⁰⁸ Congress enacted the ADA after finally recognizing the systemic discrimination faced by disabled individuals and the gaps that existed in previous legislation.¹⁰⁹ The Act “was passed by large

102. *Id.*

103. *Id.*

104. Request for Photo Exempt License/ID Temporary or Verification, Indiana State Form 45811, available at <http://www.in.gov/icpr/webfile/formsdiv/45811.pdf>.

105. Americans with Disabilities Act, 42 U.S.C. §§ 12131-12165 (2000).

106. *See infra* Part IV.C-F.

107. NANCY LEE JONES, THE AMERICANS WITH DISABILITIES ACT (ADA): STATUTORY LANGUAGE AND RECENT ISSUES 1 (2005), http://www.opencrs.com/rpts/98-921_20050613.pdf.

108. *Id.*

109. *Tennessee v. Lane*, 541 U.S. 509, 526 (2004) (citing S. REP. NO. 101-116, at 18 (1989)).

majorities in both Houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities.”¹¹⁰

The ADA was influenced by many previous statutes. The same standards developed for the public sector by section 504 of the Rehabilitation Act¹¹¹ were expanded to include *both* the private and public sector by the ADA.¹¹² Additionally, the ADA borrowed standards from Titles II and VII of the Civil Rights Act of 1964 in developing its nondiscrimination standards.¹¹³ The intentions and goals of the ADA are clearly outlined. The preamble of the ADA explicitly states that the purpose of the Act is:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards . . . ; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.¹¹⁴

B. The Rehabilitation Act of 1973 Compared to the Americans with Disabilities Act

The Rehabilitation Act of 1973 was the first statute aimed at preventing discrimination against disabled individuals.¹¹⁵ “The definition of disability and much of the substantive provisions of Titles I, II, and III [of the ADA] are modeled on regulations implementing [s]ection 504 of the Rehabilitation Act.”¹¹⁶ Additionally, the language used in Title II of the ADA is virtually the same as section 504 of the Rehabilitation Act of 1973,¹¹⁷ which “prohibits entities that

110. *Id.* at 516.

111. 29 U.S.C. § 794 (2000).

112. RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT* 6 (2005).

113. *Id.*

114. 42 U.S.C. § 12101(b) (2000).

115. Jonathan M. Lave & Mitchell P. Zeff, *When Access to the Benefits of Public Services is Handicapped: An Analysis of the Seventh Circuit’s Decision in Wisconsin Community Service v. City of Milwaukee and its Implications for Disabled Americans*, 2 SETON HALL CIRCUIT REV. 433, 443 (2006).

116. Cary LaCheen, *Using Title II of the Americans with Disabilities Act on Behalf of Clients in TANF Programs*, 8 GEO. J. ON POVERTY L. & POL’Y 1, 38 (2001).

117. COLKER, *supra* note 112, at 137. Section 504 of the Rehabilitation Act of 1973 is codified at 29 U.S.C. § 794 (2000).

receive federal financial assistance from discriminating on the basis of disability.”¹¹⁸

Because the Indiana BMV does not receive federal funds, the Rehabilitation Act would not be directly applicable to the issue at hand. However, because the ADA was modeled after the Rehabilitation Act, the cases decided under the Act are helpful in an analysis of some of the key provisions of the ADA where case law might be sparse or non-existent.

C. A Brief Overview of Title II of the ADA

There are three main titles in the ADA that cover discrimination in the following areas: employment, public services, and public accommodation.¹¹⁹ “[U]nder the ADA, one can bring suit only if one establishes that he or she is a member of the protected class as an individual with a disability.”¹²⁰ Disability is defined by the Act as: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”¹²¹

Title II of the ADA focuses on public services. “ADA Title II covers nearly any program or activity conducted by a public entity ranging from higher education to prisons to public health care.”¹²² This title was enacted as a result of vast inequities in the treatment of disabled persons in state services and programs.¹²³ The text of the title reads: “Subject to the provisions of this subchapter, 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.”¹²⁴

Further, Title II provides definitions for the terms in the provision. A clear understanding of these terms is imperative to fully comprehending the ADA and its breadth. A public entity is defined as “(A) any state or local government; [or] (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government”¹²⁵ Title II also clarifies who is protected by the provision by clearly defining what constitutes a qualified individual with a disability. A qualified individual with a disability is defined as:

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural,

118. COLKER, *supra* note 112, at 20. In her book, Colker discusses in depth the inception of the ADA and its roots in section 504 of the Rehabilitation Act as well as the Civil Rights Act of 1964. See *id.* at 15-68 for further discussion.

119. *Id.* at 18-20.

120. *Id.* at 18.

121. 42 U.S.C. § 12102(2) (2000).

122. COLKER, *supra* note 112, at 20.

123. *Tennessee v. Lane*, 541 U.S. 509, 524 (2004).

124. 42 U.S.C. § 12132 (2000).

125. *Id.* § 12131(1).

communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.¹²⁶

The promulgated regulations of Title II clearly specify what responsibilities public entities have to disabled individuals. First, the regulation requires public entities to reasonably accommodate disabled individuals.¹²⁷ Public entities must reasonably accommodate disabled individuals by “mak[ing] 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.”¹²⁸ A public entity is also not required to make modifications that would result in “undue financial and administrative burdens.”¹²⁹ However, it is important to note that this reference to “undue financial and administrative burdens” is found in the regulation concerning existing facilities.¹³⁰

The regulations give public entities leeway in determining methods to implement reasonable modifications to existing facilities,¹³¹ which makes it more difficult for public entities to claim an undue burden. The regulation states:

A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, *assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites*, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, *or any other methods* that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities.¹³²

The regulation provides flexibility to public entities by offering several alternatives for reasonably modifying a program or service. A complete overhaul

126. *Id.* § 12131(2).

127. 28 C.F.R. § 35.130(b)(7) (2007).

128. *Id.*

129. *Id.* § 35.150(a)(3).

130. *Id.* It is currently unclear whether this exception applies to existing facilities as well as new facilities. The United States Supreme Court has not ruled on this issue. Some circuits have ruled on this issue. *See, e.g., Kinney v. Yersusalim*, 9 F.3d 1067, 1075 (3d Cir. 1993) (holding the undue burden defense only applies to existing facilities).

131. Although the regulation is entitled “existing *facilities*,” the regulation’s introductory material implies it applies to existing *services* as well. *See* 28 C.F.R. § 35.150(a) (“A public entity shall operate each *service*, program, or activity so that the *service*, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.”) (emphasis added).

132. *Id.* § 35.150(b)(1) (emphasis added).

of a program or service is not required.

D. Title II Jurisprudence—Reasonable Accommodation

Although the Supreme Court has not explicitly stated Title II imposes an affirmative duty on public entities to reasonably accommodate disabled individuals, such a duty has been implied in many cases.¹³³ For example, in *Tennessee v. Lane*, the Court recognized “that because ‘failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to [program] accessibility.’”¹³⁴ The Court continued, “Title II’s ‘duty to accommodate’ requires ‘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.’”¹³⁵ Additionally, Justice Ginsberg explained, “Congress, the Court [has] observed, advanced in the ADA ‘a more comprehensive view of the concept of discrimination,’ one that embraced failures to provide ‘reasonable accommodations.’ The Court [in *Lane*] is similarly faithful to the Act’s demand for reasonable accommodation to secure access and avoid exclusion.”¹³⁶

The holding in the landmark *Olmstead v. Zimring*¹³⁷ decision also supports an affirmative accommodation duty.¹³⁸ “The Court held that Title II of the ADA is meant to be consistent with § 504 of the Rehabilitation Act, which provides for reasonable accommodation unless ‘the accommodation would impose an undue hardship on the operation of its program.’”¹³⁹ Finally, in *U.S. Airways v. Barnett*,¹⁴⁰ “the Court found the language in Title I to be nearly identical to the language in Title II.”¹⁴¹ The case involved Title I because it was an employment

133. Lave & Zeff, *supra* note 115, at 448. ADA Title II issues have recently come before the Supreme Court. However, the most recent decisions have involved the ADA’s relationship to the Fourteenth Amendment of the Constitution. For further inquiry on this topic, see *United States v. Georgia*, 546 U.S. 151, 157-60 (2006), a case holding state sovereignty could be waived in suits falling under Section 5 of the Fourteenth Amendment in Title II cases. “Thus, insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.” *Id.* at 882. See also *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (“[W]e concluded that Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress’ § 5 authority to enforce the guarantees of the Fourteenth Amendment.”).

134. Lave & Zeff, *supra* note 115, at 448 (quoting *Lane*, 541 U.S. at 531). Note that the Court is merely reiterating 28 C.F.R. § 35.160(b)(7) (2007). See *Lane*, 541 U.S. at 531.

135. Lave & Zeff, *supra* note 115, at 448 (quoting *Lane*, 541 U.S. at 532).

136. *Id.* (quoting *Olmstead v. Zimring*, 527 U.S. 581, 598 (1999)).

137. 527 U.S. 581 (1999).

138. Lave & Zeff, *supra* note 115, at 448.

139. *Id.* (quoting *Olmstead*, 527 U.S. at 606 n.16).

140. 535 U.S. 391 (2002).

141. Lave & Zeff, *supra* note 115, at 449 (citing *U.S. Airways*, 535 U.S. at 397-98).

discrimination claim.¹⁴² When the Court noted the language similarities and then ruled Title I provided an affirmative reasonable accommodation duty on public entities, it “implicitly acknowledged that Title II of the ADA contains a duty to reasonably accommodate the needs of the disabled.”¹⁴³

Appellate court decisions have affirmed this implicit duty and have outlined the duty’s contents. In 2006, the Seventh Circuit tackled the issue of whether a city was required to modify its zoning rules in order to prevent discrimination against disabled individuals and, if such a requirement existed, the extent of the modification.¹⁴⁴ While this decision specifically tackled the issue of zoning, the court sought to clarify the Act’s accommodation requirement, which affects all alleged Title II violations.¹⁴⁵ The court focused its analysis on the regulation’s requirement of reasonable modifications *necessary* to prevent discrimination due to an individual’s disability.¹⁴⁶ The court declared, “[U]nder our Title II case law, the ‘on the basis of’ language requires the plaintiff to show that, ‘but for’ his disability, he would have been able to access the services or benefits desired.”¹⁴⁷ Additionally, the court found the “necessary” language contained in the regulation “makes clear that the duty to accommodate is an independent basis of liability under the ADA.”¹⁴⁸ Further, the court outlined the core criteria for the establishment of an ADA Title II claim as requiring evidence that “(1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable modification, or (3) the defendant’s rule disproportionately impacts disabled people.”¹⁴⁹

In 2003, the Second Circuit also dealt with the issue of reasonable accommodation in the context of public benefits in *Henrietta v. Bloomberg*.¹⁵⁰ This case involved individuals living in New York City who had AIDS or HIV-

142. *Id.*

143. *Id.*

The Act requires preferences in the form of “*reasonable accommodations*” that are needed for those with disabilities to obtain the same . . . opportunities that those without disabilities automatically enjoy. By definition any special “accommodation” requires the [entity] to treat [individuals] with a disability differently, i.e., preferentially. And the fact that the difference in treatment violates an [entity’s] disability-neutral rule cannot by itself place the accommodation beyond the Act’s actual reach.

Id. (quoting *U.S. Airways*, 535 U.S. at 397-98) (emphasis added).

144. *Wis. Cmty. Serv., Inc. v. City of Milwaukee*, 465 F.3d 737, 746 (7th Cir. 2006).

145. *Id.*

146. *Id.* at 752 (“In short, each of these provisions requires the plaintiff to satisfy the ‘necessary’ element by showing that the reason for his deprivation is his disability.”).

147. *Id.* The case was remanded back to the district court because it did not use a “but for” standard. *Id.* at 755. The district court was presented with the new question of whether the facility was prevented from locating to a new facility “*because of its clients’ disabilities.*” *Id.*

148. *Id.* at 753.

149. *Id.* (quoting *Washington v. Ind. High Sch. Athletic Ass’n*, 181 F.3d 840, 847 (7th Cir. 1999)).

150. 331 F.3d 261 (2d Cir. 2003).

related illnesses.¹⁵¹ The plaintiffs brought suit against the City and State alleging these entities “fail[ed] to provide them with adequate access to public benefits.”¹⁵² The Second Circuit held:

[A] claim of discrimination based on a failure reasonably to accommodate is distinct from a claim of discrimination based on disparate impact. Quite simply, the demonstration that a disability makes it difficult for a plaintiff to access benefits that are available to both those with and without disabilities is sufficient to sustain a claim for a reasonable accommodation.¹⁵³

Thus, in order for a disabled individual to bring a claim for reasonable accommodation, it is only necessary that individual to demonstrate his or her disability prevents him or her from accessing a benefit that is available to persons with and without disabilities.¹⁵⁴

Additionally, the court found the plaintiffs were able to demonstrate they were denied a public benefit because of their disabilities.¹⁵⁵ The court demonstrated this by first showing they were entitled to the benefits, which were also available to non-disabled individuals, and, second, by showing their disabilities would “clearly necessitate a reasonable accommodation in order for them meaningfully to access the benefits.”¹⁵⁶ The court reasoned that the statute’s use of the term “qualified” meant persons who are eligible for a program under the program’s “formal legal eligibility requirements.”¹⁵⁷ In discussing the plaintiffs’ difficulty accessing the public benefits, the court referred to the district court’s undisputed finding that “the plaintiffs are sharply limited in their ability to ‘travel[], stand[] in line, attend[] scheduled appointments, complet[e] paper work, and otherwise negotiat[e] medical and social service bureaucracies.’”¹⁵⁸ The court also added, “Title II seeks principally to ensure that disabilities do not prevent access to public services where the disabilities can reasonably be accommodated.”¹⁵⁹

The Supreme Court had the opportunity to provide clarification to the term

151. *Id.* at 264.

152. *Id.* The public benefit the plaintiff’s alleged they could not adequately access was a program mandated by a city law that provided benefits and services to persons with AIDS or HIV-related illnesses. *Id.* at 264-67. The program, referred to as DASIS, “impose[d] procedural rules designed to facilitate access to existing federal, state, and local welfare benefits.” *Id.* at 266.

153. *Id.* at 276-77 (rejecting appellant’s claim that Title II of the ADA was not violated because the appellee’s could not demonstrate disparate impact because some non-disabled persons were receiving similar treatment).

154. *Id.*

155. *Id.* at 280.

156. *Id.*

157. *Id.* at 277. The court also supported this assertion by citing the regulation’s definition of “qualified individual with a disability.” *Id.*

158. *Id.* at 278 (quoting *Henrietta v. Giuliani*, 119 F. Supp. 2d 181, 185 (E.D.N.Y. 2000)).

159. *Id.* at 279.

“fundamentally alter” when it issued its decision in *PGA Tour, Inc. v. Martin*.¹⁶⁰ While the case involved a professional golfer’s claim under Title III of the ADA,¹⁶¹ the Title II regulations contain the same exception for modifications that would “fundamentally alter the nature of [a] service, program, or activity.”¹⁶² In *PGA Tour*, the Court was confronted with the issue of whether or not the Professional Golf Association (“PGA”) could prohibit a disabled professional golfer from using a golf cart because the PGA argued the nature of its tournaments would be “fundamentally altered.”¹⁶³

The Court ultimately held Martin’s use of a golf cart would not “fundamentally alter” the nature of the PGA’s tournaments.¹⁶⁴ Important to the Court’s ruling was the finding that the rule prohibiting the use of a golf cart was a “peripheral” rule and not an indispensable rule.¹⁶⁵ Additionally, the Court remarked, “The purpose of the walking rule is therefore not compromised in the slightest by allowing Martin to use a cart.”¹⁶⁶ The Court also pointed out the ADA requires the evaluation of a disabled person’s needs on an *individual* basis.¹⁶⁷ Because Title II contains the same “fundamentally alter” language as Title III, the Court’s definition of the phrase in *PGA Tour* should be applicable to Title II cases as well. An important distinction is made between proposed accommodations that would merely alter a “peripheral rule” and those that alter a rule found to be indispensable. Thus, a determination must be made as to what type of rule is affected by a proposed accommodation.

E. Title II Defenses

In contrast to Titles I and III, which contain explicit cost defenses, Title II does not contain such a defense.¹⁶⁸ “Despite the fact that the language of the statute, the regulations promulgated to enforce the integration requirement, and the legislative history all reject a cost defense, the Supreme Court interpreted ADA Title II to contain a cost defense to the integration requirement.”¹⁶⁹ Colker,

160. *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

161. Title III of the ADA concerns public accommodations. COLKER, *supra* note 112, at 3.

162. 28 C.F.R. § 35.130(b)(7) (2007).

163. *PGA Tour*, 532 U.S. at 665.

164. *Id.* at 690.

165. *Id.* (“A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to ‘fundamentally alter’ the tournament.”). The Court remarked earlier in the decision, “[T]he walking rule is not an indispensable feature of tournament golf either.” *Id.* at 686.

166. *Id.* at 690.

167. *Id.* at 687-88 (“[T]he ADA was enacted to eliminate discrimination against ‘individuals’ with disabilities . . .”).

168. COLKER, *supra* note 112, at 129.

169. *Id.* at 130-31 (quoting *Olmstead v. L.C.*, 527 U.S. 581, 606 (1999)). The *Olmstead* decision is best known for opening up the treatment options for persons with mental disabilities. The Court held that “under Title II of the ADA, States are required to provide community-based

a leading disability discrimination scholar,¹⁷⁰ uses the example of the *Olmstead v. Zimring* case as an illustration, pointing out, “the Court said it would be all right for the state to have a ‘waiting list that moved at a reasonable pace.’”¹⁷¹ Colker further notes the Court failed to provide guidance regarding what would be considered a “reasonable pace.”¹⁷² The Court “effectively amended the statute to create a cost defense that had been rejected by Congress.”¹⁷³

It has been recognized that “[a]llowance of an undue burden defense for existing facilities serves as recognition that modification of such facilities may impose extraordinary costs.”¹⁷⁴ Thus, the defense of undue burden is available when the modification involves an existing facility; however, Congress did not intend for the defense to be used in other circumstances.¹⁷⁵

F. The Indiana BMV Policy Conflicts with Title II of the ADA

The Indiana BMV currently denies disabled individuals who are unable to physically visit a BMV branch access to its services. This denial of public services violates Title II of the ADA, which prohibits the denial of “the benefits of the services, programs, or activities of a public entity.”¹⁷⁶ Congruent with the Seventh Circuit’s criteria for a Title II claim, the BMV’s rule “disproportionally impacts disabled people.”¹⁷⁷ Disabled individuals with mobility problems or frail health are disproportionately impacted by the rule in that persons without such impairments are physically capable of visiting a BMV branch.

The Indiana BMV is a public entity as defined by Title II of the ADA due its status as a state government agency.¹⁷⁸ Because of its status as public entity, the BMV must comply with the statutory and regulatory requirements of the ADA.

Federal regulations require the Indiana BMV to reasonably accommodate

treatment for persons with mental disabilities when the State’s treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the place can be *reasonably* accommodated” *Olmstead*, 527 U.S. at 607 (emphasis added).

170. Moritz College of Law—Faculty, Ruth Colker, <http://moritzlaw.osu.edu/faculty/bios.php?ID=14> (last visited Nov. 13, 2007). Professor Colker is the Heck Faust Memorial Chair in Constitutional Law at The Ohio State University Moritz College of Law. *Id.*

171. COLKER, *supra* note 112, at 131 (quoting *Olmstead*, 527 U.S. at 606). Such reference to “reasonable pace” is reminiscent of the Court’s “at all deliberate speed” language in the context of school desegregation. *Id.* (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955)).

172. *Id.*

173. *Id.*

174. *Kinney v. Yerusalim*, 9 F.3d 1067, 1074 (3d Cir. 1993) (involving the issue of a City’s responsibility to install curb ramps during road reconstruction).

175. *Id.* at 1074-75 (citing H.R. REP. NO. 485, pt. 3, at 50 (1990), *reprinted in* 1990 U.S.C.A.N. 445, 473)); *see also supra* notes 130-31 and accompanying text.

176. 42 U.S.C. § 12132 (2000).

177. *Wis. Cmty. Serv., Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006) (quoting *Washington v. Ind. High Sch. Athletic Ass’n*, 181 F.3d 840, 847 (7th Cir. 1999)).

178. *See supra* note 125 and accompanying text.

disabled individuals.¹⁷⁹ The Indiana BMV has failed to reasonably accommodate disabled individuals with significant mobility impairments or frail health due to its policy of requiring such individuals to physically visit a BMV facility in order to obtain a state-issued identification card. This denial of services could have devastating effects, resulting in the potential loss of critical health benefits due to the recent enactment of the Medicaid citizenship requirement.¹⁸⁰

The Second Circuit held that a claim for reasonable accommodation could be made by demonstrating that disabled persons have more difficulty accessing a benefit available to both disabled and non-disabled individuals.¹⁸¹ Similar to the program in *Henrietta*, the Indiana BMV's services are available to all persons, regardless of disability. Yet, because some disabled persons are completely barred from accessing these services due to severe disability, a claim for reasonable accommodation may be made.

Modifications to the BMV policy that would enable disabled individuals to access the BMV's services would not "fundamentally alter" the BMV's services because the policy is a peripheral rule. The Supreme Court explicitly excluded modification to "peripheral" rules as constituting fundamental alterations.¹⁸² Similar to the golf cart exclusion in the *PGA Tour* case, the BMV's policy of requiring a visit to a BMV branch in order to obtain an identification card is a peripheral rule. It is not an "indispensable"¹⁸³ rule for the administration of this BMV service. There are other methods besides a visit to a BMV branch that would allow disabled individuals to obtain the necessary identification cards.¹⁸⁴ The Indiana BMV must enact policies and procedures to become compliant with the ADA, or it could risk potential litigation.

The BMV does not have the benefit of a cost defense argument. However, it is likely that if litigated, the BMV would attempt to argue a cost defense. Nonetheless, any requested alteration would not impose an undue burden on the BMV because it would not constitute a fundamental alteration and it would not involve extraordinary costs.

V. POLICY RECOMMENDATIONS AND POTENTIAL SOLUTIONS

Simply pointing out an "elephant in the room" does nothing to remove the elephant from the room. Similarly, one cannot simply point out the current deficiencies of the Indiana BMV without offering potential solutions to the problem. Clearly, Indiana must adopt a solution in order to avoid potential ADA Title II litigation and serve the needs of its disabled residents. Disabled residents are at risk of losing crucial Medicaid health benefits. Several options exist to remedy the current disconnect between the Medicaid citizenship requirement and

179. 28 C.F.R. § 35.130(b)(7) (2007).

180. *See supra* Part II.

181. *Henrietta v. Bloomberg*, 331 F.3d 261, 276-77 (2d Cir. 2003).

182. *See supra* notes 164-65 and accompanying text.

183. *See supra* note 165 and accompanying text.

184. *See infra* Part V.

the Indiana BMV's policy, thus avoiding any potential litigation or deprivation of health benefits.

Most of the following proposed suggestions, however, involve policy changes at the federal level that would not simply apply to Indiana. Disabled individuals in other states likely face similar obstacles concerning this new citizenship requirement; thus, solutions at the federal level would address their needs and concerns as well. Addressing the issue at the federal level will help ensure better access and use of the Medicaid program. However, addressing the disconnect at the state level would provide disabled individuals with better access to identification cards, which will be increasingly important as such identification becomes a standard requirement on a wide range of fronts. Removing the barriers to obtaining identification cards at the state level will ensure that disabled individuals can not only access and use the Medicaid program, but that they can also access any other program or service requiring a state-issued identification card, such as voting.¹⁸⁵

One proposal offered by the Center on Budget and Policy Priorities would be for Indiana and other states to exercise an option already included in the promulgated federal regulations.¹⁸⁶ "This option allows states to document individuals' citizenship and identity by conducting electronic cross-matches with existing databases, such as vital records, Social Security, and the state motor vehicles department. (At present, automated checks are feasible only for individuals born within the state.)"¹⁸⁷ This option would not exempt disabled persons from satisfying the Medicaid citizenship requirement; rather, it would allow the State to satisfy the requirement by simply tapping into databases already containing the necessary verification.

The Social Security database would most likely encompass the broadest number of affected individuals. Most United States citizens have a Social Security number; therefore, they are registered with the Social Security office, which would have information verifying such citizenship status in its database.¹⁸⁸ It is duplicative for a state to satisfy a federal Medicaid requirement by requiring applicants and recipients to produce documentation the federal government already possesses in one of its databases, such as the Social Security office records. Moreover, the federal government has already exempted three categories of individuals receiving governmentally administered benefits: SSI, SSDI, and Medicare recipients. Similarly, "traditional" Social Security

185. See *supra* note 2 and accompanying text.

186. CENTER ON BUDGET AND POLICY PRIORITIES, *supra* note 54, at 3. This option could be exercised by any state and is not specific to Indiana. *Id.*

187. *Id.*

188. Social Security numbers are also issued by the Social Security office to non-citizens who have been lawfully admitted into the United States for purposes such as work or to obtain a benefit or service. SOCIAL SECURITY ADMINISTRATION, YOUR SOCIAL SECURITY NUMBER AND CARD 6-7 (2006), available at <http://www.ssa.gov/pubs/10002.pdf>. Even though Social Security numbers are issued to non-citizens, the Social Security office would have record of an individual's citizenship status.

beneficiaries'¹⁸⁹ citizenship status would also be on file with the federal government. It is illogical to exempt some Social Security beneficiaries, but not all Social Security beneficiaries, when all categories are required to be U.S. citizens.

Use of this database would enable state Medicaid programs to verify an individual's citizenship status; however, it would not be able to confirm the identity of the individual. There would be no verification that the individual providing a particular Social Security number is the person to whom the Social Security number attaches. Thus, the original problem remains: how to prove *identity*. In reality, while this proposal could help eliminate the amount of paperwork Medicaid applicants and recipients are required to produce, it does not solve the ultimate issue of how disabled individuals can prove identity when they are not able to access the government service that issues identity documents.

The federal government could alleviate this problem by exempting disabled individuals who are unable to physically access a state license branch from the identity documentation requirement, while still enforcing citizenship documentation. A hardship application process could be implemented to exempt the affected individuals. This application process could require verification by the individual's attending physician of his or her severe mobility impairment or frail health. Essentially, the physician would certify in writing that the applicant is virtually "homebound." A federal agency, the Social Security Administration, already uses a definition of "homebound" for Medicare recipients seeking to access home healthcare benefits covered by Medicare.¹⁹⁰ If the federal government finds the homebound criteria to be too lenient, stricter criteria could be adopted, such as deficiency in a certain number of "Activities of Daily Living."¹⁹¹

Another possible solution would be for the federal government to broaden the list of documents accepted to verify identity. The current list only contains seven possible sources of documentation, and many of the sources are only available to distinct categories of people.¹⁹² The federal government identity documentation for registered voters is even less restrictive than this provision. The Help America Vote Act of 2002 ("HAVA") outlines requirements for voters

189. "Traditional" Social Security beneficiaries are persons receiving Social Security retirement or survivor benefits. See INSTITUTE FOR WOMEN'S POLICY RESEARCH, WHO ARE SOCIAL SECURITY BENEFICIARIES? 1 (2005), http://womenandsocialsecurity.org/Women_Social_Security/pdf/D461.pdf.

190. CENTERS FOR MEDICARE AND MEDICAID SERVICES, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, MEDICARE AND HOME HEALTH CARE 11 (2004), *available at* <http://www.medicare.gov/Publications/Pubs/pdf/10969.pdf>. "To be homebound means that leaving home takes considerable and taxing effort." *Id.*

191. "Activities of Daily Living" include personal care tasks such as bathing, dressing, feeding and toileting. National Center for Health Statistics—Data Definitions, <http://www.cdc.gov/nchs/datawh/nchsdefs/ADL.htm> (last visited Nov. 13, 2007).

192. See *supra* note 75 and accompanying text.

who register by mail.¹⁹³ If an individual has registered to vote by mail and has not previously voted in a federal election, the individual is required to present photo identification when he or she votes in person.¹⁹⁴ However, HAVA provides that identity documents other than photo identification are acceptable, such as “a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.”¹⁹⁵

If the federal government is willing to accept these alternative documents for voting, it should be willing to accept them for Medicaid identity purposes. It is important to reiterate that this one identity document would not be the only piece of identification presented by Medicaid applicants and recipients. Proof of citizenship remains a requirement. Such proof is also a form of identification when coupled with the identity documentation. However, there is a possibility this proposed solution would not be adopted. With the exception of a school identification card, all of the accepted forms of identity documentation outlined under the Medicaid Citizenship Requirement are government-issued, either by states or the federal government. It is likely the federal government chose these forms of identification because these are the only forms it trusts. Further, Congress is already considering toughening the identity requirements under HAVA.¹⁹⁶

Absent a federal remedy for this issue, there are also solutions Indiana could adopt to ensure disabled individuals are not disproportionately affected by the Medicaid Citizenship Requirement. One solution is for Indiana to allow these individuals to obtain photo-exempt identification cards. The federal regulation does not require a state-issued identification card to include a photograph if it contains “other identifying information such as name, age, sex, race, height, weight, or eye color.”¹⁹⁷ Indiana already allows certain categories of individuals to obtain photo-exempt state-issued identification cards, and a form already exists to apply for this special card.¹⁹⁸ Disabled individuals could mail in the applications, alleviating the need to physically visit a BMV facility. This solution is likely the most feasible and cost-effective option for the BMV to reasonably accommodate disabled individuals. Additionally, this accommodation would likely survive any undue burden challenge. It would not involve the creation of a new policy or form, no additional staff would be necessary to implement it, and it could be implemented immediately upon adoption.

If the Indiana BMV rejected the proposal to include disabled individuals among the groups of people allowed to obtain photo-exempt state-issued

193. 42 U.S.C. § 15483(b) (Supp. 2004).

194. *Id.* § 15483(b).

195. *Id.* § 15483(b)(2)(A)(i)(II).

196. Verifying the Outcome of Tomorrow’s Elections Act of 2007, H.R. 879, 110th Cong. (2007) (as referred to the Committee on House Administration, Feb. 7, 2007).

197. 42 C.F.R. § 435.407(e)(1)(i) (2007).

198. *See supra* notes 102-04 and accompanying text.

identification cards, another way the agency could avoid ADA Title II non-compliance exists. The agency could appoint staff to conduct outreach to disabled persons who are unable to physically access the BMV facilities. These individuals would visit homes, long-term care facilities, and other applicable venues to review documentation required to obtain the state-issued identification card. Once the documentation was reviewed and the designated staff person determined an individual was eligible for the identification card, a photograph could be taken at that time by a digital camera device. This image could then be transferred to the BMV's computer database upon the staff person's return to the BMV branch, and an official identification card could be printed. The card could then be held at the branch for an authorized person (such as a caregiver) to pick up, or it could be mailed to the individual via certified mail. The person authorized to pick up the card or sign for the card, if the individual is unable to do so, could be appointed during the face-to-face visit with the BMV staff person.

This potential solution would likely provoke an undue burden argument by the BMV and thus is the least desirable solution to the problem. The BMV would likely argue that such an accommodation is too much of a financial burden. It would likely increase the staffing costs of the BMV as there would need to be staff available to conduct these off-site visits. Such a service would also be less efficient for the BMV than its current branch service where many individuals can be assisted under one roof and staff are contained within a single building. The driving time between visits would decrease the number of individuals that could be served each day compared to the BMV branch sites. Additionally, the number of disabled individuals needing this service could be concentrated more heavily in some areas of the state than others. Without data and projections of the number of individuals requiring this service, it could be very difficult for the BMV to plan ahead.

This argument can be rebutted by pointing out that many of the affected individuals likely reside in residential facilities, such as nursing facilities. Therefore, the BMV could serve several individuals at a time when it visits a facility. The BMV could design a schedule whereby it visits such facilities on a regular basis, such as bi-monthly. The facilities would then know ahead of time when the BMV was scheduled to visit particular sites, allowing them to plan accordingly with their residents. The cost resulting from this service would be minimized by maximizing the efficiency of the operation. Additionally, by having a designated team of people who administer this special program, the BMV can plan staffing needs. Furthermore, the federal regulation specifically highlights home visits as a possible modification option for public entities.¹⁹⁹

In short, if the federal requirements are not eased, Indiana will have no choice but to adopt a policy that accommodates disabled individuals, allowing them to access the crucial services of the BMV.

199. See *supra* note 132 and accompanying text.

CONCLUSION

When confronted with the collision of what seem to be such inflexible policies, it is easy to throw one's hands up and give up, believing there is no possible solution. However, while there are significant problems and contradictions between the two policies, an efficient and cost-effective solution is possible. Such a solution often requires creativity and an open mind. It often appears policies are created in a vacuum and that little consideration is given to how the policies might affect one another. It is possible to give meaning and effect to both policies, but compromise is required.

Photo identification requirements are likely only going to continue to increase as concerns regarding illegal immigration and fraud remain on the forefront of political debate. Therefore, it is essential that all eligible persons are able to obtain such identification so that they can fully participate as citizens of the United States. Many of the issues identified with respect to the new Medicaid citizenship requirement are applicable for any program or service requiring photo identification. The law need not be a barrier for at-risk and vulnerable populations to obtain this identification; rather, it can be a tool for advocacy and the development of creative solutions as has been demonstrated in this Note.