

GRAY DAVIS
GOVERNOR

State of California Health and Human Services Agency



GRANTLAND JOHNSON
SECRETARY

February 21, 2003

VIA FACSIMILE AND
U.S. MAIL

**Agency
Departments &
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- Aging
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Planning and
Development
- Workforce
Investment

Dr. Gary Gitnick, M.D.
Medical Board of California
1426 Howe Avenue, Suite 54
Sacramento, CA 95825-3236

Dear Dr. Gitnick and Members of the Medical Board:

We are writing to you as the Secretary of the Health and Human Services Agency and as the Director of the Department of Rehabilitation, respectively. The agency administers the State's health, social services and rehabilitation programs while the department is the principal State agency responsible for assisting people with disabilities. The department is charged with responsibility to assist California state government in implementing the Americans with Disabilities Act (ADA). Dr. Campisi is also the Chairperson of the Governor's ADA Interagency Task Force. The Task Force was appointed by Governor Davis and charged to provide coordinated leadership in assuring the ADA is effectively implemented within California state government. The establishment of the Task Force is only one example of the Administration's longstanding record as a supporter of disability rights and the ADA.

We are encouraged by your willingness to consider options that continue to afford the public protection against incompetent doctors but do not weaken the Americans with Disabilities Act. The Board's upcoming meeting to consider additional information is consistent with the Administration's desire not to see actions taken by the state that jeopardize the strength of the ADA. There are significant implications for disability public policy resulting from the California Medical Board's appeal to pursue the case of *Medical Board of California v. Hason*, to the U.S. Supreme Court. We share the disability community's grave concern that California, which has been a national and international leader in disability civil rights since the 1970s, will be seen as leading the effort that could damage Title II. We strongly urge the Medical Board to seek a stipulation withdrawing its petition for review by the U.S. Supreme Court and effectively remove the case from the docket.

The issue that will be decided by the Court in this appeal is whether the Eleventh Amendment of the U.S. Constitution prohibits lawsuits against states in federal court for money damages under Title II of the ADA. The pending appeal threatens the protections afforded by Title II of the ADA by preventing federal courts from awarding damages in claims against the states. We believe it will undermine the progress the nation has made in disability public policy as a result of the broad support that occurred with the enactment of the ADA in 1990. It also contradicts the advances in public policies made by California's Legislature and the current Administration in supporting the ADA and in ensuring similar or stronger protections for Californians with disabilities in state statute.

Given the recent decisions of the Supreme Court regarding states' immunity from liability in federal courts, it is likely that the Court's decision in this case will be that sovereign immunity protects states from liability for damages under Title II of the ADA. The Court has decided a series of federalism cases in recent years, in which it has held that the states may not be sued in federal court for money damages under a variety of laws enacted by Congress attempting to impose such liability. In *Garrett v. Alabama*, the Court held that states are immune from suits for damages in federal court for employment discrimination under Title I of the ADA. Since the decision in the *Garrett* case, it has been expected that the Court would accept a case for review to determine whether suits for damages under Title II are also barred by the Eleventh Amendment. Should the Medical Board withdraw its appeal to the Court, it is very likely that the Supreme Court would accept another case that raises the same issue. If it decided to do so, the case could still be tried on its merits.

As we have noted, the disability community, both in California and nationwide, is particularly upset that the appeal to the Supreme Court and its threat to the protections afforded by Title II of the ADA is coming from California. California is the birthplace of independent living centers and, for decades, has had among the strongest disability rights statutes. In fact, many of the provisions of the ADA came from statutes that had been in place in California for many years. Thus, it seems contradictory to have California advance a case to the Supreme Court arguing to narrow the application of the most significant national disability legislation, the ADA, especially when it is not needed to defend the underlying case which has no substantive merit.

Faced with a similar circumstance a few years ago, the Administration elected not to jeopardize the strength of the ADA in *Dare v. DMV*, which also raised the issue of whether states were immune from damage awards in federal court under Title I of the ADA. In that case, the Administration sought settlement of the case and Governor Davis stated, "...I simply will not be party to any lawsuit that could put the Americans with Disabilities Act in jeopardy...."

With the strong support of disability rights within California and the leadership provided by the Administration, we believe it would be inconsistent for the Medical Board to place California in the position of leading the charge to significantly scale back the advances in national disability public policy in the absence of a reasonable alternative.

The disability community and all disability civil rights advocates have made clear their recognition that neither the ADA nor state law guarantees a person with a disability entry to college, employment, or licensure regardless of their ability. In fact, as stated, the law simply provides the equal opportunity for consideration and the right to be free from decision-making or judgment based on one's disability rather than on ability or qualifications. The disability community has made clear its support for the Medical Board's effort to protect the public from unqualified physicians, including those who may have disabilities. While the law requires the provision of reasonable accommodations in the licensure process, it does not require the Board to grant licenses to physicians who cannot meet the standards required to practice medicine safely.

The Ninth Circuit decision does not compel the Board to issue a license. The court simply ruled that the activities of the Board were a service of state government and thus subject to the requirements of nondiscrimination and reasonable accommodation found in the ADA. Such requirements are also found in California law. The outcome of the Supreme Court review will produce little practical benefit for the Board, but pursuit of the appeal makes a powerful statement about whether the Board respects and understands the struggle for independence that the ADA represents.

The Board has the option to seek a stipulated agreement with Dr. Hason and his attorney to withdraw the petition from the Supreme Court and litigate the case against Dr. Hason in federal court based on its merits.

In fact, we urge the Board to adopt this judicious approach when it considers this issue at its meeting on February 28, 2003. We recommend this for several reasons. First, it will remove California from a leadership role in reversing the protections in national disability public policy. Second, a decision by the Court to extend Eleventh Amendment immunity to suits under Title II will not resolve the issue of Dr. Hason's license. Even if the Court dismisses the case based on sovereign immunity, Dr. Hason already has a probationary license. His right to a permanent license will be decided in the future based on the terms of the probationary license and could be litigated in state court by Dr. Hason regardless of whether sovereign immunity bars such a suit in federal court. Third, this option will align the Board with the Administration's policy on civil rights while allowing for the protection of the public at the same time.

In closing, we strongly urge you to take the recommended action outlined above. By doing so, we believe you will be able to carry out your important responsibility to protect the public from unqualified physicians while simultaneously maintaining the hard fought rights of persons with disabilities. Please feel free to call on either of us if we can provide you with any additional information about this matter.

Sincerely,



GRANTLAND JOHNSON
Secretary California Health and Human services Agency



CATHERINE CAMPISI, Ph.D.
Director of the Department of Rehabilitation
Chairperson, Governor's ADA Interagency Task Force