TITLE II OF THE AMERICAN WITH DISABILITIES ACT— AN OVERVIEW

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HONORS

"SuperLawyer," Texas Monthly Magazine
J. Chrys Dougherty Legal Services Award from the State Bar of Texas (2011)
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SELECTED LAW-RELATED PUBLICATIONS AND ACTIVITIES

Chapter co-author and editor, "Workers with Disabilities," *Employee & Union Member Guide to Labor Law* (Thompson West)

"Pleading Disability After the ADAAA," 31 Hofstra Lab. & Emp. L. J. 1 (2013) (co-authors Kevin Barry & Marcy Karin)

"The ADA Amendments Act of 2008 and Employment: Practical Strategies," Clearinghouse Review (July – August 2009) (co-author Claudia Center) "Deciphering Disability," *Trial* magazine (August 2007)

"The Future of Title II of the ADA as a Way of Remedying Discrimination by State Government," 22 *Civil Rights Litigation & Attorneys Fees Annual Handbook* 12-1 (Thompson West 2006)

"The ADA at 15 – Struggling to Fulfill Its Promise," *Texas Bar Journal* (July 2005)

"Don't Overlook the *Little* Things – Cases Adverse to Plaintiffs Don't Equal Employer Protection from ADA," *Texas Lawyer*, April 4, 2005

"Disability Rights—The State of the ADA," 20 *Civil Rights Litigation & Attorneys Fees Annual Handbook* 12-1 (Thompson West 2004)

"Tightening the Noose—The Supreme Court's Most Recent ADA Decisions," 18 *Civil Rights Litigation & Attorneys Fees Annual Handbook* 10-1 (Thompson West 2002)

"*Board of Trustees v. Garrett*—The Threat of 'New Federalism'," 17 *Civil Rights Litigation & Attorneys Fees Annual Handbook* 9-3 (West Group 2001)

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I. INTRODUCTION

Title II of the ADA, 42 U.S.C. §§ 12131–12134, covers state and local governments.[1] The operative statutory text is in 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."

II. THE TITLE II REGULATIONS

The statute is written very broadly, and the details are left to the Department of Justice's enforcing regulations, codified at 28 C.F.R. Part 35. The Title II regulations are entitled to *Chevron* deference, *Ivy v. Williams*, 781 F.3d 250, 255 n.6 (5th Cir. 2015), and are controlling unless they are arbitrary, capricious, or plainly contrary to the ADA. *Frame v. City of Arlington*, 657 F.3d 215, 225 n.29 (5th Cir. 2011) (en banc); *Patterson v. Kerr County*, 2007 WL 2086671, at *7 n.92 (W.D. Tex. July 18, 2007).[2]

III. TITLE II COVERAGE—APPLIES TO ALL "PUBLIC ENTITIES"

Title II applies to any "public entity." 42 U.S.C. § 12132. "Public entity" is defined in 42 U.S.C. § 12131(1) to include any State or local government, as well as any department, agency, special purpose district, or other instrumentality of a State or States or local government.[3]

A. Broad Coverage

"The ADA is a 'broad mandate' of 'comprehensive character' and 'sweeping purpose' intended 'to eliminate discrimination against disabled individuals, and to integrate them into the economic and social mainstream of American life.'" *Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011) (en banc) (*quoting PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001)). "[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Pennsylvania Dept. of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998) (internal quotes omitted). Thus, for example, Title II applies to:

- Cities, *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011) (en banc) (sidewalks and curb cuts); *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 777, 782 (W.D. Tex. 2008) (police and 911 services).
- Counties, *Patterson v. Kerr County*, 2007 WL 2086671, at *7 (W.D. Tex. July 18, 2007) (local jails).
- State agencies, *Pennsylvania Dept. of Corrs. v. Yeskey*, 524 U.S. 206 (1998);[4] *Manemann v. Texas Dep't of Criminal Justice*, 2014 WL 905876 (S.D. Tex. Mar. 7, 2014).

Note that the substantive standards and remedies of Title II are very similar to those applicable to Sec. 504 of the Rehabilitation Act of 1973 (see § 6 below), but unlike § 504, Title II applies whether or not the public entity receives any federal funding. *Pace v. Bogalusa City School Bd.*, 403 F.3d 272, 276 n.4 (5th Cir. 2005) (en banc).

Sometimes an entity appears to have both public and private features. In such cases the DOJ has set out several factors to consider in determining if the entity is a "public entity." See Americans with Disabilities Act Title II Technical Assistance Manual, § II-1.2000 (DOJ Nov. 1993) (hereafter "Technical Assistance Manual").[5] *See also id.*, § II-1.3000, which deals with public-private lease arrangements.

Title II does not apply to the federal government, although many federal agencies are covered by § 504.

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[1] This paper deals with Division A of Title II, regarding the "Prohibition Against Discrimination and Other Generally Applicable Provisions." Division B of Title II deals with public transportation, *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 671 (5th Cir. 2004), and is outside the scope of this paper.

[2] *See also Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 5 and n.5 (1st Cir. 2000) ("Title II does not elaborate on the obligation of a public entity … [so we] must rely for specifics on the regulations," which are given "legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute..."); *Helen L. v. DiDario*, 46 F.3d 325, 331–32 (3d Cir.1995) ("the regulations which the Department promulgated are entitled to substantial deference").

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

[4] *Yeskey* impliedly overruled contrary precedent like *Callaway v. Smith County*, 991 F. Supp. 801 (E.D. Tex. 1998).

[5] The Technical Assistance Manual, which is available online at http://www.ada.gov/taman2.html, is entitled to *Skidmore* deference. *Ivy v. Williams*, 781 F.3d 250, 256 n.7 (5th Cir. 2015).

B. Individual Liability

Courts generally hold that government officials are not individually liable under Title II. *See, e.g.*, *DeLeon v. City of Alvin Police Dept*., 2009 WL 3762688 at *3–4 (S.D. Tex. Nov. 9, 2009); *Albritton v. Quarterman*, 2009 WL 585659, at *10 (E.D. Tex. Mar. 6, 2009); *Coker v. Dallas County Jail*, 2009 WL 1953038, at *16 n.11 (N.D. Tex. Feb. 25, 2009), *adopted in relevant part*, 2009 WL 1953037 (July 6, 2009); *Comeaux v. Thaler*, 2008 WL 818341, at *18 (S.D. Tex. Mar. 24, 2008) (collecting cases); *Bostick v. Elders*, 2003 WL 1193028, at *1 (N.D. Tex. Jan.10, 2003).

Similarly, courts generally hold that a person cannot use §1983 as a way to sue individuals under Title II. *Pena v. Bexar County, Texas*, 726 F. Supp. 2d 675, 688–90 (W.D. Tex. 2010) (collecting authorities).

However, official capacity claims are available to enforce the ADA against the states. See § 17 below.

Also, some courts have found individual liability in Title II retaliation cases. *See Datto v. Harrison*, 664 F. Supp. 2d 472, 489–92 (E.D. Pa. 2009) (collecting authorities and finding individuals may be held liable).

C. Respondeat Superior Liability

Public entities have *respondeat superior* liability. *Pena v. Bexar County, Texas*, 726 F. Supp. 2d 675, 686 (W.D. Tex. 2010). Also, plaintiffs need not show that the discrimination was the result of a government policy. *Delano-Pyle v. Victoria County, Texas*, 302 F.3d 567, 575 (5th Cir. 2002), *cert. denied*, 540 U.S. 810 (2003). Thus, a government entity is liable for the discriminatory acts of its employees, even if they are not policymaking officials. *Delano-Pyle, supra*, 302 F.3d at 574–75.

IV. WHO DOES TITLE II PROTECT—"QUALIFIED INDIVIDUAL WITH A DISABILITY"

Title II protects a "qualified individual with a disability." 42 U.S.C. § 12132.

A. Definition of "Disability"

Title II uses the same definition of disability used in other parts of the ADA, and that definition includes "present" disabilities (aka "prong one"), "record of" disabilities ("prong two"), and "regarded as" disabilities ("prong three"). 42 U.S.C. § 12102. The ADA Amendments Act of 2008 substantially expanded the definition of disability. *See* Pub. L. 110-325, 122 Stat. 3553 (Sept. 25, 2008).[6] Note, too, that some types of ADA claim may not require proof that the plaintiff has any kind of disability. These include retaliation claims (see § 7(H) below) and association claims (see § 7(F) below).

B. Definition of "Qualified"

A person is "qualified" if—with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services—he or she meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. 42 U.S.C. § 12131(2); 28 C.F.R. § 35.104; Technical Assistance Manual, *supra*, II-2.8000; *Knowles v. Horn*, 2010 WL 517591, at *3 (N.D. Tex. Feb. 10, 2010) (plaintiff "qualified" in context of community-integration case).

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

C. Direct Threat

Note that a person is not "qualified" if he or she poses a "direct threat" to others that cannot be eliminated by reasonable modifications to the public entity's policies, practices, or procedures. 28 C.F.R. § 35.139. A "direct threat" is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services. 28 C.F.R. § 35.104.

Assessment of direct threat may not be based on generalizations or stereotypes about the effects of a particular disability. Instead, the public entity must make an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. 28 C.F.R. § 35.139(b).

Note that in contrast the EEOC regulations in the employment context, the Title II regulations do not include "danger to self" in the definition of direct threat, as the Court noted in *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 82 (2002). Some courts have held that this difference means that "danger to self" is not a defense. *Compare Celano v. Marriott Intern.*,

[6] The DOJ has proposed amendments to conform the definition of disability in the regulations to the ADA Amendments Act. *See* 79 Fed. Reg. 4839 *et seq*. (Jan. 30, 2014).

Inc., 2008 WL 239306, at *17–18 (N.D. Cal. Jan. 28, 2008) (decided under Title III).

A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities. 28 C.F.R. § 35.130(h).

V. TYPES OF ACTIVITIES REACHED

The statutory language forbids exclusion from or denial of benefits of the services, programs, or activities of a public entity, or being subjected to discrimination by any such entity. 42 U.S.C. § 12132.

The terms "programs, or activities" are broad enough to reach all of the operations of a public entity, and "services" is likewise broadly defined to mean an act, provision, organization, or apparatus done for the benefit of others or to meet a general demand. *Frame v. City of Arlington*, 657 F.3d 215, 225–26 (5th Cir. 2011) (en banc) (holding that building and altering public sidewalks are services, programs, or activities of a public entity). *Cf. Ivy v. Williams*, 781 F.3d 250, 255 (5th Cir. 2015) (drivers ed was not a service, program, or activity of the Texas Education Agency because it had no contractual or agency relationship with drivers-ed providers). *See also Van Velzor v. City of Burleson*, 43 F. Supp. 3d 746, 754 (N.D. Tex. 2014) (collecting cases reaching a "similarly all-encompassing concepts of what can constitute a service or benefit under the ADA.").[7]

Note, too, that the plain language of Title II also prohibits discrimination more generally, whether or not it is tied directly to the services, programs, or activities of the public entity. *See, e.g., Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1084–85 (11th Cir. 2007). *See also Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 44–45 (2d Cir. 1997).

Some of the governmental activities covered by Title II include, for example:

- Access to the courts, *Tennessee v. Lane*, 541 U.S. 509 (2004).
- Prisons and jails, *U.S. v. Georgia*, 546 U.S. 151 (2006); *Patterson v. Kerr County*, 2007 WL 2086671, at *7 (W.D. Tex. July 18, 2007). *See also Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1068 (9th Cir. 2010); *Borum v. Swisher Cnty.*, 2015 WL 327508, at *7 (N.D. Tex. Jan. 26, 2015) ("providing food and medical care to prisoners is undoubtedly a program or service for which Defendant was responsible").
- Law enforcement services *after* the officers securing of the scene and ensured that there is no threat to human life. *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000);[8] *Van Velzor v. City of Burleson*, 43 F. Supp. 3d 746, 756–58 (N.D. Tex. 2014) (traditional discretion to law enforcement agencies does not trump the ADA's statutory obligations); *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 771, 775–76 (W.D. Tex. Dec. 18, 2006).
- Curbs and sidewalks, *Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011) (en banc) ("Title II and § 504 unambiguously extend to newly built and altered public sidewalks … [and] plaintiffs have a private right of action to enforce Title II and § 504 to the extent they would require the City to make reasonable modifications to such sidewalks.").
- Parking enforcement, *Van Velzor v. City of Burleson*, 43 F. Supp. 3d 746, 758–59 (N.D. Tex. 2014);
- Municipality's 911 emergency response services, at least in some circumstances, *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 777, 781–83 (W.D. Tex. 2008).
- Medical care, *except for* "claims that sound in negligence or that challenge purely medical decisions," *Patterson v. Kerr County*, 2007 WL 2086671, at *7 (W.D. Tex. July 18, 2007). *Compare U.S. v. Georgia*, 546 U.S. 151, 157 (2006) (prison's refusal to accommodate disability-related needs in medical care may constitute exclusion from participation or denial of benefits), *with Albritton v. Quarterman*, 2009 WL 585659, at *10 (E.D. Tex. Mar. 6, 2009) (claims for medical treatment decisions not actionable under the ADA).
- Access to public records, *Pena v. Bexar County, Texas*, 726 F. Supp. 2d 675, 683 (W.D. Tex. 2010).

In addition, in 2010 the Title II regulations were changed to specifically address the following activities:

[7] The court in *Van Vezor* also clarified that the focus should be on the specific service or benefit at issue, rather the operations of a program as a whole. 43 F. Supp. 3d at 755.

[8] Some courts reject *Hainze*'s holding (that the ADA does not apply until the police have secured the scene). Instead they hold that the ADA applies to all police interactions, but whether a particular modification is reasonable may depend on the stage of the law-enforcement process. *See, e.g., Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1085 (11th Cir. 2007). The Supreme Court granted cert. to resolve this circuit split, but ultimately dismissed cert on the issue as improvidently granted. *See City & Cnty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1768 (2015).

- Ticketing—adding rules on the sale of tickets for accessible seating, effective March 15, 2011. 28 C.F.R. § 35.138.
- Residential housing—Title II has always covered public housing programs, but these amendments establish design requirements for residential dwelling units that are intended for sale to individual owners. 28 C.F.R. § 35.151(j).
- Housing at places of education—Title II has always covered public college dormitories, but the new amendments clarify the scope of that coverage and establish design requirements for residential facilities at places of education. 28 C.F.R. §§ 35.104 and 35.151(f).
- Group homes and shelters—clarifying the scope of coverage and establishing design requirements for housing or sleeping facilities at group homes, halfway houses, shelters, etc. 28 C.F.R. § 35.151(e).
- Detention and correctional facilities—clarifying the requirements that apply to correctional facilities, and requiring that three percent of newly constructed or altered cells to be accessible. 28 C.F.R. §§ 35.151(k) and 35.152.
- Medical care facilities—clarifying the accessibility requirements that apply to medical care facilities. 28 C.F.R. § 35.151(h).
- Seating in assembly areas—clarifying the rules regarding accessible seating in assembly areas. 28 C.F.R. § 35.151(g).

VI. DEFINITION OF DISCRIMINATION GENERALLY

"No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity." 28 C.F.R. § 35.130(a). *See also* Technical Assistance Manual, *supra*, II-3.0000.

This general definition thus includes three different types of discrimination: (a) exclusion; (b) denial of benefits; or (c) other kinds of discrimination. To state a prima facie claim under this general antidiscrimination provision, the plaintiff must show that he or she: (1) was a qualified individual; (2) was excluded from participation in, or denied benefits of, services, programs, or activities for which the public entity is responsible, or was otherwise discriminated against by the public entity; and (3) was excluded, denied benefits, or discriminated by reason of disability. *Van Velzor v. City of Burleson*, 43 F. Supp. 3d 746, 751 (N.D. Tex. 2014), *citing Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 671–72 (5th Cir. 2004), *cert. denied*, 544 U.S. 1034 (2005).

ADA jurisprudence does not focus solely on comparison-type evidence. A public entity is not only prohibited from affording unequal benefits or opportunities, but also from preventing a qualified individual with a disability from enjoying any aid, benefit, or service, regardless of whether other individuals are granted access. Therefore, a plaintiff is not required to identify a comparison class of similarly situated individuals given preferential treatment. *Van Velzor v. City of Burleson*, 43 F. Supp. 3d 746, 755–56 (N.D. Tex. 2014), *citing Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), and *Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003).

Note, too, that Title II does not require proof of a total exclusion in order to prevail. *Lee v. Valdez*, 2009 WL 1406244, at *12 (N.D. Tex. May 20, 2009). *See also Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000) (setting out alternative claims). Denial of meaningful access is as actionable as outright exclusion. *See Baughman v. Walt Disney World Co*., 685 F.3d 1131, 1134–35 (9th Cir. 2012) ("Read as Disney suggests, the ADA would require very few accommodations indeed. After all, a paraplegic can enter a courthouse by dragging himself up the front steps, so lifts and ramps would not be 'necessary' under Disney's reading of the term. And no facility would be required to provide wheelchair-accessible doors or bathrooms, because disabled individuals could be carried in litters or on the backs of their friends. That's not the world we live in, and we are disappointed to see such a retrograde position taken by a company whose reputation is built on service to the public.") (cite omitted).

The ADA was modeled after the Rehabilitation Act, and it expressly adopts the latter's remedies, procedures, and rights, so case law interpreting either statute is generally applicable to both. *See, e.g., Frame v. City of Arlington*, 657 F.3d 215, 223–24 (5th Cir. 2011) (en banc); Technical Assistance Manual, *supra*, § II-1.4100. But the laws are not identical in every way. For example, in addition to the differences in coverage (see § 3(A) above), § 504 requires proof of sole cause but the ADA does not. *See, e.g., Van Velzor v. City of Burleson*, 43 F. Supp. 3d 746, 752 (N.D. Tex. 2014), *citing Soledad v. U.S. Dept. of Treasury*, 304 F.3d 500, 503–505 (5th Cir. 2002). *See also Baird ex rel. Baird v. Rose*, 192 F.3d 462, 469 (4th Cir. 1999) ("However, the ADA and the Rehabilitation Act are not exactly the same in all respects, and thus, while the two should be construed to impose the same requirements when possible, there are situations in which differences between the statutory provisions dictate different interpretations.").

VII. SPECIFIC PROHIBITIONS

In addition to the general antidiscrimination provisions, the Title II regulations specify a number of prohibited forms of discrimination. *Van Velzor v. City of Burleson*, 43 F. Supp. 3d 746, 751 (N.D. Tex. 2014). For example:

A. Discrimination based on class or severity of disability.

The law prohibits discrimination against a class of disabilities, or based on severity of disability. 28 C.F.R. § 35.130(b)(1)(iv); 28 C.F.R. § 35.130(b)(8); 28 C.F.R. § 35.130(c). *See, e.g., Messier v. Southbury Training School*, 562 F. Supp. 2d 294, 322–23 (D. Conn. 2008); *Hahn ex rel. Barta v. Linn County*, 130 F. Supp. 2d 1036, 1050 (N.D. Iowa 2001) (and cases cited).

B. Discrimination in "siting" decisions.

The law prohibits discrimination in "siting" decisions, that is, in decisions on where to locate the programs, services, or activities of a public entity. 28 C.F.R. § 35.130(b)(4). *See California ex rel. Lockyer v. County of Santa Cruz*, 2006 WL 3086706, at *4 (N.D. Cal. Oct. 30, 2006) ("The defendants cannot purposefully select pre-1992 buildings for polling places to avoid the ADAAG; such would run afoul of 28 C.F.R. § 35.130(b)(4)(i)'s prohibition on making selections in a manner that has a discriminatory effect. Generally, § 35.130(b)(4)(i) would seem to impose on defendants a duty to select the best available sites for polling."); *National Organization on Disability v. Tartaglione*, 2001 WL 1231717, at *7 (E.D. Pa. Oct. 11, 2001) ("selection of inaccessible polling places … can have the effect of depriving mobility impaired voters of the benefit of voting in their neighborhood polling places in the same manner as non-disabled voters").

C. Surcharges.

The law prohibits public entities from imposing surcharges on people with disabilities to cover the costs of measures—such as the provision of auxiliary aids or program accessibility—that are required in order to provide nondiscriminatory treatment. 28 C.F.R. § 35.130(f); Technical Assistance Manual, *supra*, II-3.5400. *See Klingler v. Director*, 433 F.3d 1078 (8th Cir. 2006) (charging fee for disability parking hangtags violates ADA).

D. Discrimination through contractors.

The law prohibits discrimination whether done by the public entity directly, or through contractors. 28 C.F.R. § 35.130(b)(1) and (b)(3). *See also Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1066–67 (9th Cir. 2010) (upholding validity of Title II regulations barring discrimination "directly, or through contractual, licensing, or other arrangements").

Governmental programs are covered even if they are carried out by contractors, *Henrietta D. v. Bloomberg*, 331 F.3d 261, 286 (2d Cir. 2003), and Title II obligations cannot be contracted away. *Armstrong v. Schwarzenegger*, 261 F.R.D. 173, 176 (N.D. Cal.), *aff'd in relevant part*, 622 F.3d 1058, 1068 (9th Cir. 2009). For example, a State is obligated to ensure that the services, programs, and activities of a state park inn operated under contract by a private entity comply with Title II requirements. *Henrietta D.*, *supra*, 331 F.3d at 286, *citing* 28 C.F.R. Part 35 App. A, § 35.102. Title II therefore imposes supervisory liability on public entities. *Henrietta D.*, *supra*, 331 F.3d at 286–87. A public entity does not satisfy its obligations simply by requiring ADA compliance in its contracts; it must also "ensure that the private entity complies with the contract." *James v. Peter Pan Transit Management, Inc*., 1999 WL 735173, at *9 (E.D.N.C. Jan. 20, 1999).

E. Discrimination in Licensing or Regulations

The law prohibits discrimination in licensing or certification programs. 28 C.F.R. § 35.130(b)(6); Technical Assistance Manual, *supra*, II-3.7200.

A public entity does not have to lower or eliminate licensing standards that are essential to the licensed activity, but what is "essential" depends on the facts. 28 C.F.R. Part 35 App. A, § 35.130(b)(6); Technical Assistance Manual, *supra*, § II-3.7200. But a public entity may not establish requirements for the programs or activities of licensees that would result in discrimination. *Id*. A public entity must also provide auxiliary aids for applicants with disabilities, and administer the examinations in accessible locations. Technical Assistance Manual, *supra*, § II-3.7200.

Note that although licensing standards are covered by Title II, the licensee's activities themselves are not covered. 28 C.F.R. Part 35 App. A, § 35.130(b)(6); Technical Assistance Manual, *supra*, § § II-3.7200. Thus, public entities may be liable for discrimination by their contractors who are carrying out governmental functions (as set out in § 7(d) above), but they are not liable for discrimination by mere licensees who are carrying out their own, private activities. *See, e.g., Ivy v. Williams*, 781 F.3d 250 (5th Cir. 2015) (drivers education was not a service, program, or activity of the Texas Education Agency because it had no contractual or agency relationship with the drivers-ed providers; thus, TEA was not required to ensure that such programs complied with the ADA or the Rehabilitation Act).

Note, too, that the ADA's Title III provisions regarding examinations and courses also apply to Title II entities that offer them. *See* 75 Fed. Reg. 56164, 56236 (Sept. 15, 2010). *See also Simmang v. Texas Bd.*

of Law Examiners, 346 F. Supp. 2d 874, 884 n.8 (W.D. Tex. 2004).

F. Associational Discrimination

The law prohibits discrimination against "an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association." 28 C.F.R. § 35.130(g); Technical Assistance Manual, *supra*, II-3.9000. *See A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356 (4th Cir. 2008) (based on its association with addicted persons it served, methadone clinic could bring ADA claim for injuries from zoning decisions); *Doe v. County of Centre*, 242 F.3d 437 (3d Cir. 2001) (adoptive parents of child with HIV could sue to challenge policy restricting foster placements in households that include person with HIV).

G. Disparate Impact

The law also prohibits certain kinds of disparate-impact discrimination. 28 C.F.R. § 35.130(b)(3)(i) and (b)(8); *Tennessee v. Lane*, 541 U.S. 509, 549 (2004) (Rehnquist, C.J., dissenting); *Hunsaker v. Contra Costa County*, 149 F.3d 1041 (9th Cir. 1998) (disparate impact claims require showing that meaningful access was denied); *Ability Center of Greater Toledo v. City of Sandusky*, 181 F. Supp. 2d 797 (N.D. Ohio 2001); *Smith-Berch, Inc. v. Baltimore County, Md*., 68 F. Supp. 2d 602 (D. Md. 1999). *See also Alexander v. Choate*, 469 U.S. 287 (1985) (decided under § 504).

H. Retaliation

The ADA outlaws retaliating against one who has opposed unlawful practice or made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter. 42 U.S.C. § 12203(a); 28 C.F.R. § 35.134(a); Technical Assistance Manual, *supra*, II-3.11000.

It is also unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the ADA. 42 U.S.C. § 12203(b); 28 C.F.R. § 35.134(b); Technical Assistance Manual, *supra*, II-3.11000.

The elements of a retaliation claim are: plaintiff engaged in statutorily protected expression; suffered an adverse action; and the adverse action was causally related to the protected activity. *Shotz v. City of Plantation, Fla*., 344 F.3d 1161, 1180 (11th Cir. 2003). Not every unkind act is sufficiently adverse; the inquiry outside the employment context is whether a reasonable person in his position would view the action as adverse. *Id*. at 1181. *Compare Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (holding that in employment context plaintiff must show that reasonable employee would have found the challenged action "well might have dissuaded a reasonable worker from making or supporting" the protected conduct) (internal quotes omitted)

The normal Title II remedies apply to a retaliation claim based on Title II conduct. 42 U.S.C. § 12203(c).

VIII. MODIFICATION OF POLICIES

Public entities must make reasonable modifications of policies, practices, and procedures if necessary to avoid discrimination. 28 C.F.R. § 35.130(b)(7); Technical Assistance Manual, *supra*, II-3.6000; *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998); *Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 454 n.11 (5th Cir. 2005); *Borum v. Swisher Cnty*., 2015 WL 327508, at *4 (N.D. Tex. Jan. 26, 2015); *Pena v. Bexar County, Texas*, 726 F. Supp. 2d 675, 683 (W.D. Tex. 2010); *Coker v. Dallas County Jail*, 2009 WL 1953038, at *17 (N.D. Tex. Feb. 25, 2009); *Patterson v. Kerr County*, 2007 WL 2086671, at *7 (W.D. Tex. July 18, 2007); *Dees v. Austin Travis County Mental Health and Mental Retardation*, 860 F. Supp. 1186, 1190 (W.D. Tex. 1994). *See also Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (J. Ginsburg, concurring).

Title II's modification requirement is equivalent the ADA's accommodation obligation used in other contexts. *See Tennessee v. Lane*, 541 U.S. 509, 531–32 (2004); *Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005) (describing Title II's modification requirement as an accommodation obligation); *Reickenbacker v. Foster*, 274 F.3d 974, 983 (5th Cir. 2001) (similar); *Patterson v. Kerr County*, 2007 WL 2086671, at *7 (W.D. Tex. July 18, 2007); *McCoy v. Texas Dept. of Criminal Justice*, 2006 WL 2331055, at *7 (S.D. Tex. Aug. 9, 2006). Many courts therefore track the reasonable accommodation analysis used in employment cases. *See, e.g., Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003); *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002) (§ 504 case adopting the case-by-case nature of the accommodation analysis, as well as the duty to engage in an interactive process).

The plaintiff normally has the burden of requesting an accommodation unless the disability and need for accommodation are known or obvious. *Greer v. Richardson Indep. Sch. Dist*., 472 F. App'x 287, 296 (5th Cir. 2012); *Patterson v. Kerr County*, 2007 WL 2086671, at *8 (W.D. Tex. July 18, 2007); *McCoy v. Texas Dept. of Criminal Justice*, 2006 WL 2331055, at *7–8 (S.D. Tex. Aug. 9, 2006) (finding sufficient evidence that defendant knew of need, and also that sufficient request was made).

Whether an accommodation is reasonable requires a balancing of all the relevant facts, and as such, the reasonableness of an accommodation is

generally a question of fact inappropriate for resolution on summary judgment. *McCoy v. Texas Dept. of Criminal Justice*, 2006 WL 2331055, at *9 (S.D. Tex. Aug. 9, 2006). *See also Coker v. Dallas County Jail*, 2009 WL 1953038, at *19 (N.D. Tex. Feb. 25, 2009) (fact issue whether failure to return plaintiff's wheelchair excluded him from participating in, or denied him the benefits of, services, programs or activities at the jail); *Patterson v. Kerr County*, 2007 WL 2086671, at *8 (W.D. Tex. July 18, 2007) (fact issues whether assigning inmates with epilepsy to lower bunks was a reasonable accommodation, and whether this was necessary to avoid depriving them of safe sleeping facilities); Van *Velzor v. City of Burleson*, 43 F. Supp. 3d 746, 760–61 (N.D. Tex. 2014) ("Requiring disability-related training is generally considered to be reasonable under the ADA.").

The plaintiff has the burden of showing that the modification was reasonable and necessary. *Patterson v. Kerr County*, 2007 WL 2086671, at *7 (W.D. Tex. July 18, 2007). *See also Pena v. Bexar County, Texas*, 726 F. Supp. 2d 675, 685–86 (W.D. Tex. 2010) (citing the 5th Circuit's apportioning of burdens in Title III context).

The public entity can defend by showing that the modification would constitute a fundamental alteration, or undue hardship, 28 C.F.R. § 35.130(b)(7); *Tennessee v. Lane*, 541 U.S. 509, 532 (2004), but this is an affirmative defense on which the defendant has the burden of proof. *Reickenbacker v. Foster*, 274 F.3d 974, 983 (5th Cir. 2001); *Greer v. Richardson Indep. Sch. Dist*., 472 F. App'x 287, 292 (5th Cir. 2012); *Patterson v. Kerr County*, 2007 WL 2086671, at *7 (W.D. Tex. July 18, 2007); *Dees v. Austin Travis County Mental Health and Mental Retardation*, 860 F. Supp. 1186 (W.D. Tex. 1994) (finding insufficient evidence to establish such a defense). *See also Pena v. Bexar County, Texas*, 726 F. Supp. 2d 675, 686 (W.D. Tex. 2010); Although budgetary constraints are relevant, they alone are insufficient to show that an accommodation is unreasonable or would constitute a fundamental alteration. *Patterson v. Kerr County*, 2007 WL 2086671, at *8, n.105 (W.D. Tex. July 18, 2007).

Liability for the failure to modify policies does not depend on intent. *Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 455 (5th Cir. 2005) ("[T]he existence of a violation depends on whether … the demanded accommodation is in fact reasonable and therefore required. If the accommodation is required the defendants are liable simply by denying it."); *Pena v. Bexar County, Texas*, 726 F. Supp. 2d 675, 685 (W.D. Tex. 2010) ("When a public entity defendant fails to meet its affirmative obligation to make reasonable accommodations, the cause of that failure is irrelevant."); *Coker v. Dallas County Jail*, 2009 WL 1953038, at *17 (N.D. Tex. Feb. 25, 2009) ("Because public entities must make modifications that are necessary to avoid discrimination on the basis of disability, liability does not depend on evidence of purposeful discrimination. A plaintiff simply must show that "but for" his disability, he would not have been deprived of the services or benefits he desired.‖); *Patterson v. Kerr County*, 2007 WL 2086671, at *7 (W.D. Tex. July 18, 2007).

Likewise, judicially created deference doctrines or special discretion (for example, with regard to police enforcement) do not "trump" the ADA's modification requirement. *Van Velzor v. City of Burleson*, 43 F. Supp. 3d 746, 756–58 (N.D. Tex. 2014)

Note, however, that Title II does not require a public entity to provide to individuals with disabilities personal devices (e.g., wheelchairs; individually prescribed devices like prescription eyeglasses or hearing aids, readers for personal use or study, or services of a personal nature including assistance in eating, toileting, or dressing). The exact meaning of "personal devices and services" is somewhat unclear. *AP ex rel. Peterson v. Anoka-Hennepin Independent School Dist. No. 11*, 538 F. Supp. 2d 1125, 1152 (D. Minn. 2008) (holding that the term does not include request that school staff be trained and authorized to administer glucagon injection in the event student had a diabetes emergency, and thus school may have obligation to provide that).

Note that the loan of receiver as part of an assistive listening system may still be required. 28 C.F.R. § 35.135.

Note, too, that the obligation to modify policies may "trump" this limitation in the jail or prison context because inmates may have no way to bring in their own personal devices. *Purcell v. Pennsylvania Dept. of Corrections*, 1998 WL 10236, at *8–9 (E.D. Pa. Jan. 9, 1998).

IX. SERVICE ANIMALS

The Title II regulations specify that policies must be modified to allow service animals. 28 C.F.R. § 35.136(a) and (g). Among other things, the law clarifies that:

- Only dogs can be service animals. 28 C.F.R. § 35.104.
- There are no breed restrictions. 28 C.F.R. Part 35 App. A, § 35.104 ("Service Animal").
- A service animal is one that has been individually trained to do work or perform tasks for the benefit of an individual with a disability. 28 C.F.R. § 35.104.
- No special certification or documentation is required. 28 C.F.R. § 35.136(f).
- A public entity may only ask two questions of an individual with a service animal: (1) whether the

> animal is required because of a disability, and (2) what work or task the animal has been trained to perform. 28 C.F.R. § 35.136(f). Even these inquiries are impermissible "when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability." *Id*.

A public entity may ask an individual with a disability to remove a service animal from the premises only if (1) the animal is out of control and the animal's handler does not take effective action to control it; or (2) the animal is not housebroken. 28 C.F.R. § 35.136(b). Even if an animals is properly excluded, the public entity must still give the individual with a disability the opportunity to participate in the service, program, or activity without having the service animal on the premises. 28 C.F.R. § 35.136(c).

Although only dogs are service animals, the ADA does provide protections for individuals who use miniature horse. 28 C.F.R. § 35.136(i).

X. WHEELCHAIRS AND OTHER POWER-DRIVE MOBILITY DEVICES

Wheelchairs and other devices designed for use by people with mobility impairments must be permitted in all areas open to pedestrian use. 28 C.F.R. § 35.137(a). "Other power-driven mobility devices" (e.g., Segways) must be permitted unless the covered entity can demonstrate that it would fundamentally alter its programs, services, or activities, create a direct threat, or create a safety hazard. 28 C.F.R. § 35.137(b).

XI. "EFFECTIVE COMMUNICATION"

A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others. 28 C.F.R. § 35.160(a); Technical Assistance Manual, *supra*, II-7.1000; *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 777, 782 and n.19 (W.D. Tex. 2008).

The "effective communication" obligation includes a requirement to furnish appropriate auxiliary aids and services if necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity. 28 C.F.R. § 35.160(b)(1); *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 777, 782 and n.20 (W.D. Tex. 2008). Note that the proper inquiry is not whether the lack of auxiliary aids and services effectively excluded the individual, but instead whether they are necessary to give an equal opportunity to benefit from the program, service, or activity. *See Argenyi v. Creighton Univ*., 703 F.3d 441, 451 (8th Cir. 2013); *Liese v. Indian R. Cnty. Hosp. Dist*., 701 F.3d 334, 343 (11th Cir. 2012); *Saunders v. Mayo Clinic*, 2015 WL 774132, at *5 (D. Minn. Feb. 24, 2015).

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

With regard to sign-language interpreters, see Technical Assistance Manual, *supra*, II-7.1200, and note that:

- A qualified interpreter means one who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary. 28 C.F.R. § 35.104.
- Regardless of skill level, in certain circumstances a family member or friend may not be qualified to render the necessary interpretation because of factors such as emotional or personal involvement, or considerations of confidentiality, that may adversely affect the ability to interpret "effectively, accurately, and impartially." 28 C.F.R. Part 35 App. A, § 35.104.
- The definition of "qualified interpreter" in this rule does not invalidate or limit standards for interpreting services of any State or local law that are equal to or more stringent than those imposed by this definition. For instance, the definition would not supersede any requirement of State law for use of a certified interpreter in court proceedings. 28 C.F.R. Part 35 App. A, § 35.104.[9]
- Although in some circumstances written notes may be sufficient to permit effective communication, in many circumstances they may not be. For example, a qualified interpreter may

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

be necessary when the information being communicated is complex, or is exchanged for a lengthy period of time. Factors to consider include the context in which the communication is taking place, the number of people involved, and the importance of the communication. 28 C.F.R. Part 35 App. A, § 35.160.

Other kinds of auxiliary aids and services include qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments. Auxiliary aids and services may also include reading devices or readers, which should be provided when necessary for equal participation and opportunity to benefit from any governmental service, program, or activity. Such aids may be required, for example, for reviewing public documents, examining demonstrative evidence, and filling out voter registration forms or forms needed to receive public benefits. 28 C.F.R. Part 35 App. A, § 35.160.

In determining what type of auxiliary aid and service is necessary, a public entity shall give "primary consideration" to the requests of the individual with disabilities. 28 C.F.R. § 35.160(b)((2); Technical Assistance Manual, *supra*, II-7.1100.

Due to the broad, encompassing language found in the ADA, the term "effective" lends itself to a fact-intensive inquiry, making determination difficult on summary judgment. *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 777, 783 (W.D. Tex. 2008). Quality bilateral communication is often necessary. *Id*., 557 F. Supp. 2d at 785. Also, shifting and contradictory grounds as to why the defendant failed to seek an interpreter may undercut a showing that communications were effective. *Id*. at 786.

Where a public entity communicates by telephone with applicants and beneficiaries, TDDs or equally effective telecommunication systems shall be used to communicate with individuals with impaired hearing or speech. 28 C.F.R. § 35.161; Technical Assistance Manual, *supra*, II-7.2000.

Telephone emergency services, including 911 services, shall provide direct access to individuals who use TDDs and computer modems. 28 C.F.R. § 35.162; Technical Assistance Manual, *supra*, II-7.3000.

A public entity shall ensure that interested persons (including persons with impaired vision or hearing) can obtain information as to the existence and location of accessible services, activities, and facilities; and shall provide signage at all inaccessible entrances to each of its facilities directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each accessible entrance of a facility. 28 C.F.R. § 35.163.

Effective March 15, 2011 the latest amendments to the Title II regulations clarify certain provisions regarding phone service, readers, and interpreters; list additional auxiliary aids and services, including video remote interpreting (VRI) and screen-reader software; and establish performance and training standards for VRI. *See* 28 C.F.R. §§ 35.104, 35.160 and 35.161.

XII. "MOST INTEGRATED SETTING"

Public entities must provide "services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). This is the so-called "integration mandate." *See Olmstead v. L. C. by Zimring*, 527 U.S. 581, 591 (1999) ("Unjustified isolation, we hold, is properly regarded as discrimination based on disability."); *Knowles v. Horn*, 2010 WL 517591, at *4 (N.D. Tex. Feb. 10, 2010).

Public entities may not "[p]rovide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others." 28 C.F.R. § 35.130(b)(1)(iv).

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).

For more guidance on the integration mandate, see, e.g., Technical Assistance Manual, *supra*, II-3.4000.

XIII. OTHER AFFIRMATIVE OBLIGATIONS

A. Self-evaluations and Transition Plans.

Each public entity was required, by January 26, 1993, to evaluate its current services, policies, and practices, and the effects thereof, for ADA compliance (unless already addressed as part of a § 504 self-evaluation), and begin making necessary changes. 28 C.F.R. § 35.105(a) and (d). Those public entities with 50 or more employees were also required to maintain certain public information about the evaluation for at least three years following its completion. 28 C.F.R. § 35.105(c).

If structural changes were to be made to achieve program accessibility, a public entity that had 50 or more employees was required to develop a transition plan by July 26, 1992, with specified input, content, and public access. 28 C.F.R. § 35.150(d); Technical Assistance Manual, supra, II-8.3000.

Some courts have held that the self-evaluation and transition plan regulations are not privately enforceable, *e.g.*, *Iverson v. City of Boston*, 452 F.3d 94 (1st Cir. 2006); *Skaff v. City of Corte Madera*, 2009 WL 2058242 (N.D. Cal. July 13, 2009), but there is contrary authority. *Chaffin v. Kansas State Fair Bd*., 348 F.3d 850 (10th Cir. 2003). Regardless of the outcome on that question, the lack of such a plan may still have evidentiary weight. *See Pierce v. County of Orange*, 526 F.3d 1190, 1223 (9th Cir. 2008) (trial court should not assume that injunctive relief is unnecessary, taking it "on faith" that county would move toward full compliance, in light of the fact that its transition plan was untimely and incomplete); *Huezo v. Los Angeles Community College Dist*., 672 F. Supp. 2d 1045, 1054 (C.D. Cal. 2008).

For additional guidance see the Technical Assistance Manual, supra, II-8.2000; *Hainze v. Richards*, 207 F.3d 795, 802 (5th Cir. 2000).

B. ADA Coordinator, Notice, and Grievance Procedures

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information about their Title II rights and the ADA's application to the services, programs, or activities of the public entity. 28 C.F.R. § 35.106; Technical Assistance Manual, *supra*, II-8.4000.

A public entity that employs 50 or more persons shall designate at least one ADA coordinator to ensure its ADA responsibilities are carried out, and to investigate ADA complaints; the name, address, and phone number must be public. 28 C.F.R. § 35.107(a); Technical Assistance Manual, *supra*, II-8.5000.

A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by Title II. 28 C.F.R. § 35.107(b); Technical Assistance Manual, *supra*, II-8.5000.

XIV. EMPLOYMENT PROVISIONS OF TITLE II

The Title II regulations cover claims of employment discrimination. 28 C.F.R. § 35.140. *See also* Technical Assistance Manual, *supra*, II-4.0000. But the courts are divided on whether employment-discrimination claims can be brought under Title II, or must be brought under Title I. *Compare Bledsoe v. Palm Beach County Soil and Water Conservation Dist*., 133 F.3d 816, 820–825 (11th Cir. 1998) (allowing Title II employment claims), with *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169 (9th Cir. 1999) (disallowing). The Supreme Court has noted the split but has not decided the issue. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 360 n.1 (2001). The issue remains an open one in the Fifth Circuit. *Eber v. Harris County Hosp. Dist*., 130 F. Supp. 2d 847, 851 n.1 (S.D. Tex. 2001). *See also Lieu Tran v. Pflugerville Indep. Sch. Dist.*, 2013 WL 6734113 (W.D. Tex. Dec. 19, 2013) (rejecting applicability of Title II to claims of discrimination in employment). The above circuit split probably does not affect the substantive obligations of a public entity, but it could make a difference on matters like the limitations period, damage caps, and administrative exhaustion. On the last issue, see *Wagner v. Texas A&M University*, 939 F. Supp. 1297, 1309 (S.D. Tex. 1996).

XV. ARCHITECTURAL BARRIERS

The prohibition against discrimination requires public entities "to take reasonable measures to remove architectural and other barriers to accessibility." *Manemann v. Texas Dep't of Criminal Justice*, 2014 WL 905876, at *6 (S.D. Tex. Mar. 7, 2014), *citing Tenn. v. Lane*, 541 U.S. 509, 531 (2004). The accessibility rules apply to public "facilities," meaning 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.

Under the Title II regulations, "new construction" and "alterations" occurring after the passage of the ADA must be made "readily accessible" to individuals with disabilities. This is because building in accessibility at the time of construction often results in no, or very low, additional costs. *Frame v. City of Arlington*, 657 F.3d 215, 231–32 (5th Cir. 2011) (en banc). The standard for pre-ADA construction is somewhat different, however. *Id*. at 232, *citing Tennessee v. Lane*, 541 U.S. 509 (2004).

A. New Construction

New construction means each facility or part of a facility constructed by, on behalf of, or for the use of, a public entity, and for which construction began after January 26, 1992. 28 C.F.R. § 35.151(a); Technical Assistance Manual, *supra*, II-6.1000. Note, however, that many entities covered by Title II are also covered by § 504, and the new construction provisions of that law (requiring UFAS compliance) became effective June 3, 1977. *McGregor v. Louisiana State University Bd. of Sup'rs*, 3 F.3d 850, 861 (5th Cir. 1993).

New construction must comply with the applicable new-construction architectural requirements. 28 C.F.R. § 35.151; *Tennessee v. Lane*, 541 U.S. 509, 532 (2004); *Frame v. City of Arlington*, 657 F.3d 215, 234 (5th Cir. 2011) (en banc). Those standards are:

- If the new construction began after July 26, 1992 but prior to September 15, 2010, the original (1991) ADA Architectural Guidelines (ADAAG) or the Uniform Federal Accessibility Standards (UFAS) 28 C.F.R. § 35.151(c)(1).
- If construction began on or after September 15, 2010 and before March 15, 2012, the public entity can choose from among the ADAAG, the UFAS, or the 2010 Standards, except the "elevator exemption" in the earlier standards does not apply, 28 C.F.R. § 35.151(c)(2).
- If construction began on or after March 15, 2012, the 2010 Standards, 28 C.F.R. § 35.151(c)(3).

The 2010 Standards are similar to the ADAAG, but they include new coverage, new chapters, and certain other changes.[10] Note that public entities that should have complied with the original ADAAG or UFAS but have not done so by March 15, 2012 must comply with the 2010 Standards. 28 C.F.R. § 35.151(c)(5). Also, if the ADAAG or the UFAS apply, public entities can depart from particular requirements by using other methods if it is clearly evident that equivalent access to the facility (or part of the facility) is thereby provided. 28 C.F.R. § 35.151(c)(1) and (2).

Curb cuts and curb ramps must be added in newly constructed streets, road, highways, or sidewalks. 28 C.F.R. § 35.151(e); Technical Assistance Manual, *supra*, II-6.6000; *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011) (en banc).

B. Alterations

Alterations are defined as a change to a building or facility that affects or could affect the usability of the building or facility or part thereof. 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. 2010 Standards § 106.5; ADAAG § 3.5. *See also Greer v. Richardson Indep. Sch. Dist*., 752 F. Supp. 2d 746, 756–57 (N.D. Tex. 2010), *aff'd*, 472 F. App'x 287 (5th Cir. 2012) (alterations appear to include changes made in an effort to make a facility more accessible, as well as changes that only incidentally affect access). 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. 2010 Standards § 106.5; ADAAG § 3.5.

The architectural standards for alterations apply to each facility (or part of a facility) altered by, on behalf of, or for the use of, a public entity, if such alterations commenced after January 26, 1992. 28 C.F.R. § 35.151(b). *See also Greer v. Richardson Indep. Sch. Dist*., 752 F. Supp. 2d 746, 756 (N.D. Tex. 2010), *aff'd*, 472 F. App'x 287 (5th Cir. 2012); *Manemann v. Texas Dep't of Criminal Justice*, 2014 WL 905876, at *7 (S.D. Tex. Mar. 7, 2014).

Like the "new construction" schedule above, alterations must comply with the following technical specifications:

- ADAAG or UFAS, if the alterations began after July 26, 1992 but prior to September 15, 2010, 28 C.F.R. § 35.151(c)(1); *Manemann v. Texas Dep't of Criminal Justice*, 2014 WL 905876, at *7 (S.D. Tex. Mar. 7, 2014).
- ADAAG, UFAS, or the 2010 Standards, if the alterations began on or after September 15, 2010 and before March 15, 2012, 28 C.F.R. § 35.151(c)(2).
- The 2010 Standards, if the alterations began on or after March 15, 2012, 28 C.F.R. § 35.151(c)(3).

Also like for "new construction," public entities that should have complied with the ADAAG or UFAS in alterations, but have not done so by March 15, 2012, must comply with the 2010 Standards. 28 C.F.R. § 35.151(c)(5). Also, if the ADAAG or the UFAS apply, public entities can depart from particular requirements by using other methods if it is clearly evident that equivalent access to the facility (or part of the facility) is thereby provided. 28 C.F.R. § 35.151(c)(1) and (2).

Curb cuts and curb ramps must be added in newly altered streets, road, highways, or sidewalks. 28 C.F.R. § 35.151(e); *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011) (en banc). In this context, alterations include resurfacing (which involves more than minor repairs or maintenance). *Kinney v. Yerusalim*, 9 F.3d 1067, 1073 (3d Cir. 1993); Department of Justice/Department of Transportation Joint Technical Assistance on Title II of the Americans with Disabilities Act Requirements to Provide Curb Ramps when Streets, Roads, or Highways are Altered through Resurfacing (July 8, 2013).[11]

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

[10] The 2010 Standards are summarized and detailed online at, among other places, http://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm.

[11] Available online at http://www.ada.gov/doj-fhwa-ta.htm.

C. "Existing Facilities"

Title II has less stringent requirements for "existing facilities." *Frame v. City of Arlington*, 657 F.3d 215, 232 (5th Cir. 2011) (en banc). "Existing facilities" include facilities for which construction began on or before January 26, 1992, and which have not been modified.[12]

Such facilities have to meet a "program access" standard. That means that each service, program, or activity has to be operated in such a way that, when viewed in its entirety, it is readily accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.150(a); *Greer v. Richardson Indep. Sch. Dist*., 472 F. App'x 287, 291 (5th Cir. 2012); Technical Assistance Manual, supra, II-5.1000; *Manemann v. Texas Dep't of Criminal Justice*, 2014 WL 905876, at *7 (S.D. Tex. Mar. 7, 2014).

Program access does not necessarily require each existing facility be made accessible. 28 C.F.R. § 35.150(a)(1); Technical Assistance Manual, *supra*, II-5.2000; *Greer v. Richardson Indep. Sch. Dist.*, 472 F. App'x 287, 291 (5th Cir. 2012). *See also James v. State*, 89 S.W.3d 86, 89 (Tex. App.–Corpus Christi 2002, no pet.). Compliance "does not depend on the number of locations that are wheelchair-accessible; the central inquiry is whether the program, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." *Bird v. Lewis & Clark College*, 303 F.3d 1015, 1021 (9th Cir. 2002) (internal quotes omitted), *cert. denied*, 538 U.S. 923 (2003).

Failure to meet ADAAG or UFAS standards is relevant, but not determinative, evidence of the lack of program access, and public entities have flexibility to choose how to achieve program accessibility. *See Greer v. Richardson Indep. Sch. Dist.*, 472 F. App'x 287, 291–92 (5th Cir. 2012).

A public entity may comply through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in program access. 28 C.F.R. § 35.150(b)(1); Technical Assistance Manual *supra*, § II-5.2000. *See also Tennessee v. Lane*, 541 U.S. 509, 532 (2004). In choosing among available methods, a public entity shall give priority to those methods that offer services, programs, and activities in the most integrated setting appropriate. 28 C.F.R. § 35.150(b)(1).

Assessing program accessibility is a fact-specific inquiry. *Manemann v. Texas Dep't of Criminal Justice*, 2014 WL 905876, at *7 (S.D. Tex. Mar. 7, 2014). Note, however, that carrying an individual with a disability is considered an ineffective and therefore an unacceptable method for achieving program accessibility. 28 C.F.R. Part 35 App. A, § 35.150(b)(1); Technical Assistance Manual, *supra*, II-5.2000.

A public entity is not required to take actions that would pose a fundamental alteration or undue financial and administrative burdens. 28 C.F.R. § 35.150(a)(3). The public entity has the burden of proof on these defenses. The decision that compliance would result in such alteration or burden must be made by the agency head or designee after considering all resources available for use in the funding and operation of the service, program, or activity. That decision must be accompanied by a written statement of the reasons for reaching that conclusion. Even if an action would result in a fundamental alteration or undue burden, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity. *Id*.

Program access does not require action that would threaten or destroy the historic significance of an historic property. 28 C.F.R. § 35.150(a)(2).

D. Maintenance of Accessible Features

A public entity must maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities, although "isolated or temporary interruptions in service or access due to maintenance or repairs" are not permissible. 28 C.F.R. § 35.133; Technical Assistance Manual, *supra*, II-3.10000.

XVI. ENFORCEMENT OF TITLE II RIGHTS

A. Administrative Enforcement.

Administrative complaints may be filed with the Department of Justice within 180 days of the action complained of. 28 C.F.R. § 35.170; Technical Assistance Manual, *supra*, II-9.2000. There is an online complaint form at http://www.ada.gov/complaint/. Other information on how to file Title II complaints is available from Technical Assistance Manual, *supra*, II-9.0000, and a complaint form and mailing address is online at http://www.ada.gov/t2cmpfrm.htm.

[12] Note that the 2010 Title II regulations changed the definition of "existing facility" to reflect the fact that public entities have program-access requirements that are independent of, but may coexist with, new-construction or alteration requirements. See 28 C.F.R. § 35.104. Note, too, that some things that are existing facilities under Title II may be considered new construction or alterations under § 504. See § 15(A) above.

B. Exhaustion

Generally, Title II does not require filing a complaint with a federal agency, or receipt of any permission before filing suit. *See, e.g.*, 28 C.F.R. § 35.172(d); 28 C.F.R. Part 35 App. A, Subpart F (citing legislative history); *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169, 1177–78 (9th Cir. 1999); *Bledsoe v. Palm Beach County Soil and Water Conservation Dist*., 133 F.3d 816, 824 (11th Cir. 1998); *Mitchell v. Massachusetts Dept. of Correction*, 190 F. Supp. 2d 204, 209–10 and n.4 (D. Mass. 2002) (collecting authorities). *See also Camenisch v. University of Texas*, 616 F.2d 127, 134–35 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 390 (1981) (no exhaustion required in claims under § 504).

Note that other federal statutes may require exhaustion in certain types of Title II cases. For example, the Prison Litigation Reform Act requires administrative exhaustion of certain claims against prisons. *See, e.g., O'Guinn v. Lovelock Correctional Center*, 502 F.3d 1056, 1061–62 (9th Cir. 2007); *Miller v. Wayback House*, 2006 WL 297769, at *5 (N.D. Tex. Feb. 1, 2006). And although the law is unsettled, some courts require exhaustion under the IDEA (the special education law) when a student is bringing similar claims under the ADA (or § 504), or is seeking relief for such claims that is also available under IDEA.[13] There is also a split of authority as to whether employment claims brought under Title II require exhaustion.[14]

C. Private lawsuits.

There is a private right of action to sue for Title II violations. *U.S. v. Georgia*, 546 U.S. 151, 154 (2006); *Barnes v. Gorman*, 536 U.S. 181, 184–85 (2002); *Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011) (en banc). Similarly, there Title II regulations are also privately enforceable. *Frame*, *supra*, 657 F.3d at 224.

D. Statute of Limitations

Title II has no express statute of limitations, so courts generally apply the most analogous state-law limitations period, which in Texas is the two-year statute of limitations for personal injury claims. *Frame v. City of Arlington*, 657 F.3d 215, 237 (5th Cir. 2011) (en banc). The federal four-year "catch-all" statute does not apply to Title II generally. *Id*. at 236–37.

State tolling rules (excusing delays beyond the limitations period) may also be applicable. *Wagner v. Texas A&M University*, 939 F. Supp. 1297, 1310 (S.D. Tex. 1996). *See also Hickey v. Irving Indep. Sch. Dist*., 976 F.2d 980, 984 n.8 (5th Cir. 1992) (§ 504 case).

But federal law controls on determining when the cause of action accrued and the limitations clock begins. *Frame v. City of Arlington*, 657 F.3d 215, 238 (5th Cir. 2011) (en banc). The claim normally accrues when the plaintiffs knew or should have known that they were being discriminated against. *Id. See also Lyles v. University of Tex. Health Science Center, San Antonio*, 2010 WL 1171791, at *1 (W.D. Tex. Mar. 24, 2010) (limitations period began to run when plaintiff received unequivocal notice of the facts giving rise to his claim, or when a reasonable person would know of the facts giving rise to a claim). Thus, with regard to architectural barriers, the claim accrues when the individual is harmed, not when the barrier is constructed. *Frame*, *supra*, 657 F.3d at 238–39.

Class actions may be available. *See Lightbourn v. County of El Paso, Tex*., 118 F.3d 421, 425–26 (5th Cir. 1997); *Neff v. VIA Metropolitan Transit Authority*, 179 F.R.D. 185 (W.D. Tex. 1998).

E. Remedies

Title II authorizes private suits for damages. *U.S. v. Georgia*, 546 U.S. 151, 154 (2006).[15]

Plaintiffs may recover compensatory damages upon a showing of intentional discrimination. *Delano-Pyle v. Victoria County, Tex*., 302 F.3d 567, 575 (5th Cir. 2002); *Casas v. City of El Paso*, 502 F. Supp. 2d 542, 552–53 (W.D. Tex. 2007). A majority of circuits have held that deliberate indifference is enough to

[13] See Marc V. v. North East Independent School Dist., 455 F. Supp. 2d 577 (W.D. Tex. 2006) (IDEA exhaustion required where IDEA and ADA claims substantially the same); B.H.Y. b/n/f Young v. La Pryor Independent School Dist., 2004 WL 2735193 (W.D. Tex. Nov. 29, 2004) (similar). But compare Spann ex rel. Hopkins v. Word of Faith Christian Center Church, 589 F. Supp. 2d 759, 769 (S.D. Miss. 2008) (§ 504 claim involved "pure discrimination" for which IDEA offers no relief, so failure to exhaust under IDEA did not bar claim); Hornstine v. Township of Moorestown, 263 F. Supp. 2d 887, 901–903 (D.N.J. 2003) (no exhaustion required for claim seeking damages and injunction allowing plaintiff to serve as valedictorian, because the claims had nothing to do with FAPE). Note that decision adverse to the plaintiff on IDEA issues may preclude litigation of substantially similar claims under the ADA. *Compare Pace v. Bogalusa City Sch. Bd*., 403 F.3d 272, 290 (5th Cir. 2005) (en banc), *with D.A. v. Houston Independent School Dist.*, 716 F. Supp. 2d 603, 618–19 (S.D. Tex. 2009) (distinguishing *Pace*).

[14] *Compare Decker v. University of Houston*, 970 F. Supp. 575, 578–79 (S.D. Tex. 1997), *with Wagner v. Texas A&M Univ.*, 939 F. Supp. 1297, 1308–1309 (S.D. Tex. 1996). *See also Holmes v. Texas A&M University*, 145 F.3d 681, 684 (5th Cir. 1998) (declining to resolve the issue).

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

prove intentional discrimination, and although the Fifth Circuit has declined to adopt this standard, it has also declined to require a showing of animus or ill will. *Borum v. Swisher Cnty*., 2015 WL 327508, at *7 (N.D. Tex. Jan. 26, 2015). For example, a public entity's failure to make reasonable accommodations can constitute intentional discrimination. *Id*., at *8. *See also 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). In addition, the failure to accommodate may cause the individual with a disability to suffer more pain than others without disabilities. *Borum*, *supra*, 2015 WL 327508, at *8, *citing McCoy v. Tex. Dep't of Criminal Justice*, 2006 WL 2331055, at *7 (S.D. Tex. Aug.9, 2006).

Note that the statute setting damage caps on ADA Title I employment claims does not reference Title II. *See* 42 U.S.C. § 1981a(a)(2). *See also Roberts v. Progressive Independence, Inc.*, 183 F.3d 1215, 1223–24 (10th Cir. 1999) (finding no damage caps for § 504 claims).

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

Equitable and injunctive relief are available, as the court recognized in *Frame v. City of Arlington*, 657 F.3d 215, 233, 235–36 (5th Cir. 2011) (en banc), and many courts have granted such relief under Title II, *e.g., Henrietta D. v. Bloomberg*, 331 F.3d 261, 280–84 (2d Cir. 2003) (injunction requiring reasonable accommodation was appropriate); *Layton v. Elder*, 143 F.3d 469, 472 (8th Cir. 1998) (trial court abused its discretion by not ordering mandatory injunctive relief after finding ADA and § 504 violations at the county courthouse; once success on the merits is shown, three factors should be considered in determining whether injunctive relief is appropriate: the threat of irreparable harm to the plaintiff, the harm to be suffered by the defendant if the injunction is granted, and the public interest at stake). Preliminary injunctions are also available. *See Knowles v. Horn*, 2010 WL 517591 (N.D. Tex. Feb. 10, 2010).

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

At least one court has held that a Title II defendant may not seek contribution from another party. *Mims v. Dallas County*, 2006 WL 398177, at *3–4 (N.D. Tex. Feb. 17, 2006).

XVII. IMMUNITY

Although outside the scope of this paper, the issue of immunity from Title II claims may be summarized as follows.

First, counties, cities, and other local government entities do *not* have immunity from ADA claims. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 369 (2001).

In claims against a state agency or other "arm of the state," the state has no immunity from claims in cases implicating "fundamental rights," e.g., the right of access to the courts. *Tennessee v. Lane*, 541 U.S. 509 (2004). The state also has no immunity from Title II claims based conduct that is also unconstitutional. *U.S. v. Georgia*, 546 U.S. 151, 158–59 (2006). But the state *does* have immunity from some other types of Title II claims, including (to the extent covered by Title II) employment claims. *See Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (not reaching Title II issue but finding that states have immunity from employment-discrimination claims under Title I).

Even if the state is immune, state officials may still be sued for prospective relief under the *Ex parte Young* theory. *See, e.g., McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412–14 (5th Cir. 2004); *Espinoza v. Texas Dept. of Public Safety*, 2007 WL 1393751, at *6 (N.D. Tex. May 11, 2007); *Simmang v. Texas Bd. of Law Examiners*, 346 F. Supp. 2d 874, 885–89 (W.D. Tex. 2004). Also, the state also has no immunity from claims under § 504. *Pace v. Bogalusa City School Bd*., 403 F.3d 272 (5th Cir. 2005) (en banc). As a result, courts will often choose not to analyze Title II complaints when they are joined with claims under (the substantially similar) § 504. *Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 454–55 (5th Cir. 2005); *McCoy v. Texas Dept. of Criminal Justice*, 2006 WL 2331055, at *4–5 (S.D. Tex. Aug. 9, 2006). Finally, the state may waive all or part of its immunity by removing a case to federal court. *See Meyers ex rel. Benzing v. Texas*, 410 F.3d 236 (5th Cir. 2005).