

Title II of the American with Disabilities Act— An Overview

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1) What is Title II of the ADA?

- a) This paper deals with Division A of Title II, 42 U.S.C. §§ 12131–12134, regarding the “Prohibition Against Discrimination and Other Generally Applicable Provisions.”¹
- b) The operative statutory text is at 42 U.S.C. § 12132: “Subject to the provisions of this title, 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.”

2) The Title II regulations

- a) The statute is written very broadly, and the details are left to the enforcing regulations.
- b) DOJ was authorized to issue implementing regulations, which are intended to be consistent with the § 504 regulations, 42 U.S.C. § 12134, and they are codified at 28 C.F.R. Part 35.
- c) The Title II regulations are controlling unless they are arbitrary, capricious, or plainly contrary to the ADA. *Patterson v. Kerr County*, 2007 WL 2086671, at *7 n.92 (W.D. Tex. July 18, 2007). *See also Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 5 and n.5 (1st Cir. 2000) (“Title II does not elaborate on the obligation of a public entity ... [so we] must rely for specifics on the regulations,” which are given “legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute...”); *Helen L. v. DiDario*, 46 F.3d 325, 331–332 (3d Cir. 1995) (holding that “[b]ecause Title II was enacted with broad language and directed the Department of Justice to promulgate regulations ... the regulations which the Department promulgated are entitled to substantial deference”).
- d) Note that the DOJ has just issued its amended Title II regulations, at 75 Fed. Reg. 56164 (Sept. 15, 2010).² Many of the changes in the new regulations are set out below in grey text boxes; they are designed to adopt certain ADAAG changes issued by the Access Board, and

¹ Division B of Title II deals with public transportation, *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 671 (5th Cir. 2004), and is outside the scope of this paper.

² Available online at <http://edocket.access.gpo.gov/2010/pdf/2010-21821.pdf>.

to update or amend certain provisions so that they comport with the DOJ's legal and practical experiences in enforcing the ADA since 1991.³

3) Who does Title II apply to—"public entities"

- a) Title II applies to any "public entity." 42 U.S.C. § 12132.
- b) "Public entity" is defined in 42 U.S.C. § 12131(1) to include:
 - i) Any State or local government;
 - ii) Any department, agency, special purpose district, or other instrumentality of a State or States or local government.⁴
- c) Coverage is broad—" [T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Pennsylvania Dept. of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998) (internal quotes omitted).
- d) Some entities held covered:
 - i) Municipal police departments, *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 777, 782 (W.D. Tex. 2008).
 - ii) State and local jails and prisons. *Pennsylvania Dept. of Corrs. v. Yeskey*, 524 U.S. 206 (1998); *Patterson v. Kerr County*, 2007 WL 2086671, at *7 (W.D. Tex. July 18, 2007).⁵
- e) Title II applies whether or not the public entity receives any federal funding. *Pace v. Bogalusa City School Bd.*, 403 F.3d 272, 276 n.4 (5th Cir. 2005) (en banc).
- f) Public-private issues
 - i) If an entity appears to have both public and private features, the DOJ has set out several factors to consider in determining if it is a "public entity." See Americans with Disabilities Act Title II Technical Assistance Manual, § II-1.2000 (DOJ Nov. 1993) (hereafter "Technical Assistance Manual").⁶ See also *id.*, § II-1.3000.
 - ii) Public-private lease arrangements—see Technical Assistance Manual, § II-1.3000.

³ The DOJ has issued a summary of the changes at http://www.ada.gov/regs2010/factsheets/title2_factsheet.html.

⁴ The term also includes the National Railroad Passenger Corporation and any commuter authority, but those entities are outside the scope of this paper.

⁵ Note that *Yeskey* impliedly overruled contrary precedent like *Callaway v. Smith County*, 991 F. Supp. 801 (E.D. Tex. 1998).

⁶ Online at <http://www.ada.gov/taman2.html>.

- g) But Title II does not apply to the federal government, although many federal agencies are covered by the (very similar) provisions of § 504 of the Rehabilitation Act of 1973. *Id.*
- h) Individual liability
 - i) Courts generally hold that government officials are not individually liable under Title II. *See, e.g., DeLeon v. City of Alvin Police Dept.*, 2009 WL 3762688 at *3–4 (S.D. Tex. Nov. 9, 2009); *Albritton v. Quarterman*, 2009 WL 585659, at *10 (E.D. Tex. Mar. 6, 2009); *Coker v. Dallas County Jail*, 2009 WL 1953038, at *16 n.11 (N.D. Tex. Feb. 25, 2009); *Comeaux v. Thaler*, 2008 WL 818341, at *18 (S.D. Tex. Mar. 24, 2008) (collecting cases); *Bostick v. Elders*, 2003 WL 1193028, at *1 (N.D. Tex. Jan. 10, 2003).
 - ii) Courts also generally hold that a person cannot use §1983 as a way to sue individuals under Title II. *Pena v. Bexar County, Texas*, 726 F. Supp. 2d 675, 688–690 (W.D. Tex. 2010) (collecting authorities).
 - iii) However, official capacity claims are available to enforce the ADA against the states. See § 15(b)(4) below.
 - iv) Also, some courts have held that individuals may be liable in Title II retaliation claims. See § 7(h)(v) below.
- i) *Respondeat superior*—public entities have *respondeat superior* liability. *Pena v. Bexar County, Texas*, 726 F. Supp. 2d 675, 686 (W.D. Tex. 2010).
 - i) Plaintiffs need not show that the discrimination was the result of a government policy. *Delano-Pyle v. Victoria County, Texas*, 302 F.3d 567, 575 (5th Cir. 2002), *cert. denied*, 540 U.S. 810 (2003).
 - ii) A government entity is liable for the discriminatory acts of its employees, even if they are not policymaking officials. *Delano-Pyle v. Victoria County, Texas*, 302 F.3d 567, 574–575 (5th Cir. 2002), *cert. denied*, 540 U.S. 810 (2003).

4) Who does Title II protect—“qualified individual with a disability”

- a) Title II protects a “qualified individual with a disability.” 42 U.S.C. § 12132.
- b) Definition of disability
 - i) Title II uses the same definition of disability used in other parts of the ADA, and that definition includes “present” disabilities (aka “prong one”), “record of” disabilities (“prong two”), and “regarded as” disabilities (“prong three”). 42 U.S.C. § 12102.
 - ii) The ADA Amendments Act of 2008 substantially expanded the definition of disability. *See Pub.L. 110-325, 122 Stat. 3553 (Sept. 25, 2008).*⁷

⁷ For a detailed analysis of the new disability definition under the ADAAA, see the paper submitted herewith entitled

iii) Note, too, that some types of ADA claim may not require proof that the plaintiff has any kind of disability. These include retaliation claims (see § 7(h)(iii) below) and association claims (see § 7(f) below).

c) Definition of qualified

i) A person is “qualified” if—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—he or she 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); 28 C.F.R. § 35.104; Technical Assistance Manual, *supra*, II-2.8000; *Knowles v. Horn*, 2010 WL 517591, at *3 (N.D. Tex. Feb. 10, 2010) (plaintiff “qualified” in context of integration case).

ii) In some cases the “essential eligibility requirements” are minimal. For example, the only eligibility requirement for obtaining public information may be a request for it. 28 C.F.R. Part 35 App. A, § 35.104; Technical Assistance Manual, *supra*, II-2.8000. In other situations, a visitor, spectator, family member, or associate of a program participant may also be qualified individuals. Technical Assistance Manual, II-2.8000.

iii) Note that a person is not “qualified” if he or she poses a “direct threat” to others that cannot be eliminated by reasonable modifications to the public entity’s policies, practices, or procedures. 28 C.F.R. Part 35 App. A, § 35.104; Technical Assistance Manual, *supra*, II-2.8000.

(1) A “direct threat” is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services. *Id.*

(2) Assessment of direct threat may not be based on generalizations or stereotypes about the effects of a particular disability, but instead must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. *Id.*

(3) Note that in contrast the EEOC regulations in the employment context, the Title II regulations do not include “danger to self” in the definition of direct threat, as the Court noted in *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 82 (2002). Some courts have held that this difference means that “danger to self” is not a defense. *Compare Celano v. Marriott Intern., Inc.*, 2008 WL 239306, at *17–18 (N.D. Cal. Jan. 28, 2008) (decided under Title III).

“The ADA Amendments Act of 2008—Including Proposed EEOC Regulations and Current Case Law.”

Effective 3/15/2011, the latest amendments to the Title II regulations further define “direct threat” to mean a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services. See 28 C.F.R. §§ 35.104 and 35.139, as amended, 75 Fed. Reg. 56164, 56177, 56180, 56185–56186 (Sept. 15, 2010).

These amendments also add a section clarifying the circumstances in which public entities can impose safety requirements. See 28 C.F.R. § 35.130(h), as amended, 75 Fed. Reg. 56164, 56178, 56196 (Sept. 15, 2010).

5) Types of activities reached

- a) The statutory language forbids exclusion from or denial of benefits of the services, programs, or activities of a public entity, or being subjected to discrimination by any such entity. 42 U.S.C. § 12132.
- b) The plaintiff need not show total exclusion to prevail. *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000); *Lee v. Valdez*, 2009 WL 1406244, at *12 (N.D. Tex. May 20, 2009). It is enough to show “constructive exclusion,” i.e., an unreasonable level of difficulty in accessing the benefits. *Frame v. City of Arlington*, 616 F.3d 476, 484 (5th Cir. 2010) (reh. en banc granted), or that a benefit is being administered in a way that effectively denies meaningful access. *Id.* “Effective denial” is a less demanding requirement than “exclusion,” but it “requires courts to consider all circumstances, including the degree of hardship on the plaintiff and the reasonableness of the modification given its cost and the availability of substitute services.” *Id.*, n.8.
- c) Although the other circuits to consider the issue have held that the terms “services, programs, or activities” are essentially broad enough to reach everything a public entity does, *Frame*, 2010 WL 3292980, at *5 n.10 (J. Prado, dissenting in part), the Fifth Circuit has forged its own, more complicated path. *Frame, supra*.
- d) Some courts point out that regardless of the breadth of the terms services, programs, or activities, Title II also prohibits discrimination more generally. *See, e.g., Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1084–1085 (11th Cir. 2007) (“We need not enter the circuits’ debate about whether police conduct during an arrest is a program, service, or activity covered by the ADA. This is because Bircoll, in any event, could still attempt to show an ADA claim under the final clause in the Title II statute: that he was subjected to discrimination by a public entity, the police, by reason of his disability. Indeed, this Court already has explained that the final clause of § 12132 protects qualified individuals with a disability from being subjected to discrimination by any such entity, and is not tied directly to the services, programs, or activities of the public entity.”) (cite and internal quotes omitted). *See also Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 44–45 (2d Cir. 1997).
- e) Some areas held covered by Title II:
 - i) Access to the courts, *Tennessee v. Lane*, 541 U.S. 509 (2004).

- ii) Prisons and jails, *U.S. v. Georgia*, 546 U.S. 151 (2006); *Patterson v. Kerr County*, 2007 WL 2086671, at *7 (W.D. Tex. July 18, 2007). *See also* *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1068 (9th Cir. 2010).
- iii) Law enforcement services *after* the officers securing of the scene and ensured that there is no threat to human life. *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000);⁸ *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 771, 775–776 (W.D. Tex. Dec. 18, 2006).
- iv) Curbs, sidewalks, and parking lots, but only to the extent that they deny access to services, programs or activities. *Frame v. City of Arlington*, 616 F.3d 476, 488 (5th Cir. 2010) (reh. en banc granted).
- v) Municipality’s 911 emergency response services, at least in some circumstances, *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 777, 781–783 (W.D. Tex. 2008).
- vi) Medical care, *except for* “claims that sound in negligence or that challenge purely medical decisions,” *Patterson v. Kerr County*, 2007 WL 2086671, at *7 (W.D. Tex. July 18, 2007). *Compare* *U.S. v. Georgia*, 546 U.S. 151, 157 (2006) (prison’s refusal to accommodate disability-related needs in medical care may constitute exclusion from participation or denial of benefits), with *Albritton v. Quarterman*, 2009 WL 585659, at *10 (E.D. Tex. Mar. 6, 2009) (claims for medical treatment decisions not actionable under the ADA).
- vii) Access to public records, *Pena v. Bexar County, Texas*, 726 F. Supp. 2d 675, 683 (W.D. Tex. 2010).

6) Definition of discrimination generally

- a) Prohibition against discrimination generally. 28 C.F.R. § 35.130(a) (“No qualified individual with a disability shall, on the basis of 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 public entity.”). *See also* Technical Assistance Manual, *supra*, II-3.0000.
- b) Relationship to § 504—The ADA was modeled after the Rehabilitation Act and it expressly adopts the latter’s remedies, procedures, and rights, so case law interpreting either statute is generally applicable to both. *Frame v. City of Arlington*, 616 F.3d 476, 482 n.4 (5th Cir. 2010) (reh. en banc granted). *See also* *Pace v. Bogalusa City School Bd.*, 403 F.3d 272, 287–288 (5th Cir. 2005) (en banc); Technical Assistance Manual, *supra*, § II-1.4100. But the laws are not identical in every way. *See, e.g., Soledad v. U.S. Dept. of Treasury*, 304 F.3d 500, 503–505 (5th Cir. 2002); *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468–469 (4th Cir. 1999) (similar).

⁸ Rather than adopting *Hainze’s per se* exclusions from coverage until the police have secured the scene, other courts simply observe that whether a modification is reasonable may differ depending on the stage of the law enforcement process. *See, e.g., Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1085 (11th Cir. 2007).

c) Denial of meaningful access is as actionable as outright exclusion. See § 5(b) above.

7) Specific prohibitions

- a) No discrimination against a class of disabilities, or based on severity of disability. 28 C.F.R. § 35.130(b)(1)(iv) ; 28 C.F.R. § 35.130(b)(8); 28 C.F.R. § 35.130(c). *See, e.g., Messier v. Southbury Training School*, 562 F. Supp. 2d 294, 322–323 (D. Conn. 2008); *Hahn ex rel. Barta v. Linn County*, 130 F. Supp. 2d 1036, 1050 (N.D. Iowa 2001) (and cases cited).
- b) No discrimination in “siting” decisions. 28 C.F.R. § 35.130(b)(4). *See California ex rel. Lockyer v. County of Santa Cruz*, 2006 WL 3086706, at *4 (N.D. Cal. Oct. 30, 2006) (“The defendants cannot purposefully select pre-1992 buildings for polling places to avoid the ADAAG; such would run afoul of 28 C.F.R. § 35.130(b)(4)(i)’s prohibition on making selections in a manner that has a discriminatory effect. Generally, § 35.130(b)(4)(i) would seem to impose on defendants a duty to select the best available sites for polling.”); *National Organization on Disability v. Tartaglione*, 2001 WL 1231717, at *7 (E.D. Pa. Oct. 11, 2001) (“selection of inaccessible polling places ... can have the effect of depriving mobility impaired voters of the benefit of voting in their neighborhood polling places in the same manner as non-disabled voters”).
- c) No surcharges. 28 C.F.R. § 35.130(f); Technical Assistance Manual, *supra*, II-3.5400. *See Klingler v. Director*, 433 F.3d 1078 (8th Cir. 2006) (charging fee for disability parking hangtags violates ADA).⁹
- d) No discrimination directly or through contractors. 28 C.F.R. § 35.130(b)(1) and (b)(3). *See also Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1066–1067 (9th Cir. 2010) (upholding validity of Title II regulations barring discrimination “directly, or through contractual, licensing, or other arrangements”).
- i) Governmental programs are covered even if they are carried out by contractors, *Henrietta D. v. Bloomberg*, 331 F.3d 261, 286 (2d Cir. 2003), and Title II obligations cannot be contracted away. *Armstrong v. Schwarzenegger*, 261 F.R.D. 173, 176 (N.D. Cal. 2009).
- ii) For example, a State is obligated to ensure that the services, programs, and activities of a state park inn operated under contract by a private entity comply with Title II requirements. *Henrietta D.*, *supra*, 331 F.3d at 286, *citing* 28 C.F.R. Part 35 App. A, § 35.102.
- iii) Title II therefore imposes supervisory liability on public entities. *Henrietta D.*, *supra*, 331 F.3d at 286–287.

⁹ Note that the state may have immunity from certain Title II surcharge claims, *Klingler v. Director*, 455 F.3d 888 (8th Cir. 2006), but such immunity may be waived in whole or in part by removing a case to federal court. *See Meyers ex rel. Benzing v. Texas*, 410 F.3d 236 (5th Cir. 2005).

- iv) A public entity does not satisfy its obligations simply by requiring ADA compliance in its contracts; it must also “ensure that the private entity complies with the contract.” *James v. Peter Pan Transit Management, Inc.*, 1999 WL 735173, at *9 (E.D.N.C. Jan. 20, 1999).
- e) No discrimination in licensing or certification programs. 28 C.F.R. § 35.130(b)(6); Technical Assistance Manual, *supra*, II-3.7200.
 - i) A public entity does not have to lower or eliminate licensing standards that are essential to the licensed activity, but what is “essential” depends on the facts. 28 C.F.R. Part 35 App. A, § 35.130(b)(6); Technical Assistance Manual, *supra*, § II-3.7200.
 - ii) A public entity may not establish requirements for the programs or activities of licensees that would result in discrimination. *Id.*
 - iii) A public entity must provide auxiliary aids for applicants with disabilities, and administer the examinations in accessible locations. Technical Assistance Manual, *supra*, § II-3.7200.
 - iv) Note that although licensing standards are covered by Title II, the licensee’s activities themselves are not covered. 28 C.F.R. Part 35 App. A, § 35.130(b)(6); Technical Assistance Manual, *supra*, § § II-3.7200. Thus, public entities may be liable for discrimination by their contractors who are carrying out governmental functions (as set out in § 7(d) above), but they are not liable for discrimination by mere licensees who are carrying out their own, private activities. *See, e.g., Reeves v. Queen City Transp.*, 10 F. Supp. 2d 1181, 1186–1188 (D. Colo. 1998).

Examinations. The guidance issued with the latest amendments to the Title II regulations clarify that the Title III provisions regarding examinations and courses also apply to Title II entities that offer them. See 75 Fed. Reg. 56164, 56236 (Sept. 15, 2010). *See also Simmang v. Texas Bd. of Law Examiners*, 346 F. Supp. 2d 874, 884 n.8 (W.D. Tex. 2004).

- f) No discrimination against “an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.” 28 C.F.R. § 35.130(g); Technical Assistance Manual, *supra*, II-3.9000. *See A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356 (4th Cir. 2008) (based on its association with addicted persons it served, methadone clinic could bring ADA claim for injuries from zoning decisions); *Doe v. County of Centre*, 242 F.3d 437 (3d Cir. 2001) (adoptive parents of child with HIV could sue to challenge policy restricting foster placements in households that include person with HIV).
- g) Prohibits certain disparate impact discrimination. 28 C.F.R. § 35.130(b)(3)(i) and (b)(8); *Tennessee v. Lane*, 541 U.S. 509, 549 (2004) (Rehnquist, C.J., dissenting); *Hunsaker v. Contra Costa County*, 149 F.3d 1041 (9th Cir. 1998) (disparate impact claims require showing that meaningful access was denied); *Ability Center of Greater Toledo v. City of Sandusky*, 181 F. Supp. 2d 797 (N.D. Ohio 2001); *Smith-Berch, Inc. v. Baltimore County*,

Md., 68 F. Supp. 2d 602 (D. Md. 1999). *See also Alexander v. Choate*, 469 U.S. 287 (1985) (decided under § 504).

h) Retaliation.

- i) The ADA outlaws retaliating against one who has opposed unlawful practice or made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter. 42 U.S.C. § 12203(a); 28 C.F.R. § 35.134(a); Technical Assistance Manual, *supra*, II-3.11000.
- ii) It is also unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the ADA. 42 U.S.C. § 12203(b); 28 C.F.R. § 35.134(b); Technical Assistance Manual, *supra*, II-3.11000.
- iii) The elements of a retaliation claim are: plaintiff engaged in statutorily protected expression; suffered an adverse action; and the adverse action was causally related to the protected activity. *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1180 (11th Cir. 2003). Not every unkind act is sufficiently adverse; the inquiry outside the employment context is whether a reasonable person in his position would view the action as adverse. *Id.* at 1181. *Compare Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (holding that in employment context plaintiff must show that reasonable employee would have found the challenged action “well might have dissuaded a reasonable worker from making or supporting” the protected conduct) (internal quotes omitted)
- iv) The normal Title II remedies apply to a retaliation claim based on Title II conduct. 42 U.S.C. § 12203(c).
- v) Some courts have held that there is individual liability in Title II retaliation cases. *See Datto v. Harrison*, 664 F. Supp. 2d 472, 489–492 (E.D. Pa. 2009) (collecting authorities and finding individuals may be held liable).

8) Modification of policies

- a) Public entities must make reasonable modifications of policies, practices, and procedures if necessary to avoid discrimination. 28 C.F.R. § 35.130(b)(7); Technical Assistance Manual, *supra*, II-3.6000; *Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 454 n.11 (5th Cir. 2005); *Pena v. Bexar County, Texas*, 726 F. Supp. 2d 675, 683 (W.D. Tex. 2010); *Coker v. Dallas County Jail*, 2009 WL 1953038, at *17 (N.D. Tex. Feb. 25, 2009); *Patterson v. Kerr County*, 2007 WL 2086671, at *7 (W.D. Tex. July 18, 2007); *Dees v. Austin Travis County Mental Health and Mental Retardation*, 860 F. Supp. 1186, 1190 (W.D. Tex. 1994). *See also Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (J. Ginsburg, concurring).
- b) Title II’s modification requirement is equivalent the ADA’s accommodation obligation used in other contexts. *See Tennessee v. Lane*, 541 U.S. 509, 531–532 (2004); *Bennett-Nelson v.*

Louisiana Bd. of Regents, 431 F.3d 448, 454 (5th Cir. 2005) (describing Title II's modification requirement as an accommodation obligation); *Reickenbacker v. Foster*, 274 F.3d 974, 983 (5th Cir. 2001) (similar); *Patterson v. Kerr County*, 2007 WL 2086671, at *7 (W.D. Tex. July 18, 2007); *McCoy v. Texas Dept. of Criminal Justice*, 2006 WL 2331055, at *7 (S.D. Tex. Aug. 9, 2006). Many courts therefore track the reasonable accommodation analysis used in employment cases. *See, e.g., Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003). *See also Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002) (§ 504 case adopting the case-by-case nature of the accommodation analysis, as well as the duty to engage in an interactive process).

- c) The plaintiff normally has the burden of requesting an accommodation unless the disability and need for accommodation are known or obvious. *Id.* at *8; *McCoy v. Texas Dept. of Criminal Justice*, 2006 WL 2331055, at *7–8 (S.D. Tex. Aug. 9, 2006) (finding sufficient evidence that defendant knew of need, and also that sufficient request was made).
- d) Whether an accommodation is reasonable requires a balancing of all the relevant facts, and as such, the reasonableness of an accommodation is generally a question of fact inappropriate for resolution on summary judgment. *McCoy v. Texas Dept. of Criminal Justice*, 2006 WL 2331055, at *9 (S.D. Tex. Aug. 9, 2006). *See also Coker v. Dallas County Jail*, 2009 WL 1953038, at *19 (N.D. Tex. Feb. 25, 2009) (fact issue whether failure to return plaintiff's wheelchair excluded him from participating in, or denied him the benefits of, services, programs or activities at the jail); *Patterson v. Kerr County*, 2007 WL 2086671, at *8 (W.D. Tex. July 18, 2007) (fact issues whether assigning inmates with epilepsy to lower bunks was a reasonable accommodation, and whether this was necessary to avoid depriving them of safe sleeping facilities).
- e) The plaintiff has the burden of showing that the modification was reasonable and necessary. *Patterson v. Kerr County*, 2007 WL 2086671, at *7 (W.D. Tex. July 18, 2007). *See also Pena v. Bexar County, Texas*, 726 F. Supp. 2d 675, 685–686 (W.D. Tex. 2010) (citing the 5th Circuit's apportioning of burdens in Title III context).
- f) The defendant can defend by showing that the modification would constitute a fundamental alteration, or undue hardship, 28 C.F.R. § 35.130(b)(7); *Tennessee v. Lane*, 541 U.S. 509, 532 (2004), but this is an affirmative defense on which the defendant has the burden of proof. *Reickenbacker v. Foster*, 274 F.3d 974, 983 (5th Cir. 2001); *Greer v. Richardson Independent School Dist.*, 2010 WL 3025530, at *4 (N.D. Tex. Aug. 2, 2010); *Patterson v. Kerr County*, 2007 WL 2086671, at *7 (W.D. Tex. July 18, 2007); *Dees v. Austin Travis County Mental Health and Mental Retardation*, 860 F. Supp. 1186 (W.D. Tex. 1994) (finding insufficient evidence to establish such a defense). *See also Pena v. Bexar County, Texas*, 726 F. Supp. 2d 675, 686 (W.D. Tex. 2010); Although budgetary constraints are relevant, they alone are insufficient to show that an accommodation is unreasonable or would constitute a fundamental alteration. *Patterson v. Kerr County*, 2007 WL 2086671, at *8, n.105 (W.D. Tex. July 18, 2007).
- g) Note that the Fifth Circuit has held that the modification obligation does not apply to paratransit systems, *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669 (5th Cir. 2004), but subsequent DOT guidance may undercut this precedent.

- h) Liability for the failure to modify policies does not depend on intent. *Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 455 (5th Cir. 2005) (“[T]he existence of a violation depends on whether ... the demanded accommodation is in fact reasonable and therefore required. If the accommodation is required the defendants are liable simply by denying it.”); *Pena v. Bexar County, Texas*, 726 F. Supp. 2d 675, 685 (W.D. Tex. 2010) (“When a public entity defendant fails to meet its affirmative obligation to make reasonable accommodations, the cause of that failure is irrelevant.”); *Coker v. Dallas County Jail*, 2009 WL 1953038, at *17 (N.D. Tex. Feb. 25, 2009) (“Because public entities must make modifications that are necessary to avoid discrimination on the basis of disability, liability does not depend on evidence of purposeful discrimination. A plaintiff simply must show that “but for” his disability, he would not have been deprived of the services or benefits he desired.”); *Patterson v. Kerr County*, 2007 WL 2086671, at *7 (W.D. Tex. July 18, 2007).
- i) With regard to community integration claims, see *Olmstead v. L. C. by Zimring*, 527 U.S. 581, 591 (1999).
- j) Personal devices and services—Title II does not require a public entity to provide to individuals with disabilities personal devices (e.g., wheelchairs; individually prescribed devices like prescription eyeglasses or hearing aids, readers for personal use or study, or services of a personal nature including assistance in eating, toileting, or dressing)
 - i) The exact meaning of “personal devices and services” is somewhat unclear. *AP ex rel. Peterson v. Anoka-Hennepin Independent School Dist. No. 11*, 538 F. Supp. 2d 1125, 1152 (D. Minn. 2008) (holding that the term does not include request that school staff be trained and authorized to administer glucagon injection in the event student had a diabetes emergency, and thus school may have obligation to provide that).
 - ii) Note that the loan of receiver as part of an assistive listening system may still be required. 28 C.F.R. § 35.135.
 - iii) Note, too, that the obligation to modify policies may “trump” this limitation in the jail or prison context because inmates may have no way to bring in their own personal devices. *Purcell v. Pennsylvania Dept. of Corrections*, 1998 WL 10236, at 8–9 (E.D. Pa. Jan. 9, 1998). But outside that context, see *Blatch ex rel. Clay v. Hernandez*, 360 F. Supp. 2d 595, 629 (S.D.N.Y. 2005) (§ 35.135 is a limitation on all of the requirements of the regulation and applies to, for example, policy modifications).

9) Provide “effective communication”

- a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others. 28 C.F.R. § 35.160(a); Technical Assistance Manual, *supra*, II-7.1000; *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 777, 782 and n.19 (W.D. Tex. 2008).
- b) The “effective communication” obligation includes a requirement to furnish appropriate auxiliary aids and services if necessary to afford an individual with a disability an equal

opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity. 28 C.F.R. § 35.160(b)(1); *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 777, 782 and n.20 (W.D. Tex. 2008).

c) Auxiliary aids and services include qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDDs), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments. 28 C.F.R. § 35.104. *See also Salinas v. City of New Braunfels*, 557 F. Supp. 2d 777, 782 and n.21 (W.D. Tex. 2008) (holding that the term includes sign-language interpreters).

i) Sign language interpreters. *See* Technical Assistance Manual, *supra*, II-7.1200.

(1) A qualified interpreter means one who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary. 28 C.F.R. § 35.104.

(2) Note that regardless of skill level, in certain circumstances a family member or friend may not be qualified to render the necessary interpretation because of factors such as emotional or personal involvement, or considerations of confidentiality, that may adversely affect the ability to interpret “effectively, accurately, and impartially.” 28 C.F.R. Part 35 App. A, § 35.104.

(3) The definition of “qualified interpreter” in this rule does not invalidate or limit standards for interpreting services of any State or local law that are equal to or more stringent than those imposed by this definition. For instance, the definition would not supersede any requirement of State law for use of a certified interpreter in court proceedings. 28 C.F.R. Part 35 App. A, § 35.104.¹⁰

(4) Although in some circumstances written notes may be sufficient to permit effective communication, in many circumstances they may not be. For example, a qualified interpreter may be necessary when the information being communicated is complex, or is exchanged for a lengthy period of time. Factors to consider include the context in which the communication is taking place, the number of people involved, and the importance of the communication. 28 C.F.R. Part 35 App. A, § 35.160.

¹⁰ For example, Texas law expressly requires interpreters for parties, witnesses and jurors in civil trial or depositions, Tex. Civ. Prac. & Rem. Code § 21.002(a); for a child, parent/guardian, or witness in juvenile justice proceedings, Tex. Fam. Code § 51.17(e); for parents or guardians of children in certain residential-care facilities, Tex. Gov. Code § 531.164(d)(3); and for defendants or witnesses in criminal or competency proceedings, Tex. Code Crim. Proc. § 38.31. State law also specifies the certification level for interpreters used in criminal and juvenile proceedings. Tex. Fam. Code § 51.17(e); Tex. Code Crim. Proc. § 38.31.

- ii) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments.
 - (1) Auxiliary aids and services may also include reading devices or readers, which should be provided when necessary for equal participation and opportunity to benefit from any governmental service, program, or activity,
 - (2) Such aids may be required, for example, for reviewing public documents, examining demonstrative evidence, and filling out voter registration forms or forms needed to receive public benefits. 28 C.F.R. Part 35 App. A, § 35.160.
- d) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities. 28 C.F.R. § 35.160(b)(2); Technical Assistance Manual, *supra*, II-7.1100.
- e) Due to the broad, encompassing language found in the ADA, the term “effective” lends itself to a fact-intensive inquiry, making determination difficult on summary judgment. *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 777, 783 (W.D. Tex. 2008). Quality bilateral communication is often necessary. *Id.*, 557 F. Supp. 2d at 785. Also, shifting and contradictory grounds as to why the defendant failed to seek an interpreter may undercut a showing that communications were effective. *Id.* at 786.
- f) TDD—Where a public entity communicates by telephone with applicants and beneficiaries, TDDs or equally effective telecommunication systems shall be used to communicate with individuals with impaired hearing or speech. 28 C.F.R. § 35.161; Technical Assistance Manual, *supra*, II-7.2000.
- g) 911—Telephone emergency services, including 911 services, shall provide direct access to individuals who use TDDs and computer modems. 28 C.F.R. § 35.162; Technical Assistance Manual, *supra*, II-7.3000.
- h) Information and signage—A public entity shall ensure that interested persons (including persons with impaired vision or hearing) can obtain information as to the existence and location of accessible services, activities, and facilities; and shall provide signage at all inaccessible entrances to each of its facilities directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each accessible entrance of a facility. 28 C.F.R. § 35.163.

Effective 3/15/2011 the latest amendments to the Title II regulations clarify certain provisions regarding phone service, readers, and interpreters; list additional auxiliary aids and services, including video remote interpreting (VRI) and screen-reader software; and establish performance and training standards for VRI. See 28 C.F.R. §§ 35.104, 35.160 and 35.161, as amended, 75 Fed. Reg. 56164, 56177, 56183–56184 (Sept. 15, 2010).

10) Integrated settings

- a) Public entities must provide “services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). This is the so-called “integration mandate.” *See Olmstead v. L. C. by Zimring*, 527 U.S. 581, 591 (1999) (“Unjustified isolation, we hold, is properly regarded as discrimination based on disability.”); *Knowles v. Horn*, 2010 WL 517591, at *4 (N.D. Tex. Feb. 10, 2010).
- b) Public entities may not “[p]rovide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others. 28 C.F.R. § 35.130(b)(1)(iv).
- c) Public entities “may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.” 28 C.F.R. § 35.130(b)(2). *See also Dees v. Austin Travis County Mental Health and Mental Retardation*, 860 F. Supp. 1186, 1193 (W.D. Tex. 1994).
- d) *See also* Technical Assistance Manual, *supra*, II-3.4000.

11) Other affirmative obligations

- a) Self-evaluations. *See* Technical Assistance Manual, *supra*, II-8.2000; *Hainze v. Richards*, 207 F.3d 795, 802 (5th Cir. 2000).
 - i) Each public entity was required, by January 26, 1993, to evaluate its current services, policies, and practices, and the effects thereof, for ADA compliance (unless already addressed as part of a § 504 self-evaluation), and begin making necessary changes. 28 C.F.R. § 35.105(a) and (d).
 - ii) Those public entities with 50 or more employees were also required to maintain certain public information about the evaluation for at least three years following its completion. 28 C.F.R. § 35.105(c).
 - iii) Some courts have held that the self-evaluation and transition plan regulations are not privately enforceable, *e.g.*, *Iverson v. City of Boston*, 452 F.3d 94 (1st Cir. 2006); *Skaff v. City of Corte Madera*. 2009 WL 2058242 (N.D. Cal. July 13, 2009), but there is contrary authority. *Chaffin v. Kansas State Fair Bd.*, 348 F.3d 850 (10th Cir. 2003). Regardless of the outcome on that question, the lack of such a plan may still have evidentiary weight. *See Pierce v. County of Orange*, 526 F.3d 1190, 1223 (9th Cir. 2008) (trial court should not assume that injunctive relief is unnecessary, taking it “on faith” that county would move toward full compliance, in light of the fact that its transition plan was untimely and incomplete); *Huezo v. Los Angeles Community College Dist.*, 672 F. Supp. 2d 1045, 1054 (C.D. Cal. 2008).

- b) ADA coordinator, notice, and grievance procedures
 - i) Notice requirements—a public entity shall make available to applicants, participants, beneficiaries, and other interested persons information about their Title II rights and the ADA’s application to the services, programs, or activities of the public entity. 28 C.F.R. § 35.106; Technical Assistance Manual, *supra*, II-8.4000.
 - ii) ADA Coordinator—a public entity that employs 50 or more persons shall designate at least one ADA coordinator to ensure its ADA responsibilities are carried out, and to investigate ADA complaints; the name, address, and phone number must be public. 28 C.F.R. § 35.107(a); Technical Assistance Manual, *supra*, II-8.5000.
 - iii) Grievance procedures—a public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by Title II. 28 C.F.R. § 35.107(b); Technical Assistance Manual, *supra*, II-8.5000.

12) Employment provisions of Title II

- a) The Title II regulations cover claims of employment discrimination. 28 C.F.R. § 35.140. *See also* Technical Assistance Manual, *supra*, II-4.0000.
- b) But the courts are divided on whether employment-discrimination claims can be brought under Title II, or must be brought under Title I. *Compare Bledsoe v. Palm Beach County Soil and Water Conservation Dist.*, 133 F.3d 816, 820–825 (11th Cir. 1998) (allowing Title II employment claims), with *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169 (9th Cir. 1999) (disallowing). The Supreme Court has noted the split but has not decided the issue. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 360 n.1 (2001). The issue remains an open one in the Fifth Circuit. *Eber v. Harris County Hosp. Dist.*, 130 F. Supp. 2d 847, 851 n.1 (S.D. Tex. 2001).
- c) The above circuit split probably does not affect the substantive obligations of a public entity, but it could make a difference on matters like the limitations period, damage caps, and administrative exhaustion. On the last issue, see *Wagner v. Texas A & M University*, 939 F. Supp. 1297, 1309 (S.D. Tex. 1996).

13) Architectural barriers.

- a) Facility—as used in Title II, “facility” means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located. 28 C.F.R. § 35.104.
- b) New construction
 - i) Definition of new construction—each facility or part of a facility constructed by, on behalf of, or for the use of, a public entity, and for which construction began after

January 26, 1992. 28 C.F.R. § 35.151(a); Technical Assistance Manual, *supra*, II-6.1000. Note, however, that many entities covered by Title II are also covered by § 504, and the new construction provisions of that law (requiring UFAS compliance) became effective June 3, 1977. *McGregor v. Louisiana State University Bd. of Sup'rs*, 3 F.3d 850, 861 (5th Cir. 1993); *Greer v. Richardson Independent School Dist.*, 2010 WL 3025530, at *3 n.22 (N.D. Tex. Aug. 2, 2010).

ii) Architectural standards

(1) New construction must comply with the new-construction requirements in either the ADA Architectural Guidelines (ADAAG),¹¹ or with the Uniform Federal Accessibility Standards (UFAS). 28 C.F.R. § 35.151(c) Technical Assistance Manual, *supra*, II-6.2100; *Tennessee v. Lane*, 541 U.S. 509, 532 (2004); *Greer v. Richardson Independent School Dist.*, 2010 WL 3025530, at *3, 6 (N.D. Tex. Aug. 2, 2010).

(2) Public entities can depart from particular requirements by using other methods if it is clearly evident that equivalent access to the facility (or part of the facility) is thereby provided. 28 C.F.R. § 35.151(c); *Greer v. Richardson Independent School Dist.*, 2010 WL 3025530, at *6 (N.D. Tex. Aug. 2, 2010).

iii) Curb cuts and curb ramps—must be added in newly constructed streets, road, highways, or sidewalks. 28 C.F.R. § 35.151(e); Technical Assistance Manual, *supra*, II-6.6000. Note, however, that the Fifth Circuit has held that individuals can only enforce this provision if the non-complying curb cuts restrict their access to services, programs or activities. *Frame v. City of Arlington*, 616 F.3d 476, 488 (5th Cir. 2010) (reh. en banc granted).

New Accessibility Standards. The latest amendments to the Title II regulations, 75 Fed. Reg. 56236 (Sept. 15, 2010), replace the 1991 ADAAG with the 2010 “ADA Standards for Accessible Design.” These new standards include new coverage, new chapters from the updated (2004) version of ADAAG, and certain other changes. For new construction and alteration begun between 9/15/2010 and 3/15/2012, covered entities may choose between the 1991 ADAAG, UFAS, and the 2010 Standards. New construction and alteration begun on or after 3/15/2012 must comply with the 2010 Standards. Covered entities that should have complied with the 1991 ADAAG but have not done so by 3/15/2012 must comply with the 2010 Standards. See 28 C.F.R. §§ 35.104, 35.133(c), and 35.151, as amended, 75 Fed. Reg. 56164, 56177, 56178, 56180–56183 (Sept. 15, 2010).

c) Alterations

i) Definition of alteration—a change to a building or facility that affects or could affect the usability of the building or facility or part thereof. ADAAG § 3.5.

¹¹ The ADAAG guidelines are set out in App. A to the ADA Title III regulations, 28 C.F.R. Part 36, and also available online at <http://www.access-board.gov/adaag/html/adaag.htm>.

- (1) Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, resurfacing of circulation paths or vehicular ways, changes or rearrangement of the structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. ADAAG § 3.5.
- (2) Alterations do not include normal maintenance, reroofing, painting or wallpapering, or changes to mechanical and electrical systems, unless they affect the usability of the building or facility. ADAAG § 3.5.
- (3) *See also Greer v. Richardson Independent School Dist.*, 2010 WL 3025530, at *6 (N.D. Tex. Aug. 2, 2010) (alterations appear to include changes made in an effort to make a facility more accessible, as well as changes that only incidentally affect access).

ii) Architectural standards

- (1) The alterations requirements apply to each facility (or part of a facility) altered by, on behalf of, or for the use of, a public entity, and that was commenced after January 26, 1992. 28 C.F.R. § 35.151(b).
- (2) Those alterations must comply with either the ADA Architectural Guidelines (ADAAG), or with the Uniform Federal Accessibility Standards (UFAS). 28 C.F.R. § 35.151(c); *Greer v. Richardson Independent School Dist.*, 2010 WL 3025530, at *3 (N.D. Tex. Aug. 2, 2010).
- (3) Public entities can depart from particular requirements by using other methods if it is clearly evident that equivalent access to the facility (or part of the facility) is thereby provided. 28 C.F.R. § 35.151(c); *Greer v. Richardson Independent School Dist.*, 2010 WL 3025530, at *6 (N.D. Tex. Aug. 2, 2010).

iii) Curb cuts and curb ramps—must be added in newly altered streets, road, highways, or sidewalks. 28 C.F.R. § 35.151(e); Technical Assistance Manual, *supra*, II-6.6000. Note, however, that the Fifth Circuit has held that individuals can only enforce this provision if the non-complying curb cuts restrict their access to services, programs or activities. *Frame v. City of Arlington*, 616 F.3d 476, 488 (5th Cir. 2010) (reh. en banc granted).

iv) Historic properties—alterations must also comply but alternative methods can be used if compliance with UFAS or ADAAG would threaten the historic significance of the building. 28 C.F.R. § 35.151(d); Technical Assistance Manual, *supra*, II-6.5000.

New Accessibility Standards. The latest amendments to the Title II regulations, 75 Fed. Reg. 56236 (Sept. 15, 2010), replace the 1991 ADAAG with the 2010 “ADA Standards for Accessible Design.” These new standards include new coverage, new chapters from the updated (2004) version of ADAAG, and certain other changes. For new construction and alteration begun between 9/15/2010 and 3/15/2012, covered entities may choose between the 1991 ADAAG, UFAS, and the 2010 Standards. New construction and alteration begun on or

after 3/15/2012 must comply with the 2010 Standards. Covered entities that should have complied with the 1991 ADAAG but have not done so by 3/15/2012 must comply with the 2010 Standards. See 28 C.F.R. §§ 35.104, 35.133(c), and 35.151, as amended, 75 Fed. Reg. 56164, 56177, 56178, 56180–56183 (Sept. 15, 2010).

Element-by-Element Safe Harbor. The latest amendments to the Title II regulations clarify that if certain elements in existing facilities already comply with the 1991 ADAAG or UFAS and are not being altered, covered entities need not bring them into compliance with the 2010 Standards until they are altered. See 28 C.F.R. § 35.150(b)(2), as amended, 75 Fed. Reg. 56164, 56180 (Sept. 15, 2010).

d) “Existing facilities”

i) Title II has less stringent requirements for “existing facilities.” *Greer v. Richardson Independent School Dist.*, 2010 WL 3025530, at *3 and n.23 (N.D. Tex. Aug. 2, 2010).

ii) What are existing facilities?

(1) “Existing facilities” include facilities for which construction began on or before January 26, 1992, and which have not been modified. See 28 C.F.R. § 35.151(a)(and (b)); *Greer v. Richardson Independent School Dist.*, 2010 WL 3025530, at *3 (N.D. Tex. Aug. 2, 2010).

(2) Note that it is the date of construction that controls, not the date a building was leased by a public entity. Thus, a building leased after January 26, 1992 is still considered an “existing facility” if it was constructed before that date. 28 C.F.R. Part 35 App. A, § 35.151.

(3) Note, too, that some things that are existing facilities under Title II may be considered new construction or alterations under § 504. See § 13(b)(i) above.

The latest amendments to the Title II regulations change the definition of “existing facility” to reflect the fact that public entities have program-access requirements that are independent of, but may coexist with, new-construction or alteration requirements. See 28 C.F.R. § 35.104, as amended, 75 Fed. Reg. 56164, 56177 (Sept. 15, 2010).

iii) The “program access” standard applies to existing facilities, and requires that each service, program, or activity of the public entity be operated so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.150(a); Technical Assistance Manual, *supra*, II-5.1000; *Greer v. Richardson Independent School Dist.*, 2010 WL 3025530, at *3 (N.D. Tex. Aug. 2, 2010).

Element-by-Element Safe Harbor. The latest amendments to the Title II regulations clarify that if certain elements in existing facilities already comply with the 1991 ADAAG or UFAS and are not being altered, covered entities need not bring them into compliance with the 2010

Standards until they are altered. See 28 C.F.R. § 35.150(b)(2), as amended, 75 Fed. Reg. 56164, 56180 and 56206 (Sept. 15, 2010).

iv) Methods

- (1) Program access does not necessarily require each existing facility be made accessible. 28 C.F.R. § 35.150(a)(1); Technical Assistance Manual, *supra*, II-5.2000; *Greer v. Richardson Independent School Dist.*, 2010 WL 3025530, at *3, 4 (N.D. Tex. Aug. 2, 2010). *See also James v. State*, 89 S.W.3d 86, 89 (Tex. App.—Corpus Christi 2002, no pet.). Compliance “does not depend on the number of locations that are wheelchair-accessible; the central inquiry is whether the program, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.” *Bird v. Lewis & Clark College*, 303 F.3d 1015, 1021 (9th Cir. 2002) (internal quotes omitted), *cert. denied*, 538 U.S. 923 (2003).
 - (2) Failure to meet ADAAG standards is relevant, but not determinative, evidence of the lack of program access, and public entities have flexibility to choose how to achieve program accessibility. *Greer v. Richardson Independent School Dist.*, 2010 WL 3025530, at *4 (N.D. Tex. Aug. 2, 2010).
 - (3) A public entity may comply 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 program access. 28 C.F.R. § 35.150(b)(1); Technical Assistance Manual *supra*, § II-5.2000. *See also Tennessee v. Lane*, 541 U.S. 509, 532 (2004).
 - (4) A public entity is not necessarily required to make structural changes in existing facilities where other methods are effective, but if alterations are made, they must meet the accessibility requirements of § 35.151.
 - (5) In choosing among available methods, a public entity shall give priority to those methods that offer services, programs, and activities in the most integrated setting appropriate.
 - (6) Carrying an individual with a disability is considered an ineffective and therefore an unacceptable method for achieving program accessibility. 28 C.F.R. Part 35 App. A, § 35.150(b)(1); Technical Assistance Manual, *supra*, II-5.2000.
 - (7) Assessing program accessibility is a fact-specific inquiry. *Greer v. Richardson Independent School Dist.*, 2010 WL 3025530, at *3 (N.D. Tex. Aug. 2, 2010).
- v) Transition Plan—If structural changes were to be made to achieve program accessibility, a public entity that had 50 or more employees was required to develop a transition plan

by July 26, 1992, with specified input, content, and public access. 28 C.F.R. § 35.150(d); Technical Assistance Manual, *supra*, II-8.3000.¹²

vi) Defenses

(1) Fundamental alteration or undue financial and administrative burdens.

- (a) The public entity has the burden of proving that a proposed action would result in a fundamental alteration or undue burden
- (b) The decision that compliance would result in such alteration or burden must be made by the agency head or designee after considering all resources available for use in the funding and operation of the service, program, or activity
- (c) The decision must be accompanied by a written statement of the reasons for reaching that conclusion.
- (d) If an action would result in such an alteration or burden, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(2) Historic preservation

- (a) Program access does not require action that would threaten or destroy the historic significance of an historic property;
 - (b) a public entity shall give priority to methods that provide physical access to individuals with disabilities.
- e) Maintenance of accessible features—A public entity must maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities, although “isolated or temporary interruptions in service or access due to maintenance or repairs” are not permissible. 28 C.F.R. § 35.133; Technical Assistance Manual, *supra*, II-3.10000.

More New Provisions:

Ticketing. The latest amendments to the Title II regulations clarify the rules on the sale of tickets for accessible seating, effective 3/15/2011. See 28 C.F.R. § 35.138, as amended, 75 Fed. Reg. 56164, 56179, 56201–56206 (Sept. 15, 2010).

Service Animals. Effective 3/15/2011 the latest amendments clarify various things about the definition and use of service animals, including limiting the statutory protection to dogs and (with

¹² Note that the courts are divided on whether the transition-plan regulation is privately enforceable. See § 11(a)(iii) above.

some restrictions) miniature horses. The definition includes psychiatric service animals, but excludes comfort animals. See 28 C.F.R. §§ 35.104 and 35.136, as amended, 75 Fed. Reg. 56164, 56177, 56178, 56191–56195 (Sept. 15, 2010).

Wheelchairs and Other Power-Driven Mobility Devices. The new amendments adopt a two-tiered approach to mobility devices effective 3/15/2011. Wheelchairs and other devices designed for use by people with mobility impairments must be permitted in all areas open to pedestrian use. “Other power-driven mobility devices” (e.g., Segways) must be permitted unless the covered entity can demonstrate that it would fundamentally alter its programs, services, or activities, create a direct threat, or create a safety hazard. See 28 C.F.R. §§ 35.104 and 35.137, as amended, 75 Fed. Reg. 56164, 56177, 56178–56179, 56186–56190 (Sept. 15, 2010).

Residential Housing Offered for Sale to Individual Owners. Title II has always covered public housing programs, but these amendments establish design requirements (set out in the 2010 Standards) for residential dwelling units that are intended for sale to individual owners. See 28 C.F.R. § 35.151(j), as amended, 75 Fed. Reg. 56164, 56183, 56218 (Sept. 15, 2010).

Housing at Places of Education. Title II has always covered college dormitories, but the new amendments clarify the scope of that coverage and establish design requirements (set out in the 2010 Standards) for residential facilities at places of education. See 28 C.F.R. §§ 35.104 and 35.151(f), as amended, 75 Fed. Reg. 56164, 56177, 56182, 56186 (Sept. 15, 2010).

Group Homes, Shelters, Etc. Title II has always covered social service centers but the amendments clarify the scope of that coverage and establish design requirements (set out in the 2010 Standards) for housing or sleeping facilities at group homes, halfway houses, shelters, etc. See 28 C.F.R. § 35.151(e), as amended, 75 Fed. Reg. 56164, 56182, 56214–56215 (Sept. 15, 2010).

Detention and Correctional Facilities. The amendments also clarify the requirements that apply to correctional facilities, and require that three percent of newly constructed or altered cells to be accessible. See 28 C.F.R. §§ 35.151(k) and 35.152, as amended, 75 Fed. Reg. 56164, 56183, 56218–56223 (Sept. 15, 2010).

Medical care facilities. The amendments clarify the accessibility requirements that apply to medical care facilities. See 28 C.F.R. § 35.151(h), as amended, 75 Fed. Reg. 56164, 56183, 56217 (Sept. 15, 2010).

Seating in Assembly Areas. The latest amendments clarify the rules regarding accessible seating in assembly areas. See 28 C.F.R. § 35.151(g), as amended, 75 Fed. Reg. 56164, 56182–56183, 56216–56217 (Sept. 15, 2010).

14) Enforcement of Title II rights.

a) Administrative enforcement.

- i) Administrative complaints may be filed with the Department of Justice within 180 days of the action complained of. 28 C.F.R. § 35.170; Technical Assistance Manual, *supra*, II-9.2000.
 - ii) The address for filing is the Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 66738, Washington, D.C. 20035-6738, 800/514-0301 (voice), 800/514-0383 (TTY). *See also* Technical Assistance Manual, *supra*, II-9.2000.
 - iii) Other information on how to file Title II complaints is available from Technical Assistance Manual, *supra*, II-9.0000, and the complaint form and address is online at <http://www.ada.gov/t2cmpfrm.htm>.
- b) Notice and Exhaustion
- i) Title II does not require filing a complaint with a federal agency, or receipt of any permission before filing suit. *See, e.g.*, 28 C.F.R. Part 35 App. A, Subpart F (citing legislative history); *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169, 1177–1178 (9th Cir. 1999); *Bledsoe v. Palm Beach County Soil and Water Conservation Dist.*, 133 F.3d 816, 824 (11th Cir. 1998); *Mitchell v. Massachusetts Dept. of Correction*, 190 F. Supp. 2d 204, 209–210 and n.4 (D. Mass. 2002) (collecting authorities). *See also Camenisch v. University of Texas*, 616 F.2d 127, 134–135 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 390 (1981) (no exhaustion required in claims under § 504).
 - ii) Other statutes may require exhaustion in certain types of Title II cases:
 - (1) The Prison Litigation Reform Act requires administrative exhaustion of certain claims against prisons. *See, e.g.*, *O’Guinn v. Lovelock Correctional Center*, 502 F.3d 1056, 1061–1062 (9th Cir. 2007); *Miller v. Wayback House*, 2006 WL 297769, at *5 (N.D. Tex. Feb. 1, 2006).
 - (2) Some courts require exhaustion under the IDEA (the special education law) to prevent a plaintiff from circumventing IDEA exhaustion by bringing similar claims under the ADA (or § 504), or by seeking relief that is also available under IDEA. *See Marc V. v. North East Independent School Dist.*, 455 F. Supp. 2d 577 (W.D. Tex. 2006) (IDEA exhaustion required where IDEA and ADA claims substantially the same); *B.H.Y. b/n/f Young v. La Pryor Independent School Dist.*, 2004 WL 2735193 (W.D. Tex. Nov. 29, 2004) (similar). *But compare Spann ex rel. Hopkins v. Word of Faith Christian Center Church*, 589 F. Supp. 2d 759, 769 (S.D. Miss. 2008) (§ 504 claim involved “pure discrimination” for which IDEA offers no relief, so failure to exhaust under IDEA did not bar claim); *Hornstine v. Township of Moorestown*, 263 F.Supp.2d 887, 901–903 (D.N.J. 2003) (no exhaustion required for claim seeking damages and injunction allowing plaintiff to serve as valedictorian, because the claims had nothing to do with FAPE). Note that decision adverse to the plaintiff on IDEA issues may preclude litigation of substantially similar claims under the ADA. *Compare Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005) (en banc), with *D.A. v. Houston Independent School Dist.*, 716 F. Supp. 2d 603, 618–619 (S.D. Tex. 2009) (distinguishing *Pace*).

(3) Note that there is a split of authority as to whether employment claims brought under Title II require exhaustion. *Compare Decker v. University of Houston*, 970 F. Supp. 575, 578–579 (S.D. Tex. 1997), with *Wagner v. Texas A & M Univ.*, 939 F. Supp. 1297, 1308–1309 (S.D. Tex. 1996). *See also Holmes v. Texas A&M University*, 145 F.3d 681, 684 (5th Cir. 1998) (declining to resolve the issue).

(a) State pre-suit notice requirements. *Compare Smith v. Isle of Wight County School Bd.*, 284 F.Supp.2d 370, 374–376 (E.D.Va. 2003) (applying 180-day notice provision from Virginia Rights of Persons with Disabilities Act), with *Hornstine v. Township of Moorestown*, 263 F.Supp.2d 887, 897–898 (D.N.J. 2003) (rejecting application of 180-notice requirement in state tort claims act to § 504 claim).

The latest amendments to the Title II regulations, effective 3/15/2011, clarify the investigation and compliance procedures regarding Title II complaints, and the fact that administration exhaustion is not required. See 28 C.F.R. §§ 35.171(a)(2), 35.172, and 35.190(e), as amended, 75 Fed. Reg. 56164, 56184 56228–56229 (Sept. 15, 2010).

c) Private lawsuits.

i) There is a private right of action to sue for Title II violations. *U.S. v. Georgia*, 546 U.S. 151, 154 (2006); *Barnes v. Gorman*, 536 U.S. 181, 184–185 (2002); *Frame v. City of Arlington*, 616 F.3d 476, 482–483 (5th Cir. 2010) (reh. en banc granted).

ii) Elements—under a common formulation, the elements of a Title II case are that: (1) plaintiff was a qualified individual with a disability; (2) plaintiff was denied the benefits of services, programs, or activities for which the public entity is responsible, or was otherwise discriminated against by the public entity; and (3) such discrimination is by reason of his disability. *Frame v. City of Arlington*, 616 F.3d 476, 482 (5th Cir. 2010) (reh. en banc granted).

iii) Standing—

(1) The plaintiff must show that he or she has sustained or is immediately in danger of sustaining some direct injury that is real and immediate, not conjectural or hypothetical. *Greer v. Richardson Independent School Dist.*, 2010 WL 3025530, at *2 (N.D. Tex. Aug. 2, 2010) (mother who used a wheelchair had sufficient standing to challenge architectural barriers at school stadium even after her son graduated, because of her intent to return there).

(2) An architectural barrier must also be related to the particular plaintiff's disability in order for that plaintiff to have standing to sue for its removal. *Greer v. Richardson Independent School Dist.*, 2010 WL 3025530, at *7 (N.D. Tex. Aug. 2, 2010) (wheelchair user could not sue over barriers affecting only those with visual impairments).

- (3) But the plaintiff need not personally encounter an architectural barrier in order to have standing to bring suit for its removal; a plaintiff is not required to make the futile gesture of encountering each architectural barrier at a particular facility before suing for injunctive relief as to all barriers related to her disability. *Greer v. Richardson Independent School Dist.*, 2010 WL 3025530, at *7 (N.D. Tex. Aug. 2, 2010).
- (4) One may have standing under Title II even in the absence of outright exclusion. *See Applicants v. Texas State Bd. of Law Examiners*, 1994 WL 923404, at *5 (W.D. Tex. Oct. 11, 1994). *See also Espinoza v. Texas Dept. of Public Safety*, 2007 WL 1393751, at *3 (N.D. Tex. May 11, 2007). Compare § 5(b) above.
- (5) Note that the plaintiff may have standing to assert the Title II rights of one who has since died. *McCoy v. Texas Dept. of Criminal Justice*, 2006 WL 2331055, at *5–6 (S.D. Tex. Aug. 9, 2006).

iv) Statute of limitations

- (1) Title II has no express statute of limitations, so courts generally apply the most analogous state-law limitations period, which in Texas is the two-year statute of limitations for personal injury claims. *Frame v. City of Arlington*, 616 F.3d 476, 489 (5th Cir. 2010) (reh. en banc granted). Note that there is conflicting Fifth Circuit language about whether or not the federal four-year “catch-all” statute governs all or a portion of Title II. *Compare Frame, supra*, at 489 and n.18, *with Holmes v. Texas A&M University*, 145 F.3d 681, 685–686 (5th Cir. 1998).
- (2) State tolling rules (excusing delays beyond the limitations period) may also be applicable. *Wagner v. Texas A & M University*, 939 F. Supp. 1297, 1310 (S.D. Tex. 1996). *See also Hickey v. Irving Indep. Sch. Dist.*, 976 F.2d 980, 984 n.8 (5th Cir. 1992) (§ 504 case). Note, however, that the time period may not be tolled, at least in employment cases, while the plaintiff pursues an internal grievance. *Holmes v. Texas A&M University*, 145 F.3d 681, 684–685 (5th Cir. 1998).
- (3) But federal law controls on when the statute of limitation accrues, *Eber v. Harris County Hosp. Dist.*, 130 F. Supp. 2d 847, 870 (S.D. Tex. 2001), and the Fifth Circuit has held that the claim accrues when the plaintiff “knew or should have known that she was denied access to a service, program, or activity, to challenge the architectural barriers causing the exclusion.” *Frame v. City of Arlington*, 616 F.3d 476, 489–490 (5th Cir. 2010) (reh. en banc granted). *See also Lyles v. University of Tex. Health Science Center, San Antonio*, 2010 WL 1171791, at *1 (W.D. Tex. Mar. 24, 2010) (limitations period began to run when plaintiff received unequivocal notice of the facts giving rise to his claim, or when a reasonable person would know of the facts giving rise to a claim).
- (4) The defendant has the burden of proving the affirmative defense of statute of limitations. *Frame v. City of Arlington*, 616 F.3d 476, 489 (5th Cir. 2010) (reh. en banc granted).

v) Class actions may be available. *See Lightbourn v. County of El Paso, Tex.*, 118 F.3d 421, 425–426 (5th Cir. 1997); *Neff v. VIA Metropolitan Transit Authority*, 179 F.R.D. 185 (W.D. Tex. 1998).

vi) Remedies.

(1) Title II authorizes private suits for damages. *U.S. v. Georgia*, 546 U.S. 151, 154 (2006).¹³

(a) Plaintiffs may recover compensatory damages upon a showing of intentional discrimination. *Delano-Pyle v. Victoria County, Tex.*, 302 F.3d 567, 575 (5th Cir. 2002); *Casas v. City of El Paso*, 502 F. Supp. 2d 542, 552–553 (W.D. Tex. 2007). For another example of sufficient evidence of intent, see *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 777, 788 (W.D. Tex. 2008) (facts indicating police officers were aware their unsuccessful communication with deaf witness were harming her, officer disregarded advice concerning importance of getting interpreters, and dispatcher took no action to contact interpreter despite knowing individual was deaf).

(b) Note that the statute setting damage caps on ADA Title I employment claims does not reference Title II. See 42 U.S.C. § 1981a(a)(2). *See also Roberts v. Progressive Independence, Inc.*, 183 F.3d 1215, 1223–1224 (10th Cir. 1999) (finding no damage caps for § 504 claims).

(c) Punitive damages are not available. *Barnes v. Gorman*, 536 U.S. 181 (2002).

(2) Equitable and injunctive relief is available, and many courts have granted such relief under Title II, *e.g.*, *Henrietta D. v. Bloomberg*, 331 F.3d 261, 280–284 (2d Cir. 2003) (injunction requiring reasonable accommodation was appropriate); *Layton v. Elder*, 143 F.3d 469, 472 (8th Cir. 1998) (trial court abused its discretion by not ordering mandatory injunctive relief after finding ADA and § 504 violations at the county courthouse; once success on the merits is shown, three factors should be considered in determining whether injunctive relief is appropriate: the threat of irreparable harm to the plaintiff, the harm to be suffered by the defendant if the injunction is granted, and the public interest at stake). Preliminary injunctions are also available. *See Knowles v. Horn*, 2010 WL 517591 (N.D. Tex. Feb. 10, 2010).

(3) Attorneys fees, litigation expenses, and costs are available to the prevailing plaintiff. 42 U.S.C. § 12205; 28 C.F.R. § 35.175; Technical Assistance Manual, *supra*, II-9.2000. Note that with regard to collecting fees after settlements, the Supreme Court has rejected the “catalyst” theory of recovery. *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001).

¹³ Note that courts have also applied this precedent to claims under Part B of Title II relating to transportation. *See Martinson v. ViaMetropolitan Transit*, 2006 WL 3062652, at *3 (W.D. Tex. Oct. 4, 2006).

vii) Contribution—a Title II defendant may not seek contribution from another party. *Mims v. Dallas County*, 2006 WL 398177, at *3–4 (N.D. Tex. Feb. 17, 2006).

15) Immunity

- a) Counties, cities, and other local government entities do *not* have immunity from ADA claims. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 369 (2001).
- b) Suits against a state agency or other “arm of the state”
 - i) The state has no immunity from Title II claims in cases implicating “fundamental rights,” e.g., the right of access to the courts. *Tennessee v. Lane*, 541 U.S. 509 (2004).
 - ii) The state has no immunity from Title II claims based conduct that is also unconstitutional. *U.S. v. Georgia*, 546 U.S. 151, 158–159 (2006).
 - iii) The state *does* have immunity from many other types of Title II claims, including (to the extent covered by Title II) employment claims. *See Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (not reaching Title II issue but finding that states have immunity from employment-discrimination claims under Title I).
 - iv) For other kinds of claims, even if the state is immune, state officials may still be sued for prospective relief under the *Ex parte Young* theory. *See, e.g., McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412–414 (5th Cir. 2004); *Espinoza v. Texas Dept. of Public Safety*, 2007 WL 1393751, at *6 (N.D. Tex. May 11, 2007); *Simmang v. Texas Bd. of Law Examiners*, 346 F. Supp. 2d 874, 885–889 (W.D. Tex. 2004).
 - (1) Name the official in official capacity. *Reickenbacker v. Foster*, 274 F.3d 974, 976 n.9 (5th Cir. 2001).
 - (2) Limit relief to injunctive relief
 - (3) Fees are also recoverable in *Ex parte Young* actions. *Espinoza v. Texas Dept. of Public Safety*, 2002 WL 31191347, at *5 (N.D. Tex. Sept. 30, 2002).
 - v) The state also has no immunity from claims under § 504. *Pace v. Bogalusa City School Bd.*, 403 F.3d 272 (5th Cir. 2005) (en banc). As a result, courts will often choose not to analyze Title II complaints when they are joined with claims under (the substantially similar) § 504. *Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 454–455 (5th Cir. 2005); *McCoy v. Texas Dept. of Criminal Justice*, 2006 WL 2331055, at *4–5 (S.D. Tex. Aug. 9, 2006).
 - vi) The state may also waive all or part of its immunity by removing a case to federal court. *See Meyers ex rel. Benzing v. Texas*, 410 F.3d 236 (5th Cir. 2005).