The Americans with Disabilities Act

Title II Technical Assistance Manual

Covering State and Local Government Programs and Services

Introduction

This technical assistance manual addresses the requirements of title II of the Americans with Disabilities Act, which applies to the operations of State and local governments. It is one of a series of publications issued by Federal agencies under section 506 of the ADA to assist individuals and entities in understanding their rights and duties under the Act.

This manual is part of a broader program of technical assistance conducted by the Department of Justice to promote voluntary compliance with the requirements not only of title II, but also of title III of the ADA, which applies to public accommodations, commercial facilities, and private entities offering certain examinations and courses.

The purpose of this technical assistance manual is to present the ADA's requirements for State and local governments in a format that will be useful to the widest possible audience. The guidance provided in the Department's regulations and accompanying preambles has been carefully reorganized to provide a focused, systematic description of the ADA's requirements. The manual attempts to avoid an overly legalistic style without sacrificing completeness. In order to promote readability and understanding, the text makes liberal use of questions and answers and illustrations.

The manual is divided into nine major subject matter headings with numerous numbered subheadings. Each numbered heading and subheading is listed in a quick reference table of contents at the beginning of the manual.

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II-1.0000 COVERAGE

Regulatory references: 28 CFR 35.102-35.104.

II-1.1000 General.

Title II of the ADA covers programs, activities, and services of public entities. It is divided into two subtitles. This manual focuses on subtitle A of title II, which is implemented by the Department of Justice's title II regulation. Subtitle B, covering public transportation, and the Department of Transportation's regulation implementing that subtitle, are not addressed in this manual.

Subtitle A is intended to protect qualified individuals with disabilities from discrimination on the basis of disability in the services, programs, or activities of all State and local governments. It additionally extends the prohibition of discrimination on the basis of disability established by section 504 of the Rehabilitation Act of 1973, as amended, to all activities of State and local governments, including those that do not receive Federal financial assistance. By law, the Department of Justice's title II regulation adopts the general prohibitions of discrimination established under section 504, and incorporates specific prohibitions of discrimination from the ADA.

Subtitle B is intended to clarify the requirements of section 504 for public transportation entities that receive Federal financial assistance. Also it extends coverage to all public entities that provide public transportation, whether or not they receive Federal financial assistance. It establishes detailed and complex standards for the operation of public transit systems, including commuter and intercity rail (AMTRAK). The Department of Transportation is responsible for the implementation of the second subtitle of Title II and issued a regulation implementing that subtitle.

II-1.2000 Public entity. A public entity covered by title II is defined as --

1) Any State or local government;

2) Any department, agency, special purpose district, or other instrumentality of a State or local government; or

3) Certain commuter authorities as well as AMTRAK.

As defined, the term "public entity" does not include the Federal Government. Title II, therefore, does not apply to the Federal Government, which is covered by sections 501 and 504 of the Rehabilitation Act of 1973.

Title II is intended to apply to all programs, activities, and services provided or operated by State and local governments. Currently, section 504 of the Rehabilitation Act only applies to programs or activities receiving Federal financial assistance. Because many State and local government operations, such as courts, licensing, and legislative facilities and proceedings do not receive Federal funds, they are beyond the reach of section 504.

In some cases it is difficult to determine whether a particular entity that is providing a public service, such as a library, museum, or volunteer fire department, is in fact a public entity. Where an entity appears to have both public and private features, it is necessary to examine the relationship between the entity and the governmental unit to determine whether the entity is public or private. Factors to be considered in this determination include --

1) Whether the entity is operated with public funds; 2) Whether the entity's employees are considered government employees;

3) Whether the entity receives significant assistance from the government by provision of property or equipment; and

4) Whether the entity is governed by an independent board selected by members of a private organization or a board elected by the voters or appointed by elected officials.

II-1.3000 Relationship to title III. Public entities are not subject to title III of the ADA, which covers only private entities. Conversely, private entities are not subject to title II. In many situations, however, public entities have a close relationship to private entities that are covered by title III, with the result that certain activities may be at least indirectly affected by both titles.

ILLUSTRATION 1: A privately owned restaurant in a State park operates for the convenience of park users under a concession agreement with a State department of parks. As a public accommodation, the restaurant is subject to title III and must meet those obligations. The State department of parks, a public entity, is subject to title II. The parks department is obligated to ensure by contract that the restaurant is operated in a manner that enables the parks department to meet its title II obligations, even though the restaurant is not directly subject to title II.

ILLUSTRATION 2: A city owns a downtown office building occupied by its department of human resources. The building's first floor, however, is leased to a restaurant, a newsstand, and a travel agency. The city, as a public entity and landlord of the office building, is subject to title II. As a public entity, it is not subject to title III, even though its tenants are public accommodations that are covered by title III.

ILLUSTRATION 3: A city engages in a joint venture with a private corporation to build a new professional sports stadium. Where public and private entities act jointly, the public entity must ensure that the relevant requirements of title II are met; and the private entity must ensure compliance with title III. Consequently, the new stadium would have to be built in compliance with the accessibility guidelines of both titles II and III. In cases where the standards differ, the stadium would have to meet the standard that provides the highest degree of access to individuals with disabilities.

ILLUSTRATION 4: A private, nonprofit corporation operates a number of group homes under contract with a State agency for the benefit of individuals with mental disabilities. These particular

homes provide a significant enough level of social services to be considered places of public accommodation under title III. The State agency must ensure that its contracts are carried out in accordance with title II, and the private entity must ensure that the homes comply with title III.

II-1.4000 Relationship to other laws

II-1.4100 Rehabilitation Act. Title II provides protections to individuals with disabilities that are at least equal to those provided by the nondiscrimination provisions of title V of the Rehabilitation Act. Title V includes such provisions as section 501, which prohibits discrimination on the basis of disability in Federal employment; section 503, which addresses the employment practices of Federal contractors; and section 504, which covers all programs receiving Federal financial assistance and all the operations of Federal Executive agencies. Title II may not be interpreted to provide a lesser degree of protection to individuals with disabilities than is provided under these laws.

II-1.4200 Other Federal and State laws. Title II does not disturb other Federal laws or any State laws that provide protection for individuals with disabilities at a level greater or equal to that provided by the ADA. It does, however, prevail over any conflicting State laws.

II-2.0000 QUALIFIED INDIVIDUALS WITH DISABILITIES

Regulatory references: 28 CFR 35.104.

II-2.1000 General. Title II of the ADA prohibits discrimination against any "qualified individual with a disability." Whether a particular individual is protected by title II requires a careful analysis first, of whether an individual is an "individual with a disability," and then whether that individual is "qualified."

People commonly refer to disabilities or disabling conditions in a broad sense. For example, poverty or lack of education may impose real limitations on an individual's opportunities. Likewise, being only five feet in height may prove to be an insurmountable barrier to an individual whose ambition is to play professional basketball. Although one might loosely characterize these conditions as "disabilities" in relation to the aspirations of the particular individual, the disabilities reached by title II are limited to those that meet the ADA's legal definition -- those that place substantial limitations on an individual's major life activities.

Title II protects three categories of individuals with disabilities:

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 limited one or more of the individual's major life activities; and

3) Individuals who are regarded as having such an impairment, whether they have the impairment or not.

II-2.2000 Physical or mental impairments. The first category of persons covered by the definition of an individual with a disability is restricted to those with "physical or mental impairments." Physical impairments include --

1) Physiological disorders or conditions;

2) Cosmetic disfigurement; or

3) Anatomical loss

affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs (which would include speech organs that are not respiratory such as vocal cords, soft palate, tongue, etc.); respiratory,

including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine.

Specific examples of physical impairments include orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, HIV disease (symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

Mental impairments include mental or psychological disorders, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Simple physical characteristics such as the color of one's eyes, hair, or skin; baldness; left-handedness; or age do not constitute physical impairments. Similarly, disadvantages attributable to environmental, cultural, or economic factors are not the type of impairments covered by title II. Moreover, the definition does not include common personality traits such as poor judgment or a quick temper, where these are not symptoms of a mental or psychological disorder.

Does title II prohibit discrimination against individuals based on their sexual orientation? No. The phrase "physical or mental impairment" does not include homosexuality or bisexuality.

II-2.3000 Drug addiction as an impairment. Drug addiction is an impairment under the ADA. A public entity, however, may base a decision to withhold services or benefits in most cases on the fact that an addict is engaged in the current and illegal use of drugs.

What is "illegal use of drugs"? Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. It does not include use of controlled substances pursuant to a valid prescription, or other uses that are authorized by the Controlled Substances Act or other Federal law. Alcohol is not a "controlled substance," but alcoholism is a disability.

What is "current use"? "Current use" is the illegal use of controlled substances that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem. A public entity should review carefully all the facts surrounding its belief that an individual is currently taking illegal drugs to ensure that its belief is a reasonable one.

Does title II protect drug addicts who no longer take controlled substances? Yes. Title II prohibits discrimination against drug addicts based solely on the fact that they previously illegally used controlled substances. Protected individuals include persons who have successfully completed a supervised drug rehabilitation program or have otherwise been rehabilitated successfully and who are not engaging in current illegal use of drugs. Additionally, discrimination is prohibited against an individual who is currently participating in a supervised rehabilitation program and is not engaging in current illegal use of drugs. Finally, a person who is erroneously regarded as engaging in current illegal use of drugs is protected.

Is drug testing permitted under the ADA? Yes. Public entities may utilize reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs.

II-2.4000 Substantial limitation of a major life activity. To constitute a "disability," a condition must substantially limit a major life activity. Major life activities include such activities as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

When does an impairment "substantially limit" a major life activity? There is no absolute standard for determining when an impairment is a substantial limitation. Some impairments obviously or by their nature substantially limit the ability of an individual to engage in a major life activity.

> ILLUSTRATION 1: A person who is deaf is substantially limited in the major life activity of hearing. A person with a minor hearing impairment, on the other hand, may not be substantially

limited.

ILLUSTRATION 2: A person with traumatic brain injury may be substantially limited in the major life activities of caring for one's self, learning, and working because of memory deficit, confusion, contextual difficulties, and inability to reason appropriately.

An impairment substantially interferes with the accomplishment of a major life activity when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.

ILLUSTRATION 1: A person with a minor vision impairment, such as 20/40 vision, does not have a substantial impairment of the major life activity of seeing.

ILLUSTRATION 2: A person who can walk for 10 miles continuously is not substantially limited in walking merely because, on the eleventh mile, he or she begins to experience pain, because most people would not be able to walk eleven miles without experiencing some discomfort.

Are "temporary" mental or physical impairments covered by title II? Yes, if the impairment substantially limits a major life activity. The issue of whether a temporary impairment is significant enough to be a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.

ILLUSTRATION: During a house fire, M received burns affecting his hands and arms. While it is expected that, with treatment, M will eventually recover full use of his hands, in the meantime he requires assistance in performing basic tasks required to care for himself such as eating and dressing. Because M's burns are expected to substantially limit a major life activity (caring for one's self) for a significant period of time, M would be considered to have a disability covered by title II.

If a person's impairment is greatly lessened or eliminated through the use of aids or devices, would the person still be considered an individual with a disability? Whether a person has a disability is assessed without regard to the availability of mitigating measures, such as reasonable modifications, auxiliary aids and services, services and devices of a personal nature, or medication. For example, a person with severe hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that, if untreated, would substantially limit a major life activity, are still individuals with disabilities under the ADA, even if the debilitating consequences of the impairment are controlled by medication.

II-2.5000 Record of a physical or mental impairment that substantially limited a major life activity. The ADA protects not only those individuals with disabilities who actually have a physical or mental impairment that substantially limits a major life activity, but also those with a record of such an impairment. This protected group includes --

1) A person who has a history of an impairment that substantially limited a major life activity but who has recovered from the impairment. Examples of individuals who have a history of an impairment are persons who have histories of mental or emotional illness, drug addiction, alcoholism, heart disease, or cancer.

2) Persons who have been misclassified as having an impairment. Examples include persons who have been erroneously diagnosed as mentally retarded or mentally ill.

II-2.6000 "Regarded as." The ADA also protects certain persons who are regarded by a public entity as having a physical or mental impairment that substantially limits a major life activity, whether or not that person actually has an impairment. Three typical situations are covered by this category:

1) An individual who has a physical or mental impairment that does not substantially limit major life activities, but who is treated as if the impairment does substantially limit a major life activity;

ILLUSTRATION: A, an individual with mild diabetes controlled by medication, is barred by the staff of a county-sponsored summer camp from participation in certain sports because of her diabetes. Even though A does not actually have an impairment that substantially limits a major life activity, she is protected under the ADA because she is treated as though she does.

2) An individual who has a physical or mental impairment that substantially limits major life activities *only* as a result of the attitudes of others towards the impairment;

ILLUSTRATION: B, a three-year old child born with a prominent facial disfigurement, has been refused admittance to a county-run day care program on the grounds that her presence in the program might upset the other children. B is an individual with a physical impairment that substantially limits her major life activities only as the result of the attitudes of others toward her impairment.

3) An individual who has no impairments but who is treated by a public entity as having an impairment that substantially limits a major life activity.

ILLUSTRATION: C is excluded from a county-sponsored soccer team because the coach believes rumors that C is infected with the HIV virus. Even though these rumors are untrue, C is protected under the ADA, because he is being subjected to discrimination by the county based on the belief that he has an impairment that substantially limits major life activities (i.e., the belief that he is infected with HIV).

II-2.7000 Exclusions. The following conditions are specifically excluded from the definition of "disability": transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs.

II-2.8000 Qualified individual with a disability. In order to be an individual protected by title II, the individual must be a "qualified" individual with a disability. To be qualified, the individual with a disability must meet the essential eligibility requirements for receipt of services or participation in a public entity's programs, activities, or services with or without --

1) Reasonable modifications to a public entity's rules, policies, or practices;

2) Removal of architectural, communication, or transportation barriers; or

3) Provision of auxiliary aids and services.

The "essential eligibility requirements" for participation in many activities of public entities may be minimal. For example, most public entities provide information about their programs, activities, and services upon request. In such situations, the only "eligibility requirement" for receipt of such information would be the request for it. However, under other circumstances, the "essential eligibility requirements" imposed by a public entity may be quite stringent.

ILLUSTRATION: The medical school at a public university may require those admitted to its program to have successfully completed specified undergraduate science courses.

Can a visitor, spectator, family member, or associate of a program participant be a qualified individual with a disability under title II? Yes. Title II protects any qualified individual with a disability involved in any capacity in a public entity's programs, activities, or services.

ILLUSTRATION: Public schools generally operate programs and activities that are open to students' parents, such as parent-teacher conferences, school plays, athletic events, and graduation ceremonies. A parent who is a qualified individual with a disability with regard to these activities would be entitled to title II protection.

Can health and safety factors be taken into account in determining who is qualified? Yes. An individual who poses a direct threat to the health or safety of others will not be "qualified."

What is a "direct threat"? A "direct threat" is a significant risk to the health or safety of others that cannot be eliminated or reduced to an acceptable level by the public entity's modification of its policies, practices, or procedures, or by the provision of auxiliary aids or services. The public entity's determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability.

How does one determine whether a direct threat exists? The determination must be based on an individualized assessment that relies on current medical evidence, or on the best available objective evidence, to assess --

1) The nature, duration, and severity of the risk;

2) The probability that the potential injury will actually occur; and,

3) Whether reasonable modifications of policies, practices, or procedures will mitigate or eliminate the risk.

Making this assessment will not usually require the services of a physician. Medical guidance may be obtained from public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control, and the National Institutes of Health, including the National Institute of Mental Health.

ILLUSTRATION: An adult individual with tuberculosis wishes to tutor elementary school children in a volunteer mentor program operated by a local public school board. Title II permits the board to refuse to allow the individual to participate on the grounds that the mentor's condition would be a direct threat to the health or safety of the children participating in the program, if the condition is contagious and the threat cannot be mitigated or eliminated by reasonable modifications in policies, practices, or procedures.

II-3.0000 GENERAL REQUIREMENTS

Regulatory references: 28 CFR 35.130-35.135.

II-3.1000 General. Most requirements of title II are based on section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of handicap in federally assisted programs and activities. Section 504 also applies to programs and activities "conducted" by Federal Executive agencies. The ADA similarly extends section 504's nondiscrimination requirement to all activities of State and local governments, not only those that receive Federal financial assistance.

Section 504 was implemented in 1977 for federally assisted programs in regulations issued by the Department of Health, Education, and Welfare. Later, other Federal agencies issued their own regulations for the programs and activities that they funded. Public entities should be familiar with those regulations from their experience in applying for Federal grant programs. As mandated by the ADA, the requirements for public entities under title II are consistent with and, in many areas, identical to the requirements of the section 504 regulations.

The ADA, however, also mandates that the title II regulations be consistent with the concepts of the ADA. Therefore, the title II regulations include language that is adapted from other parts of the ADA but not specifically found in section 504 regulations.

II-3.2000 Denial of participation. The ADA, like other civil rights statutes, prohibits the denial of services or benefits on specified discriminatory grounds. Just as a government office cannot refuse to issue food stamps or other benefits to an individual on the basis of his or her race, it cannot refuse to provide benefits solely because an individual has a disability.

> ILLUSTRATION: A city cannot refuse to admit an individual to a city council meeting that is open to the public merely because the individual is deaf.

II-3.3000 Equality in participation/benefits. The ADA provides for equality of opportunity, but does not guarantee equality of results. The foundation of many of the specific requirements in the Department's regulations is the principle that individuals with disabilities must be provided an equally effective opportunity to participate in or benefit from a public entity's aids, benefits, and services.

> ILLUSTRATION 1: A deaf individual does not receive an equal opportunity to benefit from attending a city council meeting if he or she does not have access to what is said.

> ILLUSTRATION 2: An individual who uses a wheelchair will not have an equal opportunity to participate in a program if applications must be filed in a second-floor office of a building without an elevator, because he or she would not be able to reach the office.

> ILLUSTRATION 3: Use of printed information alone is not "equally effective" for individuals with vision impairments who cannot read written material.

On the other hand, as long as persons with disabilities are afforded an equally effective opportunity to participate in or benefit from a public entity's aids, benefits, and services, the ADA's guarantee of equal opportunity is not violated.

> ILLUSTRATION 4: A person who uses a wheelchair seeks to run for a State elective office. State law requires the candidate to collect petition signatures in order to qualify for placement on the primary election ballot. Going door-to-door to collect signatures is difficult or, in many cases, impossible for the candidate because of the general inaccessibility of private homes. The law, however, provides over five months to collect the signatures and allows them to be collected by persons other than the candidate both through the mail and at any site where registered voters congregate. With these features, the law affords an equally effective opportunity for the individual who uses a wheelchair to seek placement on the ballot and to participate in the primary election process.

Also, the ADA generally does not require a State or local government entity to provide additional services for individuals with disabilities that are not provided for individuals without disabilities.

> ILLUSTRATION 5: The ADA does not require a city government to provide snow removal service for the private driveways of residents with disabilities, if the city does not provide such service for residents without disabilities.

Specific requirements for physical access to programs and communications are discussed in detail below, but the general principle underlying these obligations is the mandate for an equal opportunity to participate in and benefit from a public entity's services, programs, and activities.

II-3.4000 Separate benefit/integrated setting. A primary goal of the ADA is the equal participation of individuals with disabilities in the "mainstream" of American society. The major principles of mainstreaming are --

> 1) Individuals with disabilities must be integrated to the maximum extent appropriate.

2) Separate programs are permitted where necessary to ensure equal opportunity. A separate program must be appropriate to the particular individual.

3) Individuals with disabilities cannot be excluded from the regular program, or required to accept special services or benefits.

II-3.4100 Separate programs. A public entity may offer separate or special programs when necessary to provide individuals with disabilities an equal opportunity to benefit from the programs. Such programs must, however, be specifically designed to meet the needs of the individuals with disabilities for whom they are provided.

ILLUSTRATION 1: Museums generally do not allow visitors to touch exhibits because handling can cause damage to the objects. A municipal museum may offer a special tour for individuals with vision impairments on which they are permitted to touch and handle specific objects on a limited basis. (It cannot, however, exclude a blind person from the standard museum tour.)

ILLUSTRATION 2: A city recreation department may sponsor a separate basketball league for individuals who use wheelchairs.

II-3.4200 Relationship to "program accessibility" requirement. The integrated setting requirement may conflict with the obligation to provide program accessibility, which may not necessarily mandate physical access to all parts of all facilities (see II-5.0000). Provision of services to individuals with disabilities in a different location, for example, is one method of achieving program accessibility. Public entities should make every effort to ensure that alternative methods of providing program access do not result in unnecessary segregation.

ILLUSTRATION: A school system should provide for wheelchair access at schools dispersed throughout its service area so that children who use wheelchairs can attend school at locations comparable in convenience to those available to other children. Also, where "magnet" schools, or schools offering different curricula or instruction techniques are available, the range of choice provided to students with disabilities must be comparable to that offered to other students.

II-3.4300 Right to participate in the regular program. Even if a separate or special program for individuals with disabilities is offered, a public entity cannot deny a qualified individual with a disability participation in its regular program. Qualified individuals with disabilities are entitled to participate in regular programs, even if the public entity could reasonably believe that they cannot benefit from the regular program.

ILLUSTRATION: A museum cannot exclude a person who is blind from a tour because of assumptions about his or her inability to appreciate and benefit from the tour experience. Similarly, a deaf person may not be excluded from a museum concert because of a belief that deaf persons cannot enjoy the music.

The fact that a public entity offers special programs does not affect the right of an individual with a disability to participate in regular programs. The requirements for providing access to the regular program, including the requirement that the individual be "qualified" for the program, still apply.

ILLUSTRATION: Where a State offers special drivers' licenses with limitations or restrictions for individuals with disabilities, an individual with a disability is not eligible for an unrestricted license, unless he or she meets the essential eligibility requirements for the unrestricted license.

BUT: If an individual is qualified for the regular program, he or she cannot be excluded from that program simply because a special program is available.

Individuals with disabilities may not be required to accept special "benefits" if they choose not to do so.

ILLUSTRATION: A State that provides optional special automobile license plates for individuals with disabilities and requires appropriate documentation for eligibility for the special plates cannot require an individual who qualifies for a special plate to present documentation or accept a special plate, if he or she applies for a plate without the special designation.

II-3.4400 Modifications in the regular program. When a public entity offers a special program for individuals with a particular disability, but an individual with that disability elects to participate in the regular program rather than in the separate program, the public entity may still have obligations to provide an opportunity for that individual to benefit from the regular program. The fact that a separate program is offered may be a factor in determining the extent of the obligations under the regular program, but only if the separate program is appropriate to the needs of the particular individual with a disability.

ILLUSTRATION: If a museum provides a sign language interpreter for one of its regularly scheduled tours, the availability of the signed tour may be a factor in determining whether it would be an undue burden to provide an interpreter for a deaf person who wants to take the tour at a different time. BUT: The availability of the signed tour would not affect the museum's obligation to provide an interpreter for a different tour, or the museum's obligation to provide a different auxiliary aid, such as an assistive listening device, for an individual with impaired hearing who does not use sign language.

II-3.5000 Eligibility criteria

II-3.5100 General. A public entity may not impose eligibility criteria for participation in its programs, services, or activities that either screen out or tend to screen out persons with disabilities, unless it can show that such requirements are necessary for the provision of the service, program, or activity.

ILLUSTRATION 1: The director of a county recreation program prohibits persons who use wheelchairs from participating in county-sponsored scuba diving classes because he believes that persons who use wheelchairs probably cannot swim well enough to participate. An unnecessary blanket exclusion of this nature would violate the ADA.

ILLUSTRATION 2: A community college requires students with certain disabilities to be accompanied to class by attendants, even when such individuals prefer to attend classes unaccompanied. The college also requires individuals with disabilities to provide extensive medical histories, although such histories are not required from other students. Unless the college can demonstrate that it is necessary for some compelling reason to adopt these policies, the policies would not be permitted by the ADA.

II-3.5200 Safety. 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 real risks, not on speculation, stereotypes, or generalizations about individuals with disabilities.

ILLUSTRATION: A county recreation program may require that all participants in its scuba program pass a swimming test, if it can demonstrate that being able to swim is necessary for safe participation in the class. This is permitted even if requiring such a test would tend to screen out people with certain kinds of disabilities.

II-3.5300 Unnecessary inquiries. A public entity may not make unnecessary inquiries into the existence of a disability.

ILLUSTRATION: A municipal recreation department summer camp requires parents to fill out a questionnaire and to submit medical documentation regarding their children's ability to participate in various camp activities. The questionnaire is acceptable, if the recreation department can demonstrate that each piece of information requested is needed to ensure safe participation in camp

activities. The Department, however, may not use this information to screen out children with disabilities from admittance to the camp.

II-3.5400 Surcharges. Although compliance may result in some additional cost, a public entity may not place a surcharge only on particular individuals with disabilities or groups of individuals with disabilities to cover these expenses.

ILLUSTRATION: A community college provides interpreter services to deaf students, removes a limited number of architectural barriers, and relocates inaccessible courses and activities to more accessible locations. The college cannot place a surcharge on either an individual student with a disability (such as a deaf student who benefited from interpreter services) or on groups of students with disabilities (such as students with mobility impairments who benefited from barrier removal). It may, however, adjust its tuition or fees for all students.

II-3.6000 Reasonable modifications

II-3.6100 General. A public entity must reasonably modify its policies, practices, or procedures to avoid discrimination. If the public entity can demonstrate, however, that the modifications would fundamentally alter the nature of its service, program, or activity, it is not required to make the modification.

ILLUSTRATION 1: A municipal zoning ordinance requires a set-back of 12 feet from the curb in the central business district. In order to install a ramp to the front entrance of a pharmacy, the owner must encroach on the set-back by three feet. Granting a variance in the zoning requirement may be a reasonable modification of town policy.

ILLUSTRATION 2: A county general relief program provides emergency food, shelter, and cash grants to individuals who can demonstrate their eligibility. The application process, however, is extremely lengthy and complex. When many individuals with mental disabilities apply for benefits, they are unable to complete the application process successfully. As a result, they are effectively denied benefits to which they are otherwise entitled. In this case, the county has an obligation to make reasonable modifications to its application process to ensure that otherwise eligible individuals are not denied needed benefits. Modifications to the relief program might include simplifying the application process or providing applicants who have mental disabilities with individualized assistance to complete the process.

ILLUSTRATION 3: A county ordinance prohibits the use of golf carts on public highways. An individual with a mobility impairment uses a golf cart as a mobility device. Allowing use of the golf cart as a mobility device on the shoulders of public highways where pedestrians are permitted, in limited circumstances that do not involve a significant risk to the health or safety of others, is a reasonable modification of the county policy.

II-3.6200 Personal services and devices. A public entity is not required to provide individuals with disabilities with personal or individually prescribed devices, such as wheelchairs, prescription eyeglasses, or hearing aids, or to provide services of a personal nature, such as assistance in eating, toileting, or dressing. Of course, if personal services or devices are customarily provided to the individuals served by a public entity, such as a hospital or nursing home, then these personal services should also be provided to individuals with disabilities.

II-3.7000 Contracting and licensing

II-3.7100 Contracting. A public entity may not discriminate on the basis of disability in contracting for the purchase of goods and services.

ILLUSTRATION 1: A municipal government may not refuse to contract with a cleaning service company to clean its government buildings because the company is owned by an individual with disabilities or employs individuals with disabilities.

II-3.7200 Licensing. A public entity may not discriminate on the basis of disability in its licensing, certification, and regulatory activities. A person is a "qualified individual with a disability" with respect to licensing or certification, if he or she can meet the essential eligibility requirements for receiving the license or certification. The phrase "essential eligibility requirements" is particularly important in the context of State licensing requirements. While many programs and activities of public entities do not have significant qualification requirements, licensing programs often do require applicants to demonstrate specific skills, knowledge, and abilities. Public entities may not discriminate against qualified individuals with disabilities who apply for licenses, but may consider factors related to the disability in determining whether the individual is "qualified."

> ILLUSTRATION: An individual is not "qualified" for a driver's license unless he or she can operate a motor vehicle safely. A public entity may establish requirements, such as vision requirements, that would exclude some individuals with disabilities, if those requirements are essential for the safe operation of a motor vehicle.

BUT: The public entity may only adopt "essential" requirements for safe operation of a motor vehicle. Denying a license to all individuals who have missing limbs, for example, would be discriminatory if an individual who could operate a vehicle safely without use of the missing limb were denied a license. A public entity, however, could impose appropriate restrictions as a condition to obtaining a license, such as requiring an individual who is unable to use foot controls to use hand controls when operating a vehicle.

A public entity does not have to lower or eliminate licensing standards that are essential to the licensed activity to accommodate an individual with a disability. Whether a specific requirement is "essential" will depend on the facts of the particular case. Where a public entity administers licensing examinations, it must provide auxiliary aids for applicants with disabilities and administer the examinations in accessible locations.

In addition, a public entity may not establish requirements for the programs or activities of licensees that would result in discrimination against qualified individuals with disabilities. For example, a public entity's safety standards may not require the licensee to discriminate against qualified individuals with disabilities in its employment practices.

> ILLUSTRATION: A State prohibits the licensing of transportation companies that employ individuals with missing limbs as drivers. XYZ company refuses to hire an individual with a missing limb who is "qualified" to perform the essential functions of the job, because he is able to drive safely with hand controls. The State's licensing requirements violate title II.

BUT: The State is not accountable for discrimination in the employment or other practices of XYZ company, if those practices are not the result of requirements or policies established by the State.

Although licensing standards are covered by title II, the licensee's activities themselves are not covered. An activity does not become a "program or activity" of a public entity merely because it is licensed by the public entity.

II-3.8000 Illegal use of drugs. Discrimination based on an individual's current illegal use of drugs is not prohibited (see II-2.3000). Although individuals currently using illegal drugs are not protected from discrimination, the ADA does prohibit denial of health services, or services provided in connection with drug rehabilitation, to an individual on the basis of current illegal use of drugs, if the individual is otherwise entitled to such services.

> ILLUSTRATION 1: A hospital emergency room may not refuse to provide emergency services to an individual because the individual is using drugs.

> ILLUSTRATION 2: A municipal medical facility that specializes in care of burn patients may not refuse to treat an individual's burns on the grounds that the individual is illegally using drugs. Because abstention from the use of drugs is an essential condition for participation in some drug rehabilitation programs, and may be a necessary requirement in inpatient or residential settings, a

drug rehabilitation or treatment program may deny participation to individuals who use drugs while they are in the program.

ILLUSTRATION: A residential drug and alcohol treatment program may expel an individual for using drugs in a treatment center.

II-3.9000 Discrimination on the basis of association. A State or local government may not discriminate against individuals or entities because of their known relationship or association with persons who have disabilities. This prohibition applies to cases where the public entity has knowledge of both the individual's disability and his or her relationship to another individual or entity. In addition to familial relationships, the prohibition covers any type of association between the individual or entity that is discriminated against and the individual or individuals with disabilities, if the discrimination is actually based on the disability.

ILLUSTRATION 1: A county recreation center may not refuse admission to a summer camp program to a child whose brother has HIV disease.

ILLUSTRATION 2: A local government could not refuse to allow a theater company to use a school auditorium on the grounds that the company ha srecently performed at an HIV hospice.

ILLUSTRATION 3: If a county-owned sports arena refuses to admit G, an individual with cerebral palsy, as well as H (his sister) because G has cerebral palsy, the arena would be illegally discriminating against H on the basis of her association with G.

II-3.10000 Maintenance of accessible features. Public entities must maintain in working order equipment and features of facilities that are required to provide ready access to individuals with disabilities. Isolated or temporary interruptions in access due to maintenance and repair of accessible features are not prohibited.

Where a public entity must provide an accessible route, the route must remain accessible and not blocked by obstacles such as furniture, filing cabinets, or potted plants. An isolated instance of placement of an object on an accessible route, however, would not be a violation, if the object is promptly removed. Similarly, accessible doors must be unlocked when the public entity is open for business.

Mechanical failures in equipment such as elevators or automatic doors will occur from time to time. The obligation to ensure that facilities are readily accessible to and usable by individuals with disabilities would be violated, if repairs are not made promptly or if improper or inadequate maintenance causes repeated and persistent failures.

ILLUSTRATION 1: It would be a violation for a building manager of a three-story building to turn off the only passenger elevator in order to save energy during the hours when the building is open.

ILLUSTRATION 2: A public high school has a lift to provide access for persons with mobility impairments to an auditorium stage. The lift is not working. If the lift normally is functional and reasonable steps have been taken to repair the lift, then the school has not violated its obligations to maintain accessible features. On the other hand, if the lift frequently does not work and reasonable steps have not been taken to maintain the lift, then the school has violated the maintenance of accessible features requirement.

ILLUSTRATION 3: Because of lack of space, a city office manager places tables and file cabinets in the hallways, which interferes with the usability of the hallway by individuals who use wheelchairs. By rendering a previously accessible hallway inaccessible, the city has violated the maintenance requirement, if that hallway is part of a required accessible route.

II-3.11000 Retaliation or coercion. Individuals who exercise their rights under the ADA, or assist others in exercising their rights, are protected from retaliation. The prohibition against retaliation or coercion applies broadly to any individual or entity that seeks to prevent an individual from exercising his or her rights or to

retaliate against him or her for having exercised those rights. Any form of retaliation or coercion, including threats, intimidation, or interference, is prohibited if it interferes with the exercise of rights under the Act.

ILLUSTRATION 1: A, a private individual, harasses X, an individual with cerebral palsy, in an effort to prevent X from attending a concert in a State park. A has violated the ADA.

ILLUSTRATION 2: A State tax official delays a tax refund for M, because M testified in a title II grievance proceeding involving the inaccessibility of the tax information office. The State has illegally retaliated against M in violation of title II.

II-3.12000 Smoking. A public entity may prohibit smoking, or may impose restrictions on smoking, in its facilities.

II-4.0000 EMPLOYMENT

Regulatory references: 28 CFR 35.140.

II-4.1000 General. Beginning January 26, 1992, title II prohibits all public entities, regardless of size of workforce, from discriminating in their employment practices against qualified individuals with disabilities.

II-4.2000 Relationship among title II and other Federal laws that prohibit employment discrimination by public entities on the basis of disability. In addition to title II's employment coverage, title I of the ADA and section 504 of the Rehabilitation Act of 1973 prohibit employment discrimination against qualified individuals with disabilities by certain public entities. Title I of the ADA, which is primarily enforced by the Equal Employment Opportunity Commission (EEOC), prohibits job discrimination --

1) Effective July 26, 1992, by State and local employers with 25 or more employees; and

2) Effective July 26, 1994, by State and local employers with 15 or more employees. Section 504 of the Rehabilitation Act prohibits discrimination in employment in programs or activities that receive Federal financial assistance, including federally funded State or local programs or activities. Each Federal agency that extends financial assistance is responsible for enforcement of section 504 in the programs it funds.

What standards are used to determine compliance under title II? For those public entities that are subject to title I of the ADA, title II adopts the standards of title I. In all other cases, the section 504 standards for employment apply. On October 29, 1992, legislation reauthorizing the Rehabilitation Act of 1973 was signed by the President. The law amended section 504 to conform its provisions barring employment discrimination to those applied under title I of the ADA. Thus, employment standards under section 504 are now identical to those under title I.

II-4.3000 Basic employment requirements. The following sections set forth examples of the basic title II employment requirements. Additional information on employment issues is available in "A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act," issued by the EEOC. (For information about obtaining this document or other information about title I, contact the EEOC at 800-669-3362 (voice) or 800-800-3302 (TDD)).

II-4.3100 Nondiscriminatory practices and policies. As of January 26, 1992, all public entities must ensure that their employment practices and policies do not discriminate on the basis of disability against qualified individuals with disabilities in every aspect of employment, including recruitment, hiring, promotion, demotion, layoff and return from layoff, compensation, job assignments, job classifications, paid or unpaid leave, fringe benefits, training, and employer- sponsored activities, including recreational or social programs.

II-4.3200 Reasonable accommodation. All public entities must make "reasonable accommodation" to the known physical or mental limitations of otherwise qualified applicants or employees with disabilities, unless the

public entity can show that the accommodation would impose an "undue hardship" on the operation of its program.

"Reasonable accommodation" means any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. Examples include --

1) Acquiring or modifying equipment or devices;

2) Job restructuring;

3) Part-time or modified work schedules;

4) Providing readers or interpreters;

5) Making the workplace accessible to and usable by individuals with disabilities.

However, any particular change or adjustment would not be required if, under the circumstances involved, it would result in an undue hardship.

"Undue hardship" means significant difficulty or expense relative to the operation of a public entity's program. Where a particular accommodation would result in an undue hardship, the public entity must determine if another accommodation is available that would not result in an undue hardship.

II-4.3300 Nondiscrimination in selection criteria and the administration of tests. Public entities may not use employment selection criteria that have the effect of subjecting individuals with disabilities to discrimination. In addition, public entities are required to ensure that, where necessary to avoid discrimination, employment tests are modified so that the test results reflect job skills or aptitude or whatever the test purports to measure, rather than the applicant's or employee's hearing, visual, speaking, or manual skills (unless the test is designed to measure hearing, visual, speaking, or manual skills).

II-4.3400 Preemployment medical examinations and medical inquiries. During the hiring process, public entities may ask about an applicant's ability to perform job-related functions but may not ask whether an applicant is disabled or about the nature or severity of an applicant's disability.

Public entities may not conduct preemployment medical examinations, but they may condition a job offer on the results of a medical examination conducted prior to an individual's entrance on duty if --

1) All entering employees in the same job category, regardless of disability, are required to take the same medical examination, and

2) The results of the medical examination are not used to impermissibly discriminate on the basis of disability.

The results of a medical entrance examination must be kept confidential and maintained in separate medical files.

II-5.0000 PROGRAM ACCESSIBILITY

Regulatory references: 28 CFR 35.149-35.150.

II-5.1000 General. A public entity may not deny the benefits of its programs, activities, and services to individuals with disabilities because its facilities are inaccessible. A public entity's services, programs, or activities, when viewed in their entirety, must be readily accessible to and usable by individuals with disabilities.

This standard, known as "program accessibility," applies to all existing facilities of a public entity. Public entities, however, are not necessarily required to make each of their existing facilities accessible.

> ILLUSTRATION 1: When a city holds a public meeting in an existing building, it must provide ready access to, and use of, the meeting facilities to individuals with disabilities. The city is not required to make all areas in the building accessible, as long as the meeting room is accessible. Accessible telephones and bathrooms should also be provided where these services are available for use of meeting attendees.
>
> ILLUSTRATION 2: D, a defendant in a civil suit, has a respiratory condition that prevents her from climbing steps. Civil suits are routinely heard in a courtroom on the second floor of the courthouse. The courthouse has no elevator or other means of access to the second floor. The public entity must relocate the proceedings to an accessible ground floor courtroom or take alternative steps, including moving the proceedings to another building, in order to allow D to participate in the civil suit.
>
> ILLUSTRATION 3: A State provides ten rest areas approximately 50 miles apart along an interstate highway. Program accessibility requires that an accessible toilet room for each sex with at least one accessible stall, or a unisex bathroom, be provided at each rest area.

Is a public entity relieved of its obligation to make its programs accessible if no individual with a disability is known to live in a particular area? No. The absence of individuals with disabilities living in an area cannot be used as the test of whether programs and activities must be accessible.

> ILLUSTRATION: A rural school district has only one elementary school and it is located in a one-room schoolhouse accessible only by steps. The school board asserts that there are no students in the district who use wheelchairs. Students, however, who currently do not have a disability may become individuals with disabilities through, for example, accidents or disease. In addition, persons other than students, such as parents and other school visitors, may be qualified individuals with disabilities who are entitled to participate in school programs. Consequently, the apparent lack of students with disabilities in a school district's service area does not excuse the school district from taking whatever appropriate steps are necessary to ensure that its programs, services, and activities are accessible to qualified individuals with disabilities.

Can back doors and freight elevators be used to satisfy the program accessibility requirement? Yes, but only as a last resort and only if such an arrangement provides accessibility comparable to that provided to persons without disabilities, who generally use front doors and passenger elevators. For example, a back door is acceptable if it is kept unlocked during the same hours the front door remains unlocked; the passageway to and from the floor is accessible, well-lit, and neat and clean; and the individual with a mobility impairment does not have to travel excessive distances or through nonpublic areas such as kitchens and storerooms to gain access. A freight elevator would be acceptable if it were upgraded so as to be usable by passengers generally and if the passageways leading to and from the elevator are well-lit and neat and clean.

Are there any limitations on the program accessibility requirement? Yes. A public entity does not have to take any action that it can demonstrate would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. This determination can only be made by the head of the public entity or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. The determination that undue burdens would result must be based on all resources available for use in the program. If an action would result in such an alteration or such burdens, the public entity must 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 and services of the program or activity.

II-5.2000 Methods for providing program accessibility. Public entities may achieve program accessibility by a number of methods. In many situations, providing access to facilities through structural methods, such as alteration of existing facilities and acquisition or construction of additional facilities, may be the most efficient method of providing program accessibility. The public entity may, however, pursue alternatives to structural

changes in order to achieve program accessibility. Nonstructural methods include acquisition or redesign of equipment, assignment of aides to beneficiaries, and provision of services at alternate accessible sites.

ILLUSTRATION 1: The office building housing a public welfare agency may only be entered by climbing a flight of stairs. If an individual with a mobility impairment seeks information about welfare benefits, the agency can provide the information in an accessible ground floor location or in another accessible building.

ILLUSTRATION 2: A public library's open stacks are located on upper floors having no elevator. As an alternative to installing a lift or elevator, library staff may retrieve books for patrons who use wheelchairs. The aides must be available during the operating hours of the library.

ILLUSTRATION 3: A public university that conducts a French course in an inaccessible building may relocate the course to a building that is readily accessible.

When choosing a method of providing program access, a public entity must give priority to the one that results in the most integrated setting appropriate to encourage interaction among all users, including individuals with disabilities.

ILLUSTRATION: A rural, one-room library has an entrance with several steps. The library can make its services accessible in several ways. It may construct a simple wooden ramp quickly and at relatively low cost. Alternatively, individuals with mobility impairments may be provided access to the library's services through a bookmobile, by special messenger service, through use of clerical aides, or by any other method that makes the resources of the library "readily accessible." Priority should be given, however, to constructing a ramp because that is the method that offers library services to individuals with disabilities and others in the same setting.

Is carrying an individual with a disability considered an acceptable method of achieving program access? Generally, it is not. Carrying persons with mobility impairments to provide program accessibility is permitted in only two cases. First, when program accessibility in existing facilities can be achieved only through structural alterations (that is, physical changes to the facilities), carrying may serve as a temporary expedient until construction is completed. Second, carrying is permitted in manifestly exceptional cases if (a) carriers are formally instructed on the safest and least humiliating means of carrying and (b) the service is provided in a reliable manner. Carrying is contrary to the goal of providing accessible programs, which is to foster independence.

How is "program accessibility" under title II different than "readily achievable barrier removal" under title III? Unlike private entities under title III, public entities are not required to remove barriers from each facility, even if removal is readily achievable. A public entity must make its "programs" accessible. Physical changes to a building are required only when there is no other feasible way to make the program accessible.

In contrast, barriers must be removed from places of public accommodation under title III where such removal is "readily achievable," without regard to whether the public accommodation's services can be made accessible through other methods.

II-5.3000 Curb ramps. Public entities that have responsibility or authority over streets, roads, or walkways must prepare a schedule for providing curb ramps where pedestrian walkways cross curbs. Public entities must give priority to walkways serving State and local government offices and facilities, transportation, places of public accommodation, and employees, followed by walkways serving other areas. This schedule must be included as part of a transition plan (see II-8.3000).

To promote both efficiency and accessibility, public entities may choose to construct curb ramps at every point where a pedestrian walkway intersects a curb. However, public entities are not necessarily required to construct a curb ramp at every such intersection.

Alternative routes to buildings that make use of existing curb cuts may be acceptable under the concept of program accessibility in the limited circumstances where individuals with disabilities need only travel a marginally longer route. In addition, the fundamental alteration and undue burdens limitations may limit the number of curb ramps required. To achieve or maintain program accessibility, it may be appropriate to establish an ongoing procedure for installing curb ramps upon request in areas frequented by individuals with disabilities as residents, employees, or visitors.

What are walkways? Pedestrian walkways include locations where access is required for use of public transportation, such as bus stops that are not located at intersections or crosswalks.

II-5.4000 Existing parking lots or garages. A public entity should provide an adequate number of accessible parking spaces in existing parking lots or garages over which it has jurisdiction.

II-5.5000 Historic preservation programs. Special program accessibility requirements and limitations apply to historic preservation programs. Historic preservation programs are programs conducted by a public entity that have preservation of historic properties as a primary purpose. An historic property is a property that is listed or eligible for listing in the National Register of Historic Places or a property designated as historic under State or local law.

In achieving program accessibility in historic preservation programs, a public entity must give priority to methods that provide physical access to individuals with disabilities. Physical access is particularly important in an historic preservation program, because a primary benefit of the program is uniquely the experience of the historic property itself.

Are there any special limitations on measures required to achieve program accessibility in historic preservation programs in addition to the general fundamental alteration / undue financial and administrative burdens limitations? Yes, a public entity is not required to take any action that would threaten or destroy the historic significance of an historic property. In cases where physical access cannot be provided because of either this special limitation, or because an undue financial burden or fundamental alteration would result, alternative measures to achieve program accessibility must be undertaken.

> ILLUSTRATION: Installing an elevator in an historic house museum to provide access to the second floor bedrooms would destroy architectural features of historic significance on the first floor. Providing an audio-visual display of the contents of the upstairs rooms in an accessible location on the first floor would be an alternative way of achieving program accessibility.

Does the special limitation apply to programs that are not historic preservation programs, but just happen to be located in historic properties? No. In these cases, nonstructural methods of providing program accessibility, such as relocating all or part of a program or making home visits, are available to ensure accessibility, and no special limitation protecting the historic structure is provided.

II-5.6000 Time periods for achieving program accessibility. Public entities must achieve program accessibility by January 26, 1992. If structural changes are needed to achieve program accessibility, they must be made as expeditiously as possible, but in no event later than January 26, 1995. This three-year time period is not a grace period; all changes must be accomplished as expeditiously as possible. A public entity that employs 50 or more persons must develop a transition plan by July 26, 1992, setting forth the steps necessary to complete such changes. For guidance on transition plan requirements, see II-8.3000.

II-6.0000 NEW CONSTRUCTION AND ALTERATIONS

Regulatory references: 28 CFR 35.151.

II-6.1000 General. All facilities designed, constructed, or altered by, on behalf of, or for the use of a public entity must be readily accessible and usable by individuals with disabilities, if the construction or alteration is begun after January 26, 1992.

What is "readily accessible and usable?" This means that the facility must be designed, constructed, or altered in strict compliance with a design standard. The regulation gives a choice of two standards that may be used (see II-6.2000).

II-6.2000 Choice of design standard: UFAS or ADAAG

II-6.2100 General. Public entities may choose from two design standards for new construction and alterations. They can choose either the Uniform Federal Accessibility Standards (UFAS) or the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG), which is the standard that must be used for public accommodations and commercial facilities under title III of the ADA. If ADAAG is chosen, however, public entities are not entitled to the elevator exemption (which permits certain buildings under three stories or under 3,000 square feet per floor to be constructed without an elevator).

Many public entities that are recipients of Federal funds are already subject to UFAS, which is the accessibility standard referenced in most section 504 regulations.

On December 21, 1992, the Access Board published proposed title II accessibility guidelines that will generally adopt ADAAG for State and local government facilities. The proposed guidelines also set specific requirements for judicial, legislative, and regulatory facilities; detention and correctional facilities; accessible residential housing; and public rights-of-way. The proposed guidelines are subject to a 90-day comment period. It is anticipated that the Department of Justice will amend its title II rule to eliminate the choice between ADAAG and UFAS and, instead, mandate that public entities follow the amended ADAAG.

Which standard is stricter, UFAS or ADAAG? The many differences between the standards are highlighted below. In some areas, UFAS may appear to be more stringent. In other areas ADAAG may appear to be more stringent. Because of the many differences, one standard is not stricter than the other.

Can a public entity follow ADAAG on one floor of a new building and then follow UFAS on the next floor? No. Each facility or project must follow one standard completely.

Can a public entity follow UFAS for one alteration project and then follow ADAAG for another alteration project in the same building? No. All alterations in the same building must be done in accordance with the same standard.

II-6.3000 Major differences between ADAAG and UFAS. Set forth below is a summary of some of the major differences between ADAAG and UFAS.

II-6.3100 General principles

1) *Work areas*

> ADAAG: Requires that areas used only by employees as work areas be designed and constructed so that individuals with disabilities can approach, enter, and exit the areas. There is, then, only a limited application of the standards to work areas (§4.1.1(3)).
>
> UFAS: Contains no special limited requirement for work areas. The UFAS standards apply (as provided in the Architectural Barriers Act) in all areas frequented by the public or which "may result in employment ... of physically handicapped persons" (§1).

2) *Equivalent facilitation*

> ADAAG: Departures from particular standards are permitted where alternatives will provide substantially equivalent or greater access (§2.2).
>
> UFAS: UFAS itself does not contain a statement concerning equivalent facilitation. However, section 504 regulations, as well as the Department's title II regulation (28

CFR 35.151(c)), state that departures are permitted where it is "clearly evident that equivalent access" is provided.

3*) Exemption from application of standards in new construction*

ADAAG: Contains a structural impracticability exception for new construction: full compliance with the new construction standards is not required in the rare case where the terrain prevents compliance (§4.1.1(5)(a)).

UFAS: Does not contain a structural impracticability exception (or any other exception) for new construction.

4) *Exemption from application of standards in alterations*

ADAAG: For alterations, application of standards is not required where it would be "technically infeasible" (i.e., where application of the standards would involve removal of a load-bearing structural member or where existing physical or site restraints prevent compliance). Cost is not a factor (§4.1.6(1)(j)).

UFAS: Application of standards is not required for alterations where "structurally impracticable," i.e., where removal of a load-bearing structural member is involved or where the result would be an increased cost of 50 percent or more of the value of the element involved (§§4.1.6(3); 3.5 ("structural impractibility")). Cost is a factor. (Note that the similar term, "structural impracticability," is used in ADAAG (see item #3 above), but in ADAAG it is used in relation to new construction. In UFAS, it is used in relation to alterations, and it has a different meaning.)

5) *Alterations triggering additional requirements*

ADAAG: Alterations to primary function areas (where major activities take place) trigger a "path of travel" requirement, that is, a requirement to make the path of travel from the entrance to the altered area -- and telephones, restrooms, and drinking fountains serving the altered area -- accessible (§4.1.6(2)). But, under the Department of Justice title III rule, a public entity is not required to spend more than 20% of the cost of the original alteration on making the path of travel accessible, even if this cost limitation results in less than full accessibility (28 CFR 36.403(f)).

UFAS: If a building undergoes a "substantial alteration" (where the total cost of all alterations in a 12-month period amounts to 50% or more of the value of the building), the public entity must provide an accessible route from public transportation, parking, streets, and sidewalks to all accessible parts of the building; an accessible entrance; and accessible restrooms (§4.1.6(3)).

6) *Additions*

ADAAG: Each addition to an existing building is regarded as an alteration subject to the ADAAG alterations requirements (including triggering of path of travel obligations, if applicable). If the addition does not have an accessible entrance, the path of travel obligation may require an accessible route from the addition through the existing building, including its entrance and exterior approaches, subject to the 20% disproportionality limitation. Moreover, to the extent that a space or element is newly constructed as part of an addition, it is also regarded as new construction and must comply with the applicable new construction provisions of ADAAG (§4.1.5).

UFAS: Has specific requirements for additions, including requirements for entrances, routes, restrooms, and common areas. An accessible route from the addition through the

existing building, including its entrance, is required if the addition does not have an accessible entrance (§4.1.5).

II-6.3200 Elements. The following requirements apply in new construction, unless otherwise indicated.

1) *Van parking*

ADAAG: One in every eight accessible spaces must be wide enough and high enough for a van lift to be deployed. The space must be marked as "van accessible" with a supplementary sign. Alternatively, "universal parking" is permitted, in which all spaces can accommodate van widths (§4.1.2(5)(b)).

UFAS: Van parking is not required. Universal parking is not addressed.

2) *Valet parking*

ADAAG: Facilities with valet parking must have an accessible passenger loading zone on an accessible route to the exterior of the facility (§4.1.2(5)(e)).

UFAS: No requirements for valet parking.

3) *Signs*

ADAAG:

* Signs designating permanent rooms and spaces (men's and women's rooms; room numbers; exit signs) must have raised and Brailled letters; must comply with finish and contrast standards; and must be mounted at a certain height and location (§4.1.3(16)(a)).

* Signs that provide direction to or information about functional spaces of a building (e.g. "cafeteria this way;" "copy room") need not comply with requirements for raised and Brailled letters, but they must comply with requirements for character proportion, finish, and contrast. If suspended or projected overhead, they must also comply with character height requirements (§4.1.3(16)(b)).

* Building directories and other signs providing temporary information (such as current occupant's name) do not have to comply with any ADAAG requirements (§4.1.3(16)).

* Has requirements not only for the standard international symbol of accessibility, but also for symbols of accessibility identifying volume control telephones, text telephones, and assistive listening systems (§§4.1.2(7); 4.30.7).

UFAS:

* Signs designating permanent rooms and spaces must be raised (Braille is not required) and must be mounted at a certain height and location (§4.1.2(15)).

* All other signs (including temporary signs) must comply with requirements for letter proportion and color contrast, but not with requirements for raised letters or mounting height (§4.1.2(15)).

* Requires only the standard international symbol of accessibility (§4.30.5).

4) *Entrances*

ADAAG: At least 50 percent of all public entrances must be accessible with certain qualifications. In addition, there must be accessible entrances to enclosed parking, pedestrian tunnels, and elevated walkways (§4.1.3(8)).

UFAS: At least one principal entrance at each grade floor level must be accessible. In addition, there must be an accessible entrance to transportation facilities, passenger loading zones, accessible parking, taxis, streets, sidewalks, and interior accessible areas, if the building has entrances that normally serve those functions (§4.1.2(8)) . (This latter requirement could result in all entrances having to be accessible in many cases.)

5) *Areas of rescue assistance or places of refuge*

ADAAG: Areas of rescue assistance (safe areas in which to await help in an emergency) are generally required on each floor, other than the ground floor, of a multistory building. An accessible egress route or an area of rescue assistance is required for each exit required by the local fire code. Specific requirements are provided for such features as location, size, stairway width, and two-way communications. Areas of rescue assistance are not required in buildings with supervised automatic sprinkler systems, nor are they required in alterations (§4.1.3(9)).

UFAS: Accessible routes must serve as a means of egress or connect to an accessible "place of refuge." No specific requirements for places of refuge are included. Rather, UFAS refers to local administrative authority for specific provisions on location, size, etc. UFAS requires more than one means of accessible egress when more than one exit is required (§4.3.10).

6) *Water fountains*

ADAAG: Where there is more than one fountain on a floor, 50% must be accessible to persons using wheelchairs. If there is only one drinking fountain on a floor, it must be accessible both to individuals who use wheelchairs and to individuals who have trouble bending or stooping (for example, a "hi-lo fountain" or fountain and water cooler may be used) (§4.1.3(10)).

UFAS: Approximately 50% on each floor must be accessible. If there is only one fountain on a floor, it must be accessible to individuals who use wheelchairs (§4.1.3(9)).

7) *Storage and shelves*

ADAAG: One of each type of fixed storage facility must be accessible. Self-service shelves and displays must be on an accessible route but need not comply with reach-range requirements (§4.1.3(12)).

UFAS: Has the same requirements as ADAAG for fixed storage, but does not contain the reach requirement exemption for self-service shelves and displays (§4.1.2(11)).

8) *Volume controls*

ADAAG: All accessible public phones must be equipped with volume controls. In addition, 25%, but never less than one, of all other public phones must have volume controls (§4.1.3(17)(b)).

UFAS: At least one accessible telephone must have a volume control (§4.1.2(16)(b)).

9) *Telecommunication Devices for the Deaf (TDD's)*

ADAAG: One TDD (also known as a "text telephone") must be provided inside any building that has at least one interior pay phone and four or more public pay telephones, counting both interior and exterior phones. In addition, one TDD or text telephone (per facility) must be provided whenever there is an interior public pay phone in a stadium or arena; convention center; hotel with a convention center; covered shopping mall; or hospital emergency, recovery, or waiting room (§4.1.3(17)(c)).

UFAS: No requirement for TDD's.

10) *Assembly areas*

ADAAG:

* Wheelchair seating: Requirements triggered in any assembly area with fixed seating that seats four or more people. The number of wheelchair locations required depends upon the size of the assembly area. When the area has over 300 seats, there are requirements for dispersal of wheelchair seating. ADAAG also contains requirements for aisle seats without armrests (or with removable armrests) and fixed seating for companions located adjacent to each wheelchair seating area (§4.1.3(19)(a)).

* Assistive listening systems: Certain fixed seating assembly areas that accommodate 50 or more people or have audio-amplification systems must have permanently installed assistive listening systems. Other assembly areas must have permanent systems or an adequate number of electrical outlets or other wiring to support a portable system. A special sign indicating the availability of the system is required. The minimum number of receivers must be equal to four percent of the total number of seats, but never less than two (§4.1.3(19)(b)).

UFAS:

* Wheelchair seating: No requirements for wheelchair seating are triggered, unless the assembly area has 50 or more seats. Seating must be dispersed and provide comparable lines of sight (§4.1.2(18)(a)).

* Assistive listening systems: Assembly areas with audio-amplification systems must have a listening system that serves a reasonable number of people, but at least two. If it has no amplification system or is used primarily as meeting or conference room, it must have a permanent or portable system. No special signs are required (§4.1.2(18)(b)).

11) *Automated teller machines (ATM's)*

ADAAG: Where ATM's are provided, each must be accessible, except that only one need comply when two or more ATM's are at the same location. Accessible machines must have, among other features, accessible controls and instructions and other information accessible to persons with sight impairments (§4.1.3(20)).

UFAS: No requirements for ATM's.

12) *Bathrooms*

ADAAG: Every public and common use bathroom must be accessible. Generally only one stall must be accessible (standard five-by-five feet). When there are six or more stalls, there must be one accessible stall and one stall that is three feet wide (§§4.1.3(11); 4.22.4).

UFAS: Same general requirements but no requirement for an additional three-foot-wide stall (§§4.1.2(10); 4.22.4).

13) *Detectable warnings*

ADAAG: Required on curb ramps, hazardous vehicular areas, and reflecting pools, but not on doors to hazardous areas. The warnings must be truncated domes (§4.29).

UFAS: "Tactile warnings" (uses different terminology) required only on doors to hazardous areas. Must be a textured surface on the door handle or hardware (§4.29).

14) *Carpet and carpet tile*

ADAAG: Same standards for carpet and carpet tile: maximum pile height of 1/2" (§4.5.3).

UFAS: Carpet must have maximum pile height of 1/2". Carpet tile must have maximum combined thickness of pile, cushion, and backing height of 1/2" (§4.5.3).

15) *Curb ramps*

ADAAG: Curb ramps must have detectable warnings (which must be raised truncated domes) (§4.7.7).

UFAS: No requirement for detectable warnings on curb ramps.

16) *Elevator hoistway floor designations and car controls*

ADAAG: Must have raised and Brailled characters (§§4.10.5; 4.10.12).

UFAS: Must have raised characters; no requirement for Braille (§§4.10.5; 4.10.12).

17) *Visual alarms*

ADAAG: Contains details about features required on visual alarms for individuals with hearing impairments, including type of lamp, color, intensity, and location. Flash rate must be at a minimum of 1Hz and maximum of 3Hz (§4.28.3).

UFAS: Contains much less detail. Allows faster flash rate of up to 5Hz (§4.28.3).

18) *Elevators and platform lifts in new construction and alterations*

ADAAG: The elevator exemption for two-story places of public accommodation or commercial facilities does not apply to buildings and facilities subject to title II. Therefore, elevators are required in all new multilevel buildings or facilities, but vertical access to elevator pits, elevator penthouses, mechanical rooms, and piping or equipment catwalks is not required. Platform lifts may be used instead of elevators under certain conditions in new construction and may always be used in alterations (§4.1.3(5)). Individuals must be able to enter unassisted, operate, and exit the lift without assistance (4.11.3).

UFAS: Has same general requirement for elevators and exceptions similar to those in ADAAG. Platform lifts may be substituted for elevators in new construction or alterations "if no other alternative is feasible" (§4.1.2(5)). Lifts must facilitate unassisted entry and exit (but not "operation" of the lift as in ADAAG) (§4.11.3).

II-6.3300 Types of facilities

1) *Historic buildings*

ADAAG: Contains procedures for buildings eligible for listing in the National Register of Historic Places under the National Historic Preservation Act and for historic buildings designated under State or local law (§4.1.7).

UFAS: Contains requirements for buildings eligible for listing in the National Register of Historic Places under the National Historic Preservation Act that are also subject to the Architectural Barriers Act. UFAS does not contain provisions applicable to buildings and facilities that are designated as "historic" under State or local law. (Under title II, the UFAS provisions may be applied to any building that is eligible for listing on the National Register of Historic Places, regardless of whether it is also subject to the Architectural Barriers Act.) (§4.1.7).

2) *Residential facilities/transient lodging*

ADAAG:

* Hotels, motels, dormitories, and other similar establishments: Four percent of the first 100 rooms and approximately two percent of rooms in excess of 100 must be accessible to both persons with hearing impairments (i.e., contain visual alarms, visual notification devices, volume-control telephones, and an accessible electrical outlet for a text telephone) and to persons with mobility impairments. Moreover, a similar percentage of additional rooms must be accessible to persons with hearing impairments. In addition, where there are more than 50 rooms, approximately one percent of rooms must be accessible rooms with a special roll-in/transfer shower. There are special provisions for alterations (§§9.1-9.4).

* Homeless shelters, halfway houses, and similar social service establishments: Homeless shelters and other social service entities must provide the same percentage of accessible sleeping accommodations as above. At least one type of amenity in each common area must be accessible. Alterations are subject to less stringent standards (§9.5).

UFAS: Contains requirements for residential occupancies with technical requirements for "dwelling units." No requirements for sleeping rooms for individuals with hearing impairments. No requirements for roll-in showers as in ADAAG. No standards for alterations (§§4.1.4(11); 4.34).

3) *Restaurants*

ADAAG: In restaurants, generally all dining areas and five percent of fixed tables (but not less than one) must be accessible. While raised or sunken dining areas must be accessible, inaccessible mezzanines are permitted under certain conditions. Contains requirements for counters and bars, access aisles, food service lines, tableware and condiment areas, raised speaker's platforms, and vending machine areas (but not controls). Contains some less stringent requirements for alterations (§5).

UFAS: Less detailed requirements. Does not address counters and bars. Raised platforms are allowed if same service and decor are provided. Vending machines and controls are covered. No special, less stringent requirements for alterations (§5).

4) *Medical or health care facilities*

ADAAG: In medical care facilities, all public and common use areas must be accessible. In general purpose hospitals and in psychiatric and detoxification facilities, 10 percent of patient bedrooms and toilets must be accessible. The required percentage is 100 percent for special facilities treating conditions that affect mobility, and 50 percent for long-term care facilities and nursing homes. Uses terms clarified by the Department of Health and Human Services to describe types of facilities. Some descriptive information was added. Contains special, less stringent requirements for alterations (§6). UFAS: Uses different terms to describe types of facilities. Required clearances in rooms exceed ADAAG requirements. No special, less stringent requirements for alterations (§6).

5) *Mercantile*

ADAAG:

Counters:

* At least one of each type of sales or service counter where a cash register is located must be accessible. Accessible counters must be dispersed throughout the facility. Auxiliary counters are permissible in alterations (§7.2(1)).

* At counters without cash registers, such as bank teller windows and ticketing counters, three alternatives are possible: (1) a portion of the counter may be lowered, (2) an auxiliary counter may be provided, or (3) equivalent facilitation may be provided by installing a folding shelf on the front of a counter to provide a work surface for a person using a wheelchair (§7.2(2)).

Check-out aisles:

* At least one of each design of check-out aisle must be accessible, and, in many cases, additional check-out aisles are required to be accessible (i.e., from 20 to 40 percent) depending on the number of check-out aisles and the size of the facility. There are less stringent standards for alterations (§7.3).

UFAS:

Much less detail. At service counters, must provide an accessible portion of the counter or a nearby accessible counter. At least one check-out aisle must be accessible (§7).

6) *Jails and prisons*

ADAAG: No scoping requirements indicating how many cells need to be accessible.

UFAS: Five percent of residential units in jails, prisons, reformatories, and other detention or correctional facilities must be accessible (§4.1.4(9)(c)).

II-6.4000 Leased buildings. Public entities are encouraged, but not required, to lease accessible space. The availability of accessible private commercial space will steadily increase over time as the title III requirements for new construction and alterations take effect. Although a public entity is not required to lease accessible space, once it occupies a facility, it must provide access to all of the programs conducted in that space (see II-5.0000). Thus, the more accessible the space is to begin with, the easier and less costly it will be later on to make programs available to individuals with disabilities and to provide reasonable accommodations for employees who may need them.

II-6.5000 Alterations to historic properties. Alterations to historic properties must comply with the specific provisions governing historic properties in ADAAG or UFAS, to the maximum extent feasible. Under those

provisions, alterations should be done in full compliance with the alterations standards for other types of buildings. However, if following the usual standards would threaten or destroy the historic significance of a feature of the building, alternative standards may be used. The decision to use alternative standards for that feature must be made in consultation with the appropriate historic advisory board designated in ADAAG or UFAS, and interested persons should be invited to participate in the decisionmaking process.

What are "historic properties?" These are properties listed or eligible for listing in the National Register of Historic Places, or properties designated as historic under State or local law.

What are the alternative requirements? The alternative requirements for historic buildings or facilities provide a minimal level of access. For example --

1) An accessible route is only required from one site access point (such as the parking lot).

2) A ramp may be steeper than is ordinarily permitted.

3) The accessible entrance does not need to be the one used by the general public.

4) Only one accessible toilet is required and it may be unisex.

5) Accessible routes are only required on the level of the accessible entrance.

But what if complying with even these minimal alternative requirements will threaten or destroy the historic significance? In such a case, which is rare, the public entity need not make the structural changes required by UFAS or ADAAG. But, if structural modifications that comply with UFAS or ADAAG cannot be undertaken, the Department's regulation requires that "program accessibility" be provided.

ILLUSTRATION: A town owns a one-story historic house and decides to make certain alterations in it so that the house can be used as a museum. The town architect concludes that most of the normal standards for alterations can be applied during the renovation process without threatening or destroying historic features. There appears, however, to be a problem if one of the interior doors is widened, because historic decorative features on the door might be destroyed. The town architect consults the standards and determines that the appropriate historic body with jurisdiction over the particular historic home is the State Historic Preservation Officer. The architect then sets up a meeting with that officer, to which the local disability group and the designated title II coordinator are invited. At the meeting the participants agree with the town architect's conclusion that the normal alterations standards cannot be applied to the interior door. They then review the special alternative requirements, which require an accessible route throughout the level of the accessible entrance. The meeting participants determine that application of the alternative minimal requirements is likewise not possible. In this situation, the town is not required to widen the interior door. Instead, the town provides access to the program offered in that room by making available a video presentation of the items within the inaccessible room. The video can be viewed in a nearby accessible room in the museum.

II-6.6000 Curb ramps. When streets, roads, or highways are newly built or altered, they must have ramps or sloped areas wherever there are curbs or other barriers to entry from a sidewalk or path. Likewise, when new sidewalks or paths are built or are altered, they must contain curb ramps or sloped areas wherever they intersect with streets, roads, or highways.

II-7.0000 COMMUNICATIONS

Regulatory references: 28 CFR 35.160-35.164.

II-7.1000 Equally effective communication. A public entity must ensure that its communications with individuals with disabilities are as effective as communications with others. This obligation, however, does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of its services, programs, or activities, or in undue financial and administrative burdens.

In order to provide equal access, a public accommodation is required to make available appropriate auxiliary aids and services where necessary to ensure effective communication.

What are auxiliary aids and services? Auxiliary aids and services include a wide range of services and devices that promote effective communication.

Examples of auxiliary aids and services for individuals who are deaf or hard of hearing include qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, and exchange of written notes.

Examples for individuals with vision impairments include qualified readers, taped texts, audio recordings, Brailled materials, large print materials, and assistance in locating items.

Examples for individuals with speech impairments include TDD's, computer terminals, speech synthesizers, and communication boards.

The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the length and complexity of the communication involved.

> ILLUSTRATION 1: Some individuals who have difficulty communicating because of a speech impairment can be understood if individuals dealing with them merely listen carefully and take the extra time that is necessary.
>
> ILLUSTRATION 2: For individuals with vision impairments, employees can provide oral directions or read written instructions. In many simple transactions, such as paying bills or filing applications, communications provided through such simple methods will be as effective as the communications provided to other individuals in similar transactions. Many transactions with public entities, however, involve more complex or extensive communications than can be provided through such simple methods. Sign language or oral interpreters, for example, may be required when the information being communicated in a transaction with a deaf individual is complex, or is exchanged for a lengthy period of time. Factors to be considered in determining whether an interpreter is required include the context in which the communication is taking place, the number of people involved, and the importance of the communication.
>
> ILLUSTRATION 1: A municipal hospital emergency room must be able to communicate with patients about symptoms and patients must be able to understand information provided about their conditions and treatment. In this situation, an interpreter is likely to be necessary for communications with individuals who are deaf.
>
> ILLUSTRATION 2: Because of the importance of effective communication in State and local court proceedings, special attention must be given to the communications needs of individuals with disabilities involved in such proceedings. Qualified interpreters will usually be necessary to ensure effective communication with parties, jurors, and witnesses who have hearing impairments and use sign language. For individuals with hearing impairments who do not use sign language, other types of auxiliary aids or services, such as assistive listening devices or computer-assisted transcription services, which allow virtually instantaneous transcripts of courtroom argument and testimony to appear on displays, may be required.

Must public service announcements or other television programming produced by public entities be captioned? Audio portions of television and videotape programming produced by public entities are subject to the requirement to provide equally effective communication for individuals with hearing impairments. Closed captioning of such programs is sufficient to meet this requirement.

Must tax bills from public entities be available in Braille and/or large print? What about other documents? Tax bills and other written communications provided by public entities are subject to the requirement for effective communication. Thus, where a public entity provides information in written form, it must, when requested, make that information available to individuals with vision impairments in a form that is usable by them. "Large print" versions of written documents may be produced on a copier with enlargement capacities. Brailled versions of documents produced by computers may be produced with a Braille printer, or audio tapes may be provided for individuals who are unable to read large print or do not use Braille.

II-7.1100 Primary consideration. When an auxiliary aid or service is required, the public entity must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice and must give primary consideration to the choice expressed by the individual. "Primary consideration" means that the public entity must honor the choice, unless it can demonstrate that another equally effective means of communication is available, or that use of the means chosen would result in a fundamental alteration in the service, program, or activity or in undue financial and administrative burdens.

It is important to consult with the individual to determine the most appropriate auxiliary aid or service, because the individual with a disability is most familiar with his or her disability and is in the best position to determine what type of aid or service will be effective. Some individuals who were deaf at birth or who lost their hearing before acquiring language, for example, use sign language as their primary form of communication and may be uncomfortable or not proficient with written English, making use of a notepad an ineffective means of communication.

Individuals who lose their hearing later in life, on the other hand, may not be familiar with sign language and can communicate effectively through writing. For these individuals, use of a word processor with a videotext display may provide effective communication in transactions that are long or complex, and computer-assisted simultaneous transcription may be necessary in courtroom proceedings. Individuals with less severe hearing impairments are often able to communicate most effectively with voice amplification provided by an assistive listening device.

For individuals with vision impairments, appropriate auxiliary aids include readers, audio recordings, Brailled materials, and large print materials. Brailled materials, however, are ineffective for many individuals with vision impairments who do not read Braille, just as large print materials would be ineffective for individuals with severely impaired vision who rely on Braille or on audio communications. Thus, the requirement for consultation and primary consideration to the individual's expressed choice applies to information provided in visual formats as well as to aurally communicated information.

II-7.1200 Qualified interpreter. There are a number of sign language systems in use by individuals who use sign language. (The most common systems of sign language are American Sign Language and signed English.) Individuals who use a particular system may not communicate effectively through an interpreter who uses a different system. When an interpreter is required, therefore, the public entity should provide a qualified interpreter, that is, an interpreter who is able to sign to the individual who is deaf what is being said by the hearing person and who can voice to the hearing person what is being signed by the individual who is deaf. This communication must be conveyed effectively, accurately, and impartially, through the use of any necessary specialized vocabulary.

May friends or relatives be asked to interpret? Often, friends or relatives of the individual can provide interpreting services, but the public entity may not require the individual to provide his or her own interpreter, because it is the responsibility of the public entity to provide a qualified interpreter. Also, in many situations, requiring a friend or family member to interpret may not be appropriate, because his or her presence at the transaction may violate the individual's right to confidentiality, or because the friend or family member may have an interest in the transaction that is different from that of the individual involved. The obligation to provide "impartial" interpreting services requires that, upon request, the public entity provide an interpreter who does not have a personal relationship to the individual with a disability.

Are certified interpreters considered to be more qualified than interpreters without certification? Certification is not required in order for an interpreter to be considered to have the skills necessary to facilitate communication. Regardless of the professionalism or skills that a certified interpreter may possess, that particular individual may not feel comfortable or possess the proper vocabulary necessary for interpreting for a computer class, for example. Another equally skilled, but noncertified interpreter might have the necessary vocabulary, thus making the noncertified person the qualified interpreter for that particular situation.

Can a public entity use a staff member who signs "pretty well" as an interpreter for meetings with individuals who use sign language to communicate? Signing and interpreting are not the same thing. Being able to sign does not mean that a person can process spoken communication into the proper signs, nor does it mean that he or she possesses the proper skills to observe someone signing and change their signed or fingerspelled communication into spoken words. The interpreter must be able to interpret both receptively and expressively.

II-7.2000 Telephone communications. Public entities that communicate by telephone must provide equally effective communication to individuals with disabilities, including hearing and speech impairments. If telephone relay services, such as those required by title IV of the ADA, are available, these services generally may be used to meet this requirement. Relay services involve a relay operator who uses both a standard telephone and a TDD to type the voice messages to the TDD user and read the TDD messages to the standard telephone user. Where such services are available, public employees must be instructed to accept and handle relayed calls in the normal course of business.

II-7.3000 Emergency telephone services

II-7.3100 General. Many public entities provide telephone emergency services by which individuals can seek immediate assistance from police, fire, ambulance, and other emergency services. These telephone emergency services--including "911" services--are clearly an important public service whose reliability can be a matter of life or death. Public entities must ensure that these services, including 911 services, are accessible to persons with impaired hearing and speech. State and local agencies that provide emergency telephone services must provide "direct access" to individuals who rely on a TDD or computer modem for telephone communication. Telephone access through a third party or through a relay service does not satisfy the requirement for direct access. (However, if an individual places a call to the emergency service through a relay service, the emergency service should accept the call rather than require the caller to hang up and call the emergency service directly without using the relay.) A public entity may, however, operate its own relay service within its emergency system, provided that the services for nonvoice calls are as effective as those provided for voice calls.

What emergency telephone services are covered by title II? The term "telephone emergency services" applies to basic emergency services -- police, fire, and ambulance -- that are provided by public entities, including 911 (or, in some cases, seven-digit) systems. Direct access must be provided to all services included in the system, including services such as emergency poison control information. Emergency services that are not provided by public entities are not subject to the requirement for "direct access."

What is "direct access? "Direct access" means that emergency telephone services can directly receive calls from TDD's and computer modem users without relying on outside relay services or third party services.

Does title II require that telephone emergency service systems be compatible with all formats used for nonvoice communications? No. At present, telephone emergency services must only be compatible with the Baudot format. Until it can be technically proven that communications in another format can operate in a reliable and compatible manner in a given telephone emergency environment, a public entity would not be required to provide direct access to computer modems using formats other than Baudot.

Are any additional dialing or space bar requirements permissible for 911 systems? No. Additional dialing or space bar requirements are not permitted. Operators should be trained to recognize incoming TDD signals and respond appropriately. In addition, they also must be trained to recognize that "silent" calls may be TDD or computer modem calls and to respond appropriately to such calls as well.

A caller, however, is not prohibited from announcing to the answerer that the call is being made on a TDD by pressing the space bar or keys. A caller may transmit tones if he or she chooses to do so. However, a public entity may not require such a transmission.

II-7.3200 911 lines. Where a 911 telephone line is available, a separate seven-digit telephone line must not be substituted as the sole means for nonvoice users to access 911 services. A public entity may, however, provide a separate seven-digit line for use exclusively by nonvoice calls in addition to providing direct access for such calls to the 911 line. Where such a separate line is provided, callers using TDD's or computer modems would have the option of calling either 911 or the seven-digit number.

II-7.3300 Seven-digit lines. Where a 911 line is not available and the public entity provides emergency services through a seven-digit number, it may provide two separate lines -- one for voice calls, and another for nonvoice calls -- rather than providing direct access for nonvoice calls to the line used for voice calls, provided that the services for nonvoice calls are as effective as those offered for voice calls in terms of time response and availability in hours. Also, the public entity must ensure that the nonvoice number is publicized as effectively as the voice number, and is displayed as prominently as the voice number wherever the emergency numbers are listed.

II-7.3400 Voice amplification. Public entities are encouraged, but not required, to provide voice amplification for the operator's voice. In an emergency, a person who has a hearing loss may be using a telephone that does not have an amplification device. Installation of speech amplification devices on the handsets of operators would be one way to respond to this situation.

II-8.0000 ADMINISTRATIVE REQUIREMENTS

Regulatory references: 28 CFR 35.105-35.107; 35.150(c) and (d).

II-8.1000 General. Title II requires that public entities take several steps designed to achieve compliance. These include the preparation of a self-evaluation. In addition, public entities with 50 or more employees are required to --

1) Develop a grievance procedure;

2) Designate an individual to oversee title II compliance;

3) Develop a transition plan if structural changes are necessary for achieving program accessibility; and

4) Retain the self-evaluation for three years.

How does a public entity determine whether it has "50 or more employees"? Determining the number of employees will be based on a governmentwide total of employees, rather than by counting the number of employees of a subunit, department, or division of the local government. Part-time employees are included in the determination.

> ILLUSTRATION: Town X has 55 employees (including 20 part-time employees). Its police department has 10 employees, and its fire department has eight employees. The police and fire department are subject to title II's administrative requirements applicable to public entities with 50 or more employees because Town X, as a whole, has 50 or more employees.

Because all States have at least 50 employees, all State departments, agencies, and other divisional units are subject to title II's administrative requirements applicable to public entities with 50 or more employees.

II-8.2000 Self-evaluation. All public entities subject to title II of the ADA must complete a self-evaluation by January 26, 1993 (one year from the effective date of the Department's regulation).

Does the fact that a public entity has not completed its self-evaluation until January 26, 1993, excuse interim compliance? No. A public entity is required to comply with the requirements of title II on January 26, 1992, whether or not it has completed its self- evaluation.

Which public entities must retain a copy of the self-evaluation? A public entity that employs 50 or more employees must retain its self-evaluation for three years. Other public entities are not required to retain their self-evaluations but are encouraged to do so because these documents evidence a public entity's good faith efforts to comply with title II's requirements.

What if a public entity already did a self-evaluation as part of its obligations under section 504 of the Rehabilitation Act of 1973? The title II self-evaluation requirement applies only to those policies and practices that previously had not been included in a self-evaluation required by section 504. Because most section 504 self-evaluations were done many years ago, however, the Department expects that many public entities will re-examine all their policies and practices. Programs and functions may have changed significantly since the section 504 self-evaluation was completed. Actions that were taken to comply with section 504 may not have been implemented fully or may no longer be effective. In addition, section 504's coverage has been changed by statutory amendment, particularly the Civil Rights Restoration Act of 1987, which expanded the definition of a covered "program or activity." Therefore, public entities should ensure that all programs, activities, and services are examined fully, except where there is evidence that all policies were previously scrutinized under section 504.

What should a self-evaluation contain? A self-evaluation is a public entity's assessment of its current policies and practices. The self-evaluation identifies and corrects those policies and practices that are inconsistent with title II's requirements. As part of the self-evaluation, a public entity should:

1) Identify all of the public entity's programs, activities, and services; and

2) Review all the policies and practices that govern the administration of the public entity's programs, activities, and services.

Normally, a public entity's policies and practices are reflected in its laws, ordinances, regulations, administrative manuals or guides, policy directives, and memoranda. Other practices, however, may not be recorded and may be based on local custom.

Once a public entity has identified its policies and practices, it should analyze whether these policies and practices adversely affect the full participation of individuals with disabilities in its programs, activities, and services. In this regard, a public entity should be mindful that although its policies and practices may appear harmless, they may result in denying individuals with disabilities the full participation of its programs, activities, or services. Areas that need careful examination include the following:

1) A public entity must examine each program to determine whether any physical barriers to access exist. It should identify steps that need to be taken to enable these programs to be made accessible when viewed in their entirety. If structural changes are necessary, they should be included in the transition plan (see II-8.3000).

2) A public entity must review its policies and practices to determine whether any exclude or limit the participation of individuals with disabilities in its programs, activities, or services. Such policies or practices must be modified, unless they are necessary for the operation or provision of the program, service, or activity. The self- evaluation should identify policy modifications to be implemented and include complete justifications for any exclusionary or limiting policies or practices that will not be modified.

3) A public entity should review its policies to ensure that it communicates with applicants, participants, and members of the public with disabilities in a manner that is as effective as its communications with others. If a public entity communicates with applicants and beneficiaries by

telephone, it should ensure that TDD's or equally effective telecommunication systems are used to communicate with individuals with impaired hearing or speech. Finally, if a public entity provides telephone emergency services, it should review its policies to ensure direct access to individuals who use TDD's and computer modems.

4) A public entity should review its policies to ensure that they include provisions for readers for individuals with visual impairments; interpreters or other alternative communication measures, as appropriate, for individuals with hearing impairments; and amanuenses for individuals with manual impairments. A method for securing these services should be developed, including guidance on when and where these services will be provided. Where equipment is used as part of a public entity's program, activity, or service, an assessment should be made to ensure that the equipment is usable by individuals with disabilities, particularly individuals with hearing, visual, and manual impairments. In addition, a public entity should have policies that ensure that its equipment is maintained in operable working order.

5) A review should be made of the procedures to evacuate individuals with disabilities during an emergency. This may require the installation of visual and audible warning signals and special procedures for assisting individuals with disabilities from a facility during an emergency.

6) A review should be conducted of a public entity's written and audio-visual materials to ensure that individuals with disabilities are not portrayed in an offensive or demeaning manner.

7) If a public entity operates historic preservation programs, it should review its policies to ensure that it gives priority to methods that provide physical access to individuals with disabilities.

8) A public entity should review its policies to ensure that its decisions concerning a fundamental alteration in the nature of a program, activity, or service, or a decision that an undue financial and administrative burden will be imposed by title II, are made properly and expeditiously.

9) A public entity should review its policies and procedures to ensure that individuals with mobility impairments are provided access to public meetings.

10) A public entity should review its employment practices to ensure that they comply with other applicable nondiscrimination requirements, including section 504 of the Rehabilitation Act and the ADA regulation issued by the Equal Employment Opportunity Commission.

11) A public entity should review its building and construction policies to ensure that the construction of each new facility or part of a facility, or the alteration of existing facilities after January 26, 1992, conforms to the standards designated under the title II regulation.

12) A review should be made to ascertain whether measures have been taken to ensure that employees of a public entity are familiar with the policies and practices for the full participation of individuals with disabilities. If appropriate, training should be provided to employees.

13) If a public entity limits or denies participation in its programs, activities, or services based on drug usage, it should make sure that such policies do not discriminate against former drug users, as opposed to individuals who are currently engaged in illegal use of drugs.

If a public entity identifies policies and practices that deny or limit the participation of individuals with disabilities in its programs, activities, and services, when should it make changes? Once a public entity has identified policies and practices that deny or limit the participation of individuals with disabilities in its programs, activities, and services, it should take immediate remedial action to eliminate the impediments to full and equivalent participation. Structural modifications that are required for program accessibility should be made as expeditiously as possible but no later than January 26, 1995.

Is there a requirement for public hearings on a public entity's self-evaluation? No, but public entities are required to accept comments from the public on the self-evaluation and are strongly encouraged to consult with individuals with disabilities and organizations that represent them to assist in the self-evaluation process. Many individuals with disabilities have unique perspectives on a public entity's programs, activities, and services. For example, individuals with mobility impairments can readily identify barriers preventing their full enjoyment of the public entity's programs, activities, and services. Similarly, individuals with hearing impairments can identify the communication barriers that hamper participation in a public entity's programs, activities, and services.

II-8.3000 Transition plan. Where structural modifications are required to achieve program accessibility, a public entity with 50 or more employees must do a transition plan by July 26, 1992, that provides for the removal of these barriers. Any structural modifications must be completed as expeditiously as possible, but, in any event, by January 26, 1995.

What if a public entity has already done a transition plan under section 504 of the Rehabilitation Act of 1973? If a public entity previously completed a section 504 transition plan, then, at a minimum, a title II transition plan must cover those barriers to accessibility that were not addressed by its prior transition plan. Although not required, it may be simpler to include all of a public entity's operations in its transition plan rather than identifying and excluding those barriers that were addressed in its previous plan.

Must the transition plan be made available to the public? If a public entity has 50 or more employees, a copy of the transition plan must be made available for public inspection.

What are the elements of an acceptable transition plan? A transition plan should contain at a minimum --

1) A list of the physical barriers in a public entity's facilities that limit the accessibility of its programs, activities, or services to individuals with disabilities;

2) A detailed outline of the methods to be utilized to remove these barriers and make the facilities accessible;

3) The schedule for taking the necessary steps to achieve compliance with title II. If the time period for achieving compliance is longer than one year, the plan should identify the interim steps that will be taken during each year of the transition period; and,

4) The name of the official responsible for the plan's implementation.

II-8.4000 Notice to the public. A public entity must provide information on title II's requirements to applicants, participants, beneficiaries, and other interested persons. The notice shall explain title II's applicability to the public entity's services, programs, or activities. A public entity shall provide such information as the head of the public entity determines to be necessary to apprise individuals of title II's prohibitions against discrimination.

What methods can be used to provide this information? Methods include the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe a public entity's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio. In providing the notice, a public entity must comply with the title II requirements for effective communication, including alternate formats, as appropriate.

II-8.5000 Designation of responsible employee and development of grievance procedures. A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and fulfill its responsibilities under title II, including the investigation of complaints. A public entity shall make available the name, office address, and telephone number of any designated employee.

In addition, the public entity must adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by title II.

II-9.0000 INVESTIGATION OF COMPLAINTS AND ENFORCEMENT

Regulatory references: 28 CFR 35.170-35.190.

II-9.1000 General. Individuals wishing to file title II complaints may either file --

1) An administrative complaint with an appropriate Federal agency; or

2) A lawsuit in Federal district court.

If an individual files an administrative complaint, an appropriate Federal agency will investigate the allegations of discrimination. Should the agency conclude that the public entity violated title II, it will attempt to negotiate a settlement with the public entity to remedy the violations. If settlement efforts fail, the matter will be referred to the Department of Justice for a decision whether to institute litigation.

How does title II relate to section 504? Many public entities are subject to section 504 of the Rehabilitation Act as well as title II. Section 504 covers those public entities operating programs or activities that receive Federal financial assistance. Title II does not displace any existing section 504 jurisdiction.

The substantive standards adopted for title II are generally the same as those required under section 504 for federally assisted programs. In those situations where title II provides greater protection of the rights of individuals with disabilities, however, the funding agencies will also apply the substantive requirements established under title II in processing complaints covered by both title II and section 504.

Individuals may continue to file discrimination complaints against recipients of Federal financial assistance with the agencies that provide that assistance, and the funding agencies will continue to process those complaints under their existing procedures for enforcing section 504. The funding agencies will be enforcing both title II and section 504, however, for recipients that are also public entities.

II-9.2000 Complaints. A person or a specific class of individuals or their representative may file a complaint alleging discrimination on the basis of disability.

What must be included in a complaint? First, a complaint must be in writing. Second, it should contain the name and address of the individual or the representative filing the complaint. Third, the complaint should describe the public entity's alleged discriminatory action in sufficient detail to inform the Federal agency of the nature and date of the alleged violation. Fourth, the complaint must be signed by the complainant or by someone authorized to do so on his or her behalf. Finally, complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Is there a time period in which a complaint must be filed? Yes. A complaint must be filed within 180 days of the date of the alleged act(s) of discrimination, unless the time for filing is extended by the Federal agency for good cause. As long as the complaint is filed with any Federal agency, the 180-day requirement will be considered satisfied.

Where should a complaint be filed? A complaint may be filed with either --

1) Any Federal agency that provides funding to the public entity that is the subject of the complaint;

2) A Federal agency designated in the title II regulation to investigate title II complaints; or

3) The Department of Justice.

Complainants may file with a Federal funding agency that has section 504 jurisdiction, if known. If no Federal funding agency is known, then complainants should file with the appropriate designated agency. In any event, complaints may always be filed with the Department of Justice, which will refer the complaint to the appropriate

agency. The Department's regulation designates eight Federal agencies to investigate title II complaints primarily in those cases where there is no Federal agency with section 504 jurisdiction.

How will employment complaints be handled? Individuals who believe that they have been discriminated against in employment by a State or local government in violation of title II may file a complaint --

1) With a Federal agency that provides financial assistance, if any, to the State or local program in which the alleged discrimination took place; or

2) With the EEOC, if the State or local government is also subject to title I of the ADA (see II-4.0000); or

3) With the Federal agency designated in the title II regulation to investigate complaints in the type of program in which the alleged discrimination took place.

As is the case with complaints related to nonemployment issues, employment complaints may be filed with the Department of Justice, which will refer the complaint to the appropriate agency.

Which are the designated Federal agencies and what are their areas of responsibility? The eight designated Federal agencies, the functional areas covered by these agencies, and the addresses for filing a complaint are the --

1) Department of Agriculture: All programs, services, and regulatory activities relating to farming and the raising of livestock, including extension services. Complaints should be sent to: Complaints Adjudication Division, Office of Advocacy and Enterprise, Room 1353 - South Building, Department of Agriculture, 14th & Independence Avenue, S.W., Washington, D.C. 20250.

2) Department of Education: All programs, services, and regulatory activities relating to the operation of elementary and secondary education systems and institutions, institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools), and libraries. Complaints should be sent to: Office for Civil Rights, Department of Education, 330 C Street, S.W., Suite 5000, Washington, D.C. 20202.

3) Department of Health and Human Services: All programs, services, and regulatory activities relating to the provision of health care and social services, including schools of medicine, dentistry, nursing, and other health-related schools, the operation of health care and social service providers and institutions, including "grass-roots" and community services organizations and programs, and preschool and day care programs. Complaints should be sent to: Office for Civil Rights, Department of Health & Human Services, 330 Independence Avenue, S.W., Washington, D.C. 20201.

4) Department of Housing and Urban Development: All programs, services, and regulatory activities relating to State and local public housing, and housing assistance and referral. Complaints should be sent to: Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 7th Street, S.W., Room 5100, Washington, D.C. 20410.

5) Department of the Interior: All programs, services, and regulatory activities relating to lands and natural resources, including parks and recreation, water and waste management, environmental protection, energy, historic and cultural preservation, and museums. Complaints should be sent to: Office for Equal Opportunity, Office of the Secretary, Department of the Interior, 18th & C Streets, N.W., Washington, D.C. 20547.

6) Department of Justice: All programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions; commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business; planning, development, and regulation (unless

assigned to other designated agencies); State and local government support services (e.g., audit, personnel, comptroller, administrative services); all other government functions not assigned to other designated agencies. Complaints should be sent to: Coordination and Review Section, P.O. Box 66118, Civil Rights Division, U.S. Department of Justice, Washington, D.C. 20035-6118.

7) Department of Labor: All programs, services, and regulatory activities relating to labor and the work force. Complaints should be sent to: Directorate of Civil Rights, Department of Labor, 200 Constitution Avenue, N.W., Room N-4123, Washington, D.C. 20210.

8) Department of Transportation: All programs, services, and regulatory activities relating to transportation, including highways, public transportation, traffic management (non-law enforcement), automobile licensing and inspection, and driver licensing. Complaints should be sent to: Office for Civil Rights, Office of the Secretary, Department of Transportation, 400 Seventh Street, S.W., Room 10215, Washington, D.C. 20590.

Where should a complaint be filed if more than one designated agency has responsibility for a complaint because it concerns more than one department or agency of a public entity? Complaints involving more than one area should be filed with the Department of Justice. If two or more agencies have apparent responsibility for a complaint, the Assistant Attorney General for Civil Rights of the Department of Justice shall determine which one of the agencies shall be the designated agency for purposes of that complaint. Complaints involving more than one area of a public entity should be sent to: Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 66118, Washington, D.C. 20035-6118.

How will complaints be resolved? The Federal agency processing the complaint will resolve the complaint through informal means or issue a detailed letter containing findings of fact and conclusions of law and, where appropriate, a description of the actions necessary to remedy each violation. Where voluntary compliance cannot be achieved, the complaint may be referred to the Department of Justice for enforcement. In cases where there is Federal funding, fund termination is also an enforcement option.

If a public entity has a grievance procedure, must an individual use that procedure before filing a complaint with a Federal agency or a court? No. Exhaustion of a public entity's grievance procedure is not a prerequisite to filing a complaint with either a Federal agency or a court.

Must the complainant file a complaint with a Federal agency prior to filing an action in court? No. The ADA does not require complainants to exhaust administrative remedies prior to instituting litigation.

Are attorney's fees available? Yes. The prevailing party (other than the United States) in any action or administrative proceeding under the Act may recover attorney's fees in addition to any other relief granted. The "prevailing party" is the party that is successful and may be either the complainant (plaintiff) or the covered entity against which the action is brought (defendant). The defendant, however, may not recover attorney's fees unless the court finds that the plaintiff's action was frivolous, unreasonable, or without foundation, although it does not have to find that the action was brought in subjective bad faith. Attorney's fees include litigation expenses, such as expert witness fees, travel expenses, and costs. The United States is liable for attorney's fees in the same manner as any other party, but is not entitled to them when it is the prevailing party.

Is a State immune from suit under the ADA? No. A State is not immune from an action in Federal court for violations of the ADA.