**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| **MICHAEL BRACCIALE** | : | **CIVIL ACTION** |
| | : | |
| **v.** | : | |
| | : | |
| **CITY of PHILADELPHIA** | : | **NO. 97-2464** |

**MEMORANDUM and ORDER**

**Norma L. Shapiro, J.** **October 28, 1997**

Plaintiff Michael Bracciale ("Bracciale") filed suit against defendant City of Philadelphia (the "City") pursuant to Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., and the Rehabilitation Act of 1973, 29 U.S.C. § 794, et seq. The City filed a motion to dismiss Bracciale's Complaint. For the reasons stated below, the City's motion to dismiss will be denied.

**FACTS**

Bracciale was hired by the City and began working for the Philadelphia Water Department (the "Water Department") on or about April 6, 1987. Bracciale held the position of meter reader from the date he began working for the Water Department until his subsequent discharge. Bracciale's duties included walking through local neighborhoods to read water meters. (Compl. ¶¶ 6-8).

On June 20, 1995, Bracciale was assigned to read a water meter at 7125 Woodland Avenue. The Water Department directed him to enter the dwelling at that address "through the front cellar

window." Id. at ¶¶ 9-10. Bracciale entered the cellar as instructed; when he attempted to exit through the window, the "window grate"[1] became detached and fell out. Id. at ¶ 11. Bracciale fell backwards into the cellar and onto the concrete floor, approximately five feet below. Id. at ¶ 12.

Bracciale, suffering back injuries including "a lumbosacral strain and sprain, lumbar radiculopathy and herniated nucleus pulposes of the lumbar spine," initially sought treatment at a City clinic.[2] Id. at ¶¶ 13-14. The clinic doctor, assigning Bracciale to light duty for three days, returned Bracciale to work at the Water Department. Id. at ¶ 15.

Bracciale, complaining about back pain, saw another City doctor. This second doctor evaluated Bracciale and released him to full work duty. Id. at ¶ 16. Bracciale resumed his regular meter reading duties for about one and a half weeks. At that point, Bracciale, feeling unable to perform his full work duties, requested a light duty job through his union for. Id. at ¶¶ 17-18. The City did not provide Bracciale with a light duty position, and Bracciale left his job to seek compensation benefits for his injuries. Id. at ¶¶ 19-20.

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[1] It is not clear exactly what a "window grate" is, but presumably it is some sort of frame around the cellar window casing.

[2] Apparently Bracciale also suffers from "canal stenosis in the lumbar spine," but this is not related to his work injuries. (Compl. ¶ 22).

Bracciale sought medical treatment from a private physician. Bracciale underwent physical rehabilitation and his back problems improved. Id. at ¶¶ 21, 23. The residual impact of his back injury and canal stenosis imposed substantial limitations on one or more of his major life activities. Id. at ¶ 24.

Bracciale's private physician released Bracciale for limited work duty in October, 1995. Bracciale called the City's personnel department and spoke with a Willa Reilly. Id. at ¶¶ 25-26. Bracciale requested reinstatement with the Water Department in a position consistent with his physical limitations. Id. at ¶ 27. The City, arguing the Water Department's policies required all employees be capable of full work duty, refused to accommodate Bracciale's request for a light duty position in the Water Department. Id. at 28-29.

Bracciale asserts the Water Department has a history, custom or practice of providing light duty work to its employees. Bracciale also asserts the City has a light duty program to which Bracciale could have been referred. Id. at ¶¶ 30-31. Bracciale further states vacancies existed in the Water Department and in other City departments that Bracciale could have filled consistent with his physical limitations. Id. at ¶ 32.

Bracciale initially filed for compensation benefits with the City. On February 7, 1996, Bracciale withdrew his application for City benefits in order to file a claim for workers'

compensation benefits under the Pennsylvania Workers' Compensation Act. Id. at ¶¶ 33-34. The City terminated Bracciale's employment on February 8, 1996. Id. at 35. Bracciale claims the City would not have terminated him had it reinstated him to a light duty position in October, 1995.

The City filed the present motion to dismiss for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6).

## DISCUSSION

### I. Standard of Review

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988) (citations omitted), cert. denied, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must decide whether "relief could be granted on any set of facts which could be proved." Random v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). A motion to dismiss may be granted only if the court finds the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Conley v. Gibson, 335 U.S. 41, 45-46 (1957).

### II. Rehabilitation Act

The Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq., [the "Rehabilitation Act"] was intended to help states develop and implement vocational rehabilitation services for disabled individuals. The Rehabilitation Act was amended to provide comprehensive protection for disabled persons subjected to discriminatory treatment. See 29 U.S.C. § 701.

Section 501 of the Rehabilitation Act, 29 U.S.C. § 791, requires federal agencies to adopt affirmative action plans to increase their employment of disabled individuals. Section 501 did not establish a private right of action, but Congress, enacting § 505(a)(1), added a private cause of action in 1978. See 29 U.S.C. § 794a(a)(1). Section 505(a)(1) provides the "remedies, procedures, and rights set forth in [Title VII] of the Civil Rights Act of 1964 ... shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by failure to take final action on such complaint." Id.

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, states:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8)[3] of

[3] Section 706(8) defines "individual with a disability" as "any individual who (i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment and (ii) can benefit in terms of an

> this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Originally, § 504 covered only programs receiving federal funds, but in 1978, when Congress enacted § 505, it amended § 504 by adding federal agencies and the Postal Service to the list of covered activities.[4] See 29 U.S.C. § 794.

Section 505(a)(2) of the Rehabilitation Act provides a private remedy for violations of § 504. See 29 U.S.C. § 794a(a)(2). Section 505(a)(2) provides the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." Id. A plaintiff claiming a violation of § 504 can seek relief under § 505(a)(2) in accordance with the procedures

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employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, VI, or VII of this chapter." 29 U.S.C. § 706(8).

[4] "The amendments to section 504 were simply the House's answer to the same problem that the Senate saw fit to resolve by strengthening section 501 [by adding section 505]. The joint House-Senate conference committee could have chosen to eliminate the partial overlap between the two provisions, but instead the conference committee, and subsequently Congress as a whole, chose to pass both provisions, despite the overlap." Prewitt v. United States Postal Serv., 662 F.2d 292, 304 (5th Cir. 1981).

established under Title VI of the Civil Rights Act of 1964 ["Title VI"], but a plaintiff claiming a violation of § 501 must seek relief under § 505(a)(1) in accordance with the procedures of Title VII of the Civil Rights Act of 1964 ["Title VII"].

The language of Rehabilitation Act § 504 prohibiting discrimination in the terms of "any program or activity" receiving federal funds covers employment discrimination. The Supreme Court held in Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984), that § 504 prohibits employment discrimination, regardless of whether the federal assistance is directed toward the provision of employment. See id. at 631.

Congressional amendment of § 504 has created an anomalous enforcement scheme. A federal agency employee who has been discriminated against based on disability might claim a violation under § 501, specifically directed at federal agencies, or under § 504, applicable to federal agencies after the 1978 amendments to the Rehabilitation Act. See 29 U.S.C. §§ 791, 794. The significance of the overlap is that a plaintiff suing under §§ 501 and 505(a)(1), with Title VII remedies, must exhaust all administrative avenues before filing suit in court, see, e.g., Brown v. General Servs. Admin., 425 U.S. 820, 829 (1976), but no administrative exhaustion is required under Title VI. See Cheney State Coll. Faculty v. Hufstedler, 703 F.2d 732, 737 (3d Cir. 1983); Chowdhury v. Reading Hosp. & Med. Ctr., 677 F.2d 317, 321

(3d Cir. 1982), cert. denied, 463 U.S. 1229 (1983); NAACP v. Medical Ctr., Inc., 599 F.2d 1247, 1250 n.10 (3d Cir. 1979).

In Spence v. Straw, 54 F.3d 196 (3d Cir. 1995), the plaintiff, an employee of the Department of Defense, filed suit under § 504 of the Rehabilitation Act. The plaintiff based his claim on § 504 rather than § 501 in order to avoid the Title VII exhaustion requirements of § 505(a)(1). See 29 U.S.C. § 794a(a)(1).

The Court of Appeals, noting the "incongruent enforcement scheme" established by §§ 501 and 504, held federal employees filing suit under § 504 must comply with the exhaustion requirements of Title VII as they would for a claim under § 501. Id. at 199, 201. The court stated "'it would make no sense for Congress to provide (and in the very same section-- 505(a)) different sets of remedies, having different exhaustion requirements, for the same wrong committed by the same employer.'" Id. at 201 (quoting McGuiness v. United States Postal Serv., 744 F.2d 1318, 1321 (7th Cir. 1984)). The court found no indication Congress intended to allow federal employees to circumvent administrative exhaustion required under § 505(a)(1). See id.[5]

[5] All other courts of appeals that have addressed the issue of federal employees suing for violation of § 504 of the Rehabilitation Act have concluded such employees either cannot raise a claim under § 504 at all or must first exhaust administrative remedies as required for § 501 claims under §

The Court of Appeals revisited the Rehabilitation Act in Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272 (3d Cir. 1996). The plaintiff, alleging the school district failed to accommodate his disability in the classroom setting, raised his claim under § 504. See id. at 275. The Court of Appeals allowed the claim to proceed without exhaustion because Spence was premised on the Rehabilitation Act's "incongruent enforcement scheme." Id. at 281. In Spence, the plaintiff was trying "to circumvent the exhaustion requirement applicable to section 501 through the simple expedient of suing under section 504." Id. "Section 504 ... incorporates by reference the remedies, procedures and rights of Title VI ... and therefore is not ordinarily subject to an exhaustion requirement." Id. at 282 n.17.

The City argues Jeremy H. only allowed the plaintiff to proceed without exhaustion because he was not alleging employment discrimination. The City asserts the Court of Appeals intended in Spence to require exhaustion of all employment claims, even those by non-federal employees.

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505(a)(1). See Doe v. Garrett, 903 F.2d 1455, 1461 (11th Cir. 1990), cert. denied, 499 U.S. 904 (1991); Johnston v. Horne, 875 F.2d 1415, 1421 n.5 (9th Cir. 1989); Johnson v. United States Postal Serv., 861 F.2d 1475, 1478 (10th Cir.), cert. denied, 493 U.S. 811 (1989); Morgan v. United States Postal Serv., 798 F.2d 1162, 1164 (8th Cir. 1986), cert. denied, 480 U.S. 948 (1987); Boyd v. United States Postal Serv., 752 F.2d 410, 413 (9th Cir. 1985); McGuiness, 744 F.2d at 1322; Prewitt, 662 F.2d at 303.

The Court of Appeals based its Spence decision on the holdings of the other courts of appeals. The other courts that have required exhaustion of claims by federal employees have based their decisions on two main considerations. First, the sole remedy for federal employees subjected to discrimination on the basis of race, color, religion, sex or national origin lies in Title VII. See Brown, 425 U.S. at 829. The courts of appeals have found it implausible "Congress would have wanted us to interpret the [Rehabilitation] Act as allowing the handicapped--alone among federal employees or job applicants complaining of discrimination-- to bypass the administrative remedies of Title VII." McGuiness, 744 F.2d at 1322.

Title VII does not preempt other federal remedies for private employees. See Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975). The legislative history of Title VII "'manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.'" Id. (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974)). Private employees are not limited to Title VII remedies in the context of discrimination based on race, color, religion, sex or national origin, so there is no incongruity in allowing disabled employees to escape Title VII's exhaustion requirement in a Rehabilitation Act claim.

In the case of federal employees there is a need to give effect to both §§ 501 and 504 of the Rehabilitation Act. See 29 U.S.C. §§ 791, 794. "When there are two acts upon the same subject, the rule is to give effect to both if possible." United States v. Borden Co., 308 U.S. 188, 198 (1939). If federal employees were allowed to bypass exhaustion as required under § 505(a)(1) simply by raising their claim as a violation of § 504 instead of § 501, the remedy conferred under §§ 501 and 505(a)(1), and the requirement for exhaustion, would be eviscerated. See Prewitt, 662 F.2d at 304; see also Mackay v. United States Postal Serv., 607 F. Supp. 271, 277-78 (E.D. Pa. 1985) (Shapiro, J.).

This concern for statutory integrity does not apply to non-federal employees. Employees of programs that receive federal funds only have one remedy under the Rehabilitation Act: they are protected from discrimination by § 504 and they have a remedy under § 505(a)(2) according to the procedures of Title VI. See 29 U.S.C. §§ 794; 794a(a)(2). Non-federal employees have no remedy under §§ 501 and 505(a)(1). See 29 U.S.C. §§ 791, 794a(a)(1). Because non-federal employees can only base Rehabilitation Act claims on §§ 504 and 505(a)(2), they are not undermining the exhaustion requirement of §§ 501 and 505(a)(1).

The Supreme Court's decision in Cannon v. University of Chicago, 441 U.S. 677 (1979), supports not requiring exhaustion

for employees claiming violation of § 504 by programs receiving federal funds. In Cannon, the Court found a private right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq. [hereinafter "Title IX"]. The regulations implementing Title IX adopted the enforcement procedures of Title VI. See 45 C.F.R. § 86.71. Likewise, § 504 of the Rehabilitation Act refers to Title VI procedures. See 29 U.S.C. § 794a(a)(2).

The Cannon Court held exhaustion was unnecessary to assert a Title IX claim because the administrative procedures provided inadequate relief to individual complainants. See Cannon, 441 U.S. at 706-08 n.41. Exhaustion is equally inappropriate for a cause of action under § 504. See Boyd, 752 F.2d at 413; Kling v. County of L.A., 633 F.2d 876, 879 (9th Cir. 1980); Camenisch v. University of Texas, 616 F.2d 127, 131 (5th Cir. 1980), vacated on other grounds, 451 U.S. 390 (1981).

The purpose of Title VI procedures is to give the funding agency a chance to obtain voluntary compliance with the statute's provisions by the funded program. The statute authorizes the agency to terminate all federal funding if the program will not comply. Complete de-funding of a federally-supported program would not help a disabled individual obtain employment. Exhaustion of the Title VI administrative procedures would serve no purpose. "Little can be gained by compelling individual

plaintiffs to engage in administrative procedures when the existing administrative remedies cannot provide the relief they seek and when the agency responsible for implementing those remedies has time and again insisted that its lack of appropriate powers and resources render it incapable of properly reviewing such claims under either Title VI, Title IX, or section 504." Chowdhury, 677 F.2d at 323 n.16.

Most other federal courts that have addressed the issue have concluded no exhaustion is necessary by private employees to pursue a claim under §§ 504 and 505(a)(2). See Tuck v. HCA Health Servs., 7 F.3d 465, 470-71 (6th Cir. 1993); Smith v. Barton, 914 F.2d 1330, 1338 (9th Cir. 1990), cert. denied, 501 U.S. 1217 (1991); Miener v. Missouri, 673 F.2d 969, 978 (8th Cir.), cert. denied, 459 U.S. 909 (1982); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1380-82 (10th Cir. 1981); Davoll v. Webb, 943 F. Supp. 1289, 1297 (D. Colo. 1996); Dertz v. City of Chicago, 912 F. Supp. 319, 324 (N.D. Ill. 1995); Gorsline v. Kansas, 1994 WL 129981, at *2 (D. Kan. Mar. 4, 1994); Finlay v. Giacobbe, 827 F. Supp. 215, 219 n.3 (S.D.N.Y. 1993); Peterson v. Univ. of Wisc. Bd. of Regents, 818 F. Supp. 1276, 1278-79 (W.D. Wisc. 1993).

The concerns expressed by the Court of Appeals in Spence and Jeremy H. over the "incongruent enforcement scheme" and "circumvention" of the exhaustion requirement of § 505(a)(1) are

not present in the case of private employees. See Jeremy H., 95 F.3d at 281; Spence, 54 F.3d at 199. The City's motion to dismiss Bracciale's Rehabilitation Act claim for failure to exhaust administrative remedies will be denied.

**III. Americans with Disabilities Act**

Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq. ["Title I"], provides that "[n]o covered entity[6] shall discriminate against a qualified individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Title I incorporates the procedures of Title VII. See 42 U.S.C. § 12117(a). A plaintiff alleging a violation of Title I must exhaust administrative remedies available through the Equal Employment Opportunity Commission ("EEOC") before filing a court action. See 42 U.S.C. §§ 2000e-5(e), (f)(1).

Although Bracciale could have filed a charge of employment discrimination against the City with the EEOC under Title I, he brought suit against the City under Title II of the ADA, 42 U.S.C. § 12131, et seq. ["Title II"]. Title II provides that "no

[6] A "covered entity" is defined as "an employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. § 12111(2). An "employer" is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." 42 U.S.C. § 12111(5).

qualified individual with a disability[7] 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,[8] or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Title II does not define the terms "services, programs, or activities of a public entity." Title II gives the Attorney General authority to promulgate regulations implementing the statute. See 42 U.S.C. §§ 12134, 12206. The Department of Justice ("DOJ") has issued regulations. "No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity." 28 C.F.R. § 35.140(a). "These regulations were expressly authorized by Congress, ... and, in view of Congress' delegation, the DOJ's regulations should be accorded "controlling weight unless [they are]

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[7] "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, 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." 42 U.S.C. § 12131(2).

[8] A "public entity" is "any State or local government," "any department, agency, special purpose district, or other instrumentality of a State or States or local government," or "the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of Title 45)." 42 U.S.C. § 12131(1).

'arbitrary, capricious, or manifestly contrary to the statute.'" Yeskey v. Pennsylvania Dept. of Corrections, 118 F.3d 168, 170-71 (3d Cir. 1997) (quoting Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2418 (1995)), cert. filed, Oct. 8, 1997; see Helen L. v. DiDario, 46 F.3d 325, 331-32 (3d Cir.) (citing Blum v. Bacon, 457 U.S. 132, 141 (1982)), cert. denied, 116 S. Ct. 64 (1995). "The same is true of the preamble or commentary accompanying the regulations since both are part of the DOJ's official interpretation of the legislation." Yeskey, 118 F.3d at 170-71 (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 510-12, (1994)).

Title II covers employment discrimination by a public entity. See Wagner v. Texas A & M Univ., 939 F. Supp. 1297, 1309-10 (S.D. Tex. 1996); Bruton v. SEPTA, No. 94-3111, 1994 WL 470277, at *2 (E.D. Pa. Aug. 19, 1994); Ethridge v. Alabama, 847 F. Supp. 903, 906 (M.D. Ala. 1993); Peterson, 818 F. Supp. at 1278.

Unlike Title I, adopting the procedures of Title VII, Title II adopts the remedies and procedures of § 505 of the Rehabilitation Act. See 42 U.S.C. § 12133. The City claims Bracciale should have complied with the exhaustion requirements of Title I regardless of whether he based his employment discrimination claim on Title I or Title II. See Def.'s Mem. Supp. Mot. Dismiss at 4 n.1.

Section 505 of the Rehabilitation Act requires federal employees to pursue the exhaustion requirements of Title VII, see 29 U.S.C. § 794a(a)(1), but allows non-federal employees to rely on the remedies of Title VI. See 29 U.S.C. § 794a(a)(2); Jeremy H., 95 F.3d at 282 n.17 (procedures and rights of Title VI apply to claim under Title II of the ADA). Title II is to be interpreted consistently with § 504 of the Rehabilitation Act, see Yeskey, 118 F.3d at 170; no administrative exhaustion is required for non-federal employees.

The DOJ regulations promulgated under Title II state "[a]t any time, the complainant may file a private suit pursuant to section 203 [Title II] of the [ADA]." 28 C.F.R. § 35.172. The DOJ's comments in the Federal Register regarding § 35.172 state Title II:

> requires the Department of Justice to establish administrative procedures for resolution of complaints, but does not require complainants to exhaust these administrative remedies. The Committee Reports make clear that Congress intended to provide a private right of action with the full panoply of remedies for individual victims of discrimination. Because the Act does not require exhaustion of administrative remedies, the complainant may elect to proceed with a private suit at any time.

56 Fed. Reg. 35,694, 35,714 (1991).

Almost all courts addressing whether a Title II plaintiff needs to exhaust administrative remedies have concluded no exhaustion is necessary. See Winfrey v. City of Chicago, 957 F. Supp. 1014, 1022 (N.D. Ill. 1997); Dominguez v. City of Council

Bluffs, No. 96-90050, 1997 WL 484647, at *5 (S.D. Iowa Aug. 13, 1997); Davoll, 943 F. Supp. at 1297; Benedum v. Franklin Tp. Recycling Center, No. 95-1343, 1996 WL 679402, at *5 (W.D. Pa. Sept. 12, 1996); Silk, 1996 WL 312074, at *11; Wagner, 939 F. Supp. at 1310; Roe v. County Com'n of Monongalia County, 926 F. Supp. 74, 77 (N.D.W. Va. 1996); Dertz, 912 F. Supp. at 324; Lundstedt v. City of Miami, No. 93-1402, 1995 WL 852443, at *17 (S.D. Fla. Oct. 11, 1995); Doe v. County of Milwaukee, 871 F. Supp. 1072, 1076 (E.D. Wis. 1995); Tyler v. City of Manhattan, 857 F. Supp. 800, 812 (D. Kan. 1994); Gorsline v. Kansas, No. 93-4254, 1994 WL 129981, at *2 (D. Kan. Mar. 4, 1994); Bechtle v. East Penn Sch. Dist., No. 93-4898, 1994 WL 3396 (E.D. Pa. Jan. 4, 1994); Etheridge, 847 F. Supp. at 907; Noland v. Wheatley, 835 F. Supp. 476, 483 (N.D. Ind. 1993); Finlay, 827 F. Supp. at 219 n.3; Peterson, 818 F. Supp. at 1279-80; Bell, 1993 WL 398612 at *4.

Congress has not mandated exhaustion under Title II. The City's motion to dismiss Bracciale's claim under Title II of the ADA will be denied.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| **MICHAEL BRACCIALE** | : | **CIVIL ACTION** |
| | : | |
| **v.** | : | |
| | : | |
| **CITY of PHILADELPHIA** | : | **NO. 97-2464** |

**ORDER**

AND NOW, this 28th day of October, 1997, upon consideration of defendant City of Philadelphia's motion to dismiss plaintiff Michael Bracciale's Complaint, plaintiff's response thereto, after oral argument on the matter, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

Defendant City of Philadelphia's motion to dismiss plaintiff Michael Bracciale's Complaint is **DENIED**.

Norma L. Shapiro, J.