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Beyond the Rehabilitation Act of 1973: Title II of the Americans with Disabilities Act

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BEYOND THE REHABILITATION ACT OF 1973: TITLE II OF THE AMERICANS WITH DISABILITIES ACT

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State and local governmental entities, particularly those from smaller cities and towns, are facing a rapidly approaching federal mandate to assure that all of their programs, facilities, and activities are accessible to persons with disabilities. One of the biggest problems in implementing these requirements is that many local officials are not yet aware of the existence of this federal mandate.[1] Title II of the Americans with Disabilities Act ("ADA")[2] requires that the services, programs, or activities of a public entity be accessible to people with disabilities.[3] This provision, which becomes effective January 26, 1992, applies to *all* state and local governments, agencies, and departments of any size, and to *all* programs they offer.

Title II serves two purposes. The first purpose is to make the prohibition against discrimination[4] on the basis of disability[5] currently set out in the regulations implementing section 504 of the Rehabilitation Act of 1973 applicable to all programs, activities, and services provided or made available by state and local governments or their instrumentalities or agents.[6] Where the Rehabilitation Act prohibited such discrimination only

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1. 2 ADA COMPLIANCE GUIDE MONTHLY BULL., at 1 (Nov., 1991).

2. 42 U.S.C.A. §§ 12101-12213 (West Supp. 1991).

3. *Id.* § 12132.

4. "Discrimination" includes: "limiting, segregating, or classifying an applicant or employee in a manner that adversely affects his opportunities or status;" using standards, criteria, or methods in a manner that results in or perpetuates discrimination; denying equal opportunities; using test or selection criteria that screen out persons with disabilities for reasons which are not job-related and the result of business necessity; denying opportunities because of the need to make reasonable accommodations; participating in contracts which have the effect of subjecting persons with disabilities to discrimination. *Id.* § 12112(b).

5. Several conditions have been classified as disabilities under section 504 of the Rehabilitation Act. *See, e.g.*, Doe v. Attorney General of the United States, 723 F. Supp. 452, 454 (N.D. Cal. 1989); Thomas v. Atascadero Unified School Dist., 662 F. Supp. 381 (C.D. Cal. 1987) (AIDS is a "handicap" for purposes of the Rehabilitation Act); Wallace v. Veterans Admin., 683 F. Supp. 758, 761 (D. Kan. 1988) (drug addiction is a "handicap" within the meaning of the Rehabilitation Act); Kohl v. Woodhaven Learning Center, 672 F. Supp. 1226, 1238 (W.D. Mo. 1987) (Hepatitis B carrier is a "handicapped individual" within the meaning of section 504), *rev'd on other grounds*, 865 F.2d 930 (8th Cir.), *cert. denied*, 493 U.S. 892 (1989); Anderson v. University of Wisconsin, 665 F. Supp. 1372, 1391 (W.D. Wis. 1987) (recovered alcoholic is a "handicapped person" within the meaning of the Rehabilitation Act), *aff'd*, 841 F.2d 737 (7th Cir. 1988); Arline v. School Bd. of Nassau County, 772 F.2d 759 (11th Cir. 1985) (teacher with tuberculosis falls within section 504 coverage), *aff'd, remanded on other grounds*, 480 U.S. 273 (1987).

6. 29 U.S.C. § 794 (1973). The regulations are set forth in a number of locations in the Code of Federal Regulations, based upon the affected agency.

by recipients of federal financial assistance,[7] section 202 of the ADA extends the nondiscrimination policy contained in section 504 to cover all state and local governmental entities. Specifically, section 202 provides that:

> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination by a department, agency, special purpose district, or other instrumentality of a State or a local government.[8]

Title II extends the prohibition contained in section 504 to all such governmental entities, regardless of whether or not the entity currently receives federal financial assistance.[9] Further, title II incorporates the specific prohibitions against discrimination on the basis of disability contained in titles I, III, and V of the ADA, and imposes additional requirements with respect to making programs accessible to individuals with disabilities and with respect to providing equally effective communications.[10]

The second purpose served by title II is to clarify the requirements of section 504 in the case of public transportation, and to extend coverage to all public entities that provide public transportation, regardless of whether such entities receive federal financial aid.[11]

The antidiscrimination provisions of title II, like those of section 504 of the Rehabilitation Act, apply only to "qualified individuals."[12] For example, where a lack of mobility of a student with a disability was not a barrier to participation in his or her selected academic program and the student was able to participate in a shuttle bus program if physical barriers were removed to enable that participation, the student was an "otherwise qualified handicapped individual" under section 504.[13] If a person with a disability would be unable to participate in a program without extensive modification of the program, section 504 would not require inclusion if the person would be unable to participate without the disability.[14] The cases decided under section 504 are instructive as to the likely outcome under title II.

In title II, Congress chose not to list the various types of actions that are included within the term "discrimination," although it did so in titles

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7. "Federal financial assistance" is defined as any grant, loan, contract or other arrangement whereby a federal agency provides financial assistance. 31 U.S.C. § 7501 (1989).

8. 42 U.S.C.A. § 12132.

9. In addition, section 204 of the ADA provides that, except for existing facilities and communications, the regulations issued by the United States Attorney General to implement title II shall be consistent with the regulations promulgated pursuant to section 504 of the Rehabilitation Act. *Id.* § 12134.

10. 56 Fed. Reg. 35,694 (1991).

11. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 1 (1990).

12. 42 U.S.C.A. § 12132; 29 U.S.C. § 794 (1973). This is consistent with other civil rights legislation. *See, e.g.*, 42 U.S.C. § 1981 (1982); 42 U.S.C. § 2000e-2 (1964).

13. Ferris v. University of Texas at Austin, 558 F. Supp. 536 (W.D. Tex. 1983).

14. Lynch v. Maher, 507 F. Supp. 1268 (D. Conn. 1981).

I and III of the ADA.[15] The reason for this is that title II is essentially just an extension of the antidiscrimination provisions of section 504 of the Rehabilitation Act to all actions of state and local governments. It was intended, however, that the forms of discrimination prohibited by section 202 of the ADA would be identical to those set forth in the applicable provisions of titles I and III.[16] Thus, the requirements of regulations implementing section 504 must be met, even if they exceed the requirements under titles I and III.[17] Section 202 of the ADA should also be interpreted consistent with *Alexander v. Choate*.[18]

I. EMPLOYMENT

Title II of the ADA applies to all activies of public entities, including their employment practices.[19] It also affects all public entity employers regardless of the number of people they employ.[20] This differs substantially from title I of the Act, where phased-in requirements and exemptions are made available to small private employers, but is consistent with section 504 of the Rehabilitation Act. The employment section of title II went into effect on January 26, 1992,[21] six months before the effective date of title I, July 26, 1992.[22] For over a decade, employers receiving federal funds have been subject to section 504 of the Rehabilitation Act, which requires those employers to make programs and activities accessible to persons with disabilities.[23] Because the ADA shares many common terms and concepts with section 504, Congress evidently decided that public entities would have a relatively smooth transition into compliance with the ADA. Thus, Congress instituted an earlier effective date and broader applicability of title II than title I. Title II, however, applies to many entities that had not previously been the recipients of federal funding, and were not, therefore, subject to section 504.

Public agencies will be required to make all employment practices accessible to individuals with disabilities. This will include hiring practices as well as benefits[24] and wages. In addition, the public entity employer

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15. 42 U.S.C.A. §§ 12112, 12132, 12182.

16. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2 (1990).

17. *See* 42 U.S.C.A. §§ 12112, 12182; 29 U.S.C. § 794 (1973).

18. 469 U.S. 287 (1985). Tennessee's reduction of number of annual inpatient hospital days that state medicaid would pay hospitals on behalf of a medicaid recipient did not violate the Rehabilitation Act, as it *did not deny the handicapped meaningful access* to medicaid services or exclude them from those services and was *neutral on its face*.

19. 56 Fed. Reg. 35,694 (1991). The regulations provide that it is unlawful to discriminate on the basis of disability in regard to recruitment, advertisement, application procedures, hiring, promotion, upgrades of position, tenure, transfer, layoffs, termination, rehiring, rates of pay, job assignments, leave, fringe benefits, training, activities, or any other term or condition of employment. 28 C.F.R. § 1630.4 (1991).

20. 56 Fed. Reg. 35,708 (1991).

21. *Id.*

22. 28 C.F.R. § 1630.2(e)(1) (1991).

23. 29 U.S.C. § 794 (1973).

24. For example, in a case decided under the Rehabilitation Act, that Act did not prohibit discrimination in the handling of an employee salary continuation program and employee health and dental benefits when an employee with a disability was no longer able to perform the essential functions of the job. Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768 (8th Cir. 1987), *cert. denied*, 485 U.S. 938 (1988).

must provide reasonable accommodation to workers and applicants with disabilities unless to do so would impose an undue administrative or financial hardship.[25] The employer is not required to accommodate a person with a disability by eliminating an essential job function.[26]

The standards established by the Equal Employment Opportunity Commission ("EEOC") will be the applicable compliance standards if the public entity meets the definition of an employer under title I.[27] Public entities not covered by title I are subject to the employment rules of section 504 of the Rehabilitation Act.[28] The standards under title I of the ADA and section 504 are largely identical, because title I was based on the requirements set forth in the regulations implementing section 504.[29]

Some questions public entity employers may want to ask in reviewing for compliance with title II are: What are the essential functions of each job? (Write a description and break it down into components to do a job analysis.) What functions might be performed by one in that position but are not essential to that job? What reasonable accommodations have been or can be made in a particular position to ensure that a qualified person with a disability can perform the essential functions? What steps

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25. Undue hardship is defined as an action requiring significant difficulty or expense. *See, e.g.*, Arneson v. Heckler, 879 F.2d 393 (8th Cir. 1989) (regarding a similar type of cost analysis performed under the Rehabilitation Act). There are five factors which may be considered in determining whether undue hardship exists: (1) The nature and cost of the accommodation; (2) The overall financial resources of the facility involved and the impact of the accommodation on the expenses and resources of the facility; (3) The overall financial resources of the covered entity; (4) The type and location of the facility and operation; and (5) The impact of the accommodation on the operation of the facility, including the impact on the ability of other employees to perform their duties and the ability to conduct business. Courts have considered whether the reasonable accommodation requirement in the Rehabilitation Act requires employers to create a new position for an employee with a disability, and have ruled consistently that it does not. *See, e.g.*, Fowler v. Frank, 702 F. Supp. 143 (E.D. Mich. 1988); Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988). Undue hardship is not limited to financial difficulty. It includes an accommodation which would require a substantial alteration in the nature of the program or service, or a situation in which the individual with a disability poses a direct threat to the health or safety of other individuals in the workplace. A direct threat to the health or safety of the individual or others is defined as "a *significant* risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r) (emphasis added). The assessment must be based upon a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence, considering (1) duration of the risk, (2) nature and severity of the potential harm, (3) likelihood that the harm will occur, and (4) imminence of the potential harm. *See, e.g.*, Butler v. Thornburgh, 900 F.2d 871 (5th Cir. 1990); Davis v. Meese, 692 F. Supp. 505.

26. A number of cases arising under the Rehabilitation Act have held that where a person with a disability cannot perform the essential functions of a particular job, there is no requirement that the employer alter the essential functions of the job. For example, in Southeastern Community College v. Davis, 442 U.S. 397 (1979), the Supreme Court held that section 504 of the Rehabilitation Act did not require an educational institution to change the admission requirements of its nursing program to accommodate an applicant who was deaf. The college had shown that the ability to understand speech without reliance on lip reading was *essential* for patient safety during the clinical component of the teaching program. Similarly, Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985), involved a postal distribution clerk with strabismus (crossed eyes), which prevented him from operating a mail-sorting machine, an essential part of the job. Jasany was unable to demonstrate that the machine could be modified to accommodate him. The court held that Jasany was not qualified, and no reasonable accommodation was required.

27. 42 U.S.C.A. § 12111.

28. 28 C.F.R. § 35.150 (1991).

29. 56 Fed. Reg. 35,708.

is the employer taking, or can the employer take, to ensure employment decisions are made without discrimination on the basis of disability?

II. PROGRAMS AND SERVICES

Title II regulations for programs and services include provisions and concepts derived from title III regulations. Both titles II and III provide that individuals with disabilities shall not be excluded from participation in or be denied the benefits of the services, programs, or activities of public or private entities.[30] This prohibition has both a physical component and a policy and procedural component.

A. Physical Component

With regard to the physical component, there are different standards for physical accessibility: one for existing buildings, and one for new construction and alterations.

A public entity should identify what services are available to program participants, such as housing, counseling, recreational activities or the provision of information, then determine whether there are any physical barriers that render, or could render, these services inaccessible to participants with disabilities. The public entity should identify whether there are auxiliary aids or other accommodations that would enable persons with disabilities to overcome any barriers. For example, in a case decided under the Rehabilitation Act, the provisions of that Act were held applicable to an inmate who was deaf in a state correctional facility who claimed entitlement to the provision of a sign language interpreter.[31] Program staff and participants should therefore be aware of nondiscrimination policies, and should receive adequate training in the operation of any relevant equipment and concerning the nondiscrimination policies of the program provider.

1. Existing Buildings

Consistent with section 204(b) of the ADA, the Department of Justice adopted the program accessibility concept employed in the section 504 regulations. The regulations provide that each service, program, or activity conducted by a public entity, when viewed in its entirety, must be readily accessible to and usable by individuals with disabilities.[32] Public entities, however, are not required to make each existing facility accessible.[33] Recipients of federal funds are allowed to make their programs and activities available to individuals with disabilities without extensive retrofitting of existing buildings and facilities by offering programs through alternative methods.[34] For example, equipment can be redesigned, services

30. 42 U.S.C.A. §§ 12132, 12182.
31. Bonner v. Lewis, 857 F.2d 559 (9th Cir. 1988).
32. 28 C.F.R. § 35.150 (1991).
33. *Id.* § 35.150(a)(1).
34. *Id.* § 35.150(b)(1).

can be reassigned to accessible buildings, and aides can be provided.[35] Creativity is really the key to compliance.

Title II requires that public entities make their programs accessible in all cases, except where to do so would result in a fundamental alteration in the nature of the program or in undue financial and administrative burdens.[36] This is a departure from the title III regulations. Under title III, public accommodations are required to remove architectural barriers where such removal is "readily achievable," or to provide goods and services through alternative methods where those methods are "readily achievable."[37]

The "undue burden" standard of title II is significantly higher than the "readily achievable" standard of title III.[38] Thus, although title II may not require removal of barriers in some cases where removal would be required under title III, the program access requirements of title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases.[39] Again, this is consistent with the rule under section 504 of the Rehabilitation Act.[40]

In determining whether financial and administrative burdens are undue, all public entity resources available for use in the funding and operation of the service, program, or activity will be considered. The burden of proving the existence of an undue burden or a fundamental alteration rests with the public entity.[41] The decision that compliance would result in such fundamental or undue burden must be made by a high level official, no lower than a department head, having budgetary authority and responsibility for making spending decisions, and the decision must be accompanied by a written statement of the reasons for reaching that conclusion.[42]

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35. Carrying an individual with a disability is considered an ineffective and therefore an unacceptable method for achieving program accessibility. 56 Fed. Reg. 35,709 (1991).

36. 28 C.F.R. § 35.150(a)(3).

37. *Id.* § 36.304(a).

38. 56 Fed. Reg. 35,708.

39. *Id.*

40. Under section 504, the entity need not make substantial modifications. Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979). It is not required that the public entity disregard the disabilities of an applicant if the disability is relevant to reasonable qualifications for acceptance, nor is the public entity required to make substantial modifications in reasonable standards or programs. Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981); Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179 (7th Cir. 1983); Pinkerton v. Moye, 509 F. Supp. 107 (W.D. Va. 1981); Kohl v. Woodhaven Learning Center, 865 F.2d 930 (8th Cir. 1989). "[S]ection 504 bans discrimination but does not mandate affirmative action to accommodate the handicapped" and section 504 does not authorize the Department of Transportation to promulgate regulations that "require extensive modifications of existing systems and impose extremely heavy financial burdens on local transit authorities." American Pub. Transit Ass'n v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981). Section 504 does not require services that impose an undue financial or administrative burden. Majors v. Housing Auth., 652 F.2d 454, 457 (5th Cir. 1981); Turillo v. Tyson, 535 F. Supp. 577, 588 (D.R.I. 1982).

41. Under section 504, there was imposed an affirmative duty to investigate individual needs to determine what special or additional services would be required, and then to provide those services. David H. v. Spring Branch Indep. School Dist., 569 F. Supp. 1324 (S.D. Tex. 1983). It is likely that a similar duty would be imposed under the very similar provisions of title II.

42. 28 C.F.R § 35.150(a)(3).

Existing buildings leased by a public entity after January 26, 1992 are not required by the regulations to meet accessibility standards for new buildings[43] simply by virtue of their being leased. They are subject, however, to the program accessibility standard for existing facilities. This is consistent with section 504 of the Rehabilitation Act.[44]

A public entity is not required to take any action that would threaten or destroy the historic significance of an historic property. This limitation is only applicable to historic preservation programs which have preservation of historic properties as a primary purpose and which are listed or are eligible for listing in the National Register of Historic Places, or to properties designated as historic under state or local law. This exception is to be applied only in those rare situations in which it is not possible to provide access to an historic property using the special access provisions established by the Uniform Federal Accessibility Standards[45] and the ADA Accessibility Guidelines.[46] If it is determined that it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the property, alternative methods of access must be provided.[47]

2. New Construction or Alterations

After January 26, 1992, buildings constructed or altered for the use of a public entity shall be designed, constructed, or altered to be readily accessible to and usable by individuals with disabilities.[48] There are two standards for accessible new construction and alterations: the Uniform Federal Accessibility Guidelines and the ADA Accessibility Guidelines.[49] If the ADA Accessibility Guidelines are chosen, the elevator exemption contained in title III does not apply to entities governed by title II.[50] The Architectural and Transportation Barriers Compliance Board is currently developing ADA accessibility guidelines specifically for public entities, which guidelines are expected to be issued soon. Once the new accessibility guidelines are published, it is anticipated that the title II regulations will be amended to adopt the new standards.[51]

Public entities are required to maintain their accessible features in operable working condition. Isolated or temporary instances of mechanical failure will not be considered a violation of the Act.[52]

A public entity should identify which facilities are being used, or are contemplated to be used, for its activities or programs. The public entity

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43. *See infra* notes 48 to 53 and accompanying text (requirements applicable to new construction or alterations).

44. 56 Fed. Reg. 35,711 (1991).

45. 41 C.F.R. § 101-19.6 app.

46. ADAAG is the standard for private buildings that was issued by the Architectural and Transporation Barriers Compliance Board and has been included by the Department of Justice into the title III regulations as appendix A.

47. 28 C.F.R. § 35.150(b)(2) (1991).

48. 42 U.S.C.A. §§ 12146, 12147.

49. *See supra* notes 45 and 46.

50. 28 C.F.R. § 35.151.

51. 56 Fed. Reg. 35,710-11.

52. 28 C.F.R. § 35.133.

also should determine, based on the Uniform Federal Accessibility Guidelines or the ADA Accessibility Guidelines,[53] what features of the facility might limit program accessibility. The public entity should identify any construction planned for the future, and for each facility for which construction is contemplated, should determine whether accessible design will be incorporated into the construction. The public entity should determine if there are non-structural means to make programs accessible or to overcome inaccessible spaces, provided that equal services are offered in the most integrated setting possible.

B. Policy and Procedural Component

Title II generally provides that 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.[54] This requires that public entities provide equal and integrated[55] access to all programs and services they provide, except where to do so would result in a fundamental alteration in the nature of the program or would result in undue financial and administrative burdens.[56] This may require the modification of all policies, practices, and procedures that exclude persons with disabilities from participating in programs and services.[57]

A public entity may not discriminate against persons with disabilities on the basis of their disability through contractual arrangements.[58] This prohibition also proscribes public entities from aiding or perpetuating discrimination against a qualified individual with a disability through the public entity's provision of significant assistance to an agency, organization, or person that discriminates, or through the denial of the opportunity to participate as a member of a planning or advisory board.[59]

The cases decided under section 504 of the Rehabilitation Act are instructive in evaluating the nature and extent of accommodations that will be required of a public entity in the provision of programs and services. For example, educational opportunities must be provided that are commensurate with those provided to other children in the public schools.[60] Facilities comparable to those for non-disabled children must

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53. *See supra* notes 45 and 46.

54. 28 C.F.R. § 35.130(a) (1991).

55. *Id.* § 35.130(b)(1). In most instances, separate programs for individuals with disabilities will not be permitted; integration is fundamental to the purposes of the ADA. 56 Fed. Reg. 35,703 (1991).

56. 28 C.F.R. § 35.150(a)(3). Persons with disabilities are not required to accept an accommodation, aid, service, opportunity, or benefit, however. *Id.* § 35.130(e). Further, the ADA does not authorize guardians or representatives of individuals with disabilities to decline food, water, medical treatment, or services for that individual. *Id.* §35.130(d)(2).

57. *Id.* § 35.130(b)(7).

58. *Id.* § 35.130.

59. *Id.* § 35.130(b)(1)(v)-(vi).

60. Gladys J. v. Pearland Indep. School Dist., 520 F. Supp. 869, 875 (S.D. Tex. 1981).

be provided.[61] The Education for All Handicapped Children Act of 1975[62] provides the parameters: each child with a disability must be provided an education in the least restrictive setting, in the absence of bad faith or gross misjudgment.[63] Where there is a risk of serious harm, however, an applicant with a disability may not be qualified for readmission to medical school.[64] For example, a school's policy excluding children with disabilities from certain activities is valid only if there is a substantial justification for the policy.[65]

Public entities must evaluate their current services, policies, and practices to determine which are out of compliance and must modify them accordingly to bring them into compliance.[66] Accessibility requires making programs and services accessible to all types of disabilities. For instance, providing wheelchair access to a building is a good start, but if an individual with a hearing impairment attends a program and a sign language interpreter is not present, the program is not accessible.

Public entities may have to create exceptions to their practices and procedures to make their programs accessible for all person with disabilities.[67] For instance, public entities will have to allow persons with visual impairments to bring their seeing eye dogs into public buildings, or if necessary, the public entity may provide a representative to go to the home of the person with a disability to enroll them in a program or service.

With respect to programs and policies, the public entity should determine the nature of the program (its participants, purpose, general activities), and how the public entity plans to advertise the program or otherwise obtain participants. The public entity should examine the eligibility requirements for the program, including any tests that may be required. If such tests are required, do they (or could they) discriminate on the basis of disability? If the tests or other eligibility criteria could be discriminatory, the public entity should determine whether alternative criteria or selection methods are available that would not have an adverse effect on people with disabilities. The public entity should examine the facilities available for conducting interviews, tests and other screening procedures, and should determine whether such facilities are accessible. If there is an interview or form used in the application or screening process, the public entity should determine whether that portion of the process is accessible to persons with disabilities, and if it is not, the public entity should examine the available alternatives.

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61. Hendricks v. Gilhool, 709 F. Supp. 1362 (E.D. Pa. 1989).
62. 20 U.S.C. §§ 1400-1485 (1988).
63. Johnston v. Ann Arbor Pub. Schools, 569 F. Supp. 1502 (E.D. Mich. 1983); St. Louis Developmental Disabilities Treatment Center Parents Ass'n v. Mallory, 591 F. Supp. 1416 (W.D. Mo. 1984), *aff'd*, 767 F.2d 518 (8th Cir. 1985).
64. *See* Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981).
65. Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977).
66. 28 C.F.R. § 35.105.
67. *Id.* § 35.130(b)(8).

III. TRANSPORTATION

One of the primary areas of concern leading to the creation of the ADA is the provision of transportation services to persons with disabilities.

> [T]ransportation holds the key to opportunity for millions of disabled Americans. No longer will the problem of "how to get there" prevent the disabled from participating in recreational activities, running errands, visiting friends, and most of all, taking pride in a job well done. Our avenues, subways, railways and waterways will carry the disabled all across this great nation so that they can live normal and productive lives.
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> The objective of the Americans with Disabilities Act is to provide mobility for all disabled Americans.[68]

Transportation affects nearly every aspect of American life. Mainline public transportation services are geared to taking people to and from work, school, shopping, and other activities on schedules that are reflective of the schedules of most people. It would be fallacious to suggest that people with disabilities do not also desire or require public transportation services.

As used in title II, the term "designated public transportation" means transportation by bus or by rail, or by any other conveyance (excluding air travel) that provides the general public with general or special service (including charter service) on a regular and continuing basis, including service contracted through an entity in the private sector.[69] Air transportation is excluded because the recently enacted Air Carrier Access Act was designed to address the issue of discrimination by air carriers. Public school transportation is also exempt from the ADA, because it is covered by section 504 of the Rehabilitation Act.[70]

Public entities are prohibited from discriminating against qualified individuals with disabilities with regard to transportation services offered to the general public.[71] State and local governments must ensure that their services, including buses and vans, terminals and stations, and rail systems are accessible to and usable by people with disabilities, including people who use wheelchairs.[72]

Again, the cases decided under section 504 of the Rehabilitation Act may provide guidance to the public entity in determining whether any

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68. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 58 (1990).

69. 42 U.S.C.A. § 12141; A private contractor "stands in the shoes" of a public entity with which it contracts, and is subject to the same accessibility requirements as apply to the public entity. 49 C.F.R. § 37.23.

70. 49 C.F.R. § 37.27 (1991).

71. *Id.* § 37.5(b).

72. *Id.* § 37.5(b) C, D.

transportation provided by that entity will "pass muster" under title II. For example, in the context of public transportation and the handicapped, denial of access cannot be lessened simply by eliminating discriminatory selection criteria; because barriers to equal participation may be physical, rather than abstract, some action must be taken to remove them, at least in new construction or purchases.[73] Federal officials who approved a county transit board's application for capital assistance with full-knowledge that both the existing transit system and the 100 new buses that the county sought to purchase would be effectively inaccessible for individuals with a mobility impairment, and who failed to require that the county give assurances that appropriate mass transit services would be provided to these individuals, discriminated against them in violation of their rights under section 504.[74]

Sometimes, the means of providing accessibility need not be structural, provided equal access is the result. Where persons who used wheelchairs were permitted to ride as passengers on county transit authority vehicles, although it was necessary for such persons to arrange for someone to help them board and alight from the bus, the action of the county transit authority in procuring and operating buses which were not designed and equipped to accommodate passengers who use wheelchairs did not violate section 504.[75]

The provision of section 504 that no otherwise qualified individual with a disability should be excluded from participation, solely by reason of their disability, from any program receiving financial assistance did not require a regional transit authority to make all its buses accessible to wheelchairs.[76] However, accommodation must be made where to do so would not result in the imposition of an undue burden. For example, the University of Alabama administered a bus system, under which only one of its five buses and none of its vans were accessible to persons whose mobility was impaired. The single lift-equipped bus was available only four hours a day, with hours shifted on forty-eight hours notice. The University did not provide people with disabilities with transportation "equal to" or "as effective as" transportation services offered to people without disabilities, as required by the Rehabilitation Act and underlying regulations. By installing lifts on two additional buses, the University could have provided people with disabilities full twelve hour, on-campus bus service equivalent to that provided people without disabilities, and the University could accommodate campus groups with mobility impairments by arranging to rent accessible vans from commercial agencies.[77]

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73. Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982).

74. Bartels v. Biernat, 427 F. Supp. 226 (E.D. Wis. 1977).

75. Snowden v. Birmingham-Jefferson County Transit Auth., 407 F. Supp. 394 (N.D. Ala. 1975), *aff'd*, 551 F.2d 862 (5th Cir. 1977).

76. Vanko v. Finley, 440 F. Supp. 656 (N.D. Ohio 1977).

77. United States v. Board of Trustees for the Univ. of Alabama, 908 F.2d 740 (11th Cir. 1990).

As a general rule, all requirements for nondiscrimination apply to the operation, as well as the design, of vehicles and facilities. Merely installing equipment which would provide access is not, of itself, sufficient to constitute compliance; the equipment must also be operational, must be maintained in good working order, and must be available when needed for access.[78] The Department of Transportation regulations[79] require that public entities ensure that vehicles and equipment are capable of accommodating all of the users for which the service is designed, and that the vehicles are maintained in proper working condition.[80] Public entities are also required to provide that their personnel are trained to operate the equipment properly and to treat persons with disabilities courteously.[81] In addition, the employees must provide information about schedules, fare, routes, etc., in a manner that is accessible to persons with disabilities.[82]

IV. COMMUNICATIONS

Another area of concern leading to the enactment of the ADA is the provision of appropriate communications access to persons with disabilities. For example, throughout the country, state and local governments provide emergency telephone assistance often accessed by dialing 911. It is through the use of these emergency telephone numbers that individuals in crisis situations are able to obtain immediate assistance from police, fire, and ambulance services. Prior to the enactment of the ADA, most of these systems across the nation were inaccessible to individuals who are hearing and/or speech impaired.

Public entities must take steps to ensure that communications provided to persons with disabilities are as effective as communications provided to others.[83] Public entities are required to furnish auxiliary aids and services where necessary to afford persons with disabilities an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity. This includes equipping offices with Telecommunications Devices for the Deaf ("TDDs") and providing interpreters and readers.[84] In determining what type of auxiliary aid and service is necessary, primary consideration will be given to the requests of persons with disabilities.[85]

Where a public entity communicates by telephone with applicants and beneficiaries, TDDs or equally effective telecommunication systems must

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78. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 87 (1990).

79. The specific requirements of the DOT regulations are provided in detail elsewhere in this volume. Please refer to that article for specific guidance regarding the obligations under the ADA of public entities in the provision of public transportation. *See* Tucker, *The Americans with Disabilities Act of 1990: An Overview*, 22 N.M.L. Rev. 13 (1992) (this issue).

80. 49 C.F.R. § 37.161 (1991).

81. *Id.* § 37.173.

82. *Id.* § 37.167.

83. 28 C.F.R. § 35.160(a) (1991).

84. *Id.* § 35.160(b)(1).

85. *Id.* § 35.160(b)(2).

be used to communicate with individuals with impaired hearing or speech.[86] Public entities must ensure that telephone emergency services are accessible to persons with impaired hearing and speech using a 911 number.[87] Direct access to telephone emergency services must be provided to individuals who use TDDs and computer modems.[88]

Communication also includes information and signage. Public entities must provide information to persons with hearing and visual impairments in a format by which they can obtain information as to the existence and location of accessible services, activities, and facilities.[89] Signage, using the international symbol for accessibility, must be installed at all inaccessible entrances directing users to an accessible entrance or to a location where they can obtain information about accessible facilities.[90]

The communication requirements are tempered by the fundamental alteration and undue financial and administrative burdens standards.[91] Public entities are not required to take any action that would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. However, the burden is on the public entity to prove that the action would fundamentally alter the program or service or would result in undue financial and administrative burdens. The decision that compliance would result in such alterations or burdens must be made by the head of the public entity or their designee after considering all the resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion.[92]

Even if the public entity can meet the above requirements, it must still take any other action that would not result in such an alteration or burden but would ensure, to the maximum extent possible, that individuals with disabilities receive the benefits or services provided by the public entity.[93]

V. ADMINISTRATIVE REQUIREMENTS

Title II, places several administrative requirements on state and local government entities. The requirements are similar to those imposed under section 504 of the Rehabilitation Act.

One of the first requirements with which state and local governmental entities must comply is the conducting of self-evaluations of their programs and policies.[94] Reminiscent of the general revenue sharing days, the self-

86. *Id.* § 35.161.
87. *Id.* § 35.162.
88. 56 Fed. Reg. 35,712 (1991).
89. 28 C.F.R. § 35.163(a).
90. *Id.* § 35.163(b).
91. *Id.* § 35.164.
92. *Id.*
93. *Id.*
94. *Id.* § 35.105.

evaluation is intended to help public entities evaluate whether any of their programs and policies violate the non-discrimination requirements of the ADA. Then, the intent is for the public entity to generate solutions for any problems that are identified, in order to bring the entity into compliance.

Public entities were required to evaluate their current services, policies, and practices to determine if they are in compliance with the ADA by January 26, 1992. The public entity only has to evaluate those services, policies, and practices which have not already been evaluated in compliance with section 504 of the Rehabilitation Act.[95]

Interested persons, including persons with disabilities, must be allowed an opportunity to participate in the self-evaluation process by submitting comments.[96] If a public entity employs more than fifty people, it must maintain on file and make available for inspection for three years a list of the interested persons consulted, a description of areas examined and any problems identified, and a description of any modification made.[97] Public entities that employ fifty or more employees are required to adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that is prohibited by the Act.[98]

Public entities with fifty or more employees are also required to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint alleging noncompliance with the Act. The ADA coordinator's name, office address and telephone number will be made available to all interested individuals.[99]

VI. REMEDIES

Title II provides for the same remedies that are available under section 504 of the Rehabilitation Act.[100] Any individual who believes that he or she has been discriminated against may file an administrative complaint with an appropriate federal agency, they may file suit privately against the offending public entity, or a federal agency may refer the case to the Attorney General to bring suit.[101] An administrative complaint must be filed within 180 days from the date of the alleged discrimination.[102] It may be filed with any agency that the aggrieved individual believes to be the appropriate agency.[103] Section 35.190 designates agencies to handle

95. *Id.* § 35.105(a), (d). Public entities were encouraged, however, to survey their programs in compliance with § 504 in 1977. Therefore, it would be prudent to survey all of their services regardless of whether they were previously evaluated. *Id.*
96. 28 C.F.R. § 35.105(b) (1991).
97. *Id.* § 35.105(c).
98. *Id.* § 35.107(b).
99. *Id.* § 35.107(a).
100. 56 Fed. Reg. 35,713 (1991).
101. *Id.*
102. 28 C.F.R. § 35.170 (1991).
103. *Id.* § 35.170(c).

area-specific components of state and local governments. Alternatively, the aggrieved individual may file a complaint with any agency that provides funding to the public entity at issue.[104]

A private lawsuit may be brought at any time. It is not necessary to exhaust administrative remedies before filing a suit under title II. Unlike section 504, state and local governments can be sued under the ADA. There is no eleventh amendment immunity.[105]

Relief may consist of "make whole" relief with regard to employment complaints, termination or suspension of federal funds to the state or local entity in question, monetary damages, and attorney's fees and litigation costs if the complainant prevails.[106] All of this may be modified by the Civil Rights Act of 1991, as the ADA is tied to the procedures and remedies of section 505 of the Rehabilitation Act, which is, in turn, tied to title VII of the Civil Rights Act of 1964.[107]

VII. TIME PERIODS

Title II of the ADA became effective January 26, 1992. All non-structural modifications required to make programs, policies, and practices accessible must have been completed by January 26, 1992. Although the self-evaluation is not required to be completed until January 26, 1993, there is no grace period for non-compliance. Structural modifications are required to be made as soon as practicable, but in no event later than January 26, 1995, and a transition plan detailing how those modifications will be undertaken must be developed by July 26, 1992. The transportation regulations with regard to the purchase of new vehicles went into effect August 26, 1990. The other regulatory provisions relating to transportation went into effect January 26, 1992.

VIII. CONCLUSION

Title II of the Americans with Disabilities Act is a comprehensive mandate to public entities. State and local governmental bodies are faced with an immediate mandate to comply with the terms of this legislation, so that all persons may enjoy the programs, services, and facilities provided by such entities. It is a piece of legislation long overdue. Now, it is the responsibility of the public community to ensure compliance, or the ADA becomes meaningless. Indeed, the ADA promises to be stringently enforced. It has received extensive publicity, enforcement agencies have already issued their final regulations under the Act, and the disabled community is more sophisticated and more activist. It is time for public entities to evaluate and generate solutions.

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104. *Id.* § 35.190.
105. *Id.* § 35.178.
106. 56 Fed. Reg. 35,713 (1991); 28 C.F.R. § 35.175 (1991).
107. 42 U.S.C. § 2000e (1988).