Presented:
TCAA Fall Conference
October 5, 2017
Houston, TX

Accommodating Disabled Persons: Municipal Facilities

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ACCOMMODATING DISABLED PERSONS: MUNICIPAL FACILITIES

A. THE AMERCIANS WITH DISABILITIES ACT

President George H. W. Bush signed the Americans with Disabilities Act ("ADA"). On July 26, 1990. The Americans with Disabilities Act of 1990 (ADA or the Act), 42 U.S.C. 12101 et. seq., established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12101(b)(1). This historic legislation was intended to integrate people with disabilities in society and eliminate discrimination against individuals with disabilities in accessing services programs or activities. 42 U.S.C. §12132. The purpose of the ADA is to prohibit denial of the right of disabled persons to participate in programs and ensure all rights, privileges, advantages, and opportunities others who are not disabled have when participating in civic activities. This paper addresses Title II of the ADA, related to the denial of benefits and the prohibition of discrimination of disabled individuals in public services. See 42 U.S.C. §§ 12131-12165. Such services include not only accessibility to actual physical facilities, but also accessibility to programs, services and activities in municipal facilities. *Id.*

B. WHO IS DISABLED UNDER TITLE II?

Title II uses the same definition of disability in other areas of the ADA. 42 U.S.C. §12102. With the passing of the Americans with Disabilities Act As Amended in 2008 (ADAAA), the statute broadens the coverage of discrimination and the scope of the definition of disabled persons. See 28 C.F.R. §35 et. seq.

Title II protects a "qualified individual with a disability..." 42 U.S.C. §12132. A qualified individual is defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *United States v. Georgia*, 546 U.S. 151, 153–54 (2006) (citing 42 U.S.C. § 12131(2)); see also, 28 C.F.R. §35.104.

Pursuant to the regulations effectuated after passage of the ADAAA, disability with respect to an individual is:

> (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).

For further clarity, the ADA defines "auxiliary aids and services" broadly. The term "auxiliary aids and services" includes:

> (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).

Coverage may be established under any of the three prongs of the disability definition. 81 Fed. Reg. 53204, 53223 (Aug. 1, 2016). If an individual does not challenge the public entity's failure to provide reasonable accommodations under §35.130(b)(7), that individual only need pursue the challenge under the "regarded as" prong of the definitions. *Id.* The ADAAA revised the ADA to specify that a public entity under Title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under Title III, "need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability" solely on the basis of being regarded as having an impairment. 42 U.S.C. §12201(h). However, this does not diminish the obligations of a public entity to provide reasonable modifications under Title II.

A person is not qualified under Title II 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.

The definition of "disability" is broadly construed in light of Congress' intent to expand the protection of disabled persons and the question of whether a person meets the definition of "disability" should not entail an extensive analysis. *Id.*

C. TITLE II OF THE ADA EXPLAINED.

What is it?

The operative statute 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."

The statute is broadly written, and Title II does not expressly require that public entities reasonably accommodate disabled individuals. The details are left to the enforcing regulations set out by the Department of Justice (DOJ). 42 U.S.C. §12134(a). The DOJ maintains the authority to issue implementing regulations. *See 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)).

Because Title II does not specify the obligations on public entities, the regulations are guiding principles and given legislative and controlling weight unless they are "arbitrary capricious, or plainly contrary to the statute…" *Id.* at n. 92; *see also, Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 5, n.5 (1st Cir. 2000). To that extent, with regard to Title II regulations, the Attorney General issued a regulation as follows: "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. §35.130(b)(7).

There are a broad range of administrative and procedural requirements, including procedures for services and compliance with design and construction standards. These include Code of Federal Regulations to Implement the ADAAA (28 C.F.R. Part 35) [1], ADA – Title II Technical Assistance Manual (and Supplement)[2], and the Americans with Disabilities Act Standards for Accessible Design[3].

Title II Applicability

Title II applies to any "public entity." 42 U.S.C. §12132. More specifically, the statute defines a "public entity" as a state or *local government*; *any department, agency special purpose district, or other instrumentality* of a State of States or *local government*. 42 U.S.C. §13121(1) (emphasis added). Essentially, Title II applicability is broad and applies to all municipalities or functions, department or arm of the municipality, such as municipal police departments.

The ADA (or ADAAA) does not condition the receipt of federal funds; Title II applies to public entities regardless of the receipt of federal funding. See 42 U.S.C. §12132; *see also, Pace v. Bogalusa City School Bd.*, 403 F.3d 272, 276 n. 4 (5th Cir. 2005).

Title II applies to all programs, activities and services provided or operated by local governments. If there is a question as to whether the local government is a public entity, such as a volunteer fire department, the ADA Technical Assistance Manual recommends evaluating the relationship between the entity and governmental unit to determine if the entity is public or private. Some factors include: 1) Whether the entity is operated with public funds; 2) Whether the entity's employees are considered government employees; 3) Whether the entity receives significant assistance from the government by provision of property or equipment; and 4) Whether the entity is governed by an independent board selected by members of a private organization or a board elected by the voters or appointed by elected officials. See Americans with Disabilities Act Title II Technical Assistance Manual, §II-1.2000.

[1] After a lengthy comment period, on August 11, 2016, the Department of Justice issued new regulations for the implementation of the ADAAA pursuant to Title II and Title III of the statute. See https://www.federalregister.gov/documents/2016/08/11/2016-17417/amendment-of-americans-with-disabilities-act-title-ii-and-title-iii-regulations-to-implement-ada

[2] https://www.ada.gov/taman2.html; https://www.ada.gov/taman2up.html

[3] https://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm

With regard to leased buildings, public entities must ensure the space it leases to private entities comply with Title III of the ADA. For example, if a municipal department is housed in a building and leases some space to a restaurant, the department is subject to Title II and the restaurant is subject to Title III of the ADA. If a public entity leases and occupies a private facility, it is required to provide access to all of the programs conducted in that facility pursuant to Title II. *Id.* at §II-1.3000.

D. WHAT ARE THE REQUIREMENTS OF A MUNICIPALITY UNDER TITLE II?

General Requirements for Municipal Entities

- Equality in Participation and Benefits -those with disabilities must have an equally effective opportunity to participate in or benefit from city **P**rograms, **S**ervices and **A**ctivities. 42 U.S.C. §12132.
    - A public entity is not required to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others. 28 C.F.R. §35.139(a).
    - Direct threat analysis requires an individualized assessment, not based on generalizations, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: 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 or the provision of auxiliary aids or services will mitigate the risk. *Id.* at (b).
- Mainstream/Integrated Setting- municipalities 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). Unjustifiable isolation of persons in a institutional setting is a form of discrimination under Title II. *Olmstead v. L.C. ex rel. Zimring*, 572 U.S. 581, 600 (1999).
    - Public entities must provide the same aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities that 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).
    - 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).
    - Technical Assistance Manual, II-3.4000 specifies the specific principles of mainstreaming for a city:
        - 1) Individuals with disabilities must be integrated to the maximum extent appropriate.

        - 2) Separate programs are permitted where necessary to ensure equal opportunity. A separate program must be appropriate to the particular individual.
        - 3) Individuals with disabilities cannot be excluded from the regular program, or required to accept special services or benefits.

- Eligibility Criteria and Medical Inquiries- A public entity may not impose eligibility criteria for participation in its programs, services or activities that either screen out or tend to screen out individuals with disabilities unless the criteria are necessary for the provision of the service, program, or activity being offered. *See* Technical Assistance Manual, II- 3.5100.
    - A program cannot request medical information unless it can demonstrate that each piece of information requested is needed to ensure safe participation in the program.
    - A city isn't required to provide waivers, exceptions, or preferential treatment is someone is disabled.
    - A disabled person must meet the basic eligibility requirements for participation in a city program, service or activity such as age, income or educational background.

- Safety Considerations- a city may impose rules and requirements for the safe operation of its programs, services and activities.
    - The safety considerations must be based on legitimate risks, not speculative thoughts, stereotypes, or generalizations about disabled persons. 28 C.F.R. §35.130(h).

- Surcharges- a city may not implement or impose a surcharge on a disabled person or a group of individuals with disabilities to cover costs to cover expenses in implementing the program, service or activity required to provide the person or group with nondiscriminatory treatment. 28 C.F.R. §35.130(f).
    - This inclues a prohibition on surcharges for service animals.

- Reasonable Modifications- a city must make reasonable modifications to policies, practices and procedures necessary to ensure no discrimination against disabled persons. 28 C.F.R. §35.130(b)(7)(1); Technical Assistance Manual- II-3.6000.
    - A city is not required to make such modifications if it can demonstrate making such modifications would fundamentally alter the program, service or activity. *Id.*
    - A plaintiff has the burden of showing that the modification was reasonable and necessary. *Patterson v. Kerr County*, No. SA-05-CA-0626-RF, 2007 WL 2086671 at *7 (W.D. Tex.-San Antonio July 18, 2007).
    - A city may be liable for disability discrimination under Title II, regardless of intent, if a plaintiff can establish "but for" the disability, he would not have been deprived of the services or benefits and a city's failure to modify its policies. *See e.g., Bennett-Nelson v. Louisiana Bd. Of Regents*, 431 F.3d 448, 455 (5th Cir. 2005); *see also, Patterson*, No. SA-05-CA-0626-RF, 2007 WL 2086671 at *7.

- Personal Services and Devices- a city does not have to provide services such as wheelchairs, individual prescribed devices (i.e.: eyeglasses, hearing aids), or personal services such as assistance in eating, dressing or toilet assistance. 28 C.F.R. §35.135.

- Effective Communication- a city shall ensure it takes steps that communication for job applicants, participants in programs, services and activities, and members of the public and their companions with disabilities are the same as those without disabilities. 28 C.F.R. §35.160(a); Technical Assistance Manual, II-7.1000; *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 777, 782 and n.19 (W.D. Tex. 2008). Effective communication includes providing auxiliary aids and services where necessary to allow disabled persons the same, equal opportunity to participate in a program, service or activity provided by the city. 28 C.F.R. §35.160(b)(1).
    - Auxiliary aids must be provided in accessible formats, timely and in a way that protects the disabled individual's privacy and independence. *Id.* at (b)(2).
    - The city is required to give primary consideration to the disabled individual's request for which type of auxiliary aid or service is necessary. *Id.*; Technical Assistance Manual. II-7.1100.
    - TDD and 911 Services- if a city uses telephone communications, the city must have equally effective communications for those with hearing or speech impediments and such 911 emergency services must have direct access to individuals who use the TDD services. Id. at §35.161, 35.162; Technical Assistance Manual, II-7.2000 and 7.3000.
    - Information and Signage- the city must ensure disabled persons can obtain information as to the existence and location of accessible services, activities and facilities and shall provide signage. Also, the international symbol for accessibility shall be posted in the accessible entrance of each city facility. 28 C.F.R. §35.163.
    - Sample of types of auxiliary aids and services:[4]
        - Interpreters; *see 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).
        - Notetakers
        - Transcription services
        - Written materials for visually impaired
        - Closed captioning decoders
        - Video Remote Interpreting
        - Assistive listening devices
        - Braille materials
        - Acquisition of such equipment or services

- Miscellaneous Service Requirements
    - Service Animals
        - A city must allow for service animals, within its facilities, and modify its policies, practices and procedures to permit the use by a disabled person. 28 C.F.R. §35.136(a)

[4] See 28 C.F.R. §35.104, Definitions: *Auxiliary aids and services* for comprehensive list.

        - An exception to this rule is if the animal is out of control or the animal is not housebroken. *Id.* at (b).
    - Mobility Devices
        - A city must permit individuals to use mobility devices within their facilities, including wheelchairs, walkers, crutches, canes or other similar devices in areas open to pedestrian use. 28 C.F.R. §35.137(a).
        - When considering reasonable modifications to policies, practices and procedures for mobility devices, a city shall consider the types of devices, volume of pedestrian traffic, design and characteristics of the facility. Id. at (b)(2)(I-v); see also, Technical Assistance Manual, II.
        - Alterations to or building new facilities also have specific requirements for mobility devices. See Technical Assistance Manual; DOJ Guidance on the 2010 ADA Standards for Accessible Design, https://www.ada.gov/regs2010/2010ADAStandards/Guidance2010ADAstandards.htm last accessed September 25, 2017; ADA Update: A Primer for State and Local Governments https://www.ada.gov/regs2010/titleII_2010/title_ii_primer.html#wheelchairs last accessed September 25, 2017.
    - Polling places
        - Polling places are governed by 28 C.F.R. §35.130(b), related to general prohibitions on disability discrimination to a city's programs, services or activities. *See California ex rel. Lockyer v. County of Santa Cruz*, No. C-05-04708 RMW, 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 ADA guidelines for construction; 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).
    - Contracting Obligations
        - A city is required to keep up with contractors and ensure they comply with contractual obligations for the ADA under Title II. 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).

- Maintenance of Accessible Features- a city must maintain its facilities and equipment in working condition for disabled persons. Temporary access interruptions for maintenance, repair, or operational activities are permitted, but must be remedied as soon as possible and may not extend beyond a reasonable period of time. 28 C.F.R. §35.133.

    - It is advisable for staff to be prepared to assist individuals with disabilities during these interruptions.

E. MUNICIPAL FACILITY ACCESS AND ARCHITECTURAL BARRIER REQUIREMENTS

What is a facility?

Under the regulations, a "facility" is "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.

For facilities that are already constructed that may need alterations, an "existing facility" is a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered. *Id.*

After 2012, Title II requires cities utilize the 2010 ADA Standards For Accessible Design (2010 Standards) for new construction and alterations. 28 C.F.R. §35.133; §35.150; §35.151(a); see also Technical Assistance Manual, II-6.1000. These 2010 Standards set out minimum requirements for newly built and alterations to city facilities. See ADA Standards for Accessible Design, https://www.ada.gov/2010ADAstandards_index.htm at p. 1, last accessed September 25, 2017. In existing facilities, a safe harbor provision provides for certain exemptions. 28 C.F.R.§35.150; 75 Fed. Reg. 56236 (Sept. 15, 2010). If no alterations have been made prior to 2012, and comply with the prior 1991 Standards, then no additional alterations are necessary. *Id.*

In the rulemaking process, some Commenters raised questions about the applicability the definition of "facilities" to activities operated in mobile facilities, such as bookmobiles or mobile health screening units. In conclusion, the DOJ indicated these activities would be covered by the requirement for program accessibility in §35.150, and would be included in the definition of "facility" as "other real or personal property." Standards for new construction and alterations of these facilities are not yet included in the accessibility standards adopted by §35.151. 28 C.F.R. §35 – Test A.

Facilities include physical buildings, handicap accessible parking and areas within the physical buildings such as employee work areas, elevators, bathrooms, loading zones, drinking fountains, TTY (text telephones), assembly areas, mobility device accessibility, service animal accessibility, window counters, courtrooms, residential facilities (i.e.: homeless shelters), playgrounds, and golf courses. See 2010 ADA Standards for Accessible Design, https://www.ada.gov/regs2010/2010ADAStandards/Guidance2010ADAstandards.htm last accessed September 25, 2017; Technical Assistance Manual, Section II.

Facility Guidelines for Construction Issues

- New Construction: All newly constructed facilities must be in compliance with the 2010 Standards.
- Alterations/Renovations to Existing Facilities:
    - 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. 28 C.F.R. Part 36.

        - 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. Americans With Disabilities Act Architectural Guidelines (ADAAG) § 3.5.
    - A city must construct alterations to the maximum extent feasible in a manner that the altered portion is readily accessible to disabled persons. 28 C.F.R. §35.151(b).
    - 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.
    - Alterations are those which make a facility more accessible as well as incidental changes affecting access. *See e.g., Greer v. Richardson Indep. Sch. Dist*., No. 3:08-CV-160-M, 2010 WL 3025530 at *6 (N.D. Tex. Aug. 2, 2010). Path of travel alterations only apply to program accessibility requirements, not physical facilities. 28 C.F.R. §35.151(b)(2).
- Historic Properties/Historic Preservation:
    - Title II only requires that alterations must comply, but alternative methods are available and cities are not required to take any action that would threaten or destroy the historic significance of an historic property. 28 C.F.R. §35.151(d); Technical Assistance Manual II-6.5000.
- Curb Cuts/Curb Ramps
    - Newly built roads or altered roads, streets, sidewalks or walkway must have ramps wherever there are curbs or other barriers to entry from a pedestrian walkway. 28 C.F.R. §35.150, §35.151(e); Technical Assistance Manual, II-6.6000. Resurfacing a street is an alteration to street. *See Kinney v. Yerusalim*, 9 F.3d 1067 (3rd Cir. 1993).
        - The Fifth Circuit 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*, 657 F.3d 215, 231 (5th Cir. 2011).[5]

Deviation from the guidelines using alternative methods is feasible if it is "clearly evident" that the city provides equivalent access to the facility. 28 C.F.R. §35.151(c); *see e.g., Greer*, 2010 WL 3025530 at *6. This includes "structural impracticability" where a city can demonstrate where it is impossible to meet the requirements based on structural impracticability. 28 C.F.R. §35.151(a)(2)(i). Compliance for accessibility is required to the extent that it is not structurally impracticable. *Id.* at (a)(2)(ii).

There are a litany of requirements for new construction and alterations from van parking to bathrooms to water fountains to toilet paper holders to carpet requirements. For specific information on each are available in the Technical Assistance Manual, and its Supplement, for the ADA covering local government programs and services. https://www.ada.gov/taman2.html; https://www.ada.gov/taman2up.html. In addition, the Standards for Accessible Design and

[5] The 5th Circuit held in the *Frame* case that sidewalks are considered "services" of a public entity under the meaning of those terms. *Frame,* 657F.3d at 234.

Guidance are also helpful resources in determining specific specifications. https://www.ada.gov/2010ADAstandards_index.htm , last accessed September 25, 2017.

What Does Facility Access Require?

A city must ensure its programs, activities, and services are accessible to individuals with disabilities. One key aspect of that requirement is program access, not just access to and within a physical facility.

Program Accessibility

The "program accessibility" requirement in regulations implementing Title II of the Americans with Disabilities Act requires that each service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities. 28 CFR 35.150(a); Technical Assistance Manual, II-5.1000 (emphasis added). Program access does not necessarily require a public entity to make each of its existing facilities accessible; cities have flexibility. 28 C.F.R. § 35.150(a)(1); Technical Assistance Manual, II-5.2000; *Greer*, 2010 WL 3025530, at *3, 4. Compliance with the program access doesn't depend on the number of accessible locations, but whether if the program is readily accessible to disabled individuals. *See Bird v Lewis & Clark College*, 303 F.3d 1015, 1021 (9th Cir. 2002) *cert. denied*, 538 U.S. 923 (2003).

Program accessibility may be accomplished with redesign of equipment, moving services to accessible buildings, delivery of services to accessible sites, assignment of aides. 28 C.F.R. §35.150(b)(1); Technical Assistance Manual, II-5.2000. Cities are not required to make structural changes to existing facilities where other methods are effective in achieving program access. 28 C.F.R. §35.151. A city shall give priority to methods for programs, services, activities in the most integrated setting that is appropriate. 28 C.F.R. §35.150(b).

Undue Burden/Hardship

However despite all of these program accessibility and facility requirements to satisfy the ADA, it does not require cities to make each facility or even each part of a particular facility, accessible. See 28 C.F.R. § 35.150(a); U.S. Dep't of Justice, Civil Rights Div., Disability Rights Section, The Ams. With Disabilities Act Title II Technical Assistance Manual, § II-5.1000 (1993). The DOJ's Interpretive Guidance for ADA Title II notes that Title II requires existing facilities to comply with a program access standard "because the cost of retrofitting existing facilities is often prohibitive." 28 C.F.R. pt. 35, app. A, § 35.150.

"Undue hardship" means significant difficulty or expense relative to the operation of a public entity's program. Technical Assistance Manual- II-4.3200. The undue burden test consists of a five-part test and is a fact based assessment done on a case-by-case basis.

The factors are as follows:

(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. See 42 U.S.C. § 12182(2)(A)(ii)-(iii) (2000); 28 C.F.R. § 36.104.

Where a particular accommodation would result in an undue hardship, the city must determine if another accommodation is available that would not result in an undue hardship. The Mayor, Council or City Manager (i.e.: the "head" of the City, or his/her designee) should make the determination about the undue financial and administrative burdens. Technical Assistance Manual- II-4.3200. Such conclusion must be supported with a written statement for making this determination resulting in an undue burden, and must include consideration of all resources available for the program, service or activity. *Id.* The Courts have found that accommodations need not be made if the accommodations create an undue burden, but this is an affirmative defense on which the city has the burden of proof. See e.g., 28 C.F.R. § 35.130(b)(7); *Tennessee v. Lane*, 541 U.S. 509, 532 (2004); *Reickenbacker v. Foster*, 274 F.3d 974, 983 (5th Cir. 2001).

If the area of a facility contains a primary function area, which is considered where major activities take place (i.e.: sidewalks, streets, parking areas, restrooms, telephones, drinking fountains), is altered, the city is responsible for making the travel path to the altered area accessible. 28 C.F.R. §35.151(4). A primary function area is an areas of the building that include the primary spaces for which the building was constructed (i.e. offices or meeting areas of city hall or classroom in a school). *Id*. The amount of money the city must spend to provide an accessible path of travel is limited to 20% of the overall cost of the alteration to the primary function area. *Id.* If the path of travel alterations are greater than the 20% limit and disproportionate to the cost of the overall alteration, the path of travel should only be made accessible without additional costs. *Id.* If all the required accessible features are already provided then no additional expenditure is needed. Additionally, if the alterations are not technically feasible due to engineering or construction barriers, then the expenditure is not required. U.S. Dept. of Justice, Civil Rights Division, Disability Rights Section, Department of Justice ADA Guide for Small Towns, at page 11, https://www.ada.gov/smtown.htm, last accessed Sept. 24, 2017.

This means that if many access improvements are needed, and there are insufficient resources to accomplish them in a single year, they can be spread out over time. It also means that rising or falling revenues can affect whether or not an access improvement can be completed in a given year. The safe harbor exemption was also intended to make it clear that the disproportionality test contained in the path of travel standards is not applicable in determining whether providing program access results in an undue financial and administration burden within the meaning of Sec. 35.150(a)(3). 2010 Standards: Guidelines, https://www.ada.gov/regs2010/2010ADAStandards/Guidance2010ADAstandards.htm , last accessed September 25, 2017.

F. ENFORCEMENT, COMPLAINTS & LITIGATION

Government Authority and Jurisdiction

The United States is authorized under 28 C.F.R. Part 35, Subpart F, to determine a City's compliance Title II of the ADA and the Department of Justice's Title II implementing regulation, to issue findings, and, where appropriate, to negotiate and secure voluntary compliance agreements. Furthermore, the Attorney General is authorized, under 42 U.S.C. § 12133, to bring a civil action enforcing Title II of the ADA.

In an effort both to facilitate compliance with all applicable laws and to mitigate the tension between federal and state enforcement processes, the ADA authorizes the Department of Justice, upon request of state or local officials, to certify that state or local accessibility laws meet or exceed the requirements of the ADA. The certification process does not delegate ADA enforcement authority nor eliminate an individual's right to seek relief through the federal courts. However, this may ensure effective enforcement of a certified code and ensuring that new or altered buildings are accessible. This process gives building owners and design professionals some assurance ADA requirements are satisfied and assert an affirmative defense or evidence of compliance if a lawsuit is filed.

Administrative Enforcement

An individual who believes a city subjected to discrimination based on a disability related to programs, services and activities, may file a complaint within 180 days of the alleged discrimination. 28 F.F.R. §35.170 *et. seq;* Technical Assistance Manual, II-9.2000. This applies not only to the public, but to employees as well. 28 C.F.R. §35.140 *et. seq.*

The DOJ has initiated its own compliance reviews resulting in over 219 voluntary settlement agreements based on discrimination by agencies receiving federal funding or complaints.

Private Right of Action

Title II authorizes suits by private citizens for money damages against public entities that violate § 12132. See 42 U.S.C. § 12133 (incorporating by reference 29 U.S.C. § 794a). *United States v. Georgia,* 546 U.S. 151, 154 (2006).

There has been an uptick of private litigation against cities for discrimination on the basis of disability under Title II or the Rehabilitation Act. Title II doesn't require an exhaustion of administrative remedies, a complaint or permissive notice in order to file a lawsuit related to a violation. See 28 C.F.R. Part 35, Appendix A; *Camenicsh v. Univ. of Tex*., 616 F.2d 127, 134-35 (5th Cir. 1980). In order to allay frivolous lawsuits, this past session, the legislature passed HB 1463 to amend the Human Resources Code to add procedures, including requiring notice to the entity and an opportunity to cure. Tex. Human Resources Code §§121.004, 121.0041.

While there is no private cause of action with respect to self-evaluation and transition plans, the fact that it has not been done can be cited as evidence of overall ADA noncompliance with respect to matters for which there is a private right of action.

The elements of proof for a plaintiff in a private cause of action under Title II are similar to those of Title VII: (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,* 657 F.3d at 222.

Private Right of Action: Defenses

In order to sufficiently establish they are entitled to pursue a claim, the plaintiff must show they sustained a real, not hypothetical, injury; or an architectural barrier directed affected them and related to its removal in order to have standing to sue. *Greer v*2010 WL 3025530 at *6. However, a plaintiff is not required to have encountered each architectural barrier in order to sue. *Id.* In Frame, the court indicated standing requires to have standing, a plaintiff must set out facts sufficient to explain in some detail how the alleged deficiencies "negatively affect their day-to-day lives," and held that mere allegations of non-compliant facilities were insufficient. *Frame,* 616 F.3d at 222. Recently, a Court analyzed the *Frame* case, and stated …[a plaintiff] need not traverse a rocky road to prove that a missing sidewalk renders it inaccessible, he must nonetheless show that the inaccessible feature "actually affects his activities in some concrete way." *Deutsch v. Abijaoude,* No. A-15-CV-975 LY, 2017 WL 913813, at *4 (W.D. Tex. Mar. 7, 2017).

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,* 657 F.3d at 238. 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. *Id.*

In general, 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). However, a city has *respondeat superior* liability under Title II. *Pena v. Bexar County, Texas*, 726 F. Supp. 2d 675, 686 (W.D. Tex. 2010). A city, is however, 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).

Cities do not have immunity from ADA claims under Title II. *Board of Trustees v. Univ. of Alabama v. Garrett*, 531 U.S. 356, 369 (2001).

Repairs to the facility in an effort to comply with the ADA based on the plaintiff's allegations for compliance is a viable defense and makes the claim moot.

Private Right of Action: Damages

A plaintiff may recover compensatory damages upon evidence of intentional discrimination. See e.g., *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).

Equitable relief and preliminary injunctions are also available under Title II. *See e.g., Knowles v. Horn*, No. no. 3:08-CV-1492-K, 2010 WL 517591 (N.D. Tex. Feb. 10, 2010).

The ADA awards plaintiffs' attorneys' fees and costs in the event of a judicial decision against a defendant or in the case of a settlement in which alterations result. This has proven to be one reason for the uptick in litigation and private lawsuits against cities. Cities are responsible for defense costs, and attorney's fees even in the event of settlement prior to trial. It is prudent to evaluate the cost benefits of these costs/fees compared to the cost of removing barriers, providing access to a program, service or activity or altering a facility. 42 U.S.C. § 12205; 28 C.F.R. § 35.175; Technical Assistance Manual, *supra*, II-9.2000.

A court reviews challenges to Title II of the ADA under a rational basis test, in particular to challenges of newly built or altered sidewalks, curb ramps and parking areas, because usually, allegations under this statute relate to denial of services as opposed to speech restrictions. *See Mason v. City of Huntsville, Al.,* No. CV-10-S-02794-NE, 2012 WL 4815518 (N.D. Al. 2012).

G. CITY ADMINISTRATIVE OBLIGATIONS UNDER TITLE II OF THE ADA

Under Title II, cities are required to achieve compliance, which requires a Self-Evaluation (should have been completed by 1994). 28 C.F.R. §35.105(a). For cities with 50 or more employees, they must establish a grievance procedure, designate an ADA Coordinator to oversee Title II compliance, develop a transition plan if structural changes are necessary to achieve program accessibility. *Id.* at (b-c); Technical Assistance Manual, II-8.000 et. seq. Failure to have such transition plan or self-evaluation may support a judgment against a city. *See e.g., Pierce v. County of Orange*, 526 F.3d 1190, 1223 (9th Cir. 2008) (court upheld injunction as full compliance not necessarily guaranteed in light of the fact that transition plan was untimely and incomplete).

ADA Coordinator

A city 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, II-8.5000. The ADA Coordinator should advise the city's employees, contractors and public about the city's ADA compliance obligations and handle the grievances alleging discrimination for programs, services or activities.

Grievance Procedures

A city 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, II-8.5000.

Notice Requirements

A city is required to provide information about Title II and its programs, services and activities and advise them about the protections against discrimination as provided under the statute. The notice must also provide the person who is responsible for apprising individuals about Title II. 28 C.F.R. §35.106. This ADA Notice can be via a poster, pamphlets or other forms, but must comply with the Title II requirements for effective communication, such as Braille, etc. Technical Assistance Manual, II-8.4000.

H. OTHER STATUTES REGULATING MUNICIPAL FACILITIES

There are several other statutes which are applicable to prohibit discrimination in municipal facilities. Facilities that must comply with the ADA Standards may also be required to comply with accessibility requirements established under state or local laws.

Rehabilitation Act: 29 U.S.C. §794:

The ADA was modeled after the Rehabilitation Act and it adopts the remedies, procedures and rights, therefore cases interpreting both apply to both. *Frame*, 657 F.3d at 222. The Rehabilitation Act was enacted to prohibit discrimination by entities receiving federal funds. *See* 29 U.S.C. § 794(a); and 28 C.F.R. § 41.51(a). Pursuant to 28 C.F.R. § 41.51(d), recipients of federal funds are required to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." Furthermore the Department of Justice has mandated: No qualified handicapped person, shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.

For example, if a Police Department receives money for specific programs, services or activities, the Rehabilitation Act applies those activities within the facility for accessibility to such programs, services or activities.

Architectural Barriers Act: 42 U.S.C. §4151 et. seq.

The Architectural Barriers Act requires that all facilities built, designed and altered with federal funds provide access to those who are disabled. See United States Access Board, Architectural Barriers Act, https://www.access-board.gov/the-board/laws/architectural-barriers-act-aba , last accessed September 25, 2017.

Architectural Barriers Law: Texas Government Code Chapter 469

Texas maintains similar requirements as Title II, the Rehabilitation Act, and the Architectural Barriers Act. See Tex. Gov't Code Ch. 469 *et. seq*. The regulations supplement the Federal regulations on design standards and cities must still adhere to the Federal regulations related to the removal of architectural barriers. The authority and requirements are administered by the Texas Department of Licensing and Regulation, 16 Texas Administrative Code, Chapter 68

Local Ordinances and Regulations

Many cities adopt or enforce building codes, some of which also include accessibility requirements. There may be significant variations among the federal, state and local code requirements. Design and construction under state and local codes complies with the ADA only when the codes provide accessibility that equals or exceeds the ADA requirements. When these laws are inconsistent, the burden falls on building owners and design professionals to ensure compliance with both federal and state laws. Local officials enforce local laws and codes. The ADA relies on the traditional method of civil rights enforcement through the DOJ, administrative enforcement or litigation in federal courts. Local officials do not have the authority to enforce the ADA on behalf of the federal government.

I. CONCLUSION

There are so many legal requirements for accommodating disabled persons under the ADA: Title II. The best course of action is to ensure there is an ADA Coordinator who understands compliance with the statute, establish a grievance procedure, self-evaluate, and implement a transition plan. Being pro-active and understanding the basics of accommodating disabled persons in facilities and programs, services and activities, as well as the authority behind them is the best way to support risk prevention.