



ACCOMMODATING DISABLED PERSONS: MUNICIPAL FACILITIES

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AMERICANS WITH DISABILITIES ACT

TITLE II

- No discrimination from a city's **P**rograms, **S**ervices, **A**ctivities
 - PSA's
 - Not just actual physical buildings, but the PSA's within those buildings too
 - Nothing specific on reasonable accommodations, but has to be done
- Applies to every governmental entity!!
 - State/local government
 - Department, agency, special purpose district or other instrumentality of a state or local government (e.g. EDC)
 - Leased buildings
- Department of Justice has regulatory authority
 - Regulations are authoritative unless "arbitrary, capricious, or plainly contrary to statute..." *Patterson v. Kerr County*, No. SA-05-CA-0626-RF, 2007 WL 2086671 at *7 (W.D. Tex.-San Antonio 2007) (citing *Bircol v. Miami-Dade County*, 480 F.3d 1072, 1081 (11th Cir. 2007)).

TITLE II: ADMINISTRATIVE AND PROCEDURAL REQUIREMENTS

- So many.....
 - Code of Federal Regulations- 28 C.F.R Part 35
 - Commentary
 - ADA- Title II Technical Assistance Manual and Supplements
 - ADA Standards for Accessible Design
 - Guidance on the ADA Standards for Accessible Design
 - Rulemaking analysis published in the Federal Register
 - Case law interpreting

WHO IS DISABLED?

- Title II of the ADA protects “a qualified individual with a disability...”
 - (i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
 - (ii) A record of such an impairment; or
 - (iii) Being regarded as having such an impairment as described in paragraph (f) of this section.
 - 28 C.F.R. §35.108(a)(1).
- What is “Qualified”?
- “Regarded As” - modifications not required if this disability is satisfied under this prong of the statute
- Still obligated to evaluate reasonable modifications!

DISABLED & DISABILITY

“Qualified individual with a disability”

- An individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for receipt of services or the participation in programs or activities provided by a public entity.

“Disability” for an individual –

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

WHAT ARE TITLE II REQUIREMENTS?

ANSWER:

- Equality in participation and benefits
- Mainstream/Integrated Setting
- Eligibility criteria and medical inquiries
- Safety Considerations
- Surcharges
- Reasonable Modifications
- Personal Services and Devices
- Effective Communication
- Maintenance of Accessible Features

More...

- Miscellaneous Services
 - Service Animals
 - Mobility Devices
 - Polling Places
 - Contracting Obligations

MUNICIPAL "FACILITY" - TRICKY

Construction

- All OR Any Portion
 - Building
 - Structure
 - Complex
 - Roads
 - Walks
 - Mobile Facilities
- Existing Facility
- 2010 Standards For Accessible Design
 - Guidance
- Safe Harbor Provision

PSA's

- Program
 - Library
- Service
 - Sidewalk
 - Handicap parking
- Activity
 - Recreational program: basketball
- Examples
 - Employee work areas
 - Window counters
 - Loading zones
 - Bathrooms
 - Elevators
 - Drinking fountains

WHAT IS FACILITY ACCESS UNDER THE ADA?

- Answer: Benefits
 - Programs
 - Services
 - Activities (employment, transportation, recreation, health care, social services, courts, voting, town meetings)
 - Does not require cities make each facility, or even each part of a particular facility, accessible.
 - The requirement is that those with disabilities must have an equally effective opportunity to participate or benefit from city programs, services, and activities.
 - Includes effective communications: auxiliary aids and services to participate in civic life

BEST PRACTICE: Self Evaluation

AUXILIARY AIDS & SERVICES

- (A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
- (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- (C) acquisition or modification of equipment or devices; and
- (D) other similar services and actions.

42 U.S.C. § 12102(1).

"WE CAN'T AFFORD MODIFICATIONS..."

- What is undue burden?

- ANSWER:

- Undue burden means significant difficulty or expense.

- What factors to we consider?

- ANSWER:

- (1) The nature and cost of the action needed under this part;

- (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;

- (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;

- (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and

- (5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

SMALL CITIES, "GRANDFATHERED", UNDUE BURDEN

- Are municipalities exempt or "grandfathered"
 - ANSWER: NO
- What about Small municipalities?
 - Municipalities with less than 50 employees not required to comply with self evaluations and designating grievance procedure for ADA complaints
- Who makes the determination about undue burden?
 - ANSWER: Head of public entity or designee
 - Must have written statement of reasoning of conclusion
 - Take any action possible to ensure access to benefits and services aside from burden

BEST PRACTICE: Do not assume anything- no general exemption so be on the up and up for compliance

ACCESSIBILITY ISSUES

- What are the types of accessibility issues that may arise?

- ANSWER:

- Accessible Parking
 - Includes van accessible parking spaces
- Accessible Route
- Accessible Entrance
- Curb Ramps
- Resurfacing
- Alternate Services
- Library Services
- Parks and Recreation Programs
- Temporary Events

BEST PRACTICE: Evaluate on a case by case basis, considering undue burden and if complaint made

PROGRAM ACCESSIBILITY

- What is this?
 - ANSWER:
 - Removing physical barriers to services, programs and activities
 - ***Technical Assistance Manual:***
 - ***Altering existing facilities, constructing new facilities;***
 - ***Relocation the program/service to a facility that is already in compliance***
 - ***Providing benefit in another manner to comply with ADA.***



BUILDINGS AND CONSTRUCTION

- Which buildings must be in compliance with the ADA design guidelines?
 - ANSWER: Generally, any new constructed facility built after January 26, 1992 must be in strict compliance with federal and state building accessibility codes, statutes, and regulations.
 - Additionally, *alterations* made to a historically significant property must be in compliance with federal and state building codes.
- When do public roads and sidewalks have to comply with ADA design guidelines?
 - ANSWER: Newly built or altered roads, streets, sidewalks, or walkways must have ramps wherever there are curbs or other barriers to entry from a pedestrian walkway.
- What about existing roads and sidewalks?
 - ANSWER: Changing existing roads/sidewalks not required.
BEST PRACTICE: construct new roadways and sidewalks in accordance with ADA standards. Create a comprehensive plan of updating roadways and sidewalks that provide access in the entirety.

BUILDING AND CONSTRUCTION

- What are new construction requirements?
 - ANSWER: ALL new buildings and facilities comply with ADA Standards for Accessible Design. 28 C.F.R. Section 35.151(a)
- What about alterations?
 - ANSWER: ALL alterations must comply, unless technically not feasible
 - Replacement of fixture or element (lavatory, toilet, piece of door hardware)
 - Replacement or new element comply with ADA standards if minimum requirements not met
 - Primary function areas (meeting rooms, offices, etc)
 - Temporary interruptions are ok
- What about additions?
 - ANSWER: Expansion, extension or increase in floor area is new construction & path of travel

BEST PRACTICE: always assume you will be required to comply with ADA for and changes for accessibility. Budget for these issues in your plans.

WHAT IS "NOT TECHNICALLY FEASIBLE"?

- ANSWER:
 - Cost is NOT a trigger of technically not feasible

With respect to an **alteration** of a building or a facility, that it has little likelihood of being accomplished because existing structural conditions would require removing or altering a load bearing member which is an essential part of the structural frame;

- or because other existing physical or **site**
- **constraints** prohibit modifications or
- addition of elements, spaces, or features
- which are in full and strict compliance with
- the minimum requirements.

HISTORIC BUILDINGS

- Do we have to retrofit a historic building?
 - ANSWER: Structural changes that would threaten or destroy the historical significance of the property or would fundamentally change the program being offered at the historic facility need not be undertaken.
 - Includes visual materials
 - No need where destroy/threaten historical significance or change program
 - Alterations must comply with new building standards; minimal standards only if alter historical significance
 - Consider alternatives to structural changes without undue burden

BEST PRACTICE: Evaluate historic building or offer in alternative accessible manner or location

EFFECTIVE COMMUNICATION

- How do we comply with effective communication under the ADA?
 - ANSWER: Ensure public meetings and publicly sponsored PSA's allow for everyone to participate
 - Auxiliary Aids defined in the ADA and CFR
 - Includes job applicants
 - Braille
 - Large print
 - Audio cassettes
 - Interpreters
 - Assistive listening systems
 - Court, public meetings, interrogations priorities
 - TTY system

BEST PRACTICE: Ensure everyone has access and if requested, do what you can to take action that doesn't result in undue burden, but ensures benefits to disabled

911, DISPATCH & TTY

- What services are required for disabled?
 - ANSWER:
 - If you provide dispatch services or emergency telephone services:
 - 911
 - TTY Calls
 - Must have equal access for response time, response quality, hours of operation, etc
 - If you don't:
 - Inquire with the other entity about accessibility services
 - Document what they have and are providing

BEST PRACTICE: Ensure everyone trained in TTY at dispatch, with equal access and adequate number of equipment- regardless of if you provide it or some other city provides it.

LAWS, ORDINANCES, REGULATIONS

- Do our laws, ordinances or regulations have to comply with Title II?
- ANSWER: Yes
 - Make reasonable modifications to policies, procedures, and procedures but consider...
 - Not required to change if “direct threat”
- How do we deal with service animals?
 - Must allow except if not housebroken or out of control and can't be controlled
- What do we do if someone insists they are disabled because they need to smoke?
 - No restrictions or prohibitions on smoking under Title II

BEST PRACTICE: If problematic or receive a complaint, revise or amend ordinance or regulations

THE DOJ IS WATCHING

- An individual who believes they have been discriminated against can file a complaint
 - Within 180 days of the alleged discrimination
 - Employees can file too
- DOJ has initiated its own compliance reviews
 - About 219 voluntary settlement or other types of agreements
 - Receipt of Federal Funding
 - Other general complaints

MORE LAWSUITS???

Claims for Modifications & Damages

- Uptick in Private Litigation!
- Equitable relief and preliminary injunctions
- Rational basis
- Private groups suing everywhere in bulk
- Attorney's fees!!

Defenses

- NO IMMUNITY!
- No individual liability, but *respondeat superior* applies.
- No hypothetical injury
 - Architectural Barrier- not all of them
- FIX IT! Claim is MOOT!
 - BUT...they still get fees!!

WHAT DO WE HAVE TO DO TO BE COMPLIANT?

- 50 + employees
 - ADA Coordinator
 - Grievance Procedures
- Notice About Title II
- SELF EVALUATION!!!



REHABILITATION ACT (RA) & ARCHITECTURAL BARRIERS ACT (ABA) & TEXAS TRIES TOO...

- RA: 29 U.S.C. §794
 - Programs receiving Federal assistance
 - No discrimination based on disability in local government or public accommodations
 - Who?
 - Employees
 - Program accessibility
 - Hearing/vision disabilities
 - New construction/alterations
- ABA: 42 U.S.C. §4151 et. seq
 - Building and facilities designed, constructed or altered with Federal funds
 - New/altered buildings
 - New leased facilities
 - Leased by Federal agency
 - Compliance with Federal standards for physical accessibility
- TX Government Code Chapter 68
- Ordinances

“IT’S REAL EASY...”

Requesting a Reasonable
ACCOMMODATION



SELF EVALUATION!!!

KNOW YOUR PSA'S
UNDUE BURDEN
RESOURCES GALORE
DON'T FIGHT IT



QUESTIONS?

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