Complying with the Americans with Disabilities Act (Accessibility Barriers and Improvements)

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Notes:

COMPLYING WITH THE AMERICAN WITH DISABILITIES ACT (ADA)
(Accessibility Barriers and Improvements)

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EQUAL ACCESS: REMOVING PHYSICAL BARRIERS

1. INTRODUCTION

The prevention of discrimination based on disability is a relatively new area of law. It started with Section 504 of the Rehabilitation Act of 1973, which was followed in 1990 by the adoption of the Americans with Disabilities Act (ADA). Title II of the ADA is the section that governs the activities of public entities. The language of the act is rather simple—it requires that all programs, services and activities of the entity must be accessible for individuals with disabilities. The difficulty lies in the application of the act to an entity's day-to-day functions. This paper will attempt to provide some helpful guidance on how to accomplish the goals of the ADA.

2. LEGAL STANDARDS

The prevention of discrimination on the basis of disability is housed in several different statutes. The laws apply to various government actions and differ in their approach and application, as discussed below.

A. Section 504 of the Rehabilitation Act of 1973

The Rehabilitation Act prohibits discrimination on the basis of disability: (i) in programs conducted by Federal agencies; (ii) in programs receiving Federal financial assistance; (iii) in Federal employment: and (iv) in the employment practices of Federal contractors. The standards for determining employment discrimination under the Rehabilitation Act are the same as those used in Title I of the Americans with Disabilities Act.

B. Americans with Disabilities Act of 1990 (ADA)

The ADA prohibits discrimination on the basis of disability in employment, state and local government, public accommodations, commercial facilities, transportation, and telecommunications. It also applies to the United States Congress.

C. California Fair Employment and Housing Act (FEHA)

The FEHA (Cal. Gov. Code § 12900, *et seq*.) makes it unlawful for an employer to harass or discriminate against any individual on the basis of a mental or physical disability.

D. The Unruh Civil Rights Act ("Unruh"),

The Unruh Act (Cal. Civil Code § 51, *et seq.*) makes it unlawful for a business establishment, including housing and public accommodations, to discriminate against any individual on the basis of a disability.

3. Title II of the ADA

Title II of the ADA is the section that applies to public entities. It requires that all programs, services and activities of the entity must be accessible to individuals with disabilities.

a. The Basic Rule

To be protected by the ADA, one must have a disability or have a relationship or association with an individual with a disability. An individual with a disability is defined by the ADA as: (i) a person who has a physical or mental impairment that substantially limits one or more major life activities, (ii) a person who has a history or record of such an impairment, or (iii) a person who is perceived by others as having such an impairment. The ADA does not specifically name all of the impairments that are covered.[1]

b. Establishing a Violation of Title II

Before an individual can file a claim alleging that he or has experienced discrimination on the basis of his or her disability and has been excluded from an entity's services, programs and activities, they must suffer from a recognized disability.

An individual has disability for purpose of ADA coverage if he or she meets any of the following: 1) A physical or mental impairment that ***substantially limits*** one or more ***major life activities*** of such individual, 2) a record of such impairment, or 3) is regarded as having such an impairment.[2] The plaintiff has the burden to establish his or her case.

If a plaintiff is able to establish that he or she has a recognized disability as required under the first prong under the test below, he or she must satisfy the remaining prongs to bring a claim under program accessibility/Title II violation. The plaintiff must establish that:

1. *he/she is qualified individual with a disability;*
2. *He/she was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and*
3. *This exclusion, denial, or discrimination was by reason of his/her disability.*[3]

i. Physical or mental impairment

An individual must have a physical or mental impairment. The term "impairment" is modeled after the definition of impairment used in section 504 of the Rehabilitation Act. Impairment includes: "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs (which would include speech organs that are not respiratory such as vocal cords, soft palate, tongue, etc.); respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine. It also means any mental or

[1] http://www.ada.gov/cguide.htm#anchor62335
[2] 29 C.F.R § 35.104(4)
[3] Cohen v. Culver City (9th Cir. 2014) 754 F.3d 690

psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[4]

This definition excludes homosexuality and bisexuality because they were never considered impairments under other Federal disability laws. Additionally, this definition excludes: "simple physical characteristics, such as blue eyes or black hair. Nor does it include environmental, cultural, economic, or other disadvantages, such as having a prison record, or being poor. Nor is age a disability. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder."[5]

ii. Record of Such Impairment

An individual is considered disabled for purposes of ADA coverage if he or she has a record of an impairment that substantially limits a major life activity. This includes anyone who has been misclassified as having such impairment. The purpose of this provision is to protect individuals who have recovered from past impairments but are substantially limited in a major life activity[6].

iii. Being Regarded as Having an Impairment

This test applies when an individual is treated by the public as though he or she has an impairment that substantially limits a major life activity, even if the individual does not in fact have such impairment. Under this test, public (third party) perception is essential. However, perception is irrelevant where an individual perceives himself or herself as having a recognized impairment.[7]

Further, this test is applicable if an individual experiences discrimination in that he or she is denied benefits, services, or is refused admittance by the public entity based on a thoughtless misperception.[8]

iv. Substantially Limits

This provision of the test explains the degree in which an individual must be affected by his or her impairment. This provision applies to all three tests for determining whether an individual has a disability for purposes of ADA coverage. To be considered for ADA coverage, the individual's life activities must be "restricted as to the condition, manner, or duration under which they can be performed" in comparison to an individual without a disability. This explanation generally excludes temporary or transitory impairments, but a temporary impairment may qualify for coverage depending on the circumstances.[9]

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[4] 28 C.F.R. § 35 app. B
[5] 28 C.F.R. § 35 app.B
[6] 28 C.F.R. § 35 app.B
[7] 28 C.F.R. § 35 app.B
[8] 28 C.F.R. § 35 app.B
[9] 28 C.F.R. § 35 app.B

v. Major Life Activities

Generally: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working, AND

Bodily Functions: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.[10]

c. Program Accessibility Standard

The concept of "program accessibility" was first adopted in section 504 regulation adopted by the Department of Health, Education, and Welfare concerning federally assisted programs and activities in 1977. This section allowed recipients of federal funding to make their programs and activities available to individuals without extensively retrofitting their existing facilities by providing the programs and services through alternative means.[11]

In determining program accessibility, the ADA requires that we analyze whether that service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. As part of that analysis, we must ensure that individuals with disabilities are not excluded from services, programs, and activities because buildings are inaccessible. The result of the analysis may require the entity to make reasonable modifications to policies, procedures, or practices, to accommodate for the needs of the disabled person(s).

The Public Entity has discretion in addressing accessibility issues. It does not have to make all of its existing facilities accessible to and usable by individuals with disabilities. Structural changes can be excused in place of other effective methods for achieving program access, such as relocation to an accessible space, personal aides to accommodate the particular disability, or providing services in an individual's home.

In addition to the discretion provided, public entities are afforded additional protection through the safe harbor provision, which provides that the public entity would be "entitled to a safe harbor for already compliant elements until such elements are altered." The rationale for the safe harbor provision is that it would allow funding to be used toward entity-wide program access rather than being wasted on repeated retrofitting.[12]

i. Program Inaccessibility Is Prohibited

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[10] 42 U.S.C.A. § 12102(2)
[11] 28 C.F.R. § 35 app.B
[12] 28 C.F.R. § 35app. A

The program accessibility standard provides "…no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, 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."[13] This includes intentional and disparate impact. [14]

Where a plaintiff brings a claim against a public entity on the basis that he or she was unable to access its programs, the plaintiff must establish, "(1) prove that the [program], when viewed in its entirety, is not readily accessible to and usable by individuals with disabilities; and (2) suggest a plausible method of making the [program] readily accessible, the costs of which, facially, do not clearly exceed its benefits."[15]

In determining if the public entity's program discriminates, the court will consider "(1) whether the plaintiff meets the program's stated requirements in spite of his/her handicap, and (2) whether a reasonable accommodation could allow the handicapped person to receive the program's essential benefits.[16]

ii. Existing Facilities

The term "existing facility" is not expressly defined but it is written into Title II regulations. The term "existing facility" applies to and includes newly constructed or altered facilities with a continuing program access obligation. This is because the identification of facilities under the ADA is neither static nor mutually exclusive. This definition accounts for the fact that a facility constructed or altered after the effective date of the original title II regulation but prior to the effective date of the revised title II regulation and Standards, must have been built or altered in compliance with the Standards in effect at that time in order to be in compliance with the ADA. This interpretation reflects the Department's view that public entities have program access requirements that are independent of, but may coexist with, requirements imposed by new construction or alteration requirements in those same facilities.

As briefly mentioned above, the existing facilities requirement has some exceptions. They are that, a public entity does not have to make all of its facilities accessible to and usable by individuals with disabilities. A public entity does not have to take any action that would threaten or destroy the historic significance of a historic property. Lastly, it does not have to take any action that would result in a fundamental alteration in the nature of a service, program or activity, or that would result in an undue financial hardship [17]or administrative burden. Despite these exceptions, the public entity must still comply with its overarching

[13] 28 C.F.R. § 35.149
[14] Crowder v Kitagawa (9th Cir. 1996) 81 F. 3d 1480
[15] Pascuiti v. New York Yankees (S.D.N.Y. 1999) 87 F.Supp.2d 221,223.
[16]Easley by Easley v. Snider (3d Cir. 1994) 36 F.3d 297,303.
[17] Please note: "Congress wanted to permit a cost defense only in the most limited circumstances." (Olmstead v. L.C. ex rel. Zimring (1999) 527 U.S. 581, 595)

obligation not to exclude individuals with disabilities from accessing its services, programs, and/or activities.[18]

1. Ways to Making Existing Facilities Accessible

Generally, a public entity may comply with accessibility requirements by: redesigning or acquiring equipment, reassigning services to accessible buildings, assigning aides to beneficiaries, providing home visits or delivering services at alternate accessible sites, altering existing facilities and constructing new facilities[19], using accessible rolling stock or other conveyance, or any other method that would result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities.[20]

Because this list provides other methods to achieve compliance, a public entity is not required to make alterations or construct new facilities where other effective methods of achieving compliance are available[21].

When public entities are determining ways to make its facilities accessible, it must give priority to those methods that will allow individuals with disabilities to be in an integrated setting.[22]

One method that will NOT achieve accessibility is for a public entity to provide carrying services. Carrying an individual with a disability to achieve accessibility will be unsuccessful because it is contrary to the individual's independence. However, there are limited circumstances in which temporary carrying may be permitted. Temporary carrying may be permitted in the following circumstances: (1) when program accessibility can only be achieved in existing facilities through structural facilities – carrying may be a temporary solution during construction, and (2) carriers are formally instructed on the safest and least humiliating means of carrying and (b) the service is provided in a reliable manner. [23]

2. Defenses – Existing Facilities

In determining whether financial and administrative burdens are undue, all public entity resources available for use in the funding and operation of the service, program, or activity should be considered. The burden of proving that compliance with paragraph (a) of §35.150 would fundamentally alter the nature of a service, program, or activity or would result in undue financial and administrative burdens rests with the public entity. [24]

3. Fundamental Alteration

[18] http://www.ada.gov/reg2.htm
[19] (Altering or constructing new facilities will be subject to accessibility standards of 28 CFR 35.151.)
[20] 28 C.F.R. § 35.150(b)(1)
[21] Structural changes in existing facilities are required only when there is no other feasible way to make the public entity's program accessible. http://www.ada.gov/reg2.htm
[22] http://www.ada.gov/reg2.htm
[23] http://www.ada.gov/taman2.html
[24] http://www.ada.gov/reg2.htm

Another manner the fundamental alteration defense is used, is to determine the reasonableness of a public entity's modification is "first, an alteration affecting an essential aspect of a defendant's policies or programs would be unacceptable even if applied to everyone equally; second, even a minor change might be unacceptable if it gave a disabled individual an advantage over others."[25]

- For Example, In the *Martin*[26] case, both the Ninth Circuit and the Supreme Court held that permitting Casey Martin to use a golf cart, despite the PGA Tour's rule requiring participants to walk, would not fundamentally alter the nature of the competition.[27]

Undue Burden

Another means of determining if a public entity's modifications are reasonable is through the undue burden test. Undue "refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."[28] In determining whether an action would result in an undue burden, factors to be considered include:

(1) The size of the employer;
(2) The size of the budget;
(3) Nature of its operation;
(4) Number of employees;
(5) Structure of its workforce and the nature and cost of the accommodation.

A public entity may not invoke this defense where it undertakes new construction or alterations of an existing facility subject to 28 C.F.R. 35.151.[29]

iii. New Construction

When a public entity decides to construct or alter a facility, the facility must be designed and constructed in such a manner that the facility is readily accessible to and usable by individuals with disabilities if the construction began after January 26, 1992.[30] This requirement is imposed when physical construction is commenced.[31] Unlike the existing facility requirement, this requirement reflects a strict compliance standard for new construction and/or alterations because "architectural barriers" can be avoided at little to no cost during the construction phase.[32]

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[25] Matthews v. NCAA (E.D. Wash. 2001) 179 F.Supp.2d 1209, 1225.
[26] PGA Tour, Inc. v. Martin (2001) 532 U.S. 661 [121 S.Ct. 1879, 1884-85, 149 L.Ed.2d 904]
[27] Matthews v. NCAA (E.D. Wash. 2001) 179 F.Supp.2d 1209, 1225
[28] http://www.ada.gov/briefs/denv1br.pdf .
[29] Willits v. City of Los Angeles (C.D. Cal. 2013) 925 F.Supp.2d 1089, 1094.
[30] 28 C.F.R. § 35.151(a)
[31] 28 C.F.R. § 35.151(c)(3)(4)
[32] Anderson v. Pennsylvania Dept. of Public Welfare (E.D. Pa. 1998) 1 F.Supp.2d 456, 464.

Because new construction is held to a strict standard of compliance, the undue financial burden defense is not applicable. However, a public entity may defend a potential violation of the new construction requirement where it is structurally impracticable to construct the facility to be readily accessible.

1. Exception to New Construction - Structural impracticability

Structural Impracticability Occurs:

- (i) Full compliance with the requirements of this section is not required where a public entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.

- (ii) If full compliance with this section would be structurally impracticable, compliance with this section is required to the extent that it is not structurally impracticable. In that case, any portion of the facility that can be made accessible shall be made accessible to the extent that it is not structurally impracticable

- (iii) If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would be structurally impracticable, accessibility shall nonetheless be ensured to persons with other types of disabilities, (e.g., those who use crutches or who have sight, hearing, or mental impairments) in accordance with this section. (28 CFR 35.151(a)(2).)

2. What If Alterations are Done?

An alteration is "a change to a building or facility that affects or could affect the usability of the building or facility or part thereof."[33] Alterations of streets, roads, or highways include activities such as reconstruction, rehabilitation, *resurfacing*, widening, and projects of similar scale and effect.[34] Alterations to existing facilities and new construction must, "to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities. [35] This definition of alteration excludes maintenance activities on streets, roads and highways, such as filling potholes.[36]

Some maintenance activities include: Treatments that serve solely to seal and protect the road surface, improve friction, and control splash and spray are considered to be maintenance because they do not significantly affect the public's access to or usability of the road. Some examples of the types of treatments that would normally be considered maintenance are:

[33] Kinney v. Yerusalim (3d Cir. 1993) 9 F.3d 1067,1072.
[34] http://www.ada.gov/doj-fhwa-ta.htm
[35] Kinney v. Yerusalim (3d Cir. 1993) 9 F.3d 1067, 1074
[36] http://www.ada.gov/doj-fhwa-ta.htm

painting or striping lanes, crack filling and sealing, surface sealing, chip seals, slurry seals, fog seals, scrub sealing, joint crack seals, joint repairs, dowel bar retrofit, spot high-friction treatments, diamond grinding, and pavement patching. In some cases, the combination of several maintenance treatments occurring at or near the same time may qualify as an alteration and would trigger the obligation to provide curb ramps.[37]

d. Recreational Facilities: Swimming Pools

Generally, a "City is not required to offer to the public (disabled or non-disabled) any type of recreational or leisure programs in the first place, [but] when it does provide and administer such programs, it must use methods or criteria that do not have the purpose or effect of impairing its objectives with respect to individuals with disabilities." [38] This is supported by the fact that people with disabilities, for far too long, have been excluded from participating in many recreational activities.

Swimming is one of the recreational activities from which people with disabilities have been excluded. However, the revised 2010 Standards have changed that. For the first time, the 2010 Standards set minimum requirements for making swimming pools, wading pools, and spas (pools) accessible. Newly constructed and altered pools must meet these requirements. Public entities and public accommodations also have obligations with respect to existing pools. State and local governments must make recreational programs and services, including swimming pool programs, accessible to people with disabilities….Program accessibility applies to all pool-related programs, services, and activities (swimming programs). Program accessibility does not typically require that every pool be made accessible. However, if a public entity has only one existing pool, it must take steps to ensure that its swimming program at that pool is accessible. [39]

1. Pool Basics

Generally, a pool should have at least two accessible means of entry with two different types of entries and located at different locations of the pool. However, if a swimming pool has less than 300 linear feet (91 m) of swimming pool wall, no more than one accessible means of entry is required provided that the accessible means of entry is a swimming pool lift that complies with section (1009.2) or a sloped entry that complies with section (1009.3).[40]

A public entity may make a pool accessible by installing any of the following: 1) swimming pool lifts that complies with section (1009.2); 2) sloped entries that comply (1009.3); 3) transfer walls that comply with (1009.4); 4) transfer systems that comply with (1009.5); and 5) pool stairs that comply with (1009.6).[41]

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[37] http://www.ada.gov/doj-fhwa-ta.htm

[38] Concerned Parents to Save Dreher Park Center v. City of West Palm Beach (S.D. Fla. 1994) 846 F.Supp. 986, 991.

[39] http://www.ada.gov/pools_2010.htm

[40] 2010 Design Standards – Section 242

[41] 2010 Design Standards – Section 242

The accessible pool requirement also encompasses other forms of water recreational activities such as, wave action pools, leisure rivers, sand bottom pools and other pools. For the aforementioned, a public entity is not required to provide more than one accessible means of entry, where user access is limited, provided that the accessible means of entry is a swimming pool lift that complies with section 1009.2, a sloped entry that complies with section 1009.3, or a transfer system that complies with 1009.5.[42] Catch pools shall not be required to provide an accessible means of entry provided that the catch pool edge is on an accessible route. [43]

e. On-Street Parking

Currently, there are no adopted regulations that address on-street parking.[44] However, as a City program, on-street parking needs to be accessible to persons with disabilities per Title II of the ADA. This is supported by the fact that the 2010 Design Standards impose certain technical requirements with respect to accessible parking in sections 208 and 502, such as a minimum number of accessible parking spaces.

On the otherhand, because there are no regulations expressly addressing parking requirements, there is an argument that Cities are not or should not be required to provide accessible parking. But, the District court in *Fortyune* disagreed with the opposing argument and held "…the broad language of the ADA requires public entities to ensure that all services, including on-street parking, are reasonably accessible to and usable by individuals with disabilities."[45]

In support of not requiring Cities to provide accessible parking until there are express regulations, the California League of Cities filed an Amicus Curiae brief, authored by Alison D. Alpert of Best, Best & Krieger, LLP, arguing the following points: 1) Requiring cities to provide on-street disabled parking without any Standards or guidelines is contrary to the purpose of the ADA and will lead to inconsistency in on-street parking; 2) Requiring cities to provide on-street disabled parking without any guidelines or standards would waste cities' limited resource and invite litigation; 3) Public entities cannot reasonably rely on ADAAG or the Draft Right-of-Way guidelines to ensure compliance with any on-street parking obligations.

At this time it appears that Cities should provide accessible parking in order to comport with the spirit of the Program Accessibility Standard of Title II despite the absence of express regulations.

f. Curb Ramps

A curb ramp is a short ramp cutting through a curb or built up to it, which is designed and constructed to be accessible, thus providing an accessible route that persons with disabilities

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[42] 2010 Design Standards – section 242
[43] 2010 Design Standards
[44] Fortyune v. City of Lomita (C.D. Cal. 2011) 823 F.Supp.2d 1036
[45] Fortyune v. City of Lomita (C.D. Cal. 2011) 823 F.Supp.2d 1036, 1038.

can use to safely transition from road way to curbed sidewalk and vice versa. [46] There is an express requirement to include the provision of curb ramps in transition plans[47] and a requirement to include provisions for curb ramps in newly altered or constructed facilities.[48]

Generally, curb ramps are needed wherever a sidewalk or other pedestrian walkway crosses a curb. Curb ramps must be located to ensure a person with a mobility disability can travel from a sidewalk on one side of the street, over or through any curbs or traffic islands, to the sidewalk on the other side of the street. However, the ADA does not require installation of ramps or curb ramps in the absence of a pedestrian walkway with a prepared surface for pedestrian use. Nor are curb ramps required in the absence of a curb, elevation, or other barrier between the street and the walkway.[49]

g. Service Animals

1. Dogs

Title II of the 1991 regulation does not specifically address service animals. However, public entities subject to the Title II must make reasonable modifications in its policies, practices, and/or procedures to allow service animals in order to avoid discrimination against individuals with disabilities. In an effort to clarify public entity confusion, the Department saw the need to clarify the term service animal.

A service animal is "any dog that is individually trained to do the work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability." This definition of service animal expressly excludes any other species of animal from being included in the definition of a service animal under the ADA.

Service animals have mandatory characteristics. A service animal must work and perform tasks that directly benefit the individual with a disability. It must be able to recognize and respond to the individual's distress. The response requirement is significant because it is what distinguishes an animal (dog) as a service animal. Animals that provide comfort and emotional support cannot satisfy the requirements of a service animal because they cannot respond to an individual with a disability who is experiencing a type of distress.

Service animals enjoy additional freedoms that benefit their handlers. They are not subject to size or weight limitations. The rationale behind this is that such a restriction may cause difficulty for the handler in choosing a service animal because they correlate to the needs of the handler. For example, a small service may not be suitable to a larger handler because of the handler's needs, such as pulling his or her wheelchair.

[46]http://www.ada.gov/comprob.pdf
[47] 28 C.F.R. § 35.150(d)(2)
[48] 28 C.F.R. § 35.151(i)
[49] http://www.ada.gov/doj-fhwa-ta.htm

Service animals are not subject to breed restrictions because the ADA already provides significant authority to exclude a service animal for inappropriate behavior and not based on generalized fears and speculation.

Though service animals enjoy many freedoms and public entities are required to make reasonable modifications in its policies, procedures and practices, they are not without restrictions. A public entity has the authority to remove and/or deny a service animal access if it is out of control and acting unreasonably, and it may be excluded from access if it is not house-broken. When deciding to remove or deny access, a public entity should consider all the facts before making a determination to ensure that the decision is necessary.

A public entity may inquire whether an animal constitutes a service animal. However, the inquiry must be limited to extracting essential information without intruding upon confidential disability related information. For example, the public entity may ask if the animal is required because of a disability and what task(s) or work is it trained to do.[50]

2. Miniature Horses

Additional provisions were made to include miniature horses as acceptable service animals. Miniature horse are generally twenty-four (24) to thirty-four (34) inches in height and weigh between seventy (70) to one-hundred (100) pounds.

When a public entity encounters a situation in which an individual with a disability needs to use a miniature horse to access its programs, services or activities, a public entity must make reasonable modifications for the individual. In making its determination(s), the public entity may consider four factors to determine whether the miniature horse may be accommodated in its facility: 1) whether the miniature horse is housebroken, 2) whether the miniature horse is under the owner's control, 3) whether the public entity can accommodate the miniature horse's size, type and weight, and 4) whether the miniature horse's presence will not compromise legitimate safety requirements necessary for safe operation of the facility.[51]

h. How Can Public Entity's Comply?

The first step is to conduct a self-evaluation. The requirement of a self-evaluation plan is modeled after section 504 adopted by the Department of Health, Education, and Welfare for federally assisted and federally conducted programs. This requirement is essential to determining a public entities' compliance by evaluating its current policies and practices to identify and correct any that are inconsistent with program access.

All public entities are required to perform a self-evaluation by January 26, 1993. Where a public entity employs 50 or more persons, the self-evaluation is required to remain on file and

[50] 28 C.F.R. § 35app. A .
[51] http://www.ada.gov/service_animals_2010.htm

accessible by the public for three (3) years. Even though public entities employing less than fifty (50) people are not required to maintain its self-evaluation plan, it is advisable that the plan is maintained for liability reasons.[52]

After concluding the self-evaluation, the next step is for the public entity to generate a transition plan that will identify the necessary steps to remedy any areas of noncompliance and the timeline for completion. It is advisable that the transition plan consider public comment and input. The transition plan must be developed within six (6) months of January 26, 1992 where a public entity employs fifty (50) or more people. Specifically, it should address: 1) limiting physical obstacles, 2) identifying detail-oriented remedial methods, 3) the time necessary to achieve compliance if the time is longer than one year, 4) steps that will be taken during each year of the transition period, and 5) identify an official with decisional and budgetary authority for implementing the terms.[53]

a. Existing Plans

If a public entity already has a transition plan, then here are some questions it may consider: 1) has the entity done a reassessment? If so, has anything changed? 2) has it added new programs? 3) has it remodeled or constructed new facilities? 4) has its web based presence/activities changed? 5) has it had staffing changes? 6) has it "privatized" anything? 7) have the regulations changed (local or federal)? 8) if it has a plan, is it following it? 9) is its plan current?[54]

3. Important ADA Dates

- http://www.ada.gov/qandaeng.htm
  - January 26, 1992-Effective date for State and Local Govt.
  - January 26, 1995-Structural Changes needed for program accessibility
  - July 26, 1992- Transition Plans musts be developed
- http://www.adasoutheast.org/ada/publications/ADA_Revised_Regulations_March-15-2011.htm
  - March 15, 2011 – Revised ADA Regulations Affecting Title II became effective
- Program Accessibility Dates (http://www.ada.gov/revised_effective_dates-2010.htm)
  - **From September 15, 2010, to March 15, 2012,** State and local governments (public entities) have the option of choosing to follow the 1991 Standards, the UFAS, or the 2010 Standards when making architectural changes to provide program access. The elevator exception in the 1991 Standards may not be used.
  - **On or after March 15, 2012,** public entities must comply with the 2010 Standards in making architectural changes to achieve program accessibility and for all new construction and alterations.

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[52] 28 C.F.R. § 35 app. B
[53] 28 C.F.R. § 35.150; http://www.ada.gov/qandaeng.htm
[54] file:///C:/Users/Owner/Downloads/6A)%20Jones%20Self%20Evaluation%20and%20Transition%20Plans%20Part%20I%20(1).pdf

- **On or after March 15, 2012,** public entities must consider the supplemental requirements (such as swimming pools, play areas, and fishing piers) in the 2010 Standards to assess compliance with program accessibility.
- **Please Note**: If elements in existing facilities already comply with corresponding elements in the 1991 Standards or the UFAS and are not being altered, then title II entities are not required to make changes to those elements to bring them into compliance with the 2010 Standards.

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Program Accessibility Scenarios

- Abe is a senior citizen who was visiting Do Good, CA for the funeral of his best friend. Unfortunately, Abe suffers from dementia and has difficulty navigating. Evilina, a local psychic had set up a table outside of Abe's hotel to read palms for $5. Evilina mailed in her permit request to the Do Good City, but in her haste, she forgot to complete the address. Evilina's table was beautiful and colorful and was located near the curb ramp outside of Abe's hotel. Abe was very tired and ready for his afternoon nap, he looked to his left and saw another curb ramp about 20 steps away, but he decided to walk around Evilina's table and step up on the sidewalk because it was quicker. Sadly, while Abe was trying to step up onto the sidewalk, he tripped and fell and sustained moderate injuries. **Is there a violation under program accessibility?**[55]

Program Accessibility Scenarios

- A public entity may succeed on an undue burden defense when it is asserted for construction or an alteration taking place in 2014? **True or False?**

  A: Such a defense is foreclosed under Title II of the ADA with respect to streets, pedestrian rights of way, sidewalks, and curb ramps that have been newly constructed or altered since January 26, 1992…"[56]

Program Accessibility Scenario

- Harry and Sally have been married for 50 years and are celebrating their 50th anniversary with a vacation to Hawaii. Sadly, Harry and Sally both lost their eyesight in an unfortunate accident 10 years ago. They each have a golden-retriever guide dog. Upon arriving to Hawaii, they are informed that the dogs have to be quarantined for 90 days before entering. Harry and Sally are permitted to stay with the dogs but they cannot leave the premises with the dogs until the 90 days is up. **Harry and Sally have filed suit alleging violation of Title II of ADA, will they be successful?**
- Alternate facts: Hawaii offered Harry and Sally two guide dogs to use in the place of their dogs during the quarantine period, but Harry and Sally refused. **Would they be**

[55] Cohen v. City of Culver City (9th Cir. 2014) 754 F.3d 690

[56] Willits v. City of Los Angeles (C.D. Cal. 2013) 925 F.Supp.2d 1089.

successful under this set of facts? (Caution: there is no answer to this alternate factual scenario.)

Program Accessibility Illustration

- Generally…
- **Illustration 1**: When a city holds a public meeting in an existing building, it must provide ready access to, and use of, the meeting facilities to individuals with disabilities. The city is not required to make all areas in the building accessible, as long as the meeting room is accessible. Accessible telephones and bathrooms should also be provided where these services are available for use of meeting attendees.
- **Illustration 2**: D, a defendant in a civil suit, has a respiratory condition that prevents her from climbing steps. Civil suits are routinely heard in a courtroom on the second floor of the courthouse. The courthouse has no elevator or other means of access to the second floor. The public entity must relocate the proceedings to an accessible ground floor courtroom or take alternative steps, including moving the proceedings to another building, in order to allow D to participate in the civil suit.[57]

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Resource Page

- www.ada.gov
- www.disability.gov
- www.askJan.org
- www.evanterry.com
- www.access-board.gov
- http://www.justice.gov/crt/about/drs/

[57] http://www.ada.gov/taman2.html#II-5.0000