

Americans with Disabilities Act: Title II- Government Programs and Services

Jodi Hanna, Attorney
Christine Curley, Advocacy Specialist
Wisconsin Coalition for Advocacy

Introduction

In 1990 Congress passed the Americans with Disabilities Act (ADA). The ADA has five titles. **Title II** prohibits discrimination against people with disabilities by public entities (*defined below*).

Title II is similar to other civil rights statutes in that it ensures equal opportunity for individuals with disabilities. There are two main protections within Title II. Title II guarantees that people with disabilities have equal access to services, programs, and activities offered by public entities, and that guarantee includes employment.

What is a Public Entity?

Public entity defined
29 USC § 790-794

Public entities include any state or local government and any of its departments, agencies, or other instrumentalities. All activities, services, and programs of public entities are covered, including activities of state legislatures and courts, town meetings, police and fire departments, motor vehicle licensing, and employment. **The Federal government, however, is not considered a public entity.** The Federal government is covered by sections 501 and 504 of the Rehabilitation Act of 1973.

Who is Protected by the ADA Under Title II?

The definition of a “disabled” person for Title II is the same as that for the other titles of the ADA. Three categories of individuals are protected by Title II of the ADA:

1. Individuals who have a physical or mental impairment that substantially limits one or more major life activities.
2. Individuals who have a record of a physical or mental impairment that substantially limits one or more of the individual’s major life activities.
3. Individuals who are regarded as having such an impairment, whether they have the impairment or not.

(Refer to ADA: Title I - Employment chapter, pg. 306 for more specific language on the ADA definition of a “disabled” person.)

28 CFR § 35.104 A “qualified individual with a disability” under Title II means:

1. An individual with a disability **who**:
 - a) with or without reasonable modifications to rules, policies or practices, **or**
 - b) the removal of architectural barriers, communication barriers, or transportation barriers; **or**
 - c) the provision of auxiliary aids and services;
2. Meets the essential eligibility requirements for receipt of services or the participation in programs or activities by a public entity.

Relationship of Title II to other laws Many of the protections of Title II are similar to those found in other laws, such as section 504 of the Rehabilitation Act of 1973, the employment provisions of Title I, and the accessibility obligations of Title III, as well as individual state laws. The similarity among these laws can cause some confusion. **If there is a conflict between any of these laws, the one providing the most protection to people with disabilities prevails.**

Difference between Title II and Title III The confusion associated with the various disability regulations often centers on Title II and Title III of the ADA. Although the goals and obligations of Title II and Title III are very similar, the accessibility standards for Title II and Title III are slightly different. In some respects, the standards for public entities (Title II) are more stringent than those for public accommodations (Title III).

What are the Program Accessibility Protections Under Title II?

In addition to the employment provisions of Title II, explained below, public entities must also ensure that people with disabilities have equal access to the services, programs, and activities offered by state and local government entities, delivered in the most integrated manner possible. This “integration mandate” of the ADA was the foundation for the landmark Supreme Court decision in Olmstead v. L.C. (See pg. 323.)

Program accessibility Public entities must provide “program accessibility,” meaning that the services, programs, and activities of a public entity must be “readily accessible to and usable by” people with disabilities. Program accessibility can be accomplished in a variety of ways, including:

- 28 CFR § 35.149-35.150
1. modifying policies, practices or procedures;
 2. acquiring adaptive equipment or a communication device; or

3. through the provision of services at alternate accessible sites.

Program vs. physical accessibility

Program accessibility differs from physical accessibility in that it may mean written documents and publications are available in braille, an interpreter who knows American Sign Language is on staff, someone is allowed to take a test using a computer, or a person is allowed to take a test orally or in a small room without distractions. Physical accessibility pertains to the structure of the facility. A physically accessible facility may have ramps, elevators with braille or doors that are easily opened.

Public entities are not necessarily required to make each of their existing facilities program accessible. A public entity's services, programs, and activities, **when viewed in their entirety**, must be readily accessible to and usable by people with disabilities.



Public entities must provide program accessibility unless it would result in a fundamental change in the nature of the program or activity, or result in an undue administrative or financial burden. This determination can only be made by the head of the public entity or his/her designee, and must include a written statement detailing the reasons for the decision. If a particular action would result in an undue burden, that public entity must take other actions to ensure that people with disabilities have program accessibility, such as moving the program or service to an accessible site.

Public entities must guarantee people with disabilities equal program access to services, programs, and activities in a number of different ways:

- Reasonable modifications** • public entities must make reasonable modifications or changes to their policies, practices, or procedures. For example, a person with cognitive disabilities may not be able to fill out a complex and lengthy application for county social services. It would be a reasonable modification for the county to offer assistance in filling out the paperwork;
- Licensing or certification** • public entities cannot discriminate against a "qualified individual with a disability" with respect to licensing or certifications. A person is a "qualified individual with a disability" if s/he can meet the essential eligibility requirements for receiving the license or certification. What requirements are considered essential will vary for each particular case. For example, a state could not refuse to issue a license to practice law to someone only because s/he has a diagnosis of mental illness. The denial, however, would be appropriate if the person's illness was uncontrolled and s/he would be unable to competently practice law;
- Eligibility requirements**

- public entities are required to modify policies, practices, or procedures relating to eligibility requirements. Public entities cannot utilize eligibility requirements that screen out or tend to screen out people with disabilities, unless it can show that these requirements are necessary. For example, a community college cannot refuse to allow students using a wheelchair from enrolling in an aerobics class. Although the student may not be able to perform exercises identical to other students, the person with a disability should still be allowed to participate. In contrast, it would be appropriate for a scuba diving class to require participants to pass a swim test, if it can show that being able to swim is a necessary requirement to safely participate in the class; and/or

Effective communication

- public entities must provide effective communication. A public entity must provide appropriate auxiliary aids and services where necessary, including interpreters, notetakers, alternative format written materials, telephone headset amplifiers, closed captioning, computer terminals, speech synthesizers and TTYs. The type of auxiliary aid or service required will depend on the length and complexity of the communication. A public entity must give people with disabilities the opportunity to request specific types of auxiliary aids and services, and must give primary consideration to the choice requested by the person. This is a more stringent requirement than the one that applies to places of public accommodation under Title III. Title III does not require the place of public accommodation to consider the preferred method of communication of the person with a disability. The public entity must provide requested auxiliary aids and services unless it would fundamentally alter the service, program, or activity, or would result in undue financial or administrative burden.

In addition to providing auxiliary aids and services, public entities must also provide equally effective telephone communication to people with disabilities, including people with hearing and speech impairments. Relay services can be used to meet this requirement. Public entities must also provide "direct access" to emergency telephone services for people with disabilities. It is not acceptable to provide telephone access through a third party or relay service. Emergency telephone services must have TTY equipment.



It is the responsibility of public entities to pay for any auxiliary aids or services, or accommodations and modification to services, programs, and activities. People with disabilities cannot be charged surcharges or fees for accommodations. For example, a public entity could not charge an individual who is deaf for the services of an interpreter, nor could a university charge students with disabilities a higher tuition.

Physical accessibility
28 CFR § 35.151

Title II also imposes accessibility requirements on the facilities used by public entities. **All facilities designed, constructed, or altered by, on**

behalf of, or for the use of a public entity must be readily accessible or usable by people with disabilities, if the construction or alteration was begun after January 26, 1992. Public entities can use either the Uniform Federal Accessibility Standards (UFAS) or the Americans with Disabilities Act Guidelines for Buildings and Facilities (ADAAG) to meet this requirement.

527 US §§ 581, 600-601

"Community Integration Mandate"

28 CFR § 35.130(d)

Olmstead decision
supct.law.cornell.edu/supct/html/98-536.ZS.html

Olmstead related links
www.hcfa.gov/medicaid/olmstead/olmslink.htm

The Olmstead v. L.C. Case

On June 22, 1999, in Olmstead v. L. C., 527 U.S. 581, 119 S. Ct. 2176 (1999), the United States Supreme Court decided that unnecessary segregation of people with disabilities is discrimination based on disability. In this landmark case, the Court held that the Americans with Disabilities Act, under certain conditions, requires states to provide community-based services rather than institutional placements for people with disabilities. The Court upheld the "community integration mandate" of Title II of the ADA, which says that, "A public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." The Court recognized that unjustified isolation in institutions perpetuates the false assumption that people with disabilities are incapable or unworthy of participating in community life, and confinement in an institution severely limits participation in everyday life activities, such as work, education, and relations with family and friends.

The Olmstead case was brought by two Georgia women who have the labels of mental retardation and mental illness. They were living in a state-run institution when they filed the lawsuit, even though their treatment professionals had decided they could be appropriately served in the community. They asserted that their continued institutionalization violated the community integration mandate of the ADA. The Court held that states must provide community-based services for people with disabilities when the state's treatment professionals reasonably determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the state and the needs of others who are receiving state-supported disability services.

A state can raise as a defense that the changes would be a fundamental alteration of the state's services and programs. A state may also be able to show compliance with the ADA by demonstrating that it has a "comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that move[s] at a reasonable pace not controlled by the state's endeavors to keep its institutions fully populated."

What are Title II's Administrative Requirements for Public Entities?

Title II also contains some administrative requirements and outlines the steps public entities should take to achieve compliance, including: designation of an individual to oversee Title II compliance, self-evaluation for compliance, development of a transition plan for structural changes, and adoption of a grievance procedure for Title II complaints.

A public entity should review all of its policies and practices, and determine whether any of these adversely affect the full participation of people with disabilities in its services, programs, and activities. Public entities must remove any impediments to full and equivalent participation discovered during this analysis. If structural modifications are required, a transition plan must be developed. A transition plan should list the physical barriers to accessibility, an outline of the methods used to remove these barriers, a schedule for achieving compliance, and the name of the official responsible for the plan's implementation. The designated oversight employee should coordinate all Title II compliance activities. Finally, the public entity must adopt and publish grievance procedures for Title II complaints.

How are Complaints Filed under Title II?

Individuals who wish to file a Title II complaint have two options:

1. An administrative complaint with an appropriate federal agency.
2. A lawsuit in federal district court.

A person can file a complaint at three different types of federal agencies: one that provides funding to the public entity that is the subject of the complaint, the Department of Justice, or a federal agency designated in the Title II regulation to investigate Title II complaints. Eight Federal agencies are designated to receive Title II complaints:

1. Department of Agriculture
2. Department of Education
3. Department of Health and Human Services
4. Department of Housing and Urban Development
5. Department of Interior
6. Department of Justice
7. Department of Labor
8. Department of Transportation

An individual may contact the Department of Justice to determine with which federal agency to file a complaint. These complaints must be filed within 180 days of the alleged acts of discrimination unless the time for filing is extended by a federal agency for good cause.

What are the Employment Protections Under Title II?

28 CFR § 35.130 Title II prohibits public entities from denying services or benefits to people because of disability. It requires equal opportunity for people with disabilities to access and participate in and benefit from a public entity's aids, benefits, and services. Of major significance is the requirement that services and activities must be provided in the most integrated setting appropriate. Separate programs for people with disabilities are permitted where necessary to ensure equal opportunity, but individuals with disabilities cannot be excluded from the regular program nor are they required to accept special benefits or services.

Employment
28 CFR § 35.140 The employment provisions of Title II are in most cases identical to those found in Title I. (*See ADA: Title I - Employment chapter, pg. 305 for a more detailed description of the employment related provisions of the ADA.*) Title II prevents public entities from discriminating against qualified people with disabilities in any aspect of employment, including recruitment, interviewing, hiring, promoting, and job assignment.

Public entities must also make "reasonable accommodations" for employees with disabilities, unless the accommodation would place an "undue hardship" on the public entity.

Reasonable accommodation Reasonable accommodation refers to a change or adjustment that allows a qualified person with a disability to participate in the employment process, or perform the essential functions of a job. Public entities must provide auxiliary aids or services, and on-the-job accommodations, so that people with disabilities can participate in the employment process.

Undue hardship An undue hardship means a significant difficulty or expense, and is judged on a case-by-case basis. If a particular accommodation would be an undue hardship, a public entity is obligated to attempt to provide an alternative accommodation that would not be an undue hardship.

Employment complaints Employment complaints must be filed with the Equal Employment Opportunity Commission (EEOC), or the State of Wisconsin Equal Rights Division (ERD), or if the employment position is with the State of Wisconsin, with the State Personnel Commission. An employment complaint must be filed within 300 days of the date of the alleged incident(s), unless the filing deadline is extended by the federal agency for good cause. Complaints can be resolved through informal means, or by a letter describing methods to remedy violations.

